Supreme Ct
Library

LIBRARY
SUPREME COURT

VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

# United States
# Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER. Trustee,

Appellees.

Transcript of Record
In 9 Volumes

Volume I
(Pages 1 to 480)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavit of Bernard Reich in Opposition to Motion Under Rule 37 56

Amendment of Answer of Sunkist Growers, Inc., and Exchange Orange Products Co., to Amended Complaint 239, 241

Answer to Plaintiff's Application for Allowance of Attorney's Fees and Points and Authorities in Support of Said Answer.... 317

Answer of Sunkist Growers, Inc., and Exchange Orange Products 28

Answer of Sunkist Growers, Inc., and Exchange Orange Products Co., to Plaintiff's and Trustee, and Intervener's Second Amended Complaint 274

Answer of Sunkist Growers, Inc., Sued Herein as California Fruit Growers Exchange and Exchange Orange Products Co., to Plaintiff's and Trustee and Intervener's Amended Complaint 120

Appeal:

- Notice of 389
- Order Extending Time for Filing and Docketing 390

INDEX PAGE

Appeal—(Continued):

Statement of Points on 3937

Stipulation and Supplemental Designation of Record on 3945

Application for Allowance of Attorney's Fees 296

Affidavit of Dixon, William C. 297

Affidavit of Reich, Bernard 301

Affidavit of Irwin, Harry M............. 306

Application by Appellants for Extension of Time for Filing Record and Docketing Appeal and Filing Designation of Record and Statement of Points 3933

Affidavit of Ross C. Fisher in Support... 3934

Order on 3937

Attorneys, Names and Addresses of 1

Clerk's Certificate (Index to Certified Transcript) 3908

Complaint 3

Complaint, Amended 73

Complaint, Second Amended 251

Index to Certified Transcript (Clerk's Certificate) 3908

INDEX PAGE

Interrogatories Propounded to Plaintiff and Intervener by Sunkist Growers, Exchange Orange Products Co., and TreeSweet Products Co. 47

Judgment, Final 336

Jury Instructions Requested by Defendants 178

Jury Instructions Requested by Plaintiff 145

Memorandum to Counsel 339

Minute Entries:

Nov. 24, 1954 72

Feb. 14, 1955 119

Dec. 13, 1955 176

Jan. 17, 1956 230

Jan. 31, 1956 248

Mar. 26, 1956 386

Mar. 30, 1956 388

Motion to Amend Amended Complaint to Conform to Evidence 242

Motion of Defendants for a Direct Verdict at Close of Plaintiff's Case 224

Motion of Defendants for Judgment in Accordance with Their Motion for a Direct Verdict at the Close of Evidence 310

Notice of 308

INDEX PAGE

Motion of Defendants for Leave to Amend Their Answers to the Amended Complaint.. 232

Affidavit of Fisher, Ross C. 238

Motion of Defendants for Leave to Amend Their Motion for a New Trial by Adding Thereto a Paragraph 20 385

Motion of Sunkist Growers and the Exchange Products Co., to Set Aside the Verdict and Judgment and for a New Trial 342

Motion of Sunkist Growers, Inc., and Exchange Orange Products Co., in the Alternative to Strike Portions of the Amended Complaint and for a More Definite Statement.. 108

Notice of 107

Motion to Dismiss Fourth and Fifth Causes of Action 175

Notice of Appeal 389

Notice of Hearing 67

Motion for Leave to Compromise....... 68

Petition 68

Notice of Motion and Motion of Exchange Lemon Products to Strike Portions of the Amended Complaint and for a More Definite Statement 102

Notice of Motion by Exchange Lemon Products Co., Under Rule 37 52

INDEX

PAGE

Notice of Withdrawal of Motion Under Rule 37, Exchange Lemon Products Co. 63

Order Approving Compromise Action No. 13788-C as Against Defendant TreeSweet Products Co. 70

Order Extending Time for Filing Record and Docketing Appeal 390

Order Filed March 15, 1956 375

Order for Production of Documents Requested in Motion of Defendant Exchange Lemon Products Co., Under Rule 34, and Grant Plaintiff's Motion to Suppress Interrogatories of Defendant Sunkist, Exchange Orange Products and TreeSweet 49

Order Granting Motion of Exchange Lemon Products Co., Under Rule 37 64

Order Permitting Intervention and Amending Caption, Petition of Ronald Walker, Waiver of Notice 26

Order of Dismissal 144

Petition of Ronald Walker, Trustee 24

Plaintiff's and Intervener's Answers to Interrogatories Propounded by Exchange Lemon Products Co. (With Objections to Certain of the Interrogatories) 55

Reply Memorandum by Exchange Lemon Products Co., Re Motion Under Rule 37 ... 59

INDEX PAGE

Specifications of Objections Pursuant to Order of March 15, 1956 376

Statement of Points 3937

Statement of Reasons and Authorities in Support of Motion by Exchange Lemon Products Co., Under Rule 37 53

Stipulation and Order Re Printing of Exhibits 3944

Stipulation for and Supplemental Designation of Record to Be Printed 3945

Stipulation for Dismissal and Order Thereon 100

Transcript of Hearing on Motion to Admit Mr. Williams 3907

Transcript of Pretrial Hearing 392

Transcript of Proceedings on Hearing on Allowance of Attorney's Fees 3742

Witnesses (On Behalf of Attorneys for Plaintiff and Trustee):

Dixon, William C.
—cross 3759

Irwin, Harry M.
—cross 3789

Warne, Clore
—direct 3812
—cross 3823

INDEX PAGE

Witnesses (On Behalf of Attorneys for Defendants):

Beardsley, Charles E.
—direct 3827
—cross 3867

Selvin, Herman F.
—direct 3874
—cross 3882

Transcript of Hearing of Motion to Set Aside the Verdict and Judgment and for a New Trial 3903

Transcript of Proceedings (Trial) 404

Arguments and Summation on Behalf of Defendants 3585

Closing Argument on Behalf of Plaintiff 3662

Court's Instructions to the Jury......... 3677

Opening Argument on Behalf of Plaintiff 3470

Opening Statement on Behalf of Defendants 512

Opening Statement on Behalf of Plaintiff 481

Witnesses, Defendants':

Armstrong, Paul S.
—direct 2692

Bylin, Richard
—direct 2596
—cross 2599

INDEX PAGE

Witnesses, Defendants'—(Continued)

Clark, Robert Victor
—direct 2949
—cross 2951
—redirect 2954

Covington, Paul A.
—direct 2617
—cross 2618, 2619

Hanson, O. E.
—direct 2621
—cross 2627
—redirect 2634

Finley, James A.
—direct 2954
—cross 3043
—redirect 3067

Kunin, Myron
—direct 2728

Lewis, Ned
—direct 2635
—cross 2637

Lynch, John A.
—direct 2007, 2074, 2226, 2298
—cross 2324
—redirect 2384

O'Hanlon, Gerald J.
—direct 2680
—cross 2686

Witnesses, Defendants'—(Continued)

Regan, Francis A.
- —direct 2387, 2432, 2464, 2482
- —cross 2499, 2507

Rodgers, William
- —direct 2580
- —cross 2591
- —redirect 2594

Smith, Arvel
- —direct 2600
- —cross 2606
- —redirect 2616

Smith, Opal
- —direct 2527

Swayne, Amos
- —direct 2272
- —cross 2283
- —redirect 2294
- —recross 2296

Taylor, Clarence C.
- —direct 2214
- —cross 2225

Walker, Marvin H.
- —direct 2173
- —cross 2191
- —redirect 2203
- —recross 2206

Witnesses, Defendants'—(Continued)

Warner, Nels
- —direct 2641
- —cross 2658
- —redirect 2663

Witnesses, Plaintiff's:

Armstrong, Paul S.
- —direct 544

Browne, Ernest A.
- —direct 1458
- —cross 1465
- —redirect 1474, 1478
- —recross 1475

Clark, Robert Victor
- —direct 946, 983
- —cross 983, 984
- —redirect 989

Finley, James A.
- —direct 665
- —cross 864
- —redirect 873, 876
- —recross 874

Hodge, Robert
- —direct 1626, 1675, 3105
- —cross 1718, 1726, 1779, 1838, 1887, 1969, 3119
- —redirect 1918, 1996
- —recross 1929

INDEX PAGE

Witnesses, Plaintiff's—(Continued)

Kelly, Sam H.

—direct 623
—cross 649
—redirect 659
—recross 665

McMillen, Donald F.

—direct 893

McCracken, Wendell K.

—direct 906
—cross 939
—redirect 943, 945
—recross 944, 945

Thompson, Donald R.

—direct 877
—cross 890
—redirect 891

Walker, Ronald

—direct 1913
—cross 2000

Ward, Morgan V.

—direct 1576, 1592
—cross 1591, 1594
—redirect 1600, 1603
—recross 1602, 1603

Wilcox, F. R.

—direct 608

PAGE

Witnesses, Plaintiff's—(Continued)

Winckler, Nicholas J.
  —direct 991
  —cross 1098, 1309, 1410, 1479
  1502, 1525, 1558, 3099
  —redirect 1606
  —the court 1401, 1499

Verdict of the Jury........................ 295

	Original	Print
Proceedings in the United States Court of Appeals for the Ninth Circuit	3950	3950
Minute entry of argument and submission (omitted in printing)	3950	3950
Order directing filing of opinion and filing and recording of judgment	3951	3950
Opinion, Barnes, J.	3952	3950
Judgment	4004	4005
Order modifying opinion and denying petitions for rehearing	4005	4006
Clerk's certificate (omitted in printing)	4006	4007
Minute entry of order on petitions for rehearing	4007	4008
Order allowing certiorari	4008	4009
Exhibits—see separate volume		

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ROSS C. FISCHER,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,
215 West Sixth Street,
Los Angeles 14, California.

For Appellees:

HARRY M. IRWIN,
215 West 5th Street,
Room 1212,
Los Angeles 13, California;

WILLIAM C. DIXON,
770 Subway Terminal Bldg.,
Los Angeles, California;

BERNARD REICH,
328 South Beverly Drive,
Beverly Hills, California;

RONALD WALKER,
458 South Spring Street,
Los Angeles 13, California.

In the United States District Court, Southern District of California, Central Division

No. 13788—WB

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation,

Plaintiff,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a Corporation; THE EXCHANGE ORANGE PRODUCTS CO., a Corporation; EXCHANGE LEMON PRODUCTS CO., a Corporation; TREESWEET PRODUCTS CO., a Corporation; DOE I CORPORATION to DOE IV CORPORATION, Inclusive, and DOE I to DOE X, Inclusive,

Defendants.

COMPLAINT FOR EQUITABLE RELIEF AND TREBLE DAMAGES UNDER THE FEDERAL AND CALIFORNIA ANTI-TRUST LAWS

Plaintiff Winckler & Smith Citrus Products Co. alleges:

General Allegations

I.

Jurisdiction. This complaint is filed and these proceedings are instituted under the following Acts of Congress and statutes of the State of California:

Section 1 of the Act of Congress of July 2, 1890, Section 2 of the Act of Congress of July 2, 1890, Section 3 of the Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act [15 USCA §§ 1, 2], Section 4 of the Act of Congress of October 15, 1914, Section 16 of the Act of Congress of October 15, 1914, commonly known as the Clayton Anti-Trust Act [15 USCA §§ 15, 26], [3*] Section 2 of the Act of Congress of October 15, 1914, as amended by Section 1 of the Act of Congress of June 19, 1936, commonly known as the Robinson-Patman Act [15 USCA §§ 13, 13(a)], Sections 16,700 to 16,758 of the California Business and Professions Code, Commonly known as the Cartwright Anti-Trust Law and Sections 17,000 to 17,101, inclusive, of the California Business and Professions Code, commonly known as the Unfair Trade Practices Act.

The unlawful acts and violations hereinafter described, including the unlawful monopoly, attempts to monopolize, combinations and conspiracies to restrain trade and commerce among the several states of the United States and the District of Columbia, and the discrimination in price, services and facilities and the conspiracies and combinations to discriminate in price, services and facilities, and the unlawful acts done in pursuance thereof, have been and are conceived, carried out, made effective and performed, in part, within this District of the Court and elsewhere in California and throughout the United States.

---

*Page numbering appearing at foot of page of original Certified Transcript of Record.

II.

(a) Plaintiff. Winckler & Smith Citrus Products Co. is, and was during all the times mentioned in this complaint, a California corporation with its principal place of business in the City of Anaheim, California.

(b) Plaintiff's Business. Plaintiff is and was a juice canner of By-product fruit, i.e., oranges, lemons and grapefruit, buying the said By-product fruit in Arizona and California, canning the fruit juices in Anaheim, California, and causing the canned juices to be transported intrastate, and interstate throughout the United States. In 1950 and 1951, plaintiff furthermore caused canned citrus fruit juices to be custom packed for it in the State of Florida and transported and marketed in interstate commerce throughout the United States. [4]

III.

Defendants. (a) California Fruit Growers Exchange (hereinafter referred to as Sunkist) is, and at all times herein mentioned was, a California membership corporation with its principal place of business in the City of Los Angeles, California. It is and was in the business of marketing citrus fruit throughout the United States. Through two or more subsidiary companies it is and was also in the business of canning fruit juices and marketing the said fruit juices throughout the United States.

(b) The Exchange Orange Product Co. (hereinafter referred to as E.O.P.) is, and at all times

5

herein mentioned was, a California corporation with its principal place of business in the City of Ontario, California, and is and was a wholly owned subsidiary of Sunkist, and is and was engaged in the business of canning and marketing canned fruit juices throughout the United States.

(c) Exchange Lemon Products Co. (hereinafter referred to as E.L.P.) is, and at all times herein mentioned was, a California corporation with its principal place of business in the City of Corona, California, and is and was a wholly owned subsidiary of Sunkist, and is and was engaged in the business of canning and marketing canned lemon juice throughout the United States.

(d) Treesweet Products Co. (hereinafter referred to as Treesweet) is, and at all times herein mentioned was, a California corporation with its principal place of business in the City of Santa Ana, California, and is and was a juice canner of By-product fruit, buying the said By-product fruit from Arizona and California, canning the fruit juices in Santa Ana, California, and causing the canned juices to be transported intrastate and interstate into at least all of the states of the United States and the District of Columbia in which plaintiff markets its canned juices. [5] Said defendant operates and for some time has operated a plant in the State of Florida and does and has transported and marketed canned citrus fruit from that state in interstate commerce throughout the United States.

(e) The true names and capacities of the fictitious defendants are unknown to plaintiff. When the true names and capacities are ascertained, plaintiff will move to amend this complaint accordingly.

IV.

Definitions. "Citrus fruit" refers to oranges, lemons and grapefruit produced for commercial purposes.

"By-product fruit" refers to citrus fruit not marketed as fresh fruit and marketed to canners for the manufacture of single strength juice, hot pasteurized concentrate juice and frozen concentrate juice. It is citrus fruit which the growers or marketing agencies consider to be of a quality not satisfactory for, or capable of being absorbed by, the fresh citrus fruit market.

"Single-strength juice" refers to canned natural citrus fruit juice.

"Hot pasteurized concentrate juice" refers to pasteurized concentrated citrus fruit juice.

"Frozen concentrate juice" refers to concentrated citrus fruit juice processed under low temperature and quick frozen.

"Independent packer" refers to a packer of citrus fruit unaffiliated with any co-operative or association such as Sunkist marketing citrus fruit.

"Custom packing" refers to the practice whereby citrus fruit is delivered to the canner for processing, title remaining in the grower or packer.

V.

The Citrus Fruit Industry. (a) All citrus fruit marketed [6] in the United States is produced in the United States almost exclusively in the states of California, Florida, Texas and Arizona.

(b) Defendant Sunkist is the largest single citrus fruit marketing organization in the United States. Its only principal competition is from the State of Florida where, however, there is no single dominating agency.

(c) Said defendant markets approximately 70% of the oranges, 90% of the lemons and 60% of the grapefruit produced in California and Arizona and marketed in interstate trade and commerce throughout the United States.

(d) Approximately 25% of the oranges, 99% of the lemons and 15% of the grapefruit, fresh and canned, marketed in the United States, are produced in California and Arizona.

(e) Defendant Sunkist directly and through subsidiaries dominates and controls the citrus fruit industry in California and Arizona.

(f) Plaintiff's existence as a juice canner depends, and at all times herein mentioned depended, upon the purchase by it from the defendant Sunkist of large quantities of By-product fruit. With respect to By-product oranges and prior to 1951, plaintiff, with difficulty, sought out the independent packer and together with purchases from the defendant Sunkist was able to purchase enough By-product oranges to market its products. However, in 1951, By-product oranges were not available in sufficient quantities from independent packers and, as hereinafter alleged, defendants acted to eliminate plaintiff from the canned orange juice market. Thus plaintiff's sales in all categories of canned citrus fruit juice were reduced by approximately 66% and in the category involving oranges, that is, orange juice and blended juices containing orange juice, plaintiff's sales were reduced by approximately 70%, and in the category of single strength orange juice, plaintiff's sales were [7] reduced by approximately 82%.

(g) Citrus fruit is canned almost exclusively in the states of California, Florida, Texas and Arizona.

(h) Plaintiff is informed and therefore alleges upon information and belief that in 1950 and 1951 defendants Sunkist, E.O.P. and Treesweet together marketed approximately 50% and 80% in the respective years of canned orange juice produced in California and Arizona and marketed throughout the United States.

(i) Plaintiff is informed and therefore alleges upon information and belief that in 1950 and 1951 defendants Sunkist, E.L.P. and Treesweet together marketed approximately 65% of the canned lemon juice produced in California and Arizona and marketed throughout the United States.

(j) Defendant E.O.P.'s sole source of supply of By-product fruit has been and is defendant Sunkist.

(k) Defendant E.L.P.'s sole source of supply of By-product fruit has been and is defendant Sunkist.

(l) Plaintiff is informed and therefore alleges upon information and belief that defendant Treesweet's principal, if not exclusive, source of supply of By-product fruit is, and in 1951 was, defendant Sunkist.

VI.

Interstate Commerce. (a) The Citrus Fruit Industry. The business of producing and marketing citrus fruit and the activities of each branch of the industry are either in or directly affect trade and commerce among the several states. In the course of producing and marketing citrus fruit there is a constant continuous stream of trade and commerce between the states and throughout the United States, consisting of the solicitation and the making of contracts, written and wired communications, the assemblage of personnel, property and material in California, Arizona and Texas, the transportation of fresh [8] fruit from Arizona and Texas to California, the shipping of fresh fruit from California to all of states of the United States, the processing and canning of fresh fruit in California, Arizona and Texas, and the shipping of the processed and canned fruit and juices throughout the United States.

(b) Plaintiff, as part of the citrus fruit industry, was and is engaged in interstate trade and commerce among the several states as above described. Plaintiff's plant is located in the City of Anaheim, California. Among other things and in the course of purchasing By-product fruit from the defendant, Sunkist, and from others, plaintiff causes the fresh fruit produced in Arizona to be shipped to it by interstate carriers from Arizona to California. Plaintiff then processes and cans the fruit in California and causes the canned fruit juices to be shipped by interstate carriers throughout the United States.

(c) Defendant Sunkist was and is engaged in trade and commerce among the several states. There is a constant continuous stream of trade and commerce in said defendant's business throughout the United States, consisting of the solicitation and the making of contracts, written an wired communications, the assemblage of personnel, property and material in at least fifty cities of the United States, the transportation of fresh fruit from Arizona to the plants of the said defendant and its subsidiaries in California. At said defendant's instance fresh fruit and canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States.

(d) Defendants E.O.P. and E.L.P. were and are engaged in interstate trade and commerce throughout the United States substantially in the same manner as the plaintiff and the defendant, Sunkist.

(e) Defendant Treesweet was and is engaged in interstate trade and commerce throughout the

United States substantially in the same manner as the plaintiff and the defendant, Sunkist, E.O.P. [9] and E.L.P.

VII.

Damages. Prior to 1951, plaintiff enjoyed an extensive and profitable business and had expended in excess of $500,000.00 in promoting and developing its good will, reputation and distribution of its products. By reason of the wrongful acts and conduct of the defendants, as herein alleged, plaintiff has been injured in its business and property, good will, promotions, advertising and loss of earnings in the sum of at least $800,000.00 and will suffer damages in the future in an amount at this time unknown to plaintiff. When the exact damages shall be ascertained, plaintiff will ask leave to amend this complaint so as to allege said exact and further damages.

VIII.

Threatened Loss and Damage. By reason of the wrongful acts and conduct of the defendants as herein alleged:

(a) The business of the plaintiff as an independent juice canner has been seriously impaired, injured and damaged and plaintiff has suffered great damage and loss of profits and good will, and the reputation and prestige of its business as a first class juice canner has been seriously and irreparably impaired and injured, and to the unfair and wrongful advantage of the defendants and others;

(b) Plaintiff has been compelled to pay unreasonable and discriminatory prices for By-product fruit to the damage and loss of plaintiff and to the unfair and wrongful advantage of the defendants and others;

(c) Plaintiff is irreparably losing patronage for its products and otherwise continues to be threatened with loss and damage;

(d) Plaintiff is without any plain, speedy or adequate remedy at law; and [10]

Unless the defendants and each of them are temporarily and permanently restrained and enjoined pursuant to pertinent statutes and laws from continuing their unlawful practices and activities as herein alleged, defendants will continue in their wrongful acts and conduct and plaintiff will continue to suffer irreparable loss and damage.

First Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full each and every paragraph of the general allegations above.

II.

Section 1 of the Sherman Act. All of the defendants each well knowing and acquiescing in the actions of the others, and each corporation within itself by and through its officers and employees, and each parent company with each of its subsidiaries and affiliates, have, for many years last past, in the course of interstate trade and commerce, contracted, combined and conspired with each other unreasonably to restrain and monopolize trade and commerce and pursuant to said contracts, combinations and conspiracies, defendants have in effect unreasonably restrained and monopolized trade and commerce in the production and marketing of citrus fruit and canned fruit juices produced and processed in the State of Californa and marketed throughout the United States.

III.

Specifications. For many years last past, and particularly since in or about the year 1951 the said defendants contracted, combined and conspired in such manner as to tend to eliminate plaintiff from the canned citrus fruit juice market and particularly from the single strength orange juice market and so as to disable [11] plaintiff from competing with the defendants freely, fairly and reasonably.

Among other things,

(a) Defendant Sunkist refused to sell By-product fruit to plaintiff except at a price which prevented plaintiff from competing with defendants E.O.P., E.L.P., and Treesweet.

(b) Defendants combined, agreed and undertook, directly and indirectly, to have the defendants Treesweet, E.O.P. and E.L.P. purchase By-product fruit from defendant Sunkist substantially below defendant Sunkist's scheduled price for said By-product

fruit so that said defendants could market canned citrus fruit juice and particularly single strength orange juice at a price which plaintiff could not possibly meet.

(c) Defendants combined, agreed and undertook, directly and indirectly, to favor defendants Treesweet, E.O.P., and E.L.P., and in discrimination against plaintiff with respect to the terms of purchase of By-product fruit.

(d) Defendants combined, agreed and undertook, directly and indirectly, to permit defendants Treesweet, E.O.P., and E.L.P. to custom pack fruit juices for them while refusing to permit the plaintiff so to do.

(e) Defendant Sunkist discriminated in favor of defendants Treesweet, E.O.P., and E.L.P. and against plaintiff with respect to the terms of purchase of By-product fruit.

(f) Defendants Sunkist, E.O.P., and E.L.P. conducted their business with plaintiff in the most arbitrary manner and with the intent to disable plaintiff from competing in a free and fair market.

Second Cause of Action

I.

Plaintiff realleges with the same force and effect as if [12] herein set forth in full each and every paragraph of the general allegations above and paragraphs II and III of the First Cause of Action herein.

II.

Section 2 of the Sherman Act. All of the defendants have for many years last past monopolized, attempted to monopolize, combined and conspired each with the other to monopolize the citrus fruit industry among the several states and the District of Columbia and have effectuated their monopolization of trade and commerce among the several states and the District of Columbia by doing, among other things, the acts set forth in paragraph III of the First Cause of Action herein.

Third Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every paragraph of the general allegations above.

II.

Section 1 of the Robinson-Patman Act. For many years last past and particularly in 1951, (a) defendants were and they now are engaged in trade and commerce throughout the United States;

(b) In the course of such commerce defendant Sunkist has individually and/or through its wholly owned subsidiaries, the defendants E.O.P. and E.L.P., directly and indirectly, discriminated in price between different purchasers of commodities of like grade and quality, to wit. By-product fruit and particularly oranges for the canning of single strength orange and orange blended juice;

(c) The purchases involved in such discrimina-

tion were in commerce among the several states, the District of Columbia, and the territories of the United States; [13]

(d) The effect of such discrimination was substantially to lessen competition from the plaintiff and tended to create a monopoly in the defendants and to injure, destroy and prevent competition from the plaintiff;

(e) Defendants Sunkist, E.O.P., and/or E.L.P., paid and contracted for the payment of things of value to and for the benefit of its customers, including defendant Treesweet, in the course of such commerce, as compensation or in consideration for services and facilities furnished by and through said customers including defendant Treesweet, in connection with the processing, handling and sale of products and commodities, to wit, canned fruit juices, particularly single strength orange and orange blended juice manufacture, sold or offered for sale by defendants Sunkist, E.O.P., and/or E.L.P., without defendants Sunkist, E.O.P., and E.L.P. making such payment or consideration available on proportionally equal terms to all other customers, including plaintiff, competing in the distribution of such products and commodities;

(f) Defendant Treesweet in the course of such commerce knowingly induced and received discriminations in price above described and which is prohibited by law.

III.

Section 3 of the Robinson-Patman Act. For many years last past and particularly in 1951, and in the

course of said commerce as hereinabove alleged, defendants were parties to, and assisted in, transactions of sale and contracts to sell which discriminated, to their knowledge, against competitors, including plaintiff, of defendants Sunkist, E.O.P., E.L.P.'s purchasers, including defendant Treesweet, in that allowances were granted to the purchasers, including the defendant Treesweet, over and above any allowances available at the time of the tranactions to said competitors, including plaintiff, in respect of sales of goods of like grade, quality and quantity, that is, By-product fruit, [14] particularly oranges.

IV.

Specification. (a) On April 4, 1951, defendant Sunkist published and distributed its Valencia Price Schedule #1-51, effective April 9, 1951, which showed the price per ton, f.o.b. packing house, of Valencia oranges on the basis of pounds of soluble solids per ton;

(b) The number of pounds of soluble solids per ton varies with each run of oranges;

(c) For example, where the number of pounds of soluble solids per ton was 120, the price per ton f.o.b. packing house, pursuant to said Valencia Price Schedule, was fixed by the defendant Sunkist at $40.00;

(d) In 1951 plaintiff purchased from the defendant Sunkist Valencia oranges in accordance with the said price schedule;

(e) In 1951 defendant Treesweet, directly and indirectly, purchased Valencia oranges of like grade and quality as did plaintiff, from the other defendants for a price less than one-half fixed by the said schedule of prices and paid by plaintiff.

V.

Further Specification. Plaintiff is informed and therefore alleges upon information and belief that one of the methods used by the defendants in effectuating the price discrimination in favor of the defendant Treesweet (as well as others) and in discrimination against plaintiff was substantially as follows:

Defendants Sunkist and E.O.P. delivered By-product oranges to defendant Treesweet (and others) on consignment under an arrangement whereby these canners produced single-strength orange juice for defendant E.O.P. and for which defendant E.O.P. paid the cost incurred to produce such juice. Defendant Treesweet (and others) were then permitted to purchase the canned orange juice from defendant E.O.P. at approximately $2.30 a case. [15] Thus, after producing and canning the orange juice, defendant Treesweet acquired packed orange juice at a net cost which in substance reflected a cost of the By-product oranges used in such product of less than one-half of the price set forth in defendant Sunkist's said Valencia Price Schedule.

VI.

Further Specification. During the period mentioned in the previous paragraph plaintiff requested of the defendants Sunkist and E.O.P. that it be permitted to make similar transactions as above described with the said defendants, which requests were denied.

Fourth Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every paragraph of the general allegations above.

II.

Cartwright Anti-Trust Act. (a) For many years last past in the State of California defendants combined their capital and skill and together acted to create and carry out restrictions in trade and commerce and to prevent competition in the manufacture, making, transportation, sale and purchase of citrus fruit, particularly canned single strength orange juice, and defendants did, (1) create and carry out restrictions in trade and commerce, (2) prevent competition in the manufacture, making, transportation, sale and purchase of said produce and commodities, (3) make, enter into, execute and carry out contracts, obligations and agreements by which they established and settled the price of said produce and commodities so as directly and indirectly to preclude a free and unrestricted competition among themselves and any purchasers in the sale of such produce and commodities, and they did combine [16] and directly and indirectly united their interests which they had in connection with the sale of such produce and commodities so that the price of the said produce and commodities was affected.

(b) All of the defendants have for many years last past monopolized, attempted to monopolize, combined and conspired each with the other to monopolize the citrus fruit industry, particularly canned single strength orange juice, within the State of California.

III.

Specifications. For many years last past, particularly since in or about the year 1951 the defendants contracted, combined, conspired, monopolized and attempted to monopolize in such manner as to eliminate plaintiff from the canned citrus fruit industry, particularly from the single strength orange and orange blended juice market, and so as to disable plaintiff from competing with the defendants freely, fairly and reasonably within the State of California by doing in intrastate commerce, among other things, the acts described in Paragraphs II and III of the First Cause of Action, Paragraph II of the Second Cause of Action, and Paragraphs II, III, IV, V and VI of the Third Cause of Action, as having been done in interstate commerce.

Fifth Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every allegation of the general allegations above and Paragraphs II and III of the Fourth Cause of Action.

II.

Unfair Practices Act. For many years last past, particularly in 1951, and in the State of California, defendants Sunkist, E.O.P., and E.L.P. secretly paid and allowed defendant Treesweet rebates, refunds, commissions and unearned discounts, and secretly extended [17] to defendant Treesweet special services and privileges not extended to all purchasers, including the plaintiff, purchasing upon like terms and conditions, to the injury of plaintiff, which payments and allowances tended to destroy competition.

Wherefore plaintiff prays as follows:

1. That the Court issue its preliminary, permanent and perpetual injunction restraining the defendants and each of them from any and all unlawful practices, conduct and activities as alleged in this complaint.

2. That the Court issue its preliminary, permanent and perpetual prohibitory and/or mandatory injunction against the defendants California Fruit Growers Exchange, The Exchange Orange Products Co., and Exchange Lemon Products Co., in an appropriate form so as to divorce the ownership and operation of the three companies.

3. That the Court issue its preliminary, permanent and perpetual mandatory injunction directing and requiring the defendants California Fruit

Growers Exchange, The Exchange Orange Products Co., and Exchange Lemon Products Co., and each of them to offer and sell By-product fruit to the plaintiff on fair and equitable terms in fair and open competition with any and all competitors including the defendants The Exchange Orange Products Co., Exchange Lemon Products Co., and Treesweet Products Co.

4. That each of the contracts, combinations and conspiracies in restraint of trade and commerce, together with the attempts to monopolize and the monopolization of the same hereinabove described, be declared illegal and violative of the antitrust laws of the United States and the State of California.

5. That plaintiff have judgment in the sum of $2,400,000.00 the same being threefold damages under the federal laws which it sustained, or $1,600,000.00, the same being twofold [18] damages under state law, and such further and additional damages as may have been suffered up to the date of the trial and as to which the complaint may be amended.

6. That plaintiff have judgment, in addition, for its costs including reasonable attorney's fees.

7. For all proper relief.

Dated: January 15, 1952.

/s/ BERNARD REICH,
Attorney for Plaintiff.

Duly verified.

Complaint amended December 14, 1954.

[Endorsed]: Filed February 1, 1952. [19]

[Title of District Court and Cause.

No. 13788—WB

PETITION OF RONALD WALKER, TRUSTEE

To the Honorable District Court of the United States for the Southern District of California, Central Division, and to the Honorable William M. Byrne, District Judge:

Ronald Walker, as trustee of the estate of Winckler & Smith Citrus Products Co., Debtor, in the proceeding in this district No. 53,860-C, for his petition to this Honorable Court alleges:

1. By Order dated March 26, 1952, made by District Judge James M. Carter, your petitioner was appointed trustee of the estate of the said debtor.

2. Pursuant to Paragraph 5(h) of the said Order, petitioner has examined into this action which was filed on February 1, 1952, and prior to the petition of the debtor in the said proceeding before Judge Carter, the debtor in that proceeding [204] and the plaintiff in this action being the same party.

3. Petitioner and his attorney, Harry M. Irwin, have examined the records and files in this action and petitioner has particularly examined into the facts as they are reflected in the books, records, documents and papers of the plaintiff, and after consultation with his said attorney he became of the firm opinion that the complaint filed in this action sets forth substantial and meritorious claims which

should be diligently prosecuted. Petitioner became of the further opinion, from his said investigation, that the actionable and wrongful acts of defendants as set forth in the complaint in this action were principal causes for the Chapter X proceeding now pending.

4. Inasmuch as any recovery in this action will accrue to the benefit of the estate of which petitioner is trustee, petitioner obtained leave in the said Chapter X proceeding to file the petition herein. The Order to this effect was made by District Judge Carter the 30th day of April, 1952.

5. Petitioner desires to intervene in this action for the protection, maintenance and preservation of the said debtor and plaintiff's rights and causes of action.

6. Petitioner does not desire to substitute himself in the place and stead of the plaintiff, but merely to intervene in aid of a recovery.

7. Petitioner respectfully proposes that the caption be amended to reflect the intervention and also to reflect the true names of the defendants as given in their papers, all as set forth in the proposed Order submitted herewith.

8. The only party affected by petitioner's desire to intervene, and contemplated by Rule 24(c) of the Federal [205] Rules of Civil Procedure, is the plaintiff. Submitted herewith and as part of the papers herein is the Waiver of Notice properly executed by the attorney for the plaintiff.

9. Petitioner adopts the pleading of the plaintiff heretofore filed.

10. Petitioner has knowledge of the motions pending before this Court for hearing May 5, 1952, requires no further notice of same, and adopts the papers filed by plaintiff.

Wherefore, your petitioner respectfully prays that the Order herewith proposed be made and filed.

Dated this 30th day of April, 1952.

/s/ RONALD WALKER,
Petitioner Ronald Walker,
as Trustee.

/s/ HARRY M. IRWIN,
Attorney for Petitioner.

Duly verified.

[Endorsed]: Filed May 9, 1952. [206]

[Title of District Court and Cause.]

No. 13788-WB

ORDER PERMITTING INTERVENTION AND AMENDING CAPTION; PETITION OF RONALD WALKER, TRUSTEE; WAIVER OF NOTICE

On application of Harry M. Irwin, attorney for the trustee In the Matter of Winckler & Smith Citrus Products Co., Debtor, No. 53,860-C, this district, and on the records and files in that proceeding and in this action, and on the filing of Waiver of Notice by the plaintiff herein, and due deliberation having been had thereon, and good cause appearing therefor,

It Is Hereby Ordered as follows:

1. The application of the said trustee to intervene in this action is granted.

2. The above-entitled caption is amended to read as follows: [208]

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation,

Plaintiff,

vs.

SUNKIST GROWERS, INC., a Corporation; THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation; EXCHANGE LEMON PRODUCTS COMPANY, a Corporation; TREESWEET PRODUCTS CO., a Corporation; DOE I CORPORATION to DOE IV CORPORATION, Inclusive, and DOE I to DOE X, Inclusive,

Defendants.

RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,

Intervener.

Dated this 9th day of May, 1952.

/s/ WM. M. BYRNE,
District Judge.

[Endorsed]: Filed May 9, 1952. [209]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS SUNKIST GROWERS, INC., A CORPORATION, SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE, AND THE EXCHANGE ORANGE PRODUCTS COMPANY, A CORPORATION, SUED HEREIN AS THE EXCHANGE ORANGE PRODUCTS CO.

Come now defendant Sunkist Growers, Inc., a corporation, sued herein as California Fruit Growers Exchange, and defendant the Exchange Orange Products Company, a corporation, sued herein as the Exchange Orange Products Co., and for answer to plaintiff's complaint admit, deny and allege as follows: [265]

(For the convenience of the Court the subject headings used in this answer correspond to those used by plaintiff in its complaint.)

Answer to General Allegations of Plaintiff's Complaint

I.

Jurisdiction. Admit that plaintiff's complaint purports to be filed and the proceedings purport to be instituted under the Acts of Congress and Statutes of the State of California set forth in Paragraph I of Plaintiff's General Allegations.

Deny the allegations of the last subparagraph of Paragraph I of Plaintiff's General Allegations, and particularly deny that defendants here answering or either of them at any time alleged in plaintiff's complaint, or at all, committed any unlawful act or violation as described in plaintiff's complaint or otherwise, and in that connection particularly deny that either of said defendants committed any unlawful act or violation which included the unlawful monopoly or attempt to monopolize or combination or conspiracy to restrain trade and commerce among the several or any state of the United States, or the District of Columbia, or the discrimination in price or service or facilities, or any conspiracy or combination to discriminate in price, service or facilities, or that any unlawful act or violation of the character described in plaintiff's complaint, or otherwise, has been conceived or carried out or made effective or performed, in whole or in part, within this District of the Court or elsewhere in California, or throughout the United States, or at all.

II.

(a) **Plaintiff.** Admit the allegations of subparagraph (a) of Paragraph II of Plaintiff's General Allegations. [266]

(b) **Plaintiff's Business.** Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph (b) of Paragraph II of Plaintiff's General Allegations except that defendants admit that plaintiff is and was at the times alleged in plaintiff's complaint a juice canner of citrus fruit, canning the fruit juices in Anaheim, California, and that plaintiff bought some of said citrus fruit in California, the exact nature or amount being unknown to defendants here answering, and except that defendants admit that in the years 1950 and 1951, plaintiff caused citrus fruit juices to be custom packed for it in the State of Florida.

III.

(a) Defendants. For answer to subparagraph (a) of Paragraph III of Plaintiff's General Allegations, admit that defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange (in said paragraph and sometimes herein referred to as Sunkist), is and at all times mentioned in plaintiff's complaint was a California membership corporation with its principal place of business in the City of Los Angeles, California, and allege in that regard that at all of said times said defendant is and was a corporation duly existing under and by virtue of the laws of the State of California, to wit, a non-profit agricultural co-operative marketing association, and that it is and was organized and instituted for the purposes of mutual help and benefit of its members as producers of agricultural products, and not conducted for profit, and none of its members was or is allowed more than one vote therein, and it did not and does not pay any dividends on membership capital, and did not and does not deal in the products of non-members to an amount greater in value than such as are handled by it for its members. Allege that on or about the 8th day of February, 1952, by Certificate of Amendment to its articles of incorporation duly filed with the Secretary of State of the State of California, the name of said [267] corporation was changed to Sunkist Growers, Inc., a certified copy of said Certificate of Amendment being filed in the office of the County Clerk of Los Angeles County on February 11, 1952. Allege that at all times since the filing of said Certificate of Amendment with said Secretary of State the name of said corporation has been and now is Sunkist Growers, Inc. Admit that it is now and was in the business of marketing citrus fruit of its members throughout the United States and elsewhere. Deny that through two or more subsidiary companies it is and was also in the business of canning fruit juices and marketing the said fruit juices throughout the United States, but admit that through defendant, The Exchange Orange Products Company, it is and was at all times mentioned in plaintiff's complaint in the business of canning fruit juices, but allege that such fruit juices so canned by defendant The Exchange Orange Products Company were and are marketed through Sunkist.

(b) For answer to subparagraph (b) of Paragraph III of Plaintiff's General Allegations admit that The Exchange Orange Products Company, sued herein as The Exchange Orange Products Co. (being referred to in plaintiff's complaint and sometimes herein as EOP), is and at all times mentioned in plaintiff's complaint was a California corporation. Deny that EOP has, or at any time mentioned in plaintiff's complaint had its principal place of business in the City of Ontario, California, and allege in that regard that at all times mentioned in plaintiff's complaint and at the present time EOP had and now has its principal office for the transaction of the business of the corporation in the County of Los Angeles, State of California. Admit that said defendant is and was a wholly-owned subsidiary of Sunkist, and is and was engaged in the business of canning fruit juices. Deny that EOP is or was at any times mentioned in plaintiff's complaint engaged in the business of marketing canned fruit juices throughout the United States, and allege in that regard that at all of said times the fruit juices canned by EOP were and are marketed through Sunkist, and that EOP is and was organized and instituted for the purposes of the mutual help and benefit of the members of Sunkist as producers of agricultural products and not for profit, and it did not and does not pay dividends on stock, and it did not and does not deal in the products of non-members of Sunkist to an amount greater in value than such as are handled by it for the members of Sunkist.

(c) For answer to subparagraph (c) of Paragraph III of Plaintiff's General Allegations defendants here answering admit that Exchange Lemon Products Company, sued herein as Exchange Lemon Products Co. (Exchange Lemon

Products Company being referred to in plaintiff's complaint and sometimes herein as ELP), is and at all times mentioned in plaintiff's complaint was a California corporation with its principal place of business in the City of Corona, California, and is and was engaged, among other businesses, in the business of canning lemon juice, but deny that said corporation is or at any times mentioned in plaintiff's complaint or at all was a wholly-owned subsidiary or any subsidiary of Sunkist, and allege that the lemon juice canned by ELP is and was marketed through Sunkist.

(d) For answer to subparagraph (d) of Paragraph III of Plaintiff's General Allegations admit that TreeSweet Products Co. (TreeSweet Products Co. being referred to in plaintiff's complaint and in this answer as TreeSweet) is and at all times mentioned in plaintiff's complaint was a California corporation with its principal place of business in the City of Santa Ana, California; that it is and was, among other things, a juice canner of citrus fruit; admit that it buys a portion of said citrus fruit canned by it in California, and that it cans fruit juices in Santa Ana, California; that defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations of said subparagraph (d) other than the allegations [269] specifically admitted above.

(e) For answer to subparagraph (e) of Paragraph III of Plaintiff's General Allegations defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations of said subparagraph (e).

IV.

Definitions. Defendants here answering assume that the definitions used in Paragraph IV of Plaintiff's General Allegations are to be restricted to the purposes of plaintiff's complaint. So restricted, defendants here answering do not question said definitions as so adopted and used by plaintiff. Defendants do allege, however, that said definitions do not correspond in all respects with the accepted use of said terms in the citrus industry. Defendants here answering in this answer will assume that plaintiff in using the terms defined in said Paragraph IV intend to restrict the connotation of said defined words to the exact definitions set forth in said paragraph.

V.

Citrus Fruit Industry. (a) For answer to subparagraph (a) of Paragraph V of Plaintiff's General Allegations, defendants here answering deny that all citrus fruit marketed in the United States is produced in the United States almost exclusively in the States of California, Florida, Texas and Arizona, and allege in that regard that considerable citrus fruit marketed in the United States is produced outside the United States.

(b) For answer to subparagraph (b) of Paragraph V of Plaintiff's General Allegations defendants here answering deny each, every and all the allegations of said subparagraph except that defendants here answering admit that defendant Sunkist is the largest single citrus fruit marketing organization in the United States, and allege in that regard that Sunkist markets less than one-sixth of the oranges marketed in the United States for utilization in [270] processing (including in the term processing the processing of canned single strength orange juice), and allege that Sunkist produces less than 2% of the canned single strength orange juice produced in the United States, and allege that Sunkist has substantial competition from marketing organizations in the State of California, in Florida, in Texas, in Arizona and foreign countries, and further allege in that regard that approximately 90% of the canned single strength orange juice which is processed in the United States is processed in the State of Florida.

(c) For answer to subparagraph (c) of Paragraph V of Plaintiff's General Allegations defendants here answering deny that defendant Sunkist markets approximately 70% of the oranges, 90% of the lemons and 60% of the grapefruit produced in California and Arizona and marketed in interstate trade and commerce throughout the United States, and allege in that regard that figures are not available from which defendants can determine the percentage of oranges, lemons and grapefruit produced in California and Arizona, and marketed in interstate trade and commerce throughout the United States.

(d) For answer to subparagraph (d) of Paragraph V of Plaintiff's General Allegations defendants here answering deny that approximately 25% of the oranges, 99% of the lemons and 15% of the grapefruit, fresh and canned being considered together, marketed in the United States are produced in California and Arizona, and allege in that regard that figures ~~are not~~ available from which defendants can determine the percentage of oranges, lemons and grapefruit, fresh and canned being considered together, marketed in the United States which are produced in California and Arizona.

(e) This subparagraph (e) in plaintiff's complaint was stricken by order of court.

(f) For answer to subparagraph (f) of Paragraph V of Plaintiff's General Allegations defendants here answering deny that [271] plaintiff's existence as a juice canner depends, or at any time mentioned in plaintiff's complaint depended, upon the purchase by it from defendant Sunkist of large quantities, or any quantity, of citrus fruit. Admit and allege that with respect to oranges both prior to 1951, during said year and since said time, plaintiff with purchases made from defendant Sunkist was able to purchase enough by-product oranges to market its products. Deny that plaintiff had difficulty seeking out the independent packer or purchasing enough by-product oranges from independent packers and defendant Sunkist to market its products. Deny that in 1951 or at any other time or times whatsoever by-product oranges were not available to plaintiff in sufficient quantities from independent packers or that defendants, or either of them, acted to eliminate plaintiff from the canned orange juice market. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation in said subparagraph (f) that plaintiff's sales in all categories of canned citrus fruit juice were reduced by approximately 66%, or that in the category involving oranges, namely orange juice and blended juices containing orange juice, plaintiff's sales were reduced by approximately 70% or that in the category of single strength orange juice plaintiff's sales were reduced by approximately 82%. Defendants here answering allege that plaintiff's sales in the categories mentioned in subparagraph (f) of paragraph V were not reduced in any manner whatsoever by any acts of defendants here answering, or either of them.

(g) For answer to subparagraph (g) of Paragraph V of Plaintiff's General Allegations defendants here answering deny that citrus fruit is canned almost exclusively in the States of California, Florida, Texas and Arizona, and allege in that regard that citrus fruit is also canned elsewhere in various parts of the world.

(h) For answer to subparagraph (h) of Paragraph V of [272] Plaintiff's General Allegations defendants here answering deny that in 1950 and 1951 defendants Sunkist, EOP and TreeSweet together marketed approximately 50% and ~~80% in the~~

respective years of canned orange juice produced in California and Arizona and marketed throughout the United States, and allege in that regard that defendant EOP was not during said years nor is it at the present time engaged in the marketing of canned orange juice, and that the orange juice canned by EOP was and is marketed through Sunkist; that figures are not available from which defendants can determine the percentage of canned orange juice produced in California and Arizona and marketed by Sunkist throughout the United States, and defendants here answering are without knowledge as to the amount or percentage of canned orange juice produced in California and Arizona and marketed throughout the United States by TreeSweet during said years.

(i) For answer to subparagraph (i) of paragraph V of plaintiff's General Allegations defendants here answering deny that in 1950 and 1951 defendants Sunkist, ELP and TreeSweet together marketed approximately 65% of the canned lemon juice produced in California and Arizona and marketed throughout the United States, and allege that figures are not available from which defendants can determine the percentage of canned lemon juice produced in California and Arizona and marketed by Sunkist throughout the United States, and defendants here answering are without knowledge as to the amount and percentage of canned lemon juice produced in California and Arizona and marketed throughout the United States by TreeSweet during said years.

(j) Admit the allegations of subparagraph (j) of paragraph V of plaintiff's General Allegations.

(k) Deny the allegations of subparagraph (k) of paragraph V of plaintiff's General Allegations, and allege in that connection that the sole source of supply of by-product fruit for ELP is its grower-shareholders, who are members of Sunkist. [273]

(1) Defendants here answering are without knowledge whether TreeSweet's principal source of supply of by-product fruit was in 1951 or is defendant Sunkist, or whether defendant Sunkist is or was its exclusive source of supply of said by-product fruit.

VI.

Interstate Commerce. (a) For answer to subparagraph (a) of paragraph VI of plaintiff's General Allegations regarding the citrus industry, defendants here answering admit that the citrus fruit industry includes the matters set forth in said subparagraph, and allege in that regard that the State of Florida, not mentioned by plaintiff, is a very important factor in the citrus fruit industry, particularly the canned single strength orange juice field, canning approximately 90% of all single strength orange juice canned in the United Sates.

(b) For answer to subparagraph (b) of paragraph VI of plaintiff's General Allegations defendants here answering are without knowledge as to the allegations contained in said subparagraph except that defendants here answering admit that plain-

tiff's plant is located in the City of Anaheim, California, and that in the course of purchasing byproduct fruit from defendant Sunkist plaintiff occasionally has caused grapefruit but not oranges produced in Arizona to be shipped to it by interstate carriers from Arizona to California, and that it processes the fruit and cans the juice in California.

(c) For answer to subparagraph (c) of paragraph VI of plaintiff's General Allegations defendants here answering admit said allegations except the allegations regarding the transportation of fresh fruit from Arizona to the plants of defendant Sunkist and its subsidiaries in California, and allege in that regard that the only transportation of fresh fruit from Arizona to plants of defendant Sunkist in California is a small amount to its wholly owned subsidiary EOP. [274]

(d) Deny the allegations contained in subparagraph (d) of paragraph VI of plaintiff's General Allegations.

(e) Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation that defendant Tree-Sweet was and is engaged in interstate trade and commerce throughout the United States substantially in the same manner as plaintiff is alleged to have been in plaintiff's complaint, and as defendants Sunkist, EOP and ELP are alleged to have been in plaintiff's complaint.

VII.

Damages. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph VII of plaintiff's General Allegations that prior to 1951 plaintiff had expended in excess of $500,000 in promoting and developing its good will, reputation and distribution of its products. Deny that prior to 1951 or at any other time or times plaintiff enjoyed an extensive or a profitable business; deny that by reason of any act or conduct of defendants here answering or either of them plaintiff has been injured in its business or property or good will or promotions or advertising or at all, or that it has suffered loss of earnings in the sum of $800,000 or any other sum whatsoever, or that it will suffer any damage in the future in an amount at this time unknown to plaintiff or at all by any act or conduct of defendants here answering or either of them as alleged in plaintiff's complaint or otherwise.

VIII.

Threatened Loss and Damage. Deny each, every and all the allegations of paragraph VIII of plaintiff's General Allegations. [275]

Answer to Plaintiff's First Cause of Action

IX.

For answer to paragraph I of plaintiff's First Cause of Action defendants here answering incorporate herein with the same force and effect as if herein set forth in full each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

X.

Section 1 of the Sherman Act. Deny the allegations of paragraph II of plaintiff's First Cause of Action.

XI.

Specifications. Deny the allegations of paragraph III of plaintiff's First Cause of Action.

Answer to Second Cause of Action of Plaintiff's Complaint

XII.

For answer to paragraph I of plaintiff's Second Cause of Action defendants here answering incorporate herein with the same force and effect as if herein set forth in full each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above and paragraphs X and XI of defendants' answer to plaintiff's First Cause of Action.

XIII.

Section 2 of the Sherman Act. Deny the allegations of paragraph II of plaintiff's Second Cause of Action.

Answer to Third Cause of Action of Plaintiff's Complaint

XIV.

For answer to paragraph I of plaintiff's Third Cause of [276] Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

XV.

Section 1 of Robinson-Patman Act. For answer to paragraph II of plaintiff's Third Cause of Action, deny each, every and all of the allegations contained and set forth in said paragraph except that defendants here answering admit and allege that defendant Sunkist is now and was engaged in trade and commerce throughout the United States and foreign countries.

XVI.

Section 3 of the Robinson-Patman Act. Deny the allegations of paragraph III of plaintiff's Third Cause of Action.

XVII.

Specification. For answer to paragraph IV of plaintiff's Third Cause of Action defendants here answering admit the allegations of subparagraphs (a) to (d), inclusive, of said paragraph IV, and deny the allegations of subparagraph (e) of paragraph IV of plaintiff's Third Cause of Action.

XVIII.

Further Specification. For answer to paragraph V of plaintiff's Third Cause of Action defendants here answering deny each, every and all of the allegations of said paragraph except that they admit and allege as follows:

(a) Admit and allege defendant EOP delivered oranges to defendant TreeSweet on consignment under arrangements whereby defendant TreeSweet produced single strength canned orange juice for defendant EOP, and defendant EOP paid the costs incurred to produce such juice.

(b) Admit and allege defendant TreeSweet was under the arrangement permitted to purchase from said canned juice processed [277] by it its canned orange juice requirements from Sunkist at Sunkist's published price in effect at the time of purchase, less certain discounts and allowances which were reasonable and customary in the trade and which were and are available on proportionally equal terms to all purchasers desiring the same and having acceptable credit standing.

(c) Admit and allege that similar arrangements were made on proportionally equal terms when oranges were available with other processors having processing standards of like grade and quality to those of TreeSweet and who had accepted credit standing.

XIX.

Further Specification. For answer to paragraph VI of plaintiff's Third Cause of Action defendants here answering admit that during the period mentioned in paragraph V of plaintiff's Third Cause of Action plaintiff through its president, Winckler, requested by telephone of defendant EOP that it be permitted to make a transaction similar to that made with defendant TreeSweet but that such requests were not granted for good and sufficient business reasons. Deny each, every and all of the allegations of said paragraph VI not herein specifically admitted.

Answer to Fourth Cause of Action of Plaintiff's Complaint

XX.

For answer to paragraph I of plaintiff's Fourth Cause of Action defendants here answering incorporate herein with the same force and effect as if herein set forth in full each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

XXI.

Cartwright Antitrust Act. Deny the allegations of paragraph II of plaintiff's Fourth Cause of Action. [278]

XXII.

Specifications. Deny the allegations contained in paragraph III of plaintiff's Fourth Cause of Action and in connection with the acts alleged in said paragraph defendants here answering incorporate by this reference their answer contained in paragraphs X and XI of their answer to plaintiff's First Cause of Action, and in paragraph XIII of their answer to plaintiff's Second Cause of Action, and paragraphs XV, XVI, XVII, XVIII and XIX of their answer to plaintiff's Third Cause of Action as fully as though herein set forth in full.

Answer to Fifth Cause of Action of Plaintiff's Complaint

XXIII.

For answer to paragraph I of plaintiff's Fifth Cause of Action defendants here answering incorporate herein with the same force and effect as if herein set forth in full each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

XXIV.

Unfair Practices Act. Deny the allegations of paragraph II of plaintiff's Fifth Cause of Action.

For a Separate, Distinct and Affirmative Defense to Plaintiff's Complaint and to the General Allegations and to Each and Every Cause of Action in Said Complaint defendants here answering allege plaintiff's complaint and the General Allegations and the First, Second, Third, Fourth and Fifth Causes of Action therein fail and each of them fails to state a claim upon which relief can be granted against the defendants here answering, or either of them.

For a Second Separate, Distinct and Affirmative Defense to the Fourth and Fifth Causes of Action in Said Complaint, defendants [279] here answering allege that the court lacks jurisdiction over the subject matter of the said purported Causes of Action, and each of them.

Wherefore, defendants here answering pray that plaintiff take nothing by its action, that defendants here answering have judgment for their costs incurred herein against plaintiff and intervener, and for such other relief as may to the Court seem meet and proper in the premises.

FARRAND & FARRAND,
GEORGE E. FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,
Attorneys for Defendants
Here Answering.

Affidavit of service by mail attached.

[Endorsed]: Filed May 26, 1952. [280]

[Title of District Court and Cause.]

No. 13788-WB

INTERROGATORIES PROPOUNDED TO PLAINTIFF AND INTERVENER BY DEFENDANTS SUNKIST GROWERS, INC., THE EXCHANGE ORANGE PRODUCTS COMPANY AND TREESWEET PRODUCTS CO.

* * *

You and Each of You Please Take Notice that you are required to answer the following interrogatories within 15 days after service of these interrogatories upon you, separately and fully, in writing and under oath:

In order to avoid unnecessary duplication these interrogatories are propounded by defendants Sunkist Growers, Inc., The Exchange Orange Products Company and by defendant TreeSweet Products Co.

While defendant Exchange Lemon Products Company does not join herein, we are advised that on any interrogatories to be propounded by it it will not duplicate the matters covered herein. [458]

* * *

Dated June 12, 1952.

FARRAND & FARRAND,
GEORGE E. FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company.

O'MELVENY & MYERS,
PIERCE WORKS,
WILLIAM W. ALSUP,
BENNETT W. PRIEST,

By /s/ WILLIAM W. ALSUP,
Attorneys for Defendant
TreeSweet Products Co.

[Endorsed]: Filed June 16, 1952. [483]

[Title of District Court and Cause.]

No. 13788-WB

ORDER FOR PRODUCTION OF DOCUMENTS REQUESTED IN MOTION OF DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY UNDER RULE 34, AND GRANTING PLAINTIFF'S MOTION TO SUPPRESS INTERROGATORIES OF DEFENDANTS SUNKIST, E.O.P. AND TREESWEET

The motion of defendant Exchange Lemon Products Company for production of documents under Rule 34 and the motion of plaintiff and intervener to suppress the interrogatories served by defendants Sunkist Growers, Inc., The Exchange Orange Products Company and TreeSweet Products Co., came on regularly for hearing in Court Room No. 4 of the above-entitled court before Honorable William M. Byrne on the 8th day of September, 1952; Exchange Lemon Products Company appearing by Clayson, Stark & Rothrock, Pope, Ballard & Loos, Donald D. Stark of counsel, Winckler & Smith Citrus Products Co., and Ronald Walker, trustee, appearing by their counsel, Bernard Reich, Sunkist Growers, Inc., and The Exchange [646] Orange Products Company appearing by Farrand & Farrand, Ross C. Fisher and Knox Farrand of counsel, and TreeSweet Products Co., appearing by O'Melveny & Myers, Bennett W. Priest of counsel; and the Court having read the pleadings and affidavits on file and heard the argument of counsel, and good cause appearing:

It Is Hereby Ordered that plaintiff Winckler & Smith Citrus Products Co., and intervener Ronald Walker, produce the following documents for the period of April 1, 1949, to the date of filing of the complaint. The said documents shall be made available in normal business hours during the week commencing Monday, October 13, 1952, at the plaintiff's office in Anaheim, California, and plaintiff and intervener shall permit the defendant Exchange Lemon Products Company to inspect said documents and have the same photographed or otherwise copied: [647]

* * *

12. The books and records showing the tests made by plaintiff's laboratory and the results thereof, with respect to citrus fruit and citrus products.

13. Books and records showing one or more of the following:

(a) Inspection of a citrus product of plaintiff by a Government agency or by any quality control or analysis agency other than plaintiff's laboratory,

(b) Date of each such inspection,

(c) Results of each such inspection,

(d) Product inspected,

(e) Steps taken to meet or satisfy inspection standards, if any. [649]

* * *

It Is Further Ordered that defendants Sunkist Growers, Inc., The Exchange Orange Products Company, and TreeSweet Products Co., shall be afforded an opportunity to inspect said books at the said time and place and to photograph or copy the same and be bound by this order to the same extent as defendant Exchange Lemon Products Company.

It Is Further Ordered that all requests for documents contained in the said motion under Rule 34 and not herein expressly ordered are denied without prejudice to their renewal, on good cause shown, after the documents herein ordered to be produced have been examined and analyzed and after conference and discussion among counsel for the respective parties.

It Is Further Ordered that the motion of plaintiff and intervener to suppress the interrogatories served by defendants Sunkist Growers, Inc., The Exchange Orange Products Company, and TreeSweet Products Co., be granted and said interrogatories are hereby suppressed in their entirety, without prejudice to the renewal thereof in whole or in part after the documents herein ordered to be produced have been examined and analyzed by said defendants and after conference and discussion among counsel for the respective parties.

Dated October 30, 1952.

/s/ WILLIAM M. BYRNE,
District Judge.

[Endorsed]: Filed October 30, 1952. [650]

[Title of District Court and Cause.]

No. 13788—WB

NOTICE OF MOTION BY DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY UNDER RULE 37

Please Take Notice

That the defendant Exchange Lemon Products Company will move before the Honorable William M. Byrne at his court room in the United States Post Office and Courthouse Building, Temple and Spring Streets, City of Los Angeles, State of California, on the 23rd day of March, 1953, at 9:45 o'clock in the forenoon of that [682] day, or as soon thereafter as counsel can be heard.

That, pursuant to Rule 37 of said Rules of Civil Procedure:

(a) It shall be taken to be established for the purposes of this action that, according to the laboratory records of plaintiff, the citrus products produced and offered for sale by plaintiff during the period April 1, 1949, to the filing of the complaint were of an inferior quality with respect to flavor, per cent of soluble solids, acidity, and sugar content; and

(b) Neither plaintiff nor intervener may introduce in evidence in this action any laboratory reports of tests, made between April 1, 1949, and the date of filing of the complaint, of plaintiff's citrus products, or documents or testimony concerning or pertaining to such reports or to the contents of any such reports; and

* * *

Dated March 10, 1953.

CLAYSON, STARK &
ROTHROCK,
POPE, BALLARD & LOOS,

By /s/ DONALD D. STARK,
Attorneys for Defendant Exchange Lemon Products Co.

Affidavit of service by mail attached.

[Endorsed]: Filed March 10, 1953. [683]

[Title of District Court and Cause.]

No. 13788—WB

STATEMENT OF REASONS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY UNDER RULE 37

Grounds of Motion

1. An order was entered by this court on October 30, 1952, after briefs and oral arguments, which directed plaintiff and intervener to produce for inspection and copying by defendant Exchange Lemon Products Company, at plaintiff's office in Anaheim, California, during normal business hours

and during the week commencing October 13, 1952, the following for the period April 1, 1949, to the date of filing of the complaint in this action:

> 12. "The books and records showing the tests made by plaintiff's laboratory and [685] the results thereof, with respect to * * * citrus products."

2. Said books and records were not produced as directed by said order, and have not yet been produced, as stated in the attached affidavit of Donald D. Stark.

3. Subsequent to said order and said week of October 13, 1952, counsel for defendant Exchange Lemon Products Company requested counsel for plaintiff and counsel for intervenor to produce said books and records and each of them refused to do so, as stated in the attached affidavit of Donald D. Stark.

* * *

Dated March 10, 1953.

CLAYSON, STARK & ROTHROCK,
POPE BALLARD & LOOS,

By /s/ DONALD D. STARK,
Attorneys for Defendant Exchange Lemon Products Company.

Affidavit of service by mail attached.

[Endorsed]: Filed March 10, 1953. [686]

[Title of District Court and Cause.]

No. 13788—WB

PLAINTIFF AND INTERVENER'S ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY (WITH OBJECTIONS TO CERTAIN OF THE INTERROGATORIES)

Plaintiff and intervener herewith submit their answers and objections to interrogatories propounded by defendant Exchange Lemon Products Company.

These answers are based on knowledge presently available.

Plaintiff and intervener have not completed their discovery and reserve the right to revise and amend their answers a reasonable time before trial. [697]

Interrogatory 1. With respect to the allegations of lines 9 through 18, page 2, of the complaint, that certain "unlawful" acts, "violations," a "monopoly," "attempts to monopolize," "combinations and conspiracies to restrain trade," a "discrimination" and "combinations and conspiracies to discriminate," and "unlawful acts done in pursuance thereof" were "conceived, carried out, made effective and performed, in part, within this District of the Court and elsewhere in California and throughout the United States," state each act performed by each defendant, and when and where performed, in conceiving, carrying out, making effective, and performing the things alleged, except acts alleged elsewhere in the complaint.

Answer. In addition to the acts alleged in the complaint, the defendants combined and conspired to fix prices of canned fruit juices, among other things, by the device of fruit processing [698] agreements.

* * *

Dated: March 12, 1953.

BERNARD REICH, and
HARRY M. IRWIN,

By /s/ BERNARD REICH,
Attorneys for Plaintiff and Intervener.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed March 13, 1953. [750]

[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD REICH IN OPPOSITION TO MOTION UNDER RULE 37

* * *

7. As I wrote to the attorney for the moving defendant, I committed an error at the time of the

hearing as I did not notice that the item included "citrus products" as well as "citrus fruit."

8. My error came about in this way: Since the price of the by-product fruit depended upon laboratory tests of both Sunkist and plaintiff, and if I was entitled to the laboratory tests of Sunkist, the defendants were entitled to the laboratory tests of plaintiff—but only as to the by-product fruit. The complaint did not raise any question with respect to which the laboratory tests of the products as distinguished from the fruit would be material. Furthermore, there was nothing [755] in the pleadings of the defendant or in its moving affidavit which would make the laboratory tests of the products material. It did not occur to me therefore when I stipulated to item 14 that I was stipulating to the laboratory tests of the citrus products in addition to the laboratory tests with respect to the citrus fruit.

9. Because of my error, and the mental omission in my mind, the records concerning the laboratory tests of the products were not made available to the defendants. It was only after counsel for the moving defendant herein brought the matter to my attention that I went back to the item and to the order of this Court. Furthermore, I might have waived my objection to the materiality and relevance of the material were it not that the trustee and intervener herein advised me that the laboratory tests of the products would disclose confidential formula and

that they could not consent to the production unless the order was reaffirmed by the Court. It was then that I offered to make application to this Court to be relieved of that part of the order which had been entered upon by stipulation. However, as indicated above, I had every reason to believe that the defendants were going to require additional material, which they had a right to do under the order, and bring up the subject of this particular item at the same time. Instead the moving defendant raises the question under the punitive Rule 37.

10. It is respectfully submitted that the moving defendant's motion is ill conceived. Under paragraph (a) this defendant asks that it shall be taken to be established that according to plaintiff's laboratory records the citrus products offered for sale were of an inferior quality with respect to flavor, etc. This is apparently proposed in [756] accordance with Rule 37 (b) (2) (i) which provides that designated facts shall be taken to be established "in accordance with the claim of the party obtaining the order." But where has the party obtaining the order claimed that the citrus products were of an inferior quality, etc.?

11. As to Paragraph (b) of this defendant's motion which asks that neither plaintiff nor intervener introduce in evidence any of the laboratory reports, etc., I know of no issue, as I have already indicated, on which these reports would be material. This

points up the objection which I make to the production of these laboratory tests in the first place. [757]

* * *

/s/ BERNARD REICH,

[Endorsed]: Filed March 16, 1953. [758]

[Title of District Court and Cause.]

No. 13788—WB

REPLY MEMORANDUM BY DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY RE MOTION UNDER RULE 37

I.

Plaintiff and Intervener Have Failed to Establish Substantial Justification for Refusal to Comply With the Court's Order to Produce.

In their answering memorandum, plaintiff and intervener state that there was substantial justification for their failure and refusal to produce the laboratory analyses of citrus products in compliance with the order of this court. This bare assertion of the existence of substantial justification is wholly unspported and, in fact, is refuted by the facts set forth in the affidavit of their counsel.

No question is raised but that the court's order requiring [775] the production of "books and records showing tests made by plaintiff's laboratory and the results thereof, with respect to * * * citrus products" described in clear and unequivocal language the books which plaintiff and intervener have refused to produce.

The only objection which is given any definite form in counsel's affidavit is a claim that the laboratory analyses of products are not material. Thus, at lines 12 and 13 of page 5 of counsel's affidavit, reference is made to the fact that he might have "waived his objection to the materiality and relevance of these records" but for certain matters. Actually, there is no question now before this court regarding the waiver or non-waiver of such an objection. The objection has already been made by plaintiff and intervener (Plaintiff and Intervener's Supplemental Memorandum in Opposition to Defendant Exchange Lemon Products Company's Motion Under Rule 34, dated August 13, 1952, page 7, lines 26-27). The court's order, after full hearing on the objections, directed production of the records in question.

Petitioner, in effect, asks this court to ignore the extensive pleadings which were filed in connection with the original motion under Rule 34, and the lengthy argument presented on objections thereto, as well as the court's own order granting the motion. Plaintiff and intervener apparently seek to have the court start all over again, in the hope that some other result might be attained. It is submitted that this refusal to accept and comply with the clear and unambiguous terms of this court's decision is clearly action without justification and the solicitation of "the court's ruling as to the validity of plaintiff and intervener's objections to the production of citrus products tests" is a frivolous reassertion of an objection already presented in due course and overruled by the court. [776]

II.

Plaintiff and Intervener Had Full Notice of the Objectives of Item 14 in Defendant Exchange Lemon Products Company's Motion Under Rule 34.

In the affidavit of counsel (page 4, line 32, to page 5, line 2) it is stated that "there is nothing in the pleadings of the defendant or in its moving affidavit which would make the laboratory tests of products material." It is submitted that counsel has failed to give sufficient study to the affidavit and statement in support of the motion under Rule 34 which was filed by Exchange Lemon Products Company.

The affidavit of Melville C. Williams (page 4, lines 10-12) identifies the documents sought by Item 14 of that motion by reference to the testimony of plaintiff's president as follows:

> "The laboratory of Plaintiff checked the ratio of citrus acid, pulp content of juice, and quality of the finished juice (Tr. 19-20)." (Emphasis added.)

In its statement in support of its motion under Rule 34 (page 8, lines 14-23) defendant Exchange

Lemon Products Company made the following comment relative to the request for laboratory analyses:

> "Paragraphs 14, 15 and 16 of the motion ask for laboratory tests, government inspection records, and correspondence with customers and brokers pertaining to the quality of the fruit used by Plaintiff and the quality of Plaintiff's products. Plaintiff has alleged in paragraph VIII(a) of the complaint that it is a first-class juice canner. It is essential to determine whether it used first-class fruit and manufactured a first-class product. If the product was not satisfactory [777] the damages claimed by Plaintiff may have resulted from this fact rather than from any acts of Defendants." (Emphasis added.)

Plaintiff and intervener were thus put on notice that, of all of the documents requested in Items 14, 15 and 16 of the motion under Rule 34, the tests relating to quality of the product carry the highest materiality and were relevant to the specific allegation of the complaint. It is therefore submitted that counsel for plaintiff and intervener is in no position to suggest that there is nothing to indicate the materiality of the documents sought. Contrary to counsel's assertion that he desires to be relieved from an unfortunate stipulation (Affidavit of Reich, page 3, line 30), he is seeking relief from a solemn order of this court granting a meritorious request to which only the most perfunctory objection was timely raised, and that objection having been expressly waived in open court. [778]

* * *

Dated March 19, 1953.

CLAYSON, STARK &
ROTHROCK,
POPE BALLARD & LOOS,

By /s/ DONALD D. STARK,
Attorneys for Defendant, Exchange Lemon Products Co.

Affidavit of service by mail attached.

[Endorsed]: March 20, 1953. [780]

[Title of District Court and Cause.]

No. 13788-WB

DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY'S NOTICE OF WITHDRAWAL OF MOTION UNDER RULE 37

In accordance with the Court's instructions at the hearing on March 30, 1953, notice is hereby given to the Court that the records were produced by plaintiff and intervener and made available to defendant Exchange Lemon Products Company for photocopying. The said motion has accordingly become moot and is hereby withdrawn.

Dated: April 17, 1953.

CLAYSON, STARK & ROTHROCK,
POPE, BALLARD & LOOS,

By /s/ DONALD D. STARK,
Attorneys for Defendant Exchange Lemon Products Company.

Affidavit of service by mail attached.

[Endorsed]: Filed April 18, 1953. [802]

[Title of District Court and Cause.]

No. 13788 C

ORDER GRANTING MOTION OF DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY UNDER RULE 37

The motion of Defendant Exchange Lemon Products Company Under Rule 37 to compel Plaintiff and Intervener to further answer certain interrogatories, came on regularly to be heard in the above-entitled court before Honorable James M. Carter on the 8th and 11th days of March, 1954; Exchange Lemon Products Company appearing by

Clayson, Stark & Rothrock and Pope & Ballard, Donald D. Stark and Melville C. Williams of counsel, Winckler & Smith Citrus Products Co. and Ronald Walker, Trustee, appearing by Bernard Reich and Harry M. Irwin; and the Court having read the pleadings and supporting papers and heard the arguments of counsel, and good cause appearing: [1037]

It Is Hereby Ordered that plaintiff and intervener shall answer separately and fully in writing, Interrogatories Nos. 15, 16, 25, 26, 27 and 32 of the interrogatories propounded by defendant Exchange Lemon Products Company on or about December 26, 1952; provided, however, that the time for serving said answers on defendant Exchange Lemon Products Company be postponed until Plaintiff and Intervener have completed their discovery of documents pursuant to the stipulation and order on their motion under Rule 34, the date for said answers to be fixed by stipulation of counsel, or on application to the Court by either party.

It Is Further Ordered that the alternative relief sought by defendant Exchange Lemon Products Company in said motion

(a) Striking certain words from page 12 of the complaint; and

(b) allowing attorneys' fees and expenses in connection with said motion under Rule 37, is hereby denied.

Dated May 10, 1954.

/s/ JAMES M. CARTER,
Judge.

Approved as to form in accordance with Local Rule 7 (a).

CLAYSON, STARK & ROTHROCK,
POPE & BALLARD,

By /s/ DONALD D. STARK,
Attorneys for Defendant, Exchange Lemon Products Company.

BERNARD REICH,
HARRY M. IRWIN,

By /s/ BERNARD REICH,
Attorneys for Plaintiff and Intervener.

[Endorsed]: Filed May 10, 1954. [1038]

In the United States District Court, Southern District of California, Central Division

No. 53,860—C

In the Matter of:

WINCKLER & SMITH CITRUS PRODUCTS CO.,

Debtor.

No. 13,788—C

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation,

Plaintiff,

vs.

SUNKIST GROWERS, INC., a Corporation, et al.,

Defendants;

RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,

Intervener.

NOTICE OF HEARING; MOTION FOR LEAVE TO COMPROMISE; PETITION

Please Take Notice that the Hearing on the Motion and Petition will be had in the above-entitled Court in the courtroom of the Honorable James M. Carter, District Judge, on the 19th day of July, 1954, at 10:00 a.m.

/s/ BERNARD REICH,
Attorney for Plaintiff and Intervener.

/s/ HARRY M. IRWIN,
Attorney for Trustee. [1061]

[Title of District Court and Causes.]

Nos. 53,860-C and 13,788-C

MOTION FOR LEAVE TO COMPROMISE

Comes now Winckler & Smith Citrus Products Co., plaintiff and debtor, and Ronald Walker, trustee, and move the Court for an order granting said party leave to compromise the action against the defendant TreeSweet Products Co. only, and on the terms set forth in the petition herein.

/s/ BERNARD REICH,
Attorney for Plaintiff and
Intervener.

/s/ HARRY M. IRWIN,
Attorney for Trustee. [1062]

[Title of District Court and Causes.]

Nos. 53,860-C and 13,788-C

PETITION

Winckler & Smith Citrus Products Co., for its petition, alleges:

1. The defendant TreeSweet Products Co., in Action No. 13,788-C, has offered to pay $2500.00 in compromise of the said action.

2. Petitioner's President, Nicholas J. Winckler, and the Trustee, Ronald Walker, have indicated their assent subject to the approval of the [1063] Court.

3. It is proposed that in consideration of the said sum a covenant not to sue further be delivered to the said defendant.

It is proposed also that the discovery heretofore had of the said defendant remain as binding as if the said defendant remained in the case.

4. The inducement to make the said settlement on the part of the plaintiff, intervener and trustee is that the said sum shall be used to prosecute the said action against the remaining defendants.

5. It is proposed that the covenant and stipulation between plaintiff, intervener and trustee on the one hand and the defendant TreeSweet Products Co. on the other shall be submitted to the Court for its approval and order.

6. Petitioner contemplates an order directing that the said defendant TreeSweet Products Co. pay the said $2500.00 to the Trustee, that the Trustee will pay to Bernard Reich such sum as is fixed by the Court in a companion petition for his legal services rendered, and that the balance of the said $2500.00 be earmarked by the Trustee, exclusively for the prosecution of the said anti-trust action.

Dated: May 27, 1954.

WINCKLER & SMITH CITRUS PRODUCTS
CO. and RONALD WALKER,

By /s/ RONALD WALKER,
Plaintiff, Intervener and
Trustee;

/s/ BERNARD REICH,
Attorney for Plaintiff and Intervener;

/s/ HARRY M. IRWIN,
Attorney for Trustee.

Duly verified.

[Endorsed]: Filed July 2, 1954. [1064]

In the United States District Court, Southern District of California, Central Division

No. 13,778-C

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation,

Plaintiff,

vs.

SUNKIST GROWERS, INC., a Corporation, et al.,

Defendants;

RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,

Intervener.

ORDER APPROVING COMPROMISE OF ACTION No. 13,788-C AS AGAINST DEFENDANT TREESWEET PRODUCTS CO.

Winckler & Smith Citrus Products Co., plaintiff and debtor, and Ronald Walker, trustee, having moved for leave to compromise the action in No. 13,788-C as against the defendant TreeSweet Products Co., a corporation, only, and the hearing having been had thereon on the 19th day of July, 1954, in this Court, Bernard Reich, attorney for plaintiff; Harry M. Irwin, attorney for trustee and intervener, and Jack Stutman, attorney for the debtor, all appearing in support of the motion, and no one appearing in opposition, and the Court having given due deliberation to the motion, now then [1070]

It Is Hereby Ordered:

1. The motion is granted and the compromise with defendant TreeSweet Products Co., a corporation, in the sum of $2500 is approved.

2. Pursuant to said compromise defendant TreeSweet Products Co. is directed to pay to the trustee, Ronald Walker, the sum of $2500 upon receipt by it of the Covenant Not to Sue duly executed.

3. The trustee shall deposit said sum in a separate bank account to be used to prosecute the action in No. 13,788-C and otherwise as directed by the Court, including compliance with any order of the Court to pay to Bernard Reich and/or Harry M. Irwin attorneys fees, if any, hereafter fixed. The trustee shall not expend in excess of $1500.00 of said $2500.00 in prosecution of action No. 13,788-C without further order of this Court.

4. This order is made without prejudice to the prosecution of the action in No. 13,788-C against the defendants other than TreeSweet Products Co., and with respect to defendants other than Tree-

Sweet Products Co. without prejudice to the plaintiff in the use of discovery already had therein.

Dated this 28th day of July, 1954.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed July 29, 1954. [1071]

[Title of District Court and Cause.]

MINUTES OF THE COURT

November 24, 1954

Present: Hon. James M. Carter, District Judge.

Counsel for Plaintiff: Harry M. Irwin, for intervening plaintiff Ronald Walker; William C. Dixon, Spec. Counsel for intervening plaintiff Ronald Walker.

Counsel for Defendants: Ross C. Fisher, for defendants Sunkist and Exchange Orange; Melville Williams, for defendant Exchange Lemon.

Proceedings:

For pretrial hearing.

Court and counsel confer relative to the issues, etc.

On motion of Attorney Dixon, it is ordered that plaintiff may file an amended complaint by December 24, 1954, and that defendants may have 30 days from service thereof within which to move or plead thereto.

EDMUND L. SMITH,
Clerk;

By L. B. FIGG,
Deputy Clerk. [1103]

In the United States District Court, Southern District of California, Central Division

Case No. 13,788-C

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, a Corporation, and RONALD WALKER, Trustee and Intervener,

Plaintiffs,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a Corporation; THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation; EXCHANGE LEMON PRODUCTS COMPANY, a Corporation, and TREESWEET PRODUCTS COMPANY, a Corporation,

Defendants.

AMENDED COMPLAINT FOR EQUITABLE RELIEF AND TREBLE DAMAGES UNDER THE FEDERAL AND CALIFORNIA ANTI-TRUST LAWS

Plaintiff, Winckler & Smith Citrus Products Company, alleges:

General Allegations

I.

Jurisdiction. This amended complaint is filed and these proceedings are instituted under the following Acts of Congress and Statutes of the State of California:

Section 1 of the Act of Congress of July 2, 1890; Section 2 of the Act of Congress of July 2, 1890; Section 3 of the Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act (15 USCA §§ 1, 2); Section 4 of the Act of Congress of October 15, 1914; Section 16 of the Act of Congress of October 15, 1914, commonly known as the Clayton Anti-Trust Act (15 USCA §§ 15, 26); Section 2 [1104] of the Act of Congress of October 15, 1914, as amended by Section 1 of the Act of Congress of June 19, 1936, commonly known as the Robinson-Patman Act (15 USCA §§ 13, 13 (a) 1); Sections 16,700 to 16,758 of the California Business and Professions Code, commonly known as the Cartwright Anti-Trust Law, and Sections 17,000 to 17,101, inclusive, of the California Business and Professions Code, commonly known as the Unfair Trade Practices Act.

The unlawful acts and violations hereinafter described, including the unlawful monopoly, attempts to monopolize, combinations and conspiracies to restrain trade and commerce among the several states of the United States and the District of Columbia, and the discrimination in price, services and facilities and the conspiracies and combinations to discriminate in price, service and facilities, and the unlawful acts done in pursuance thereof, have been and are conceived, carried out, made effective and performed, in part, within this District of the Court, and elsewhere in California and throughout the United States.

II.

(a) Plaintiff. Winckler & Smith Citrus Products Company is, and was during all the times mentioned in this complaint, a California corporation with its principal place of business in the City of Anaheim, California. Plaintiff filed a Petition under Chapter 10 of the Bankruptcy Act, known as No. 53860-c in the files of this court, on March 19, 1952, and, on or about March 26, 1952, plaintiff filed a petition for reorganization under said Act, and Ronald Walker, intervener herein, was appointed trustee of the assets of plaintiff by the court, in said proceedings.

(b) Plaintiff's Business. Prior to the bankruptcy proceedings referred to in Par. II (a) herein, plaintiff was a juice canner of by-product citrus fruit, i.e., oranges, lemons and grapefruit, buying the said by-product fruit in Arizona and California, processing and canning the fruit into natural and frozen concentrate [1105] juice, in Anaheim, California, and causing the canned juices to be transported and marketed in intrastate and interstate commerce throughout the United States. In 1950 and 1951 plaintiff furthermore caused canned citrus fruit juice to be custom packed for it in the State of Florida and transported and marketed in interstate commerce throughout the United States.

III.

Defendants.

(a) California Fruit Growers Exchange (hereinafter referred to as Sunkist) is, and at all times herein mentioned was a California membership corporation with its principal place of business in the City of Los Angeles, California. The name of said defendant was changed to Sunkist Growers, Inc., on or about February 8, 1952. The members of Sunkist produce about 70% of all the oranges grown in the State of California. Sunkist is and at all times mentioned herein was in the business of marketing fresh citrus fruit throughout the United States. Through a subsidiary company, The Exchange Orange Products Company, one of the defendants herein, Sunkist is and at all times mentioned herein was in the business of canning fruit juices and marketing the said fruit juices in intrastate and interstate commerce throughout the United States.

(b) The Exchange Orange Products Company (hereinafter referred to as E.O.P.) is, and at all times herein mentioned was, a California corporation, with its principal place of business in the County of Los Angeles, California. It is and at all times herein mentioned was engaged in the business of processing and canning by-product fruit into natural and frozen concentrate citrus fruit juices. The fruit juices canned directly by E.O.P. are marketed for said defendant in intrastate and interstate commerce throughout the United States by defendant Sunkist.

(c) Exchange Lemon Products Company (referred to hereinafter as E.L.P.) is, and at all times herein mentioned, was a [1106] California corporation with its principal place of business in the City of Corona, California. Substantially all the lemons produced in the United States are produced in California. The members of E.L.P. produce about 90% of all lemons produced in California. E.L.P. is, and during the year 1951 was, among other things engaged in the business of producing lemons and canning natural and frozen concentrate citrus fruit juices. In December, 1950, E.L.P. acquired all the capital stock of Dameral-Allison Company, a California corporation and a processor of citrus fruit juices, and merged the assets of said company with E.L.P., thereafter selling the orange juice and frozen concentrate so acquired in competition with the plaintiff during the year 1951. Substantially all the citrus fruit juices canned by E.L.P. are marketed for it throughout the United States by defendant, Sunkist.

(d) TreeSweet Products Company (hereinafter referred to as TreeSweet) is, and at all times herein mentioned was, a California corporation with its principal place of business in the City of Santa Ana, California. It is and at all times mentioned was a juice canner of by-product fruit, buying the said by-product fruit in Arizona and California, and causing the canned juices to be transported in intrastate and interstate commerce into the various states of the United States, including the states in which plaintiff marketed its canned juices. Said defendant operates and for some time has operated a plant in the State of Florida and does and has transported and marketed canned citrus fruit from that state in interstate commerce throughout the United States.

(e) E. A. Silzle Corporation (hereinafter referred to as Silzle) is a corporation organized under the laws of the State of California, with its principal place of business at Anaheim, California. Said corporation is engaged in the business of processing by-product citrus fruit into natural and frozen concentrate juice and marketing the same in the State of California and other states [1107] of the United States. It is named a co-conspirator, but is not made a defendant herein.

IV.

Definitions:

"Citrus fruit" refers to oranges, lemons and grapefruit produced for commercial purposes.

"By-product fruit" refers to citrus fruit not marketed as fresh fruit and marketed to canners for processing into single strength juice, hot pasteurized concentrate juice and frozen concentrate juice. It is citrus fruit which the growers or marketing agencies consider to be of a quality not satisfactory for or capable of being absorbed by the fresh citrus fruit market.

"Citrus fruit juice" refers to "natural" and "frozen concentrate" juice processed from "by-product fruit."

"Natural fruit juice" refers to "single strength juice" and "hot pasteurized concentrate juice."

"Frozen concentrate juice" refers to concentrate citrus fruit juice processed under low temperature and quickly frozen.

"Independent packer" refers to a packer of citrus fruit unaffiliated with any co-operative or association such as Sunkist, marketing citrus fruit.

"Custom packing" refers to the practice whereby citrus fruit is delivered to the canner for processing, title remaining in the grower or packer.

V.

The Citrus Fruit Industry

(a) Substantially all of the citrus fruit marketed in the United States is produced in the states of California, Florida, Texas and Arizona.

(b) Defendant Sunkist is the largest citrus fruit marketing organization in the United States, and through its subsidiary, E.O.P., [1108] is the largest single source of by-product oranges in the State of California. As marketing agent for defendant, E.L.P., Sunkist also is the largest marketing organization for lemons, other than by-product lemons, marketed as fresh fruit in interstate trade and commerce throughout the United States.

(c) Defendant E.L.P. is the primary and principal source of by-product lemons used by plaintiff and other independent juice canners in producing canned natural and frozen concentrate lemon juice.

(d) Plaintiff's existence as a juice canner depends and at all times herein mentioned was dependent upon the acquisition by it of large quantities of by-product fruit for processing into canned natural or frozen concentrate juice.

(e) During the year 1951 defendant Sunkist engaged in an extensive advertising program to promote the trade name "Sunkist" as applied to canned natural and frozen concentrate fruit juices marketed by it and for defendant E.L.P., in intrastate and interstate commerce.

(f) Substantially all the canned natural and frozen concentrate citrus fruit juices sold in the United States are canned in the states of California, Florida, Texas and Arizona. Plaintiff is informed and therefore alleges upon information and belief that in 1950 and 1951, approximately 50% and 80% in the respective years, of canned natural and frozen concentrate orange juice produced in California and Arizona and thereafter marketed throughout the United States, was processed by or on behalf of defendant Sunkist.

(g) Plaintiff is informed and therefore alleges upon information and belief that in the years 1950 and 1951 more than 50% of the canned natural and frozen concentrate lemon juice produced in California and Arizona and marketed throughout the United States was processed by or on behalf of defendants Sunkist and E.L.P.

(h) Defendant E.O.P.'s sole source of supply of by-product fruit in 1951 was defendants Sunkist and E.L.P. [1109]

(i) Substantially all the by-product oranges processed by defendant E.L.P. into natural and frozen orange concentrate juice are secured from defendant E.O.P.

(j) Plaintiff is informed and therefore alleges upon information and belief that defendant Tree-Sweet's principal, if not exclusive, source of supply of by-product fruit in 1951 was defendants E.O.P. and E.L.P.

VI.

Interstate Commerce

(a) The business of producing and marketing citrus fruit and the activities of each branch of the industry are either in or directly affect trade and commerce among the several states. In the course of producing and marketing citrus fruit there is a constant, continuous stream of trade and commerce between the states and throughout the United States, consisting of the solicitation and making of contracts, written and wired communications, the assemblage of personnel, property and material in California, Arizona and Texas, the transportation of fresh fruit from Arizona and Texas to California, the shipping of fresh fruit from California to all the states of the United States, the processing and canning of by-product fruit in California, Arizona, Florida and Texas, and the shipping of the natural and frozen concentrate fruit juices produced therefrom, throughout the United States.

(b) Plaintiff, as part of the citrus industry during the year 1951, was engaged at its Anaheim, California, plant in the business of processing by-product fruit into natural and frozen concentrate juice and thereafter selling the same in intra and interstate commerce in competition with natural and concentrate juices processed and sold by defendants and co-conspirator Silzle. Among other things and in the course of purchasing by-product fruit from defendants E.O.P., E.L.P. and others, plaintiff caused fresh fruit produced in Arizona to be shipped to it by interstate carriers, from [1110] Arizona to California. In 1951 plaintiff also purchased some natural juice in the states of Florida and California from processors located in said states, for resale purposes to customers of plaintiff located in the various states of the United States.

(c) Defendant Sunkist was and is engaged in trade and commerce among the several states. There is a constant, continuous stream of trade and commerce in said defendant's business throughout the United States, consisting of the solicitation and the making of contracts, written and wired communications, the assemblage of personnel, property and material in at least fifty cities of the United States: the transportation of fresh fruit from Arizona to the plants of the said defendant and its subsidiary, E.O.P., and defendant E.L.P. At said defendant's instance fresh fruit and canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States.

(d) Defendant E.L.P. is and during the year 1951 was engaged in interstate trade and commerce throughout the United States in transporting canned fruit juices from California to other states of the United States.

(e) Defendant TreeSweet is and was during the year 1951 engaged in interstate trade and commerce throughout the United States in transporting and selling canned fruit juices from California to and in other states of the United States.

(f) Plaintiff, defendants Sunkist, E.O.P., E.L.P., TreeSweet and co-conspirator Silzle processed or caused to be processed substantially all the canned natural and frozen concentrate orange and lemon juice produced in the State of California during the year 1951. A substantial part of said canned fruit juice was transported in interstate commerce.

VII.

Damages

Prior to 1951 plaintiff enjoyed an extensive and profitable [1111] business and had expended in excess of $500,000.00 in promoting and developing good will, reputation and distribution for its products. By reason of the wrongful acts and conduct of the defendants, as herein alleged, plaintiff was eliminated as a competitive factor in the business of processing and selling citrus fruit juices in intrastate and interstate markets, and has been injured in its business and property, good will, promotions, advertising, and loss of earnings in the sum of at least $800,000.00 and will suffer damages in the future in an amount at this time unknown to plaintiff.

VIII.

Threatened Loss and Damage

By reason of the wrongful acts and conduct of the defendants as herein alleged:

(a) The business of the plaintiff as an independent juice canner has been seriously impaired, injured and damaged and plaintiff has suffered great damage and loss of profits and good will, and the reputation and prestige of its business as a first-class juice canner has been seriously and irreparably impaired and injured, and to the unfair, wrongful and competitive advantage of defendants and others;

(b) Plaintiff was compelled to pay unreasonable and discriminatory prices for by-product fruit to the damage and loss of plaintiff and to the unfair, wrongful and competitive advantage of the defendants and others;

(c) Plaintiff has irreparably lost patronage for its products and otherwise continues to be threatened with loss and damage;

(d) Plaintiff is without any plain, speedy or adequate remedy at law, and unless the defendants and each of them are temporarily and permanently restrained and enjoined, pursuant to pertinent statutes and laws, from continuing their unlawful practices and activities as herein alleged, defendants will continue their wrongful acts and conduct and plaintiff will continue to suffer [1112] irreparable loss and damage.

First Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full each and every paragraph of the foregoing allegations.

II.

Section I of the Sherman Act

All of the defendants, each well knowing and acquiescing in the actions of the others, and each corporation within itself by and through its officers and employees, have, for many years last past, in the course of interstate trade and commerce, combined and conspired with each other and have entered into contracts which have had the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juice produced and processed in the State of California and marketed throughout the United States with resultant injury and damage to the plaintiff.

III.

Specifications

For some time past, and particularly since in or about the year 1951, the exact date being unknown to plaintiff, the defendants and co-conspirator Silzle combined and conspired and entered into contracts which have had the effect of tending to eliminate plaintiff and of eliminating plaintiff as a competitor in the canned natural and frozen concentrate juice market of the United States and particularly from the single strength orange juice market therein, so as to disable and prevent plaintiff from competing with the defendants in such market.

The defendants and co-conspirator Silzle have done the things they conspired and combined to do and among other things have entered into contracts, written and oral, which have had the [1113] force and effect of eliminating the competition of the plaintiff in such market. Specifically, among other things, said defendants did the following acts:

(a) Defendant E.L.P., by oral agreement with defendants Sunkist and E.O.P., agreed to process and did in fact process during the year 1951, oranges made available to E.O.P. by Sunkist for processing into canned, natural and frozen citrus fruit juice, at cost and without profit to E.L.P. During the canning season, 1950-1951, defendant

E.L.P. processed 28,812 tons of oranges for E.O.P. under said oral agreement.

(b) Defendant E.O.P., by oral agreement, agreed to process and did process in 1951 lemons made available to E.O.P. by E.L.P. for processing into canned, natural and frozen citrus fruit juice at cost and without profit to E.O.P., or defendant Sunkist. E.O.P. processed 1,740 tons of lemons for E.L.P. during the 1950-1951 season under said oral agreement.

(c) Defendants Sunkist and E.O.P. agreed to establish and maintain the price of by-product oranges available to independent processors of natural and frozen concentrate juice, such a plaintiff, at a price which would make it impossible for independent processors such as plaintiff to purchase or acquire by-product oranges from defendant E.O.P. or any other source, at a price, or under any other arrangement that would enable plaintiff and other independent processors to produce and sell canned natural and frozen concentrate juice at a price that would be competitive to the prices charged by defendants and favored processors TreeSweet and co-conspirator Silzle.

(d) Defendant E.O.P. and defendant TreeSweet entered into a written custom packing agreement with an effective date of July 23, 1951, which provided among other things for the processing of by-product oranges into natural orange juice for the account of E.O.P. at cost and without profit to defendant TreeSweet. Said contract [1114] also provided for the purchase by defendant TreeSweet from Sunkist of the "canned juice requirements" of TreeSweet. The contract had the purpose and effect of enabling defendant TreeSweet to process by-product oranges into natural orange juice without purchasing by-product oranges from E.O.P. or any other supplier, and to secure its requirements of natural orange juice at a cost to it which prevented plaintiff from competing with defendants Sunkist or TreeSweet in the natural orange juice market. Defendant E.O.P. furnished by-product oranges to TreeSweet during the 1951 orange juice canning season, under said contract, which oranges TreeSweet processed at cost for defendant E.O.P., defendant Sunkist selling and defendant TreeSweet acquiring its requirements of natural orange juice from E.O.P., thereunder, during the latter part of 1951 and the early part of 1952. Substantially all the single natural orange juice processed by TreeSweet and sold by it during the 1951 orange juice canning season was processed under said contract and was sold in competition to that processed and sold by plaintiff to the canned juice market.

(e) Defendant E.O.P. and co-conspirator Silzle entered into a written contract executed September 10, 1951, but effective as of June 26, 1951, wherein, among other things, defendant E.O.P. agreed to make by-product oranges available to Silzle for processing into canned orange juice under the Silzle label at a cost of $22.50 a ton or substantially below the price at which defendant E.O.P. was then selling or willing to sell by-product oranges of the same quality for processing purposes to plaintiff and other independent processors. Defendant E.O.P. furnished by-product oranges to Silzle and Silzle acquired by-product oranges from defendant E.O.P. during the 1951 canning season under said contract and produced 85,080 cases of canned natural orange juice thereunder, which juice was processed, acquired and sold by Silzle in competition with juice processed and sold by plaintiff in the canned natural orange juice market. Said contract had the purpose and effect of enabling Silzle [1115] to acquire by-product oranges at a price substantially below the price then charged other independent processors, such as plaintiff by E.O.P. for by-product oranges and enabled Silzle to acquire its requirements of natural orange juice at a cost to it which prevented plaintiff from competing with Silzle and defendants Sunkist, E.O.P., E.L.P. and TreeSweet in the natural orange juice market.

(f) Defendant E.O.P. refused to enter into a custom packing agreement with plaintiff for processing oranges during the 1951 canning season comparable to the contracts entered into with defendant TreeSweet and co-conspirator Silzle.

As a direct and approximate result of each of the above acts of the defendants, plaintiff was unable to process, can and sell natural and frozen concentrate fruit juice in competition with defendants or co-conspirator Silzle and was forced to file proceedings under Chapter 10 of the Bankruptcy Act of March 19, 1952, and has been damaged in the manner and to the extent alleged in Paragraphs VII and VIII herein.

Second Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full each and every paragraph of the foregoing allegations.

II.

Section 2 of the Sherman Act

Defendants Sunkist, E.O.P. and E.L.P. have a monopoly control over the production and distribution of fresh citrus fruit available in California and Arizona for processing into canned natural and frozen concentrate citrus fruit juice in the State of California. By entering into the oral and written agreements and in doing the acts described in Paragraph III (a) to (f), inclusive, herein, defendants Sunkist, E.O.P. and E.L.P. have attempted to monopolize, and in fact have monopolized that part of the [1116] interstate trade and commerce in natural and frozen concentrate fruit juices which is represented by the production of natural and frozen concentrate fruit juices processed in California and thereafter transported and sold in intra and interstate commerce, with the resultant damages and injury to the plaintiff as alleged in Paragraphs VII and VIII herein.

Pursuant to a conspiracy to monopolize and said attempt to monopolize the aforesaid part of the trade and commerce of the United States in canned natural and frozen concentrate citrus fruit juice, defendants Sunkist and E.L.P entered into the oral agreements and contracts and did the acts referred to in Paragraph III (a) to (f), inclusive, herein, and delivered and sold by-product oranges, in the course of such commerce, to the parties to said contracts, which were thereafter processed into natural orange juice which was purchased ~~by~~ defendant TreeSweet and co-conspirator Silzle from E.O.P., for resale purposes at prices which prevented plaintiff from processing and selling natural orange juice at prices competitive to those at which defendants Sunkist, E.L.P., TreeSweet and co-conspirator Silzle sold natural orange juice in the intrastate and interstate market for such juice, with the resultant injury and damage to the plaintiff as alleged in Paragraphs VII and VIII, herein.

Third Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every paragraph of the foregoing allegations.

II.

Section 1 of the Robinson-Patman Act

For many years last past and particularly in 1951, (a) defendants were and they now are engaged in trade and commerce throughout the United States. (b) In the course of such commerce defendant Sunkist has through its wholly-owned subsidiary, defendant E.O.P., [1117] directly and indirectly, discriminated in price between different purchasers of commodities of like grade and quality, to wit, by-product fruit and particularly oranges for the canning of single strength orange and orange blended juice. (c) The purchases involved in such discrimination were in commerce among the several states, the District of Columbia, and the territories of the United States. (d) The effect of such discrimination was substantially to lessen competition from the plaintiff and tended to create a monopoly in the defendants and to injure, destroy and prevent competition from the plaintiff. (e) Defendants Sunkist, E.O.P., and/or E.L.P., paid and contracted for the payment of things of value to and for the benefit of its customers, including defendant TreeSweet and co-conspirator Silzle, in the course of such commerce, as compensation or in consideration for services and facilities furnished by and through said customers, including defendant TreeSweet and co-conspirator Silzle, in connection with the processing, handling and sale of products and commodities, to wit, canned fruit juices, particularly single strength orange and orange blended juice manufactured, sold or offered for sale by defendants Sunkist, E.O.P., and/or E.L.P., without defendants Sunkist, E.O.P. and E.L.P. making such payment or consideration available on proportionately equal terms to all other customers, including plaintiff, competing in the distribution of such products and commodities. (f) Defendant TreeSweet in the course of such commerce knowingly induced and received discrimination in price above described and which is prohibited by law.

III.

Section 3 of the Robinson-Patman Act

For many years last past and particularly in 1951, and in the course of said commerce as hereinabove alleged, defendants and co-conspirator Silzle were parties to and assisted in transactions of sale and contracts to sell which discriminated, to their knowledge, against competitors, including plaintiff, of defendants [1118] Sunkist, E.O.P. and E.L.P.'s purchasers, including defendant TreeSweet and co-conspirator Silzle, in that allowances were granted to such purchasers, including defendant TreeSweet and co-conspirator Silzle, over and above any allowance available at the time of the transactions to said competitors, including plaintiff, in respect of sales of goods of like grade, quality and quantity, that is, by-product fruit, particularly oranges.

IV.

Specifications

(a) On April 4, 1951, defendant Sunkist published and distributed its Valencia Price Schedule # 1-51, effective April 9, 1951, which showed the price per ton, f.o.b. packing house, of Valencia oranges on the basis of pounds of soluble solids per ton. (b) The number of pounds of soluble solids per ton varies with each run of oranges. (c) For example, where the number of pounds of soluble solids per ton was 120, the price per ton, f.o.b. packing house, pursuant to said Valencia Price Schedule, was fixed by the defendant Sunkist at $40.00. (d) In 1951 plaintiff purchased from the defendant Sunkist Valencia oranges in accordance with the sale price schedule. (e) In 1951 defendant TreeSweet and co-conspirator Silzle directly and indirectly by means of the contracts referred to in Paragraph III, (a) to (f), inclusive herein, purchased Valencia oranges of like grade and quality as did plaintiff, from the other defendants, for a price less than one-half that fixed by the said schedule of prices and paid by plaintiff.

V.

Further Specification

Plaintiff is informed and therefore alleges upon information and belief that one of the methods used by the defendants in effectuating the price discrimination in favor of the defendant TreeSweet and co-conspirator Silzle (as well as others) and discrimination against plaintiff was substantially as follows: [1119]

Defendants Sunkist and E.O.P. delivered by-product oranges to defendant TreeSweet (and others) on consignment under an arrangement whereby these canners produced single strength orange juice for defendant E.O.P., and for which defendant E.O.P. paid the cost incurred to produce such juice. Defendant TreeSweet and co-conspirator Silzle were then permitted to purchase the canned orange juice from defendant E.O.P. at approximately $2.30 a case. Thus, after producing and canning the orange juice, defendant TreeSweet acquired packed orange juice at a net cost which in substance reflected a cost of the by-product oranges used in such product of less than one-half the price set forth in defendant Sunkist's said Valencia Price Schedule.

VI.

Further Specifications

During the period mentioned in the previous paragraph plaintiff requested of the defendants Sunkist and E.O.P. that it be permitted to make similar transactions as above described, with the said defendants, which request was denied. Plaintiff also purchased a carload of canned natural orange juice from defendant E.O.P. on or about September 28, 1951, for resale purposes, which carload was sold in competition with the natural orange juice sold by defendants Sunkist, E.L.P., TreeSweet and co-conspirator Silzle, which price was discriminatory as to plaintiff and in violation of Section 2 (15 U.S.C. 13a) of the Clayton Act.

Fourth Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every paragraph of the foregoing allegations above.

II.

Cartwright Anti-Trust Act

(a) For some time past in the State of California defendants [1120] combined their capital and skill and together acted to create and carry out restrictions in trade and commerce and to prevent competition in the manufacture, making, transportation, sale and purchase of canned natural and frozen concentrate citrus juice, particularly canned natural orange juice, and defendants did (1) create and carry out restrictions in trade and commerce; (2) prevent competition in the manufacture, making, transportation, sale and purchase of said canned natural and frozen concentrate citrus juice; (3) make, enter into, execute and carry out contracts, obligations and agreements by which they established and settled the price of said product and commodities so as to directly and indirectly to preclude a free and unrestricted competition among themselves and any purchasers in the sale of such produce and commodities, and they did combine and directly and indirectly united their interests which they had in connection with the sale of such produce and commodities so that the price of the said produce and commodities was affected.

(b) All of the defendants have for many years last past monopolized, attempted to monopolize, combined and conspired each with the other to monopolize the business of canned natural and frozen concentrate citrus juice, particularly canned natural orange juice, within the State of California.

III.

Specifications.

For some time past, particularly since in or about the year 1951, the defendants contracted, combined, conspired, monopolized and attempted to monopolize in such manner as to eliminate plaintiff from the canned citrus fruit industry, particularly from the canned citrus fruit industry, particularly from the single strength orange market, and so as to disable plaintiff from competing with the defendants freely, fairly and reasonably within the State of California by doing in intrastate commerce, among other things, the acts described in Paragraph III of the First Cause of Action, [1121] Paragraph II of the Second Cause of Action and Paragraphs II, III, IV, V, and VI of the Third Cause of Action, as having been alone in interstate commerce.

Fifth Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full, each and every allegation of the foregoing allegations above and particularly Paragraphs II and III of the Fourth Cause of Action.

II.

Unfair Practice Act

For some time past, particularly in 1951, and in the State of California, defendants Sunkist, E.O.P., and E.L.P. secretly paid and allowed defendant

Treesweet rebates, refunds, commissions and unearned discounts, and secretly extended to defendant Treesweet special services and privileges not extended to all purchasers, including the plaintiff, purchasing upon like terms and conditions, to the injury of plaintiff, which payments and allowances tended to destroy competition.

Wherefore, plaintiff prays as follows:

1. That the Court issue its preliminary, permanent and perpetual injunction restraining the defendants and each of them from any and all unlawful practices, conduct and activities as alleged in this Complaint.

2. That the Court issue its preliminary, permanent and perpetual mandatory injunction directing and requiring the defendants, Sunkist, E.O.P., and E.L.P., and each of them, to offer and sell by-product fruit to the plaintiff on fair and equitable terms in fair and open competition with any and all competitors, including defendants, The Exchange Orange Products Company, Exchange Lemon Products Company, Treesweet Products Company and co-conspirator Silzle, and to offer custom packing agreements to plaintiff when defendants [1122] E.O.P., Sunkist and E.L.P. offer comparable agreements to defendants Treesweet and co-conspirator Silzle.

3. That each of the contracts, combinations and conspiracies in restraint of trade and commerce, together with the attempts to monopolize and the

monopolization of the same hereinabove described, be declared illegal and violative of the anti-trust laws of the United States and the State of California.

4. That plaintiff have judgment in the sum of $2,400,000.00, the same being threefold damages under the Federal laws which it sustained for the violations alleged in the First and Second Causes of Action, or $1,600,000.00, the same being twofold damages under state law, for the violations alleged in the Fourth and Fifth Causes of Action and such further and additional damages as may have been suffered by plaintiff for the violations of law alleged in said Third Cause of Action.

5. That plaintiff have judgment, in addition, for its costs including reasonable attorney's fees.

6. For all other proper relief.

Dated: ....

/s/ WILLIAM C. DIXON,
Attorney for Plaintiff
and Intervening Trustee.

/s/ BERNARD REICH,
Attorney for Plaintiff.

/s/ HARRY M. IRWIN,
Attorney for Trustee.

Affidavit of service by mail attached.

[Endorsed]: Filed December 14, 1954. [1123]

In the United States District Court, Southern
District of California, Central Division

No. 13788-C

WINCKLER & SMITH CITRUS PRODUCTS
CO., a Corporation,

Plaintiff,

vs.

SUNKIST GROWERS, INC., a Corporation, et al.,

Defendants;

RONALD WALKER, as Trustee of WINCKLER
& SMITH CITRUS PRODUCTS CO.,

Intervener.

STIPULATION FOR DISMISSAL AND ORDER THEREON

Subject to the approval of the Court, It Is Stipulated as follows:

1. The above action is dismissed as to defendant TreeSweet Products Co., a corporation, only, and without prejudice.

2. This dismissal is made without prejudice to the prosecution of the action against the defendants other than TreeSweet Products Co., and with respect to defendants other than defendant TreeSweet Products Co., without prejudice to the plaintiff and intervener in the use of discovery already had therein. [1127]

Dated: December 7, 1954.

O'MELVENY & MYERS,

By /s/ BENNETT W. PRIEST,
Attorneys for Defendant TreeSweet Products Co.,
a Corporation;

/s/ HARRY M. IRWIN,
Attorney for Intervener.

/s/ RONALD WALKER,
Trustee of Winckler & Smith
Citrus Products Co.

/s/ BERNARD REICH,
Attorney for Plaintiff.

It Is So Ordered: This 3rd day of January, 1955.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed January 3, 1955.

Docketed and entered January 6, 1955. [1128]

[Title of District Court and Cause.]

No. 13788-C

NOTICE OF MOTION AND MOTION OF DEFENDANT EXCHANGE LEMON PRODUCTS COMPANY (1) TO STRIKE PORTIONS OF THE AMENDED COMPLAINT, AND (2) FOR A MORE DEFINITE STATEMENT

* * *

1. To strike the following portions of plaintiff's amended complaint, with leave to amend, upon the ground that they fail to comply with Rules 8(a)(1), 8(a)(2) and 8(e)(1) of the Federal Rules of Civil Procedure, which require that a complaint shall contain a "plain statement" of the grounds of the Court's [1129] jurisdiction and of "the claim showing that the pleader is entitled to relief," and that "each averment of a pleading shall be simple, concise and direct":

a. Paragraphs II and III of the so-called "First Cause of Action."

b. Paragraphs I and II of the so-called "Second Cause of Action."

* * *

2. In the alternative, to order plaintiff to file a more definite statement with respect to the said paragraphs of the amended complaint, as hereinafter specified.

3. To strike all claims stated in the amended complaint that were not pleaded in the original complaint and that arose more than three years prior to the filing of the amended complaint, on the ground they are barred by the applicable statute of limitations.

* * *

For grounds and specifications of said motion, defendant will state:

Motion to Strike (Rule 8)

First So-called "Cause of Action,"

Paragraphs II and III

1. There is no identification of the supposed tortious act, or acts, of defendants, whether committed pursuant to [1130] an alleged conspiracy and combination or pursuant to an alleged illegal contract, that are claimed to have injured the plaintiff;

2. The complaint fails to disclose how many conspiracies and combinations are claimed or to identify their parties and substantial terms;

3. No "specifications" whatsoever are set forth with respect to grapefruit or grapefruit juices, and no substantial specifications are set forth with respect to lemons, although it is claimed the offenses related to "citrus juices," which include grapefruit juice and lemon juice by definition (paragraph IV of the general allegations);

4. There is no showing that any right, or rights, of plaintiff have been violated by the defendants pursuant to any unlawful contract, combination, or conspiracy;

5. There is no showing of a causal connection between plaintiff's claimed injury and anything claimed to have been done by one or more defendants;

6. There is no showing of any injury to the public; and

7. There is no showing that the supposed unlawful contracts, combinations and conspiracies had any substantial effect upon interstate commerce.

Second So-called "Cause of Action,"

Paragraphs I and II

1. This so-called "cause of action" does not state a claim upon which relief can be granted separate and distinct from the so-called "first cause of action";

2. The supposed tortious act, or acts, committed pursuant to the claimed attempt or attempts to monopolize, claimed monopoly or claimed conspiracy to monopolize, and [1131] which are supposed to have injured the plaintiff, are not stated;

3. The right, or rights, of the plaintiff claimed to have been violated by the defendants pursuant to the offenses sought to be alleged are not identified;

4. There is no allegation showing a causal connection between plaintiff's claimed injury and anything supposed to have been done by the defendants;

5. No substantial terms of the claimed "conspiracy to monopolize" are stated;

6. No public injury is shown;

7. Paragraph II confusingly treats an alleged joint attempt to monopolize, a joint monopolizing, and a conspiracy to monopolize as if they were separate offenses under the Sherman Act instead of the same offense, which the statute designates a "conspiracy to monopolize"; and

8. Paragraph II fails to show that the "natural and frozen concentrate fruit juices processed in California" (lines 2 and 3, page 14) are competitively unique and distinct from similiar juices processed in Florida, Texas and Arizona (paragraph V (f) of the general allegations alleges processing in these states), so that such California juices constitute an identifiable market in interstate commerce that might be the subject of an unlawful monopoly, attempt to monopolize, or conspiracy to monopolize. [1132]

* * *

Motion for More Definite Statement

The grounds of the alternative motion for a more definite statement are that the said paragraphs are too vague and ambiguous in the respects set forth above with respect to defendant's motion to strike to enable this defendant to frame a responsive answer.

Motion to Strike (Statute of Limitations)

The following paragraphs plead supposed acts of defendants not pleaded in the original complaint, and that were committed, if at all, more than three years before the filing of the amended complaint:

Subparagraph (e) of paragraph II, and para- III of the first so-called "cause of action."

Subparagraph (e) of paragraph II, and paragraphs III, V and VI, of the so-called third "cause of action." [1135]

* * *

Dated January 26, 1955.

Respectfully submitted,

CLAYSON, STARK &
ROTHROCK,
POPE & BALLARD,

By /s/ DONALD D. STARK,
Attorneys for Defendant Exchange Lemon Products Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 27, 1955. [1136]

[Title of District Court and Cause.]

No. 13788-C

NOTICE OF MOTION OF DEFENDANTS SUNKIST GROWERS, INC. (SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE), AND THE EXCHANGE ORANGE PRODUCTS COMPANY, IN THE ALTERNATIVE: (1) TO STRIKE PORTIONS OF THE AMENDED COMPLAINT, AND (2) FOR A MORE DEFINITE STATEMENT

To: Winckler & Smith Citrus Products Co., a corporation, the above-named plaintiff, and to Bernard Reich, Esq., its attorney; and

To: Ronald Walker, Esq., trustee and intervener, and to Harry M. Irwin, Esq., attorney for said trustee; and [1162]

To: William C. Dixon, Esq., attorney for plaintiff and said intervening trustee.

Please Take Notice that the undersigned will bring the attached motion by defendants Sunkist Growers, Inc. (sued herein as California Fruit Growers Exchange), and The Exchange Orange Products Company, in the alternative: (1) to strike portions of the amended complaint, and (2) for a more definite statement, and the memorandum of points and authorities in support thereof attached thereto, on for hearing before this court in the courtroom of the Honorable James M. Carter, District

Judge, United States Post Office and Court House Building, located at Temple and Spring Streets in the City of Los Angeles, County of Los Angeles, State of California, on the 14th day of February, 1955, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated this 28th day of January, 1955.

FARRAND, FISHER & FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company.

Receipt of copy acknowledged. [1163]

[Title of District Court and Cause.]

No. 13788-C

MOTION BY DEFENDANTS SUNKIST GROWERS, INC. (SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE), AND THE EXCHANGE ORANGE PRODUCTS COMPANY, IN THE ALTERNATIVE: (1) TO STRIKE PORTIONS OF THE AMENDED COMPLAINT; AND (2) FOR A MORE DEFINITE STATEMENT

Defendants Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange and hereinafter in this motion referred to as "Sunkist," and The Exchange Orange Products Company, hereinafter in [1164] this motion referred to as "EOP," move the court as follows:

I.

To strike the following portions of plaintiff's amended complaint, with leave to amend, upon the ground that they fail to comply with Rules 8 (a)(1), and 8 (a) (2) of the Federal Rules of Civil Procedure which require that a complaint shall contain a "plain statement" of the grounds of the court's jurisdiction and of "the claim showing that the pleader is entitled to relief," and that "each averment of a pleading shall be simple, concise and direct":

(a) Paragraphs II and III of the alleged "First Cause of Action";

(b) Paragraphs I and II of the alleged "Second Cause of Action";

(c) Subparagraphs (b), (c), (d) and (e) of paragraph II; paragraph III; paragraph IV and paragraph VI of the alleged "Third Cause of Action";

(d) Paragraphs II and III of the alleged "Fourth Cause of Action";

(e) Paragraph II of the alleged "Fifth Cause of Action."

II.

In the alternative, to order plaintiff to file a more definite statement with respect to the said paragraphs of the amended complaint.

III.

To strike, without leave to amend, all claims stated in the amended complaint that were not pleaded in the original complaint and that arose more than three years prior to the filing of the amended complaint on the grounds, that they are barred by the applicable statute of limitations, being Section 338 (1) of the Code of Civil Procedure of the State of California. [1165]

IV.

To strike paragraph VII of the General Allegations of the amended complaint, with leave to amend, for failure to state specifically items of special damage as required by Rule 9 (g) of the Federal Rules of Civil Procedure.

For grounds and specifications of said motion these moving defendants represent and state:

1. In order to avoid repetition these moving defendants adopt by this reference and incorporate herein as though herein set forth in full the notice of motion and motion of defendant Exchange Lemon Products Company (1) to strike portions of the amended complaint, and (2) for a more definite statement, dated January 26, 1955, heretofore filed herein insofar as said motion of said defendant Exchange Lemon Products Company is applicable to these moving defendants. These moving defendants will therefore include herein only matters supple-

mental to or in addition to the matters covered by Exchange Lemon Products Company's said motion.

2. Supplementing defendant Exchange Lemon Products Company's motion these moving defendants move to strike subparagraphs (b), (c) and (d) of paragraph II of plaintiff's alleged third cause of action for the following reasons:

(a) There is no identification of the purchases alleged to have been made. The specifications relate only to Valencia oranges or Valencia orange juice although these subparagraphs allegedly relate to by-product fruit which by plaintiff's definition (plaintiff's amended complaint General Allegations, paragraph IV, p. 5), would refer to oranges, lemons and grapefruit.

(b) There is no showing of any effect of the alleged discrimination upon competition nor of the volume of the alleged discriminatory sales, nor as to the products with respect to which competition was allegedly substantially lessened or prevented.

(c) There is no showing of any effect of the alleged discrimination upon monopoly or as to the products allegedly tending to be monopolized.

3. Supplementing defendant Exchange Lemon Products Company's motion these moving defendants move to strike paragraph IV of plaintiff's alleged third cause of action for the following reasons:

(a) There is no showing in subparagraph (d) of said paragraph IV of plaintiff's third cause of action as to the date or dates in 1951 that plaintiff purchased Valencia oranges from Sunkist, nor as to the amount purchased nor as to the use to which the plaintiff put said oranges. It cannot be determined from said subparagraph (d) whether said alleged purchases of Valencia oranges were made before or after the contracts referred to in paragraph III (a) to (f) of plaintiff's alleged third cause of action were entered into or whether the oranges were used to make products competitive to the products alleged to have been made under the contract.

4. Supplementing defendant Exchange Lemon Products Company's motion these moving defendants move to strike the following portions of paragraph VI of plaintiff's alleged third cause of action for the following reasons:

(a) The first sentence of paragraph VI should be stricken as the allegation is immaterial to an alleged violation of the Robinson-Patman Act.

(b) The second sentence of paragraph VI should be stricken as there is no showing that the alleged sale of a carload of canned natural orange juice to plaintiff arose in the course of interstate commerce.

This motion will be based upon the records and files in [1167] this case and upon the memorandum of points and authorities in support of this motion hereto attached.

Dated: January 28th, 1955.

Respectfully submitted,

FARRAND, FISHER &
FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc., and
The Exchange Orange Products Company. [1168]

Memorandum of Points and Authorities in Support of Motion of Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company, in the Alternative: (1) To Strike Portions of the Amended Complaint; and (2) for a More Definite Statement

1. Adoption by reference of defendant Exchange Lemon Products Company's Memorandum of Points and Authorities.

In order to avoid repetition these moving defendants adopt by this reference and incorporate herein as though herein set forth in full the Memorandum of Points and Authorities of defendant Exchange Lemon Products Company in support of its motion in the alternative (1) to strike portions of the amended complaint; and (2) for a more definite statement, heretofore filed herein and accompanying its said motion insofar as said Memorandum of Points and Authorities is applicable to the motion made by these moving defendants. These moving defendants will therefore include herein only points and authorities supplemental to or in addition to matters covered by Exchange Lemon Products Company's Memorandum of Points and Authorities.

2. Motion to strike subparagraphs (b), (c) and (d) of paragraph II of plaintiff's alleged third cause of action.

Defendant's reasons for the motion are adequately stated in the motion and hence will not be amplified in this memorandum. There is no statement in plaintiff's amended complaint showing the effect of the alleged discrimination upon competition. The amended complaint should allege the amount of purchases alleged to have been made, the type of product and its effect both upon competition and upon monopoly. Title 15 U.S.C.A. Sec. 13 requires that the effect of [1169] the alleged discrimination must be "substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers or either of them." None of these matters are alleged in plaintiff's amended complaint and without such showing adequate answer cannot be framed to the amended complaint.

3. Motion to strike paragraph IV of plaintiff's third cause of action.

As pointed out in these moving defendants' motion, there is no showing in subparagraph (d) of paragraph IV of plaintiff's third cause of action as to the date or dates in 1951 that plaintiff purchased Valencia oranges from Sunkist, nor as to the amount purchased, nor as to the use to which plaintiff put said oranges, nor can it be determined from said subparagraph whether the alleged purchases of Valencia oranges were made before or after the TreeSweet and Silzle contracts alleged in plaintiff's amended complaint were entered into.

In a charge of violation of the Robinson-Patman Act it is essential that the plaintiff show that it is a "purchaser" at the time the alleged discrimination took place. The fact that plaintiff may have been a purchaser in the past is not enough.

See Shaw's, Inc., v. Wilson-Jones Co., 105 Fed. (2d) 331 (C.C.A. 3d, 1939), (a Robinson-Patman Act case), wherein the court said, at page 333:

> "Past purchases or conversations with respect to possible future purchases are insufficient."

Also, Sorrentino v. Glen-Gery Shale Brick Corporation, 46 Fed. Supp. 709 (Dist. Ct. E.D. Penn. 1942), wherein in sustaining defendant's motion to dismiss plaintiff's complaint under the [1170] Robinson-Patman Act the Court said, at page 711:

> "Plaintiff's arguments that his past purchases from Glen-Gery make him a 'purchaser'

within the meaning of this section and that defendant manufacturers' refusal to sell him while selling to Margolis constitutes a 'discrimination' between 'purchasers' in violation thereof cannot be sustained."

(The Court then quoted extensively from the Shaw's, Inc., v. Wilson-Jones Co. case, supra.)

Also, Chicago Seating Co. v. S. Karpen & Bros., 83 Fed. Supp. 409 (U.S. Dist. Ct. N.D. Ill., E.D. 1949).

4. Motion to Strike Paragraph VI of plaintiff's third cause of action.

(a) The allegation contained in the first sentence of paragraph VI that plaintiff requested of these moving defendants that plaintiff be permitted to make "similar transactions as above described, with the said defendants, which request was denied," is immaterial to a Robinson-Patman Act charge and should be stricken.

It is fundamental that the gravamen of such a charge is a discrimination among "purchasers" and that a seller has a right to select his customers. A refusal to sell is immaterial to a Robinson-Patman Act charge.

See cases cited under 3 above.

Also, Z. T. Naifeh, d.b.a. Sooner Sales Company v. Ronson Art Metal Works, Inc., C C H Trade Regulation Service, ¶ 67,646 (U.S. Dist. Ct. W.D. Okla. 1953).

(b) There is no showing in the second sentence of paragraph VI that the alleged sale of natural orange juice to plaintiff occurred in the "course" of interstate commerce. It is of course essential to a claimed violation of the Robinson-Patman Act that the alleged discrimination be in the course of interstate commerce. [1171] Unless plaintiff alleges facts from which it can be determined that the purchase occurred in the course of commerce no claim is stated. Plaintiff should allege where the alleged sale to it of the carload of orange juice took place. Otherwise it cannot be determined whether the sale occurred in the course of commerce.

5. Motion to Strike (Statute of Limitations).

All claims stated in the amended complaint not pleaded in the original complaint and that arose more than three years prior to the filing of the amended complaint should be stricken without leave to amend on the grounds that they are barred by the statute of limitations. As stated in defendant Exchange Lemon Products Company's memorandum of points and authorities, subparagraphs (a) through (f) of paragraph III of plaintiff's first cause of action, subparagraph (e) of paragraph II and paragraphs III, IV, V and VI of plaintiff's third cause of action plead supposed acts of these answering defendants not alleged in the original complaint and that were committed, if at all, more than three years before the filing of the amended complaint. For example, the alleged sale of a carload of juice to plaintiff on September 28, 1951, referred to in paragraph VI of plaintiff's amended complaint, not pleaded in plaintiff's original complaint, occurred more than three years prior to the filing of plaintiff's amended complaint. Any recovery of damages by plaintiff for injuries caused by such supposed acts is therefore barred by the statute of limitations.

The antitrust laws contain no definite statute of limitations. It was early held that there should be applied to such actions the statute of limitations of the state where the alleged violations of the antitrust laws took place. As the alleged violations in this case took place in California the California statute of limitations would be applicable, being section 338 (1) of the Code of Civil Procedure of the State of California. [1172]

See

Burnham Chemical Co. v. Borax Consolidated, Ltd.
170 Fed. (2d) 569, at p. 576 (C.C.A. 9th, 1948);

Suckow Borax Mines Consolidated, Inc., v. Borax Consolidated, Ltd.
185 Fed. (2d) 196 at p. 204 (C.C.A. 9th, 1950);

Levy v. Paramount Pictures, Inc.
104 Fed. Supp. 787 (U.S. Dist. Ct. N.D. of Calif. S.D. 1952).

Respectfully submitted,

FARRAND, FISHER & FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company.

Affidavit of service by mail attached.

[Endorsed]: Filed January 28, 1955. [1173]

[Title of District Court and Cause.]

No. 13788-C

MINUTES OF THE COURT
FEB. 14, 1955

Present: Hon. James M. Carter, District Judge:

Counsel for Plaintiff: Bernard Reich;

Counsel for Intervening Plaintiff, Ronald Walker, as Trustee, etc.: William C. Dixon and Harry M. Irwin;

Counsel for Defendants Sunkist & Exchange Orange: Ross C. Fisher;

Counsel for Defendant Exchange Lemon: Melville Williams; Donald Stark.

Proceedings:

For (A) hearing motion of defendants Sunkist Growers, Inc., and Exchange Orange Products, filed

January 28, 1955, (1) to strike portions of the amended complaint, and (2) in the alternative, for a more definite statement;

(B) hearing motion of defendant Exchange Lemon Products Co., filed January 27, 1955, (1) to strike portions of the amended complaint, and (2) in the alternative, for a more definite statement.

Attorney Williams argues in support of motions.

Attorney Dixon argues in opposition.

Attorney Fisher argues in support of motions.

It Is Ordered that each of said motion is denied.

EDMUND L. SMITH,
Clerk;

By /s/ L. B. FIGG,
Deputy Clerk. [1201]

[Title of District Court and Cause.]

Case No. 13788—C

ANSWER OF DEFENDANTS SUNKIST GROWERS, INC., A CORPORATION (SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE), AND THE EXCHANGE ORANGE PRODUCTS COMPANY, A CORPORATION, TO PLAINTIFF'S AND TRUSTEE AND INTERVENER'S AMENDED COMPLAINT

Come now defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange, and defendant The Exchange Orange Products Company, a corporation, and for answer to plaintiff's and trustee and intervener's amended complaint, admit, deny and allege as follows:

> (For the convenience of the Court, the subheadings used in this answer correspond to those used in the amended complaint.) [1212]

Answer to General Allegations of Amended Complaint

I.

Jurisdiction. Admit that plaintiff's amended complaint purports to be filed and the proceedings purport to be instituted under the acts of Congress and Statutes of the State of California set forth in paragraph I of plaintiff's General Allegations.

Deny the allegations of the last subparagraph of paragraph I of plaintiff's General Allegations, and particularly deny that defendants here answering or either of them at any time alleged in plaintiff's amended complaint, or at all, committed any unlawful act or violation as described in plaintiff's amended complaint or otherwise, and in that connection particularly deny that either of said defendants committed any unlawful act or violation which included the unlawful monopoly or attempt to monopolize or combination or conspiracy to restrain trade and commerce among the several or any state of the United States, or the District of Columbia, or the discrimination in price or service or facilities.

or any conspiracy or combination to discriminate in price, service or facilities, or that any unlawful act or violation of the character described in plaintiff's amended complaint, or otherwise, has been conceived or carried out or made effective or performed, in whole or in part, within this District of the Court or elsewhere in California, or throughout the United States or at all.

II.

(a) Plaintiff. Admit the allegations of subparagraph (a) of paragraph II of plaintiff's General Allegations.

(b) Plaintiff's Business. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph (b) of paragraph II of plaintiff's General Allegations, except, that defendants admit that prior to the bankruptcy proceedings referred to in subparagraph (b) of paragraph II of plaintiff's General Allegations, [1213] plaintiff was a juice canner of citrus fruit, processing and canning the fruit into natural and frozen concentrate juice in Anaheim, California, and that plaintiff bought citrus fruit in California, the exact nature or amount being unknown to defendants here answering, and except that defendants admit that in the years 1950 and 1951 plaintiff caused citrus fruit juice to be custom packed for it in the State of Florida.

III.

(a) Defendants. For answer to subparagraph (a) of paragraph III of plaintiff's General Allegations, admit that defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange (in said paragraph and sometimes herein referred to as Sunkist), is and at all times mentioned in plaintiff's amended complaint was a California membership corporation, with its principal place of business in the City of Los Angeles, California, and admit that its name was changed to Sunkist Growers, Inc., on or about February 8, 1952, and admit that its member-growers produce about 70% of the oranges grown in the State of California, and allege in that regard that at all of said times said defendant was and is a corporation duly existing under and by virtue of the laws of the State of California, to wit, a nonprofit agricultural co-operative marketing association, and that it is and was organized and instituted for the purposes of mutual help and benefit of its members as producers of agricultural products, and not conducted for profit, and none of its members was or is allowed more than one vote therein, and it did not and does not pay any dividends on membership capital, and did not and does not deal in the products of nonmembers to an amount greater in value than such as are handled by it for its members. Admit that it is now and at all times mentioned in plaintiff's amended complaint was in the business of marketing fresh citrus fruit of its members throughout the United States and elsewhere. Admit that a subsidiary company of Sunkist, [1214] The Exchange Orange Products Company, one of the defendants here answering, is and at all times mentioned in plaintiff's amended complaint was in the business of canning orange and grapefruit juices, but allege that such juices so canned by defendant The Exchange Orange Products Company were and are marketed by it through Sunkist. Admit that said juices so canned were and are marketed in intrastate and interstate commerce throughout the United States.

(b) For answer to subparagraph (b) of paragraph III of plaintiff's General Allegations, admit that defendant The Exchange Orange Products Company (being referred to in plaintiff's amended complaint and sometimes herein as EOP) is and at all times mentioned in plaintiff's amended complaint was a California corporation with its principal place of business in the County of Los Angeles, State of California. Admit that said defendant is and at all times mentioned in plaintiff's amended complaint was engaged in the business of processing and canning oranges and grapefruit into, among other products, natural and frozen concentrate fruit juices. Admit that the said fruit juices canned by defendant EOP are marketed by it through Sunkist, and allege in that regard that EOP is and was organized and instituted for the purposes of the mutual help and benefit of the members of Sunkist as producers of agricultural products and not for profit, and it did not and does not pay dividends on stock, and it did not and does not deal in products of nonmembers of Sunkist in amounts greater in value than such as are handled by it for the members of Sunkist. Admit that the said fruit juices canned by EOP and marketed by it through Sunkist are marketed in interstate and intrastate commerce throughout the United States. Deny each, every and all of the allegations of said subparagraph (b) of paragraph III of plaintiff's General Allegations except those specifically herein admitted.

(c) For answer to subparagraph (c) of paragraph III of [1215] plaintiff's General Allegations, defendants here answering admit that Exchange Lemon Products Company (being referred to in plaintiff's amended complaint and sometimes herein as ELP) is and at all times mentioned in plaintiff's amended complaint was a California corporation with its principal place of business in the City of Corona, California. Admit that ELP is and during the year 1951, was among other things engaged in the business of producing natural and frozen concentrate lemon juice. Deny that it is and was during said times engaged in the business of producing lemons, and deny that it is and was during said time engaged in the business of canning natural or frozen orange juice or grapefruit juice. Admit that on or about December, 1950, ELP acquired all of the capital stock of Damerel-Allison Company, a California corporation, which was at the time a processor of citrus fruit juices, and that it merged the assets of said company with ELP. Admit that substantially all of the lemon juices canned by ELP are marketed by it throughout the United States through defendant Sunkist. Allege that ELP at all times mentioned in plaintiff's amended complaint has been and now is a corporation organized under the laws of the State of California, and operated in compliance with the requirements of Section 1190 et seq. of the California Agricultural Code. Allege that is was organized by growers of lemons, for collectively processing, preparing for market, handling and marketing in interstate and foreign commerce lemons and lemon products, and that it is and at all times mentioned in plaintiff's amended complaint was operated for the mutual benefit of its members as producers of lemons, and that it does not pay dividends and does not deal in the products of nonmembers in amounts greater in value than such as are handled by it for its members. Deny for lack of information or belief each, every and all of the allegations of said subparagraph (c) of paragraph III of plaintiff's General Allegations except those specifically herein admitted. [1216]

(d) For answer to subparagraph (d) of paragraph III of plaintiff's General Allegations, admit that TreeSweet Products Co. (being referred to in plaintiff's amended complaint as TreeSweet Products Company, and being referred to in plaintiff's amended complaint and in this answer as TreeSweet) is and at all times mentioned in plaintiff's amended complaint was a California corporation with its principal place of business in the City of Santa Ana, California; that it is and was among other things a juice canner of citrus fruit; admit that at times during the times mentioned in plaintiff's amended complaint it bought in California a portion of said citrus fruit canned by it. Admit that it did and does cause a portion of the canned juices to be transported in intrastate and interstate commerce. Admit that said defendant operates and for some time has operated a plant in the State of Florida, and does and has transported and marketed some canned citrus juices from that State in interstate commerce. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations of subparagraph (d) other than the allegations specifically admitted above. Allege that subsequent to the service and filing of plaintiff's amended complaint TreeSweet was dismissed as a party defendant in this action.

(e) For answer to subparagraph (e) of paragraph III of plaintiff's General Allegations, admit that E. A. Silzle Corporation (being referred to in plaintiff's amended complaint and in this answer as Silzle) is a corporation organized under the laws of the State of California, with its principal place of business at Anaheim, California. Admit that said corporation is engaged in the business of processing citrus fruit into juice and marketing the same. Deny that Silzle is or was at any time mentioned in plaintiff's amended complaint or at any other time or times, a co-conspirator of these answering defendants or either of them, or of [1217] any defendant herein, and deny that these answering defendants or either of them, or any other defendant herein, at any time or times mentioned in plaintiff's amended complaint or at all, ever conspired to or with Silzle in any manner, shape or fashion whatsoever.

Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations of said paragraph (e) other than the allegations specifically mentioned herein.

IV.

Definitions. Defendants here answering assume that the definitions used in paragraph IV of plaintiff's General Allegations are to be restricted to the purposes of plaintiff's amended complaint. So restricted, defendants here answering do not question said definitions as so adopted and used by plaintiff. Defendants do allege, however, that said definitions do not correspond in all respects with the accepted use of said terms in the citrus industry. Defendants here answering in this answer will assume that plaintiff in using the terms defined in said paragraph IV intend to restrict the connotation of said defined words to the exact definitions set forth in said paragraph.

V.

The Citrus Fruit Industry

(a) For answer to subparagraph (a) of paragraph V of plaintiff's General Allegations, defendants here answering admit that substantially all of the citrus fruit marketed in the United States is produced in the States of California, Florida, Texas and Arizona.

(b) For answer to subparagraph (b) of paragraph V of plaintiff's General Allegations, the defendants here answering deny each, every and all of the allegations of said subparagraph, except that defendants here answering admit that defendant Sunkist is the largest single citrus fruit marketing organization in the [1218] United States, and allege in that regard that Sunkist markets less than one-sixth of the oranges marketed in the United States for utilization in processing (including in the term "processing" the processing of canned single strength orange juice), and allege that EOP processes less than 2% of the canned single strength orange juice produced in the United States, and allege that there is substantial competition from other marketing organizations; and further allege in that regard that approximately 90% of the canned single strength orange juice which is processed in the United States is processed in the State of Florida.

(c) For answer to subparagraph (c) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said subparagraph (c).

(d) For answer to subparagraph (d) of paragraph V of plaintiff's General Allegations, defendants here answering deny each, every and all of the allegations contained in said subparagraph (d).

(e) For answer to subparagraph (e) of paragraph V of plaintiff's General Allegations, defendants here answering deny said allegations, and in that connection allege that in 1951 defendants ELP and EOP advertised the products packed by each of them under the trade-mark Sunkist.

(f) For answer to subparagraph (f) of paragraph V of plaintiff's General Allegations, deny the allegations contained in the first sentence of said subparagraph (f). Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence of said subparagraph (f).

(g) For answer to subparagraph (g) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as [1219] to the truth of the allegations contained in said subparagraph.

(h) For answer to subparagraph (h) of paragraph V of plaintiff's General Allegations, defendants here answering deny each, every and all of said allegations.

(i) For answer to subparagraph (i) of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said subparagraph (i).

(j) For answer to subparagraph (j) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said subparagraph (j).

VI.

Interstate Commerce

(a) For answer to subparagraph (a) of paragraph VI of plaintiff's General Allegations regarding the citrus industry, defendants here answering admit that the citrus fruit industry as a whole includes the matters set forth in said subparagraph, and allege in that regard that the State of Florida is a very important factor in the citrus fruit industry, particularly in the canned single strength orange juice field, canning approximately 90% of all single strength orange juice canned in the United States, and in the frozen orange concentrate field, canning approximately 75% of all frozen orange concentrate canned in the United States.

(b) For answer to subparagraph (b) of paragraph VI of plaintiff's General Allegations, defendants here answering are without knowledge as to the allegations contained in said subparagraph, except that defendants here answering admit that plaintiff's plant was located in the City of Anaheim, California.

(c) For answer to subparagraph (c) of paragraph VI of plaintiff's General Allegations, defendants here answering admit said allegations except the allegations regarding the transportation [1220] of fresh fruit from Arizona to the plants of defendant Sunkist and its subsidiary EOP and defendant ELP, and the allegation that at defendant Sunkist's instance fresh fruit and canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States, and allege in that regard that the only transportation of fresh fruit (i.e., fruit intended for fresh fruit channels) from Arizona to the plants of Sunkist and its subsidiary EOP and defendant ELP is a small amount of fruit to defendant Sunkist's citrus distributing plants, and allege that at defendants' instance fresh fruit (i.e., fruit intended for fresh fruit channels) is transported by interstate carriers from California and Arizona between the said states and throughout the United States, and deny that at said defendants' instance canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States.

(d) For answer to subparagraph (d) of paragraph VI of plaintiff's General Allegations, defendants here answering deny said allegations, except that they admit that during the year 1951 said defendant ELP transported some canned lemon juice by interstate carriers from California to certain other states of the United States.

(e) Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said subparagraph (e).

(f) For answer to subparagraph (f) of paragraph VI of plaintiff's General Allegations, defendants here answering deny the allegations contained in the first sentence of said subparagraph (f), and defendants here answering are without knowledge of the *allegations* contained in the second sentence of said subparagraph (f), except that defendants here answering admit that a part of the canned orange and grapefruit juices processed by EOP [1221] during the year 1951 and marketed by it through Sunkist was transported in interstate commerce.

VII.

Damages

Deny each, every and all of the allegations of paragraph VII of plaintiff's General Allegations.

VIII.

Threatened Loss and Damage

Deny each, every and all of the allegations of paragraph VIII of plaintiff's General Allegations.

Answer to Plaintiff's First Cause of Action

IX.

For answer to paragraph I of plaintiff's first cause of action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

X.

Section 1 of the Sherman Act

Deny the allegations of paragraph II of plaintiff's First Cause of Action.

XI.

Specifications

For answer to paragraph III of plaintiff's First Cause of Action, defendants here answering deny each, every and all of the allegations contained and set forth in said paragraph, except that defendants here answering admit that effective as of July 23, 1951, it entered into an agreement with defendant TreeSweet on the terms and conditions set forth in said agreement, a full, true and correct copy of said agreement being attached to these answering defendants' answer to Plaintiff's Interrogatory No. 14 of Plaintiff's [1222] Interrogatories dated March 14, 1952, heretofore filed herein, and said contract is by this reference made a part hereof, and that effective as of June 26, 1951, defendant EOP entered into a written agreement with Silzle on the terms and conditions set forth in said agreement, a full, true and correct copy of said agreement being attached to these answering defendants' answer to Plaintiff's Interrogatory No. 14 of Plaintiff's Interrogatories dated March 14, 1952, heretofore filed herein, and said contract is by this reference made a part hereof, and admit that fruit was supplied to each of said processors under said respective agreements, and except that by oral agreement with defendant EOP, ELP processed for EOP in 1951 at cost and without profit to ELP approximately 28,800 tons of Valencia oranges (some of said oranges were processed into canned single strength juice and some were processed into canned frozen concentrate), and except that by oral agreement between ELP and EOP, EOP in 1951 custom packed for ELP, at cost and without profit to EOP, about 1,740 tons of lemons (some of said lemons were processed into canned single strength lemon juice and some were processed into frozen concentrate lemon juice).

Answer to Plaintiff's Second Cause of Action

XII.

For answer to paragraph I of plaintiff's Second Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answers to plaintiffs General Allegations set forth above, and paragraphs X and XI of defendants' answer to plaintiff's First Cause of Action.

XIII.

Section 2 of the Sherman Act

Deny the allegations of paragraph II of plaintiff's Second Cause of Action. [1223]

Answer to Plaintiff's Third Cause of Action

XIV.

For answer to paragraph I of plaintiff's Third Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above, and paragraphs X and XI of defendants' answer to plaintiff's First Cause of Action, and paragraph XIII of defendants' answer to plaintiff's Second Cause of Action.

XV.

Section 1 of the Robinson-Patman Act

Deny the allegations of paragraph II of plaintiff's Third Cause of Action.

XVI.

Section 3 of the Robinson-Patman Act

Deny the allegations of paragraph III of plaintiff's Third Cause of Action.

XVII.

Specifications

For answer to paragraph IV of plaintiff's Third Cause of Action, defendants here answering deny each, every and all of the allegations contained and set forth in said paragraph, except that defendants here answering admit the allegations contained in clauses (a), (b), (c) and (d) of said paragraph, and allege in that connection that in 1951 plaintiff's purchases from defendant Sunkist of Valencia oranges aggregated only 21 tons.

XVIII.

Further Specifications

Deny the allegations of paragraph V of plaintiff's Third Cause of Action.

XIX.

Further Specifications

For answer to paragraph VI of plaintiff's Third Cause of Action, defendants here answering deny each, every and all the allegations contained and set forth in said paragraph, except that defendants here answering admit that on or about July 16, 1951, plaintiff wrote defendant EOP a letter, a full, true and correct copy of which is attached hereto marked Exhibit A and by this reference made a part hereof, which letter was received by EOP on July 17, 1951, and allege that defendant EOP did not reply to said letter, and admit that on or about September 28, 1951, plaintiff purchased a carload of canned single strength Valencia orange juice from defendant EOP.

Answer to Plaintiff's Fourth Cause of Action

XX.

For answer to paragraph I of plaintiff's Fourth Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above, and paragraphs X and XI of defendants' answer to plaintiff's First Cause of Action, and paragraph XIII of defendants' answer to plaintiff's Second Cause of Action, and paragraphs XV, XVI, XVII, XVIII and XIX of defendants' answer to plaintiff's Third Cause of Action.

XXI.

Cartwright Antitrust Act

Deny the allegations of paragraph II of plaintiff's Fourth Cause of Action.

XXII.

Specifications

Deny the allegations contained in pargaraph III of plaintiff's Fourth Cause of Action, and in connection with the acts alleged in said paragraph, defendants here answering incorporate by [1225] this reference their answer contained in paragraph XI of their answer to plaintiff's First Cause of Action and in paragraph XIII of their answer to plaintiff's Second Cause of Action, and in paragraphs XV, XVI, XVII, XVIII and XIX of their answer to plaintiff's Third Cause of Action, as fully as though herein set forth in full.

Answer to Plaintiff's Fifth Cause of Action

XXIII.

For answer to paragraph I of plaintiff's Fifth Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above, and paragraphs X and XI of defendants' answer to plaintiff's First Cause of Action, paragraph XIII of defendants' answer to plaintiff's Second Cause of Action, paragraphs XV, XVI, XVII, XVIII and XIX of defendants' answer to plaintiff's Third Cause of Action, and paragraphs XXI and XXII of defendants' answer to plaintiff's Fourth Cause of Action.

XXIV.

Unfair Practice Act

Deny the allegations of paragraph II of plaintiff's Fifth Cause of Action.

First Affirmative Defense

For a Separate, Distinct and Affirmative Defense to Plaintiff's Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Amended Complaint, defendants here answering allege plaintiff's amended complaint and the General Allegations and the First, Second, Third, Fourth and Fifth Causes of Action therein fail and each of them fails to state a claim upon which relief can be granted against the defendants here answering or either of them. [1226]

Second Affirmative Defense

For a Second Separate, Distinct and Affirmative Defense to the Fourth and Fifth Causes of Action in Said Amended Complaint, defendants here answering allege that the Court lacks jurisdiction over the subject matter of the said purported causes of action and each of them.

Third Affirmative Defense

For a Third Separate, Distinct and Affirmative Defense to Plaintiff's Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Amended Complaint, defendants here answering allege that each, every and all of said alleged causes of action are barred by the applicable statute of limitations, namely, by the provisions of Section 338(1) of the Code of Civil Procedure of the State of California.

Fourth Affirmative Defense

For a Fourth Separate, Distinct and Affirmative Defense to the Third Cause of Action of Plaintiff's Amended Complaint, defendants here answering allege that this Court lacks jurisdiction to award damages for a claimed injury resulting from acts violating Section 3 of the Robinson-Patman Act.

Fifth Affirmative Defense

For a Fifth Separate, Distinct and Affirmative Defense to Plaintiff's Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Amended Complaint, defendants here answering allege that each, every and all of said alleged causes of action are barred by the laches of plaintiff and trustee and intervener in this, that any reliance placed by plaintiff and trustee and intervener upon any acts, contracts or matters alleged in plaintiff's amended complaint involving the E. A. Silzle Corporation are barred by laches and plaintiff and trustee and intervener are estopped and debarred from raising any of such acts, contracts and matters for the reason that the contract with Silzle, [1227] referred to in plaintiff's amended complaint was disclosed in the answer of defendants here answering to Interrogatory No. 14 of the interrogatories of plaintiff dated March 14, 1952, which answer was filed herein May 26, 1952. Despite this plaintiff did not amend its complaint to include the Silzle contract until on or about December 15, 1954, when plaintiff served and filed its amended complaint, and such long delay has been prejudicial to these answering defendants and plaintiff and trustee and intervener are now estopped and debarred from relying upon any acts, contracts or other matters alleged in plaintiff's amended complaint involving alleged co-conspirator Silzle.

Wherefore, defendants here answering pray that plaintiff take nothing by plaintiff's action; that defendants here answering have judgment for their costs incurred herein against plaintiff and intervener, and for such other relief as to the Court may seem meet and proper in the circumstances.

FARRAND, FISHER &
FARRAND,
ROSS C. FISHER,
KNOX FARRAND,

By /s/ ROSS C. FISHER,
Attorneys for Defendants
Here Answering. [1228]

EXHIBIT A

Winckler & Smith Citrus Products Company
Incorporated
General Offices and Plant
408 South Atchison Street
Anaheim, California
P.O. Box 431

Phone Anaheim 2181

July 16, 1951.

Packers of Anagold Brand
Citrus Juices and Concentrates

Exchange Orange Products,
616 E. Grove Street,
Ontario, California.

Attn.: Mr. J. A. Finley.

Dear Mr. Finley:

We are pleased to advise that at the present time we have surplus capacity and we would be prepared to do custom packing for your account on the following items:

A. Single strength citrus juices in any can size from 5 oz. to 1 gallon as requested.

B. Low Temperature concentrate in any customary can size or bulk.

C. Hot pasteurized concentrate in any customary can size or bulk.

In the event you would be interested in our proposition, we would assure you of lowest quotations, strictly Grade A. quality—in case of low temperature concentrate, under your supervision if necessary.

If you are interested, please be kind enough to communicate with the undersigned or, in his absence, with our Mr. Pendergrass.

Very truly yours,

WINCKLER & SMITH CITRUS
PRODUCTS CO.,

N. J. WINCKLER,

NICHOLAS J. WINCKLER,
President.

NJW:sd.

Affidavit of service by mail attached.

[Endorsed]: Filed February 21, 1955. [1229]

In the United States District Court, Southern District of California, Central Division

No. 13788—C

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, a Corporation, and RONALD WALKER, Trustee and Intervener,

Plaintiffs,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a Corporation, et al.,

Defendants.

ORDER OF DISMISSAL

The plaintiffs having moved for the dismissal of the Amended Complaint as against defendant Exchange Lemon Products Company and against all John Doe defendants named in said Amended Complaint, good cause appearing therefore,

It Is Ordered, Adjudged, and Decreed that the Amended Complaint be, and the same is hereby dismissed with prejudice as to the defendant Exchange Lemon Products Company, and without prejudice as to any John Doe defendants named or referred to therein.

Dated: November 30, 1955.

/s/ JAMES M. CARTER,
Judge, United States District Court.

[Endorsed]: Filed December 1, 1955.

Judgment docketed and entered December 1, 1955. [1380]

[Title of District Court and Cause.]

No. 13788—C

JURY INSTRUCTIONS REQUESTED BY PLAINTIFFS

Plaintiffs request that the attached jury instructions be given by the Court.

Dated: November .., 1955.

Respectfully submitted,

/s/ WILLIAM C. DIXON,
Attorney for Plaintiffs. [1382]

Jury Instruction No. 1

You are not bound to decide any fact or the main issue in conformity with the testimony or the number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number of witnesses, or as against a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does not mean that you are to decide an issue by the simple process of counting the number of witnesses who have testified, but it does mean that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence.

The testimony of one witness entitled to full credit is sufficient for the proof of any fact in accordance with such testimony even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of the witnesses, and after weighing the various other factors in the evidence, the jury believes the one witness.

As given:

U. S. A. v. Local 36
(Southern Dist. of California, Peirson M. Hall, Judge).

Affirmed: Ninth Circuit Court of Appeals, 177 F. (2d) 320; cert. den. Nov. 29, 1949. [1383]

Jury Instruction No. 2

I charge you that the acts of The Exchange Orange Products Company, may be the acts of its parent corporation Sunkist Growers, Inc. I further charge you that a parent corporation and its wholly owned subsidiary can be guilty of conspiring together to violate the antitrust laws. The defendants Sunkist Growers, Inc., and its wholly owned subsidiary Exchange Orange Products Company, can accordingly conspire together to violate Sections 1 and 2 of the Sherman Act as charged in the first and second causes of action.

Keefer-Stewart v. Seagram,
340 U. S. 211; 71 S. Ct. 259. [1384]

Jury Instruction No. 3

The purpose of the antitrust laws is to preserve the freedom of interstate and foreign trade, to secure unrestricted equality to engage in such trade, and to protect the public against the evils incident to the destruction of competition, by striking down combinations which tend unduly to interfere with the free exercise of the right of those engaged or desiring to engage in such trade, or which may tend directly to suppress competition therein.

Paramount Famous Lasky Corporation v. United States, 282 U. S. 30, 42;

United States v. First National Pictures, Inc., 280 U. S. 44;

Binderup v. Pathe Exchange, Inc., 263 U. S. 291;

Keifer Stewart v. Seagrams, 340 U. S. 211, 213;

Cinema Amusements, Inc., v. Loew's, Inc., (D.C. Utah, 1952) Ins. No. 3; Judgment affirmed,
(C.A. 10, 1954) 210 F. 2d 86;

See: Village Theatres, Inc., v. Paramount Film Distributing Corporation, Inc., C 143-53,
(D.C. Utah, 1954) Judge Willis [1385] Ritter.

Jury Instruction No. 4

The Federal Antitrust Act "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

(Mandeville Island Farms, Inc., v. Amer. Crystal Sugar Co., 334 U.S. 219, 236;

Roseland v. Phister Mfg. Co.,
125 F. 2d 416, 419;
Vines v. General Outdoor Adv. Co.,
171 F. 2d 487, 490.) [1386]

Jury Instruction No. 5

I charge you that the single-strength orange juice and other citrus juice products produced in California and sold in intra and interstate commerce constitute part of the total trade in commerce in these products and may be the subject of restraint and monopoly under the Sherman Act.

U. S. v. National City Lines, Inc., et al.,
186 F. 2d 562 (cert. den. 341 U.S. 916);

Indiana Farmers Guide Publishing Company v. Prairie Farmer Publishing Co., et al., 293 U. S. 268; 55 S. C. 182. [1387]

Plaintiff's Jury Instruction No. 6

Sections 1 and 2 of the Sherman Act have both the geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of the things forming a part of interstate commerce. If you find that any two or more of the defendants combined together to eliminate the competition of the plaintiff in the market for citrus juice products, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that any of the acts charged to have been performed by such defendants in the first cause of action were performed, and that the performance of any of such acts was the proximate cause of any damage to the plaintiffs, you should find for the plaintiff on the first cause of action.

Indiana Farmers Guide Publishing Company v. Prairie Farmer Publishing Co., et al., 293 U. S. 268; 55 S. C. 182. [1388]

Plaintiffs' Jury Instruction No. 7

I charge you that acts lawful in themselves become unlawful when part of an illegal scheme or plan or when used to accomplish an illegal purpose. If you find as a fact that any two or more of the defendants combined together as charged in the first and second causes of action to perform any of the acts alleged by the plaintiffs to have been performed as part of the conspiracy or combination charged in the first and second causes of action, and that any one or more of the acts alleged by the plaintiffs to have been committed pursuant to the combination or conspiracy were committed by any one or more of the defendants that you find were a party to such combination, that the act or acts so committed would then become the act of all members of the combination, and if you find that such acts damaged the plaintiffs, you should find for the plaintiff and against such defendants as were members of or parties to the combination charged in the first and second causes of action.

Atkins v. Wisconsin,
195 U. S. 194-206;

U. S. v. Logan,
130 F. 550;

Swift & Co. v. U. S.,
196 U. S. 375, 396;

Associated Press v. U. S.,
326 U. S. 1-14;

American Tobacco Co. v. U. S.,
328 U. S. 781-809. [1389]

Plaintiffs' Jury Instruction No. 7
Revision No. 1

I charge you that acts lawful in themselves become unlawful when part of an illegal scheme or plan or when used to accomplish an illegal purpose. If you find as a fact that either or both of the defendants combined or conspired with TreeSweet or Silzle as charged in the first and second causes of action, and that any one or more of the acts alleged by the plaintiffs to have been committed pursuant to the combination or conspiracy were committed by either one of the defendants or co-conspirators, that you find were a party to such combination or conspiracy, that the act or acts so committed would then become the act of all members of the combination or conspiracy.

[Note: The Court, on reviewing this instruction, has stricken from the instruction No. 7 as considered, on line 6, the words beginning, "to perform" and following down through line 8, including by striking the words, "second cause of action and that public injury was proven."

The court has also ended the instruction, at line 13 of 7, as it was considered, following the words, "combination or conspiracy" and has stricken the balance of the instruction.] [1390]

Plaintiffs' Jury Instruction No. 8

Plaintiffs need not show that any of the acts which the defendants are alleged to have performed in combination under the first cause of action were done with the specific intent of eliminating the competition of the plaintiffs in the interstate market for citrus juice products. It is sufficient if you find that any acts charged by the plaintiffs to have been done pursuant to the combination alleged in the first cause of action actually resulted in the elimination of the competition of the plaintiffs in such market since everyone is presumed to intend the natural and probable results or consequences of his conduct or business arrangements.

U. S. v. Griffith, et al.,
334 U. S. 100; 68 S. C. 941. [1391]

Jury Instruction No. 9

I charge you that no formal agreement is necessary to constitute a conspiracy or combination. A combination or conspiracy in violation of the law or statute may be inferred from a course of dealing as well as through direct exchange of words. An unlawful conspiracy may, and often is, formed without simultaneous action or agreement on the part of the conspirators. Acceptance without previous agreement or an invitation to participate in a plan, the necessary consequence of which, if carried out, restrains interstate commerce is sufficient to establish an unlawful conspiracy under the antitrust laws. It is not necessary to a conspiracy that all of the conspirators be a part of the conspiracy from the beginning. A person may join a conspiracy after it has been agreed upon.

Charge to jury:

Brookside Theatre Corporation v. 20th Century Fox Film Corporation, et al., 194 F 2d 846;

Interstate Circuit v. U. S., 306 U.S. 208. [1392]

Jury Instruction No. 10

You are instructed that men or entities who combine for illegal purposes will normally not tell openly everything about their purposes. Thus, it is often impossible to prove the existence of an illegal agreement by what is known as direct evidence. Very often, particularly in conspiracy cases, there cannot be direct proof of the making or existence of an illegal understanding. The acts of the parties over a period of time, their course of conduct and declarations, either written or oral, and all the surrounding circumstances may then be considered by you for the purpose of determining whether or not an illegal understanding was entered into.

Jury instruction given:

United States v. Standard Oil Co., et al., with adaptations;

Approved United States v. Socony Vacuum Oil Co., 310 U. S. 150. [1393]

Jury Instruction No. 11

It is sufficient if there is a concert of action, all of the parties working together understandingly, with a single design and for the accomplishment of a common purpose. It is not necessary that each conspirator have knowledge of all the details of the conspiracy, or the means to be used; nor is it necessary that the conspirators should meet together, in order to constitute an unlawful combination. If they have a mutual understanding, and act through one or more individuals as a consequence of such mutual understanding, the conspiracy is complete.

As given:

U. S. A. v. Local 36 (Southern Dist. of California, James Carter, Judge);

Affirmed: Ninth Circuit Court of Appeals, 177 F. (2d) 320; cert. den. Nov. 29, [1394] 1949.

Plaintiff's Jury Instruction No. 12

If you find that the effect of the action of Exchange Orange Products Company in entering into the 1951 contracts with Treesweet Products Company and E. A. Silzle Corporation and in refusing to enter into a comparable arrangement with the plaintiffs whereby it could have secured oranges or single-strength Valencia orange juice was to exclude the plaintiff as a competitor of Exchange Orange Products Company, Treesweet Products Company and E. A. Silzle Corporation from a substantial market for single-strength Valencia orange juice processed in California and sold in interstate commerce, such exclusion would be unreasonable per se, and you should find for the plaintiffs on the first cause of action.

American Federation of Tobacco Growers v. Neal, 189 F. 2d 869;

Darnell v. Markwood, et al., 220 F. 2d 374;

International Salt Company v. U. S., 32 U. S. 392, 396; 68 S. Ct. 12-15. [1395]

Jury Instruction No. 13

The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful.

U. S. v. Griffith,
334 U. S. 100; 68 S. Ct. 941, 945. [1396]

Plaintiffs' Jury Instruction No. 14

The exercise or use of monopoly power, however lawfully acquired, for the purpose of eliminating or excluding a competitor from a defined portion of an industry would violate Section 2 of the Sherman Act.

Indiana Farmers Guide Publishing Company
v. Prairie Farmer Publishing Co., et. al.,
293 U.S. 268; 55 S.C. 182. [1397]

Jury Instruction No. 15

The right of a private business concern to select its customers is neither absolute nor exempt from regulation. Its exercise as a purposeful means of maintaining a monopoly is prohibited by the Sherman Act.

Lorain Journal Co. v. U. S.,
342 U. S. 143-154; 72 S. C. 181, 187.

U. S. v. Klearflax Linen Looms, Inc.,
63 F. Supp. 32. [1398]

Jury Instruction No. 16

If you find that any one of the defendants had the power to exclude the plaintiff from interstate market for single-strength Valencia juice processed in California, and that such defendant or defendants exercised such power by performing any of the acts complained of by the plaintiff with the purpose or intent of excluding the plaintiff from such market, and that any such act or acts damaged the plaintiff, such conduct would violate Section 2 of the Sherman Act, and you should find for the plaintiff and against such defendants or defendant as you find performed such acts on the second cause of action.

U. S. v. Griffith,
334 U. S. 100; 68 S. C. 941, 945. [1399]

Plaintiffs' Jury Instruction No. 17

If you find as a fact that the defendant The Exchange Orange Products Company refused to enter into a custom packing agreement with the plaintiff during the 1951 packing season, comparable to the agreements Exchange Orange Products Company entered into with Treesweet Products Company and E. A. Silzle Corporation, for the purpose of creating or maintaining a monopoly control over or eliminating the competition of plaintiff in that part of the interstate trade and commerce in single-strength Valencia orange juice represented by the single-strength Valencia orange juice processed in California and sold in intra and interstate commerce, and that such refusal directly and proximately resulted in any damage to the plaintiff, you should find for the plaintiff and against the defendant The Exchange Orange Products Company on the second cause of action.

Lorain Journal Co. v. U. S.,
342 U. S. 143; 72 S. C. 181;

Gamco, Inc. v. Providence Fruit and Produce Building, Inc., 194 F. 2d 484,
(cert. den. 10/13/52);

Eastman Kodak Company of N. Y. v. So. Photo Materials Company, 273 U. S. 359,
47 S. C. 400, 404;

Associated Press v. U. S.,
326 U. S. 1-14;

U. S. v. Nat'l City Lines, Inc.,
186 F. 2d 562 (cert. den. 341 U. S. 916);

U. S. v. Klearflax Linen Looms, Inc.,
63 F. Supp. 32. [1400]

Plaintiffs' Jury Instruction No. 18

If you find as a fact that the defendant Exchange Orange Products Company or its parent corporation Sunkist Growers, Inc., refused to make Valencia oranges available to the plaintiff under terms and conditions comparable to those at which Exchange Orange Products Company made Valencia oranges available to Treesweet Products Company and E. A. Silzle Corporation during the 1951 packing season for the purpose of creating or maintaining a monopoly control over or eliminating the competition of the plaintiff in that part of the interstate trade and commerce in single-strength orange juice represented by the single-strength Valencia orange juice processed in California and sold in intra and interstate commerce, and that such refusal directly and proximately resulted in any damage to the plaintiff, you should find for the plaintiff and against the defendant or defendants making such refusal on the second cause of action.

Lorain Journal Co. v. U. S.,
342 U. S. 143-154; 72 S. C. 181, 187;

Gamco, Inc., v. Providence Fruit and Produce Building, Inc., 194 F. 2d 484,
(cert. den. 10/13/52);

Eastman Kodak Company of N. Y. v. So. Photo Materials Company, 273 U. S. 359,
47 S. C. 400, 404;

Associated Press v. U. S.,
326 U. S. 1-14;

U. S. v. National City Lines, et al.,
186 F. 2d 562 (cert. den. 341 U. S. 916);

U. S. v. Klearflax Linen Looms, Inc.,
63 F. Supp. 32. [1401]

Plaintiffs' Jury Instruction No. 19

I charge you that the plaintiff need not show by direct evidence that the alleged refusal of the defendant The Exchange Orange Products Company to enter into an agreement with plaintiff comparable to that entered into by The Exchange Orange Products Company in 1951 with Treesweet Products Company and E. A. Silzle Corporation, or to make Valencia oranges available to the plaintiff under terms and conditions comparable to those at which Exchange Orange Products Company made Valencia oranges available to Treesweet Products Company and E. A. Silzle Corporation during the 1951 packing season, was pursuant to a purpose on the part of Exchange Orange Products Company or Sunkist Growers, Inc., its parent corporation, to eliminate the competition of the plaintiff in the intra and interstate market for single-strength orange juice or to create or maintain a monopoly or monopoly control over the processing or selling of Valencia single-strength orange juice processed in California and sold in the intra or interstate market as charged in the first and second causes of action. Such a purpose frequently cannot be shown by direct evidence, but may be shown by circumstantial evidence from which just and reasonable inferences to that effect may be drawn.

Eastman Kodak Company of N. Y. v. So. Photo Materials Company, 273 U. S. 359, 375; 47 S. C. 400, 404;

Interstate Circuit v. U. S., 306 U. S. 208;

U. S. v. Griffith, et al., 334 U. S. 100; 68 S. Ct. 941. [1402]

Plaintiffs' Jury Instruction No. 19
Revision No. 1

I charge you that the plaintiff need not show by direct evidence that the alleged refusal of the defendant Exchange Orange to enter into an agreement with plaintiff comparable to that entered into by the Exchange Orange Products Company in 1951 with Treesweet and Silzle, or to make Valencia oranges available to the plaintiff under terms and conditions comparable to those at which Exchange Orange made Valencia oranges available to Treesweet and Silzle during the 1951 packing season, was pursuant to the combination or conspiracy charged, and a purpose on the part of Exchange Orange or Sunkist, its parent corporation, to eliminate the competition of the plaintiff in the interstate market for single-strength orange juice or to create or maintain a monopoly over the processing or selling of Valencia single-strength orange juice processed in California and sold in the interstate market as charged in the first and second causes of action. Such a combination, conspiracy or purpose frequently cannot be shown by direct evidence, but may be shown by circumstantial evidence and from all just and reasonable inferences which may be drawn.

However, the plaintiff has the burden to prove such matters by a preponderance of the evidence.

[Note: The court has merely had retyped plaintiff's No. 19 and has added the last paragraph shown, beginning with the word "However."] [1403]

Plaintiffs' Jury Instruction No. 20

Any attempt to monopolize, the actual monopolization of, or the exercise of monopoly power by any of the defendants over the processing in California of single-strength Valencia orange juice for the purpose of exeluding competition in the processing and selling of such citrus juice in interstate commerce would violate Section 2 of the Sherman Act. If you find that any one of the defendants attempted to monopolize, monopolized, or exercised monopoly power over such trade and commerce for the purpose of excluding the competition of the plaintiff therein, and that such attempt to monopolize, monopoly, or the exercise of monopoly power by any such defendant directly and proximately damaged the plaintiff, you should find for the plaintiff and against such defendant or defendants on the second cause of action.

U. S. v. National City Lines, Inc., et al., 186 F. 2d 562 (cert. den. 341 U. S. [1404] 916).

Plaintiffs' Jury Instruction No. 21

If you find that the defendant The Exchange Orange Products Company directly or indirectly discriminiated in price between the plaintiff and Treesweet Products Company or E. A. Silzle Corporation in sales of oranges or single-strength Valencia orange juice of like grade and quality and that such discrimination tended to create a monopoly in California Valencia single-strength juice in Sunkist Growers, Inc., or Exchange Orange Products or to injure, destroy or prevent competition with Exchange Orange Products or Sunkist Growers, Inc., by the plaintiff, you should find for the plaintiff on the third cause of action in such amount as represents the damages sustained by the plaintiff as a result of such discrimination.

> American Co-Op Serum Ass'n v. Anchor Serum Company, 153 F. 2d 907 (cert. den. 329 U.S. 721). [1405]

Jury Instruction No. 22

I charge you that it is not necessary for the plaintiff to be a purchaser of either oranges or single-strength orange juice from the defendants the Exchange Orange Products Company or Sunkist Growers, Inc., for it to recover under the third cause of action. If you find that the sales of oranges or orange juice under the Treesweet Products Company and E. A. Silzle Corporation contracts tended to create a monopoly in Exchange Orange Products Company, Sunkist Growers, Inc., Treesweet Products Company, or E. A. Silzle Corporation of single-strength Valencia juice or tended to injure, destroy, or prevent competition between the plaintiff and Exchange Orange Products Company or Sunkist Growers, Inc., or the purchasers of oranges or Valencia orange juice from Exchange Orange Products Company or Sunkist Growers, Inc., and that such acts by Sunkist Growers Inc., or Exchange Orange Products Company damaged the plaintiff, you should find for the plaintiff and against such defendants in such amount as plaintiff has suffered in damages as a result of such acts.

> American Co-Op Serum Ass'n v. Anchor Serum Company, 153 F. 2d 907 (cert. den. 329 U.S. 721). [1406]

Jury Instruction No. 23

If you as jurors should determine that plaintiffs' business or property was injured by activities in restraint of trade, the question will arise as to how plaintiffs' damages should be computed. One whose business or property has been injured by the activities of a combination in restraint of trade is entitled to damages. Since proof of the damages suffered may be difficult, "The wrongdoer may not object to the plaintiffs' reasonable estimate of the cause of the injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoers' misconduct has rendered unavailable. The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. * * * That principle is an ancient one * * * and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application."

Speegle v. Board of Fire Underwriters,
29 Cal. 34, 46.

Citing and quoting Bigelow v. RKO Radio Pictures, Inc., et al., 327 U.S. 251. [1407]

Jury Instruction No. 23
Revision No. 1

If you as jurors, based on all the evidence and instructions in this case should determine that plaintiff's business or property was injured and that the defendants or either of them is liable therefore, the question will arise as to how plaintiff's damages should be computed. Since proof of the damages suffered may be difficult, a "wrongdoer may not object to the plaintiffs' reasonable estimate of the cause of the injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoers' misconduct has rendered unavailable. The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."

[Note: The court has revised a portion of the language appearing on line 2 of the instruction No. 23 as heretofore considered. The court has also struck out the balance of the quote appearing on lines 13, 14 and 15 of the instructions as originally considered.] [1408]

Jury Instruction No 24

"A tortfeasor is liable for all consequences naturally resulting, all injuries actually flowing from his wrongful act, whether in fact anticipated or contemplated by him when his tortious act was committed. Recoverable damages, therefore, include compensation for all injury to plaintiff's business arising from wrongful acts committed by defendant, provided such injury was the natural and proximate result of the wrongful acts. This includes injury to business standing or good will, loss of business, additional expenses incurred because of the tort and all other elements of injury to the business. These are governing principles applying to compensatory damages * * * whether damages be compensatory or exemplary, if unliquidated, when determined by the trier of the facts, their propriety cannot be governed or measured by any precise yardstick. They must bear some reasonable relationship to the injury inflicted and the amount must rest largely in the discretion of the trier of facts. * * *."

Quotation from:

Aladdin Mfg. Co. v. Mantel Lamp Co. of America, 116 F. 2d 708, 716, 717. [1409]

Plaintiffs' Jury Instruction No. 25

I charge you that the law permits you to take into account both the damages which were inflicted on existing property and damages which were sustained by being unable to make profits which reasonably could be anticipated and would have been realized had it not been for the wrongdoing of the defendants.

Cape Cod Food Products v. Nat'l Cranberry Ass'n. 119 F. Supp. 900. [1410]

Jury Instruction No. 26

Section 7 of the same Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

You are not to be concerned at all with the treble damages or the costs of suit or the attorneys' fees, and are not to be influenced one way or the other by reason of the fact that the act provides therefor. As I will later tell you in more detail, your interest will be solely with respect to actual damages, and that only in the event that you shall first find under the law and facts that the plaintiffs are entitled to a recovery. [1411]

Jury Instruction No. 27

It is not in dispute that Treesweet and Silzle were selling single-strength orange juice in interstate commerce in competition with single-strength orange juice processed by Exchange Orange and sold by Sunkist in interstate commerce. It is illegal per se and in violation of the Sherman Antitrust Law for any two or more competitors to enter into any agreement which fixes or otherwise tampers with the price or price structure at which the products which such companies sell shall be sold in interstate commerce. If, therefore, you find that the 1951 Treesweet or Silzle contracts had the necessary or intended effect of fixing or tampering with the price or price structure at which Sunkist, Treesweet or Silzle sold single-strength orange juice in interstate commerce, you may consider such fact in determining whether such contracts were in fact processing contracts or whether they were in fact entered into as part of a conspiracy to restrain interstate commerce or to monopolize or control the production and sale of California single-strength Valencia orange juice in interstate commerce as charged by the plaintiff. [1412]

Plaintiff's Jury Instruction No. 28

Agreements which create potential power for price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints on interstate commerce within the meaning of the Sherman Act.

U. S. v. Trenton Potteries Company,
273 U. S. 392, 47 S. C. 377; quoted with approval in

U. S. v. Socony Vacuum Oil Co., et al., 310 U. S. 150; 60 S. C. 811, 842. [1413]

Plaintiff's Jury Instruction No. 29

Any combination which tampers with price structures is engaged in an illegal activity. Even though the members of the price fixing group are in no position to control the market, to the extent that they raise, lower, or stabilize prices, they would be directly interfering with the free play of market forces. The Sherman Act places all such schemes beyond the pale and protects that vital part of an economy against any degree of interference.

U. S. v. Socony Vacuum Oil Company, et al., 310 U. S. 150, 221. [1414]

Plaintiff's Jury Instruction No. 30

I charge you that while the defendant Exchange Orange may legally enter into a processing contract whereby Valencia oranges furnished by Sunkist or Exchange Orange may be processed into single-strength orange juice for Sunkist by an independent processor party to such contract, that processing contracts cannot be entered into by Exchange Orange as part of a scheme or plan which has the purpose or effect of fixing the prices at which single-strength Valencia juice processed by Treesweet and Silzle for Exchange Orange may be sold or offered for sale by Treesweet or Silzle in interstate commerce as such contracts would then be illegal contracts. [1415]

Plaintiff's Jury Instruction No. 31

If you find that the plaintiff in 1951 requested either Sunkist or Exchange Orange to make Valencia oranges available to it for processing into single-strength Valencia orange juice on any basis that would have enabled the plaintiff to have acquired oranges or such juice from Exchange Orange or Sunkist and to have sold the same in interstate commerce in competition with that sold by Treesweet or Silzle in interstate commerce, and that Sunkist or Exchange Orange refused to make Valencia oranges available to the plaintiff while at the same time making them available to Treesweet or Silzle on a basis whereby Treesweet or Silzle acquired such juice and sold it in interstate commerce, and that such refusal by Sunkist or Exchange Orange operated to prevent the plaintiff from being able to process and sell any California single-strength Valencia orange juice in interstate commerce in competition with that sold by Treesweet or Silzle, I charge you that if the plaintiff could not have secured California Valencia oranges from any other source on a basis that would have enabled it to have processed such oranges into single-strength Valencia juice and sold it in interstate commerce in competition with that processed by Treesweet and Silzle under their 1951 agreements with Exchange Orange, that you might consider such refusal as evidence of the existence of the combination and conspiracy alleged by the plaintiff to be in violation of Sections 1 and 2 of the Sherman Antitrust Law. [1416]

Plaintiff's Jury Instruction No. 32

Any combination effectively excluding or trying to exclude outsiders from the business altogether is a monopoly or an incipient monopoly and is unconditionally unlawful.

> American Federation of Tobacco Growers, Inc., v. Neal, et al., 183 Fed. (2d) [1417] 869.

Plaintiff's Jury Instruction No. 33

In considering the matter of monopoly power two ingredients are of outstanding significance: the power to fix prices and the power to exclude competition.

> United States v. Aluminum Co. of America, 91 F. Supp. 332, 342. [1418]

Plaintiff's Jury Instruction No. 34

Monopoly power is the power to exclude a competitor from a market. Such power may, however, be lawfully acquired. If you find that the defendants Sunkist and Exchange Orange Products had such power, they could lawfully exercise it in the case before you by deciding to process or retain for their own use all of the product oranges of their grower members. They could even destroy such oranges if they cared to do so, but when Sunkist or Exchange Orange Products offered to make them available to independent processors by sale or under other arrangements and made them available to their competitors such as Treesweet or Silzle, then

Sunkist or Exchange Orange must exercise their monopoly power over the product oranges of their grower members in such a manner as not to restrain competition in any citrus juice products that may be processed therefrom. [1419]

Plaintiff's Jury Instruction No. 35

I charge you that even though the defendants Sunkist and Exchange Orange Products might lawfully have a monopoly control over the product oranges available in California for processing into citrus juice products, such control could not be exercised by them or either of them to extend such control over citrus juice processed in California and sold in interstate commerce by means which had the necessary effect of eliminating a competitor or eliminating competition in such products as such action would restrain interstate trade and commerce. If, therefore, you find that Sunkist and Exchange Orange Products, or either of them, were endeavoring to extend their control into such market by making contracts with independent processors, Treesweet and Silzle, and that as part of such scheme or plan they refused to make oranges available to the plaintiff under comparable arrangements, and that such refusal eliminated the plaintiff as a competitor of Sunkist, Treesweet and Silzle in such market and caused the plaintiff damage, you should find for the plaintiff.

U. S. v. Griffith,
334 U. S. 100, 106;
68 S. Ct. 941, 945. [1420]

Plaintiff's Jury Instruction No. 36

If you find as a fact that the defendants Sunkist and EOP exercised such control over the price and amount of California product Valencia oranges in 1951 that they had the power to determine the price and quantity of Valencia oranges that were available to independent processors in California for making single-strength Valencia juice or other citrus juice products, such power would constitute monopoly power.

If you find that either Sunkist or EOP or both together had such power, it would not, however, have been illegally acquired in violation of the antitrust laws as they could legally acquire such power as corporations organized under Federal and state laws which permit producers of agricultural products such as oranges to combine together in organizations comparable to that of the defendants Sunkist and Exchange Orange Products for the purpose of marketing and processing the products of their members in interstate commerce. Such laws do not, however, permit Sunkist or Exchange Orange Products to combine together with an independent processor such as Treesweet and Silzle for the purpose of restraining, monopolizing, or otherwise controlling trade and commerce in citrus juice products, such as single-strength Valencia juice or frozen orange concentrates that are processed in California from such oranges and thereafter sold in interstate commerce. [1421]

Plaintiff's Jury Instruction No. 37

The defendant Sunkist is permitted under the law to acquire a legal monopoly over the amount of Valencia oranges that are available to independent processors for processing into citrus juice products, including single-strength Valencia juice. Sunkist or Exchange Orange Products could in 1951 have processed all of such oranges in their own plants into citrus juice products and not made any of them available to independent processors, such as the plaintiff, Treesweet or Silzle, if they had cared to do so. Defendant Exchange Orange Products, as the processing company for the grower members of Sunkist, could also enter into valid processing contracts with independent processors to have the oranges of the grower members of Sunkist processed into citrus juices to be thereafter sold by Sunkist as the citrus juice products of its grower members to prospective buyers thereof in interstate commerce. However, such contracts must be true processing contracts and not devices which are resorted to, to restrain trade or to monopolize that part of the citrus juice market which is represented by such citrus juices as are processed in California and thereafter sold in interstate commerce. It is for you to decide whether the contracts which Exchange Orange Products entered into in 1951 with Treesweet and Silzle were true processing contracts or whether they were contracts which had the purpose and effect of extending the monopoly control of Sunkist and Exchange Orange Products over the citrus juices that are processed in California and sold in interstate commerce, by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts. Such latter effect, when coupled with any refusal of the defendant Sunkist or Exchange Orange Products to make oranges available to the plaintiff under comparable arrangements would render such contracts in violation of the antitrust laws for which the plaintiff would be entitled to recover such damages as you find proximately resulted from such refusal. [1422]

38

Plaintiff's Suggested Instruction on Exercise of Monopoly Power by Defendants

It is for you to decide whether the defendants. Sunkist or Exchange Orange or either of them, had such power or control over the amount of product oranges that were available in 1951 to independent processors for processing into citrus juice products, that they or either of them were able, in fact, to determine the price or terms and conditions at which product oranges would be made available to independent processors by the defendants and any other actual or potential supplier of product Valencia oranges, for processing into citrus juice products, particularly single-strength Valencia juice processed from product Valencia oranges in California in 1951.

[Endorsed]: Filed December 7, 1955. [1424]

[Title of District Court and Cause.]

No. 13788-C

MOTION BY SUNKIST GROWERS, INC. AND THE EXCHANGE ORANGE PRODUCTS COMPANY TO DISMISS THE FOURTH AND FIFTH CAUSES OF ACTION

Come now Sunkist Growers, Inc., and The Exchange Orange Products Company, defendants herein, and move for a judgment of dismissal of the fourth and fifth causes of action of the amended complaint upon the ground that the Court lacks jurisdiction of the subject matter of the said purported causes of action and each of them.

This motion is based upon the records and files herein. [1428] and upon the Memorandum of Points and Authorities attached hereto.

Dated this 13th day of December, 1955.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants.

[Endorsed]: Filed December 13, 1955.

[Title of District Court and Cause.]

No. 13,788-C

MINUTES OF THE COURT
DEC. 13, 1955

Present: Hon. James M. Carter, District Judge.

Counsel for Plaintiff and Intervening Plaintiff: Wm. C. Dixon;

Counsel for Intervening Plaintiff: Harry M. Irwin;

Counsel for Defendants Sunkist Growers, Inc., and The Exchange Orange Products Co.: Ferris E. Hurd, Melville C. Williams, Ross C. Fisher, and Donald D. Stark.

Proceedings:

For jury trial. At 9:45 a.m. court convenes in Chambers out of the presence of the jury panel.

Defendants move to dismiss the fourth and fifth causes of action herein, and written motion thereon is now filed, and It Is Ordered that said motion is granted.

Court and counsel confer re procedure. At 10:05 a.m. court recesses.

At 10:10 a.m. court reconvenes herein in the courtroom, and all parties being present as before, and both sides answering ready, Court orders that a jury be impaneled, and trial proceed.

The following jurors, duly impaneled, are sworn to try this cause:

1. Charles W. Daiker
2. Morris D. Weiner
3. Marshall S. Chlavin
4. Joseph Rendler
5. Rachel A. Rhoads
6. Tillie H. Johnson
7. Arthur W. Niebling
8. Sophie Adelman
9. Martha S. Stronach
10. Joseph C. Berger
11. Nairn Johnstone
12. Eleanor Wells

Alternate Jurors: (1) Harriette Colby and (2) Louis Duber.

At noon Court admonishes the jurors not to discuss this cause and declares a recess to 2 p.m. At 2 p.m. court reconvenes herein, and all parties being present as before, and the jury being present,

Attorney Dixon makes opening statement to the jury for plaintiffs.

At 3:15 p.m. Court reminds the jurors of the admonition heretofore given and declares a recess. At 3:30 p.m. court reconvenes herein, and all parties being present as before, the jury being absent:

Defendents object to the introduction of any evidence and move to dismiss the action on the grounds (1) that plaintiffs in their opening statement have failed to state a claim upon which relief can be granted, and (2) that the second amended complaint fails to state a claim upon which relief can be granted.

It Is Ordered that said objections are overruled and the motion of defendants to dismiss is denied as to each ground.

At 3:40 p.m. the jury is brought into court, and the jury now being present, it is ordered that trial proceed.

Attorney Hurd makes opening statement to the jury for defendants.

At 4:35 p.m. Court admonishes the jurors not to discuss this cause and Orders cause continued to 10 a.m., Dec. 14, 1955, for further jury trial.

JOHN A. CHILDRESS,
Clerk,

By L. B. FIGG,
Deputy Clerk. [1444]

[Title of District Court and Cause.]

No. 13788 C

JURY INSTRUCTIONS REQUESTED BY DEFENDANTS

Defendants request that the attached jury instructions be given by the Court.

Dated: January 10, 1956.

Respectfully submitted,

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants.

Defendants' Jury Instruction No. A

The Court instructs you, ladies and gentlemen, that under the evidence in this case you must find the issues for the defendants on the first cause of action. You will therefore return a verdict for defendants on the charge that they, or either of them, have violated Section 1 of the Sherman Act. [1468]

Defendants' Jury Instruction No. B

The Court instructs you, ladies and gentlemen, that under the evidence in this case you must find the issues for the defendants on the second cause of action. You will therefore return a verdict for defendants on the charge that they or either of them have violated Section 2 of the Sherman Act. [1469]

Defendants' Jury Instruction No. C

The Court instructs you, ladies and gentlemen, that under the evidence in this case you must find the issues for the defendants on the third cause of action. You will therefore return a verdict for the defendants on the charge that they or either of them have violated the Robinson-Patman Act. [1470]

Defendants' Jury Instruction No. 1

On every issue in the case plaintiff has the burden of proof. That is, if your minds are in even balance on any issue, you must decide that issue for the defendants and not for the plaintiff. The plaintiff does not have to persuade you beyond a reasonable doubt, but it does have to persuade you that its is the more probable version.

~~Cape Cod~~ Food Products Co. v. National Cranberry Ass'n, 119 Fed. Supp. 900, 905 (District of Mass., 1954). [1471]

Defendants' Jury Instruction No. 2

If evidence is presented with respect to conduct which appears to you to be equivocal, that is to say, susceptible of being interpreted as lawful and, in your view, equally susceptible of being interpreted as unlawful, you must intepret it as being lawful. If you are persuaded that the conduct is equally consistent with a lawful motive and an unlawful motive, you must interpret it as being lawful.

Cape Cod Food Products Co. v. National Cranberry Ass'n, 119 Fed. Supp. 900, 905 (District of Mass., 1954). [1472]

Defendants' Jury Instruction No. 3

You are instructed that the defendants Sunkist and Exchange Orange and the alleged co-conspirator Exchange Lemon, component parts of the Sunkist cooperative marketing organization, are cooperatives entitled to the exemptions from the antitrust laws afforded by Section 6 of the Clayton Act, which is one of the antitrust laws, and by Section 1 of the Capper-Volstead Act, which relates to associations of producers of agricultural products. Section 6 of the Clayton Act provides that nothing contained in the antitrust laws shall be construed to forbid the existence and operation of agricultural organizations instituted for the purposes of mutual help, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objectives thereof, nor shall such organizations or their members be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws. Section 1 of the Capper-Volstead Act provides that fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, the fruit of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; provided that such associations are operated for the mutual benefit of the members thereof, as such producers.

Sec. 6 of Clayton Act (15 U.S.CA., Sec. 17)

Sec. 1 of Capper-Volstead Act (7 U.S.C.A., Sec. 291)

The California Fruit Growers Exchange System, U. S. Dept. of Agric., Washington, D.C., Circular C-135, May 1950. [1473]

Defendants' Jury Instruction No. 4

You are further instructed that defendant Sunkist is in legal effect a single cooperative marketing organization, consisting of a number of components including defendant Exchange Orange and alleged co-conspirator Exchange Lemon, and that this cooperative marketing organization, being in effect a single entity is, as a matter of law, incapable of conspiring with or within itself. [1474]

Defendants' Jury Instruction No. 5

There can be no conspiracy unless more than one person is involved. The very word conspiracy means "together with." Therefore, since defendants Sunkist and Exchange Orange and alleged co-conspirator Exchange Lemon are to be regarded by you as a single cooperative marketing organization, that is, one person, you may not find that there was any conspiracy in this case, either a conspiracy to restrain trade or a conspiracy to monopolize trade.

unless you find from a preponderance of the evidence that either Treesweet or Silzle was a party to such a conspiracy. [1475]

Defendants' Jury Instruction No. 6

With respect to the first and second causes of action, it is essential that plaintiff allege and prove a violation of the Sherman Act and injury to plaintiff proximately resulting therefrom. Injury to plaintiff alone, however, is not sufficient, even though it causes him to go out of business. There must be harm to the general public in the form of an undue restriction upon interstate trade and commerce, and the injurious effect upon the public interest must be appreciable. Unless you find, therefore, from a preponderance of the evidence, that the alleged wrongful conduct of the defendants, in some appreciable fashion restrained the movement of citrus fruit juices in interstate commerce, your verdict must be for the defendants on both the first and second causes of action. That is to say, if you find from the preponderance of the evidence that plaintiff alone was injured, from whatever cause, and that there was no substantial injury to the marketing of citrus fruit juices in interstate commerce, your verdict must be for the defendants on the first two causes of action.

Shotkin v. General Electric Co.,
171 F. (2) 236, and other cases cited on p. 12 of Defendants' Trial [1476] Memorandum.

Defendants' Jury Instruction No. 7

The first cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators, Exchange Lemon, Treesweet Products Company, and E. A. Silzle Corporation, combined and conspired with each other and entered into contracts and did certain other things in 1951 for the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juice produced in California and marketed throughout the United States, with resultant injury and damage to the plaintiff. What is actually charged by the first cause of action, in view of the evidence in this case, is that the defendants and the alleged co-conspirators combined and conspired to eliminate the competition of the plaintiff in the interstate market for canned citrus fruit juice in the year 1951. Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or Exchange Lemon, or one or more of them, combined and conspired with either Treesweet Products Company or E. A. Silzle Corporation, and in 1951 did the specific things charged in the first cause of action with the specific purpose and effect of eliminating the competition of plaintiff in the interstate market for canned citrus fruit juice, your verdict must be for the defendants on the first cause of action. [1477]

Revision No. 1
Defendants' Jury Instruction No. 7

The first cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators, Exchange Lemon, Treesweet and Silzle, combined and conspired with each other at a date unknown to the plaintiff, and entered into contracts and did certain other things in 1951 with the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juices, particularly single-strength Valencia orange juice produced in California and marketed throughout the United States, with resultant injury and damage to the plaintiff, i.e., that Sunkist and Exchange Orange and the alleged co-conspirators combined and conspired to eliminate the competition of the plaintiff in the interstate market for canned citrus fruit juices and particularly single-strength Valencia orange juice in the year 1951, and performed certain acts pursuant to such combination and conspiracy which proximately caused damage to plaintiffs.

Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either Treesweet or Silzle, and in 1951 did one or more of the specific acts charged in the first cause of action, and that such act or acts had the purpose or effect of damaging or eliminating the competition of plaintiffs in the interstate market for California canned citrus fruit juices or single-strength Valencia orange juice, your verdict must be for the defendants on the first cause of action. [1478]

Defendants' Jury Instruction No. 8

You are instructed that the specific acts charged in the first cause of action must have been done with the specific intent of eliminating plaintiff as a competitor in the interstate market for canned citrus fruit juice, because the disappearance of plaintiff as a competitor was not the necessary and direct result of these specific acts, and in such case, the law requires proof by a preponderance of the evidence, not only that plaintiff disappeared as a competitor but that the alleged conspirators specifically intended this result.

U. S. v. Griffith,
334 U. S. 100

Times-Picayune v. U. S.,
345 U. S. 594 [1479]

Defendants' Jury Instruction No. 9

You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Orange and Exchange Lemon whereby Exchange Lemon processed oranges into single-strength orange juice for Exchange Orange at cost and without profit to Exchange Lemon. Unless you find, therefore, from the preponderance of the evidence, that such agreement or arrangement was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Orange and Exchange Lemon as being of no consequence in this case, so far as the first cause of action is concerned. [1480]

Defendant's Jury Instruction No. 9a

You are instructed that there was nothing unlawful per se, that is, in and of itself, in any of the six specific acts complained of by the plaintiff. Except as you may find, therefore, from the preponderance of the evidence that these acts, or any one or more of them, were performed pursuant to the conspiracy charged in the first cause of action and with the specific purpose and the effect of eliminating the competition of the plaintiff in the market for citrus fruit juices processed in California and sold in interstate commerce, you will disregard such acts as being of no consequence in this case, so far as the first cause of action is concerned. [1481]

Defendants' Jury Instruction No. 9-A
(1st Revision)

The plaintiff claims that the six acts complained of were performed pursuant to a combination or conspiracy to restrain or monopolize interstate commerce and that it was injured by reason of the performance of one or more of these acts. Each of these acts standing by itself and apart from any combination or conspiracy was lawful. Except as you may find therefore from the preponderance of the evidence that these acts, or any one or more of them, were performed pursuant to the conspiracy charged in this case, and with the purpose or the necessary effect of eliminating the competition of the plaintiff in the market for citrus fruit juice processed in California and sold in interstate commerce, you will disregard such acts as being the cause or causes of plaintiff's alleged damage. [1482]

Defendants' Jury Instruction No. 10

You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Lemon and Exchange Orange whereby Exchange Orange processed lemons for Exchange Lemon at cost and without profit to Exchange Orange. Unless you find, therefore, from the preponderance of the evidence, that such agreement or arrangement was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Lemon and Exchange Orange as being of no consequence in this case, so far as the first cause of action is concerned. [1483]

Defendants' Jury Instruction No. 9A

You are instructed that there was nothing unlawful per se, that is, in and of itself, in any of the six specific acts complained of by the plaintiff. Except as you may find, therefore, from the preponderance of the evidence that these acts, or any one or more of them, were performed pursuant to the conspiracy charged in the first cause of action and with the specific purpose and the effect of eliminating the competition of the plaintiff in the market for citrus fruit juices processed in California and sold in interstate commerce, you will disregard such acts as being of no consequence in this case, so far as the first cause of action is concerned. [1484]

Defendants' Jury Instruction No. 11

You are instructed that there was nothing unlawful in Sunkist's setting its own price of by-product Valencia oranges available to independent processors at $40.00 per ton in 1951; and, unless you find, from the preponderance of the evidence, that the setting of such price was a part of the conspiracy charged in the first cause of action and was done for the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard Sunkist's setting of the $40.00 price as being of no consequence in this case, so far as the first cause of action is concerned. [1485]

Defendants' Jury Instruction No. 12

You are instructed that there was nothing unlawful in the contract entered into between defendant Exchange Orange and alleged coconspirator TreeSweet Products Company, effective as of July 23, 1951; and, unless you find, from the preponderance of the evidence, that such contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged coconspirator TreeSweet Products Company, as being of no consequence in this case, so far as the first cause of action is concerned. [1486]

Defendants' Jury Instruction No. 13

You are instructed that there was nothing unlawful in the contract between defendant Exchange Orange and alleged coconspirator E. A. Silzle Corporation, effective June 26, 1951; and, unless you find, from the preponderance of the evidence, that this contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged coconspirator E. A. Silzle Corporation, as being of no consequence in this case, so far as the first cause of action is concerned. [1487]

Defendants' Jury Instruction No. 14

You are instructed that there was nothing unlawful in the refusal of defendant Exchange Orange to enter into a processing agreement with plaintiff for processing Valencia oranges during the 1951 season comparable to the contracts entered into between defendant Exchange Orange and alleged coconspirators TreeSweet Products Company and E. A. Silzle Corporation; and, unless you find, from the preponderance of the evidence, that such refusal was a part of the conspiracy charged in the first cause of action and was done with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard the refusal as being of no consequence in this case, so far as the first cause of action is concerned. [1488]

Defendants' Jury Instruction No. 14a

It is also charged in the first cause of action that, as a result of the alleged conspiracy between Sunkist, Exchange Orange, Exchange Lemon, TreeSweet, and Silzle, and of the six acts claimed to have been performed by them pursuant to the alleged conspiracy, Sunkist determined, dominated and controlled the price at which single-strength Valencia orange juice was sold in interstate commerce by TreeSweet and Silzle in 1951, and all price competition between Sunkist, TreeSweet and Silzle was eliminated. Unless you find from the preponderance of the evidence that the alleged price control and elimination of competition so charged was done pursuant to the conspiracy charged in the first cause of action and with the purpose and effect of eliminating the competition of the plaintiff, you will disregard such charge as being of no consequence in this case; and you will disregard such charge in any event, unless you also find from the preponderance of the evidence that Sunkist or Exchange Orange entered into an agreement or agreements with TreeSweet or Silzle fixing the prices at which TreeSweet or Silzle resold single-strength Valencia orange juice purchased from Exchange Orange, or unless you find from the preponderance of the evidence that the discounts at which Exchange Orange sold such juice to TreeSweet and Silzle were not sufficient to permit price competition between Sunkist and TreeSweet or Sunkist and Silzle. [1489]

Defendants' Jury Instruction No. 14b

The first question you should decide under the second cause of action is whether the preponderance of the evidence establishes that citrus fruit juices produced in California are so different and distinct competitively from citrus fruit juices produced in Florida that they constitute an identifiable segment of the total interstate trade and commerce in citrus fruit juices produced in the United States as a whole. Unless you find from the preponderance of the evidence that Florida and California citrus fruit juices are not substantially the same and that one has an appreciable competitive advantage over the other in the market place, your verdict must be for the defendants on the second cause of [1490] action.

Defendants' Jury Instruction No. 15

The second cause of action alleges, among other things, that defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon have a monopoly control over fruit grown and available for processing in California and Arizona. You are instructed, in this connection, that it is not a violation of the Sherman Act, or any other antitrust act, for Capper-Volstead Cooperatives, such as defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon admittedly are, to acquire a large or even 100% of the citrus fruit grown in California and Arizona, if they do so solely through cooperative or collective action authorized by the Capper-Volstead Act. There is no evidence in this case that the fruit grower members of defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon, or all or any one of the three cooperatives, established or increased their membership, and consequently the combined fruit-growing acreage of their members, in any manner which was contrary

to the provisions of the Capper-Volstead Act. You are instructed, therefore, that there was nothing unlawful about the size of the membership or the acreage or the amount of the citrus fruit produced in the Sunkist system.

> Cape Cod Food Products Co. v. National Cranberry Ass'n., 119 Fed. Supp. 900, 905 (District of Mass., 1954). [1491]

Defendants' Jury Instruction No. 16a

You are instructed that you may not find that defendants Sunkist or Exchange Orange had monopoly control or power over the production and distribution of products oranges unless you find from the preponderance of the evidence that defendant Sunkist or Exchange Orange had the power to exclude others from producing or distributing or selling products oranges or the power to determine the prices at which others sell products [1493] oranges.

Defendants' Jury Instruction No. 16

You are further instructed that, so far as oranges are concerned, there has been no showing that defendants Sunkist and Exchange Orange had monopoly control or power over fruit grown and available for processing in California and Arizona. The evidence is that in 1951 grower-members of the Sunkist system produced approximately 65% of the products oranges. There has been no showing of

power to exclude others from growing products oranges. Hence, you may not find from the evidence in this case that defendants Sunkist and Exchange Orange had monopoly control or power over products oranges.

U. S. v. Griffith,
334 U.S. 100.

U.S. v. Aluminum Co. of America,
148 F. (2) 416, 424. [1492]

Defendants' Jury Instruction No. 16b

The term "monopolize" as it is used in Section 2 of the Sherman Act, means to acquire or retain effective market control for the purpose of excluding competition, and to follow such a course of action with the purpose of monopolizing.

U.S. v. Griffith,
334 U.S. 100. [1494]

Defendants' Jury Instruction No. 17

The second cause of action charges that, by doing the same six specific things charged in the first cause of action, defendants Sunkist and Exchange Orange and coconspirator Exchange Lemon have attempted to monopolize and have in fact monopolized the business of processing fruit juice in California and selling it in interstate commerce, with resultant injury and damage to plaintiff. As the Court has already instructed you, the term "monopolize" as it is used in Section 2 of the Sherman Act, means to acquire or retain effective market control for the purpose of excluding competition, and to follow such a course of conduct with the intent of monopolizing. What the second cause of action really charges, therefore, in view of the evidence which has been presented in this case, is that defendants Sunkist and Exchange Orange, by doing the specific acts charged in the first cause of action, have attempted to obtain and in fact have obtained effective control of the interstate market for California single strength Valencia orange juice, with the intent and effect of excluding the competition of plaintiff. Unless, therefore, you find, from the preponderance of the evidence, that defendants Sunkist and Exchange Orange, by doing the same specific acts which are charged in the first cause of action, either attempted to obtain or actually obtained effective control of the interstate market for California single strength Valencia orange juice, with the specific intent of excluding and with the effect of excluding the competition of the plaintiff in such market, your verdict must be for the defendants on the second cause of action. [1495]

Defendants' Jury Instruction No. 17a

The second cause of action charges that the defendants Sunkist and Exchange Orange and the alleged coconspirators Exchange Lemon, TreeSweet and Silzle combined and conspired together, and performed the same six acts alleged in the first cause of action, in order to monopolize the production and interstate sale of California citrus fruit juices, especially single strength Valencia orange juice, and that pursuant to such conspiracy they actually monopolized such production and interstate sale of California citrus fruit juices, with resultant injury and damage to plaintiff. Unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon, or one or more of the defendants, combined and conspired with either TreeSweet or Silzle, and pursuant to such combination and conspiracy did the same specific acts charged in the first cause of action, in order to acquire effective control of the interstate market for California citrus fruit juices, with the specific intent and effect of excluding substantially all competition, including that of the plaintiff, from such market, your verdict must be for the defendants on the second cause of action. [1496]

Defendants' Jury Instruction No. 18

You are instructed that the specific acts charged in the second cause of action must have been done with the specific intent of excluding the plaintiff as a competitor in the interstate market for California single strength Valencia orange juice, because the exclusion of plaintiff as a competitor was not the necessary and direct result of these specific acts, and in such case the law requires proof by a preponderance of the evidence, not only that plaintiff was ex-

cluded as a competitor but that plaintiff's exclusion as a competitor was specifically intended.

U.S. v. Griffith,
334 U.S. 100.

Times-Picayune v. U.S.,
345 U.S. 594. [1497]

Defendants' Jury Instruction No. 19

The second cause of action also charges that defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon conspired to monopolize the business of processing fruit juice in California and selling it in interstate commerce. But, as you have already been instructed, defendants Sunkist and Exchange Orange and alleged coconspirator Exchange Lemon are in legal effect a single entity, and therefore are not capable of entering into a conspiracy. You will, therefore, disregard and concern yourselves no further with the charge that Sunkist, Exchange Orange and Exchange Lemon entered into a conspiracy to monopolize any part of interstate commerce. [1498]

Defendants' Jury Instruction No. 20

You are instructed again in connection with the second cause of action that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Orange and Exchange Lemon whereby Exchange Lemon processed oranges into single-strength orange juice for Exchange Orange at cost and without profit to Exchange Lemon, and unless you find, from the preponderance of the evidence, that such agreement or arrangement was entered into by Exchange Orange with the specific intent of excluding and with the effect of excluding the competition of the plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard such agreement or arrangement as being of no consequence in this case, so far as the second cause of action is concerned. [1499]

Defendants' Jury Instruction No. 21

You are instructed again in connection with the second cause of action that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Lemon and Exchange Orange whereby Exchange Orange processed lemons for Exchange Lemon at cost and without profit to Exchange Orange, and, unless you find from the preponderance of the evidence, that such agreement or arrangement was entered into by Exchange Lemon or Exchange Orange with the specific intent of excluding and with the effect of excluding the competition of plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard such agreement or arrangement as being of no consequence in this case, so far as the second cause of action is concerned. [1500]

Defendants' Jury Instruction No. 22

You are instructed again in connection with the second cause of action that there was nothing unlawful in Sunkist's setting its own price on byproduct Valencia oranges available to independent processors at $40.00 per ton in 1951, and unless you find, from the preponderance of the evidence that Sunkist set such price with the specific intent of excluding and with the effect of excluding the competition of the plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard the setting of such price for Valencia oranges as being of no consequence in this case, so far as the second cause of action is concerned. [1501]

Defendants' Jury Instruction No. 23

You are instructed again in connection with the second cause of action that there was nothing unlawful in the contract entered into between defendant Exchange Orange and alleged coconspirator TreeSweet Products Company, effective as of July 23, 1951, and unless you find, from the preponderance of the evidence, that defendant Exchange Orange made such contract with the specific intent of excluding and with the effect of excluding the competition of the plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard such agreement as being of no consequence in this case, so far as the second cause of action is concerned. [1502]

Defendants' Jury Instruction No. 24

You are instructed again in connection with the second cause of action that there was nothing unlawful in the contract between defendant Exchange Orange and alleged coconspirator E. A. Silzle Corporation, effective June 26, 1951, and unless you find, from the preponderance of the evidence, that Exchange Orange made this contract with the specific intent of excluding, and with the effect of excluding the competition of the plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard such agreement as being of no consequence in this case, so far as the second cause of action is concerned. [1503]

Defendants' Jury Instruction No. 25

You are instructed again in connection with the second cause of action that there was nothing unlawful in the refusal of defendant Exchange Orange to enter into a processing agreement with plaintiff for processing Valencia oranges during the 1951 season comparable to the contracts entered into with alleged coconspirators, TreeSweet Products Company or E. A. Silzle Corporation, and unless you find that defendant Exchange Orange made such refusal with the specific intent of excluding and with the effect of excluding the competition of the plaintiff in the interstate market for California single-strength Valencia orange juice, you will disregard such refusal as being of no consequence in this case, so far as the second cause of action is concerned. [1504]

Defendants' Jury Instruction No. 25a

The laws of the United States do not require that persons engaged in private trade and commerce must deal with everyone. They may not always discriminate between those with whom they deal, but they do have the right to choose their customers. Section 2(a) of the Robinson-Patman Act itself provides that "Nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

Chicago Seating Co. v. S. Karpen & Bros.,
177 D. (2) 863.

Naifeh v. Ronson Art Metal Works,
218 F. (2) 202. [1505]

Defendants' Jury Instruction No. 25b

You are instructed that it would not have been unlawful for defendants Sunkist or Exchange Orange Products Company, to have sold or offered to sell Valencia oranges at one price for processing into hot-pack or frozen concentrated orange juice, and at a different price for processing into single-strength orange juice, provided that there were valid business reasons in the citrus industry for such a dual pricing system, and provided further that such sales or offers to sell were not made for the purpose of eliminating and suppressing interstate competition. By the same token, it was not unlawful for defendants Sunkist or Exchange Orange to sell or offer to sell Valencia oranges or contract to sell them to processors of hot-pack or frozen concentrated orange juice at one price and at the same time arrange with other processors, such as TreeSweet and Silzle, to process oranges into single-strength orange juice for the account of Exchange Orange and then to buy the single-strength orange juice from Exchange Orange, for sums which returned to Exchange Orange a lesser price, provided that there were valid business reasons in the citrus industry for selling oranges and orange juice in this fashion, and provided further that such sales or offers or contracts to sell, and such processing arrangements, were not made for the purpose of eliminating and suppressing interstate competition. Your verdict in this case must be for the defendants, therefore, unless you find, from the preponderance of the evidence, that defendant Sunkist fixed a price of $40 per ton for Valencia oranges, and defendant Exchange Orange entered into the TreeSweet and Silzle contracts [1506] without valid business reasons and with the purpose of eliminating and suppressing competition from the plaintiff.

Maryland & Virginia Milk Prop. Assn. v. United States, 193 F. 2d 907 (C.A.D. of C., 1951). [1507]

Defendants' Jury Instruction No. 25c

You are instructed that defendant Exchange Orange was under no legal obligation to enter into processing contracts, that is, contracts comparable to those entered into with TreeSweet Products Company and E. A. Silzle Corporation, with any independent processor at all; and you are further instructed that unless defendant Exchange Orange Products Company had an unlawful motive or purpose, it had a perfect right to enter into processing contracts with one or more independent processors of its own choice, and was under no legal obligation to enter into a comparable processing contract with the plaintiff or with any other independent processor with whom it did not choose to do business. Your verdict in this case must be for the defendants, therefore, unless you find that defendant Exchange Orange, in refusing to enter into a processing contract with the plaintiff comparable to the processing contracts entered into with TreeSweet Products Company and E. A. Silzle Corporation, was motivated by a purpose to restrain or eliminate competition from the plaintiff in the processing and interstate selling of single strength Valencia orange juice. [1508]

Defendants' Jury Instruction No. 25d

This case really turns upon the question whether defendant Exchange Orange refused, without valid business reasons, to make Valencia oranges or Valencia orange juice available to plaintiff in 1951, on terms comparable to the TreeSweet or Silzle contracts and whether Exchange Orange did this as part of and pursuant to the conspiracies to restrain or monopolize interstate trade in California citrus fruit juices, especially single-strength Valencia orange juice, charged in the first and second causes of action. Exchange Orange itself was under no legal obligation to enter into contracts, comparable to the TreeSweet or Silzle contracts, with any independent processor at all. It had a perfect right, acting alone, to enter into processing contracts with one or more independent processors of its own choice and was under no legal obligation to enter into comparable processing contracts with the plaintiff or any other independent processor with whom it did not choose to do business. Unless you find from the preponderance of the evidence that the refusal of defendant Exchange Orange to make Valencia oranges or Valencia orange juice available to plaintiff in 1951 on terms comparable to the TreeSweet or Silzle contracts was without valid business reasons, and that such refusal was not the independent decision of Exchange Orange but was made pursuant to one or the other of the conspiracies charged in the first or second causes of action, your verdict must be for the defendants. [1509]

Defendants' Jury Instruction No. 25-1

It is also charged in the second cause of action that as part of the alleged conspiracy to monopolize and the monopolization effected by defendants Sunkist and Exchange Orange and coconspirators Exchange Lemon, TreeSweet, and Silzle, defendants Sunkist and Exchange Orange entered into agreements with Hyland-Stanford under which Sunkist sold oranges to this company to be processed and sold by it as hot pack concentrate orange juice and under which Exchange Orange obtained "first call" on the excess processing facilities of said company for processing hot pack concentrate orange juice, to the exclusion of other marketing cooperative organizations such as Independent Fruit Growers Association, whose fruit was sold through Morgan Ward. Unless you find from the preponderance of the evidence that these agreements with Hyland-Stanford were entered into as a part of a conspiracy between Sunkist, Exchange Orange, Exchange Lemon, TreeSweet and Silzle to monopolize the processing and interstate sale of California citrus fruit juices, especially single-strength Valencia orange juice, for themselves, you will disregard such contracts as being of no consequence in the case, except as you may infer from them that in 1951, the Independent Fruit Growers Association had a greater than usual supply of Valencia oranges available for their regular customers, including the plaintiff. [1510]

Defendants' Jury Instruction No. 26

The third cause of action charges that defendant Sunkist or defendant Exchange Orange, or both of them violated Section 2(a) of the Robinson-Patman

Act in 1951 by discriminating in prices between different purchasers of commodities of like grade and quality, to wit, by-product fruit or juices processed therefrom, one or more of the purchases involved in such discrimination being in interstate commerce. The evidence in this case shows that none of the allegedly discriminatory sales made by either of the defendants Sunkist or Exchange Orange of by-product fruit or juices processed therefrom, were made in interstate commerce. You are instructed, therefore, that your verdict must be for the defendants on the charge that they, or either of them, violated Section 2(a) of the Robinson-Patman Act.

Myers v. Shell Oil Co.,
97 F. Supp. 670.

Lewis v. Shell Oil Co.,
50 F. Supp. 547.

Spencer v. Sun Oil Co.,
94 F. Supp. 408. [1511]

Defendants' Jury Instruction No. 27

The third cause of action charges that defendant Sunkist violated Section 2(a) of the Robinson-Patman Act when it sold approximately 21 tons of Valencia oranges to plaintiff in April, 1951, at a price alleged to discriminate against plaintiff. It does not appear from the evidence that the price charged plaintiff was any different than the price charged other purchasers, at that time of the year, for Valencia oranges of like grade and quality. It is clear from the evidence that the sale to plaintiff was in intra-state commerce, and there is no evidence of inter-state sales to other purchasers at different prices. Also, there is no evidence that the price charged plaintiff had any effect whatever upon competition or tended to create a monopoly in any line of commerce. You are instructed, therefore, as a matter of law, that this sale of approximately 21 tons of oranges to plaintiff in April, 1951, was not a violation of Section 2(a) of the Robinson-Patman Act. [1512]

Defendants' Jury Instruction No. 28

The third cause of action also charges that defendant Exchange Orange violated Section 2(a) of the Robinson-Patman Act when it sold a carload of single-strength orange juice to plaintiff on or about September 28, 1951, at a price alleged to be higher than the price at which defendant was then selling single strength Valencia orange juice of like grade and quality to TreeSweet Products Company. The evidence shows that the sale to plaintiff on September 28, 1951, was a spot sale made to plaintiff in order to enable it to fill a particular order obtained by it from a California customer, while the sales to TreeSweet Products Company were continuing sales made under a long term contract. The evidence does not show whether the orange juice sold to plaintiff and the orange juice sold to

TreeSweet was of like grade and quality. The evidence indicates that neither the sale to plaintiff nor the sales to TreeSweet Products Company were in interstate commerce. The evidence also indicates that the difference in prices had no effect upon competition, if anything increased competition, and did not tend to create a monopoly in any line of commerce. You are instructed, therefore, as a matter of law, that the sale of orange juice to plaintiff in September, 1951, did not constitute a violation of Section 2(a) of the Robinson-Patman Act. [1513]

Defendants' Jury Instruction No. 29

The third cause of action also charges that defendant Sunkist, acting through its wholly-owned subsidiary defendant Exchange Orange Products Company, violated Section 2(a) of the Robinson-Patman Act in 1951 by discriminating in prices between different purchasers of commodities of like grade and quality, to wit, by-product fruit, particularly oranges, for the canning of single-strength orange juice and blended grapefruit and orange juice, the purchases involved in such discrimination being in interstate commerce, and the effect of such discrimination being substantially to lessen competition from the plaintiff and to tend to create a monopoly in the defendants. You are instructed, as a matter of law, that the evidence in this case does not show that either of the defendants Sunkist Growers, Inc., or Exchange Orange Products Company, sold by-product fruit, including oranges, to different purchasers at discriminatory prices, as charged. Your verdict will therefore be for the defendants on this charge. [1514]

Defendants' Jury Instruction No. 30

The third cause of action also charges that defendant Sunkist or defendant Exchange Orange, or both of them, violated Section 2(a) of the Robinson-Patman Act in 1951 by discriminating indirectly in prices between different purchasers of commodities of like grade and quality, to wit, by-product fruit or juices processed therefrom, one or more of said purchases being in interstate commerce. The charge, under the evidence that has been introduced, is that the price schedule of defendant Sunkist showed Valencia oranges for sale in 1951 at $40 per ton, whereas defendant Exchange Orange entered into processing and sales contracts with TreeSweet Products Company and E. A. Silzle Corporation, but not with the plaintiff, whereby TreeSweet Products Company and E. A. Silzle Corporation processed Valencia oranges for defendant Exchange Orange and then purchased the juice itself from Exchange Orange at prices which in effect reflected a cost of the Valencia oranges of considerably less than $40 per ton. The evidence does not show that there was any discrimination in price between different purchasers, or that there was any discrimination in price between different purchasers of commodities of like grade and quality, or that any of the transactions were in interstate commerce. Actually, the evidence shows affirmatively that all of the transactions complained of took place within the State of California. You are instructed, therefore, that your verdict must be for the defendants on this charge. [1515]

Defendants' Jury Instruction No. 31

The third cause of action also charges that defendants Sunkist or Exchange Orange, or both of them, violated Section 2(d) of the Robinson-Patman Act in 1951 by paying and contracting to pay things of value to its customers, TreeSweet Products Company and E. A. Silzle Corporation, in the course of interstate commerce, as compensation for services or facilities furnished by TreeSweet Products Company and E. A. Silzle Corporation in connection with the processing, handling and sale of products sold or offered for sale by defendants Sunkist or Exchange Orange, or both of them, to wit, canned fruit juice, particularly single-strength orange juice and blended orange juice, without making such payments or contracts to pay available to all other customers, including the plaintiff, on proportionally equal terms. Plaintiff's charge, under the evidence in this case, is that defendant Exchange Orange paid TreeSweet Products Company and E. A. Silzle Corporation a profit for processing the oranges under the TreeSweet and Silzle contracts, without making the same or proportionally equal profit payments available to plaintiff. As it does not appear from the evidence that defendant Exchange Orange paid or contracted to pay either TreeSweet Products Company or E. A. Silzle Corporation any profit whatever for the processing of oranges under the TreeSweet or Silzle contracts, you are instructed that your verdict must be for the defendants on this charge. [1516]

Defendants' Jury Instruction No. 32

The third cause of action also charges that defendants Sunkist or Exchange Orange, or both of them, violated Section 2(d) of the Robinson-Patman Act in 1951 by paying and contracting to pay things of value to its customers, TreeSweet Products Company and E. A. Silzle Corporation, in the course of interstate commerce, as compensation for services or facilities furnished by TreeSweet Products Company and E. A. Silzle Corporation in connection with the processing, handling and sale of products sold or offered for sale by defendants, Sunkist or Exchange Orange, or both of them, to wit, canned fruit juice, particularly single-strength orange juice and blended orange juice, without making such payments or contracts to pay available to all other customers, including the plaintiff, on proportionally equal terms. It does not appear from the evidence in this case that defendants Sunkist or Exchange Orange paid or contracted to pay anything of value to its customers, TreeSweet Products Company or E. A. Silzle Corporation, in the course of interstate commerce, or withheld any similar payments to or contracts to pay plaintiff in the course of interstate commerce, or that defendants Sunkist or Exchange Orange paid or contracted to pay anything of value to TreeSweet Products Company or E. A. Silzle Corporation, for processing products which had either been sold or were at the time being offered for sale by defendants Sunkist or Exchange Orange. And it affirmatively appears from the evidence that the plaintiff was not a customer of Sunkist or Exchange Orange. Under the evidence as it has been presented, I instruct you, as a matter of law, that your verdict on the charge of a violation of Section 2(d) of the Robinson-Patman Act must be for the defendants. [1517]

Defendants' Jury Instruction No. 33

The third cause of action charges that defendants Sunkist and Exchange Orange violated Section 3 of the Robinson-Patman Act in 1951 by being parties to and assisting in transactions of sale and contracts to sell with TreeSweet Products Company and E. A. Silzle Corporation, in interstate commerce, which discriminated to their knowledge against competitors of TreeSweet and Silzle, including the plaintiff, in that allowances were granted to TreeSweet and Silzle over and above any allowances then available to their competitors, including plaintiff, in respect of the sale of goods of like grade, quality and quantity, to wit, by-product fruit, particularly oranges. The evidence presented in this case does not show that any of the transactions of sale or contracts to sell complained of by plaintiff, including the transactions of sale or contracts to sell entered into with TreeSweet or Silzle, were in interstate commerce. The evidence does not show that by-products fruit, including oranges was sold to TreeSweet or Silzle. The evidence does not show that by-products fruit, including oranges, was sold to competitors of TreeSweet or Silzle, including plaintiff, except for a sale of 21 tons of Valencia oranges to plaintiff in April, 1951, the terms of which were the same as the terms available to all buyers of Valencia oranges at the time. The record is barren of any evidence from which a comparison could be made of different sales of by-product fruit, including oranges, of like grade, quality and quantity. You are instructed, therefore, that your verdict must be for the defendants on the charge that either or both of them violated Section 3 of the Robinson-Patman Act. [1518]

Defendants' Jury Instruction No. 34

As the Court has already stated, your first problem is to find whether, under the Court's instructions, the defendants have violated the antitrust laws. If you find that the defendants have violated the antitrust laws, you will then have to consider to what extent the circumstances which befell the plaintiff are attributable to the wrongdoing, if any, of the defendants. Your verdict must be for the defendants, unless you find not only that defendants have violated the antitrust laws but that such violation was a substantial cause of any injury which may have occurred to the plaintiff's business. The mere fact that plaintiff may have lost a substantial sum of money and had a business failure in 1951 does not prove that such loss or failure was caused by any illegal act on the part of the defendants. It may be that you will find that plaintiff's loss or failure in 1951 was due to plaintiff's inability to obtain by-product oranges from Morgan Ward who, according to the evidence, had been plaintiff's principal source of supply since 1948, or it may be that you will find that plaintiff's loss in 1951 was simply another in a series of losses sustained since it first entered business and was inevitable in view of the manner in which plaintiff conducted its business, or it may be that you will find that plaintiff's loss was caused by the quality of its products or its reputation in the trade, or it may be that you will find that plaintiff's loss was caused by its inability to keep its manufacturing and selling costs below its selling prices, or it may be that you will find that plaintiff's loss was caused by general economic conditions in the citrus industry in 1951. If you find that plaintiff's loss was caused by any of these things, or by any combination of them, then the acts of the defendants relied upon by the plaintiff in this case would [1519] not have been the cause or causes of plaintiff's loss or injury, and your verdict must be for the defendants. [1520]

Revision of Defendants' No. 34

As the court has already stated, your first problem is to find whether, under the court's instructions, the defendants have violated the antitrust laws. If you find that the defendants have violated the antitrust laws, you will then have to consider whether or not one or more of the acts complained of by the plaintiff resulted in injury or damage to the plaintiff. You will next determine whether or not the violation of the antitrust laws, if such you find, and the commission of the act or acts complained of, if such you find, was a proximate cause of any injury which the plaintiff may have [1521] suffered.

Defendants' Jury Instruction No. 34a

If you find that neither of the defendants has violated the antitrust laws, it will be unnecessary for you to consider whether any acts of the defendants injured the plaintiff. If you find that the defendants, or either of them, have violated the antitrust laws, you will then have to consider whether or not any of the acts complained of as part of the conspiracy or conspiracies charged were the proximate cause of injury to the plaintiff. The fact that the plaintiff may have lost a substantial sum of money or suffered a business failure in 1951 does not prove that such loss or failure was caused by any illegal act of the defendants. Before you can return a verdict for the plaintiff, you must find not only that either or both of the defendants have violated the antitrust laws but that one or more of the specific acts complained of was the proximate cause of injury to the plaintiff. If you find that plaintiff's loss or business failure in 1951 resulted not from one or more of the acts complained of but from some other cause or causes, then the acts of the defendants relied upon by the plaintiff in this case would not have been the proximate cause of an injury to the plaintiff, and your verdict should be for the defendants. [1522]

Defendants' Jury Instruction No. 35

The purpose of the Sherman Act is to prevent unreasonable restraints upon free competition in business and commercial transactions which tend to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which have come to be regarded as a special form of public injury.

Apex Hosiery Co. v. Leader.
310 U.S. 469.

Northern California M.D. Ass'n v. Interment Ass'n., 120 F. Supp. 93, 95 (D. Calif., 1954). [1523]

Defendants' Jury Instruction No. 36

But even where one who has violated the antitrust laws has by his wrong prevented a precise computation of damages, the jury may not render a verdict based on speculation or guesswork. It may make a just and reasonable estimate of the damages based on relevant data and render its verdict accordingly.

Bigelow v. RKO Radio Pictures,
327 U.S. 251. [1524]

Defendants' Jury Instruction No. 36a

If you determine from a preponderance of the evidence, and under the instructions of the Court, that the defendants and the alleged coconspirators have violated the antitrust laws, and that such violation was the proximate cause of injury to the plaintiff, you will then have to consider the question of damages. Since any and all damage to plaintiff is claimed to have resulted from its alleged inability to acquire Valencia oranges or Valencia orange juice in 1951, you will have to determine at the outset the extent to which defendants Sunkist or Exchange Orange were under a duty to make Valencia oranges or Valencia orange juice available to plaintiff in that year, that is to say, you must determine before you can fix plaintiff's damage, what amount of Valencia oranges or Valencia orange juice defendants Sunkist or Exchange Orange were obligated to make available to plaintiff under all the circumstances which existed in 1951. You are instructed that you may not speculate or conjecture as to what this amount should have been but must base your decision upon some reasonable yardstick or yardsticks for determining what amount of Valencia oranges or Valencia orange juice defendants Sunkist or Exchange Orange should have made available or allocated to the plaintiff. If you are unable, without speculating or conjecturing, to determine or to come to some reasonable estimate of the amount of Valencia oranges or Valencia orange juice which defendants

Sunkist or Exchange Orange were obligated to furnish to plaintiff, as a particular independent processor of citrus fruit juices, you may not bring in a verdict for the plaintiff but your verdict must be for the defendants. [1525]

Defendants' Jury Instruction No. 37

You are instructed that you may not speculate as to the fact of damage, but if the fact of damage is proved, the amount may be reasonably approximated if the approximation is based on relevant evidence.

> Bigelow v. RKO Radio Pictures, 150 F (2) 877 (rev'd on other grounds, 327 U.S. 251). [1526]

Defendants' Jury Instruction No. 38

You are instructed that loss of earnings to form a basis of damages for violation of the antitrust laws cannot depend upon speculation or conjecture.

> Paterson Parchment Paper Co. v. Story Parchment Co., 37 F. (2) 537 (rev'd on other grounds, 281 U.S. 711). [1527]

Defendants' Jury Instruction No. 39

Upon the question of claimed loss of earnings, you may consider the evidence in respect of plaintiff's earnings since the time of its incorporation, and, if you determine that plaintiff operated at a loss during the period from its incorporation until July 31, 1951, then you may not find that it suffered a loss of earnings thereafter as a result of the alleged wrongful conduct of the defendants, unless you find from the preponderance of the evidence that there was a change in conditions after July 31, 1951, which would justify an inference of reasonable expectation of earnings [1528] thereafter.

Defendants' Jury Instruction No. 40

You have been told that the plaintiff corporation is in reorganization under Chapter 11 of the Bankruptcy Act, and that Mr. Walker, whom you have seen in the courtroom, is the Trustee appointed by the Court to look after plaintiff's affairs during reorganization. You are instructed, however, that as against the defendants in this case, Mr. Walker's rights are no different from, or any greater than, the rights of the plaintiff corporation itself. For the purposes of this case, Mr. Walker simply stands in the shoes of the plaintiff. [1529]

Defendants' Jury Instruction No. 41

You are instructed that, if you reach and consider the question of damage, you may not take into consideration any claimed damage resulting from any refusal of defendant Exchange Orange to enter into an agreement or arrangement with plaintiff comparable to the Silzle contract. [1530]

Defendants' Jury Instruction No. 42
(Formerly Court Instruction M)

The Court will now attempt to advise you concerning the contentions and theories of the defendants in this case.

It is defendants' position, first of all, that they did not have a monopoly of products oranges or a monopoly of the business of processing the oranges and selling the juice in interstate commerce. Defendants contend that such monopolies would have been lawful, if they had existed, because of the statutes relating to marketing associations, but they deny that there were such monopolies.

With respect to lemons, it is defendants' position that whether Exchange Lemon had a monopoly of products lemons or of the business of processing and selling lemon juice, is immaterial in this case, since, defendants claim, the plaintiff was not in the lemon juice business except in a very minor way.

In any event, defendants deny that they misused any power that they may have had with respect to products oranges or lemons.

Defendants also deny that they violated the antitrust laws in any way. They deny they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to restrain trade and commerce in single strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired with Exchange Lemon, Tree-

Sweet and Silzle, or any of them, to suppress or eliminate the competition of the plaintiff.

Defendants also deny that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to monopolize the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired [1531] with Exchange Lemon, TreeSweet and Silzle, or any of them, to exclude the competition of the plaintiff from such market.

The defendants also deny that they and Exchange Lemon and TreeSweet and Silzle, or any of them, actually monopolized the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce.

With respect to the six acts complained of as causing plaintiff's damage, defendants contend that such acts were lawful and that they were not performed pursuant to any combination or conspiracy or for the purpose of restraining or monopolizing trade and commerce or for the purpose of injuring the plaintiff.

It is also defendants' contention that they were under no legal obligation to do business with the plaintiff, and that even if defendants had had some obligation to do business with independent processors generally, there was ample justification for not doing business with the plaintiff.

Defendants contend, finally, that what happened to the plaintiff in 1951 was caused, not by any act of the defendants, but by the general economic conditions in the citrus fruit industry and by plaintiff's lack of capital and the mismanagement of its business. [1532]

Defendants' Jury Instruction No. 43
(To Follow Plaintiff's 33)

You are instructed that the fact that Sunkist's growers produced 65% of the products Valencia oranges is not sufficient evidence, standing alone, to establish monopoly power over such [1533] oranges.

Defendants' Jury Instruction No. 44
(To Follow Plaintiff's No. 12)

The action of Exchange Orange in entering into the 1951 contracts with TreeSweet and Silzle and in refusing to enter into a comparable arrangement with the plaintiff must have been performed pursuant to the alleged combination or conspiracy to monopolize the market for citrus fruit juices processed in California and sold in interstate commerce, particularly single-strength Valencia orange juice. If you find that such action of Exchange Orange was the independent decision of Exchange Orange and was not engaged in pursuant to such conspiracy, your verdict should be for the [1534] defendants.

Defendants' 45

Interborough News Co. v. Curtis Publishing Co. 127 Fed. Supp. 286 (S.D. N.Y. 1954) Judge Sugarman.

Page 298:

> "This exclusion of a single person from competition is not monopoly. The essence of monopoly is power to effect the exclusion of competition generally in a field for the benefit of a particular person or class."

Page 299:

> "In the absence of either (a) the existence of monopoly power and intent to exercise it or (b) conduct intended to result in monopoly or monopoly power, there is no violation of §2."

Receipt of Copy acknowledeged.

[Endorsed]: Filed January 10, 1956. [1535]

[Title of District Court and Cause.]

MOTION OF DEFENDANTS FOR A DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S CASE

Now come the defendants, jointly and severally, as the close of plaintiff's evidence, and move the Court to direct a verdict for defendants on each of the causes of action attempted to be set forth in the amended complaint, and for grounds of said motion say:

First Cause of Action

1. The first cause of action does not state a claim upon which relief may be granted. [1540]

2. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for cooperatives by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.

3. Plaintiff has failed to prove that defendants, or either of them, engaged in a combination or conspiracy in restraint of interstate trade or commerce or entered into or performed any contract in restraint of such trade or commerce. Furthermore, any cause of action arising from any contract pleaded in the first cause of action, except the Tree-Sweet contract, is barred by the Statute of Limitations, since it was not pleaded in the original complaint.

4. Plaintiff has failed to prove that defendants, or either of them, had any intent or purpose to restrain interstate trade or commerce.

5. Plaintiff has failed to prove any restraint of interstate trade or commerce, either substantial or insubstantial.

6. Plaintiff has failed to prove any public injury.

7. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

8. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or of either of them.

9. Plaintiff has failed to prove the amount of damage claimed to have resulted to plaintiff from the alleged injury or injuries.

10. Plaintiff has failed to prove the first cause of action attempted to be alleged in its amended complaint.

Second Cause of Action

1. The second cause of action does not state a claim upon which relief may be granted. [1541]

2. Plaintiff has failed to prove that defendants, or either of them, had monopoly control over fruit grown and available for processing in California and Arizona.

3. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for cooperatives by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.

4. Plaintiff has failed to prove that defendants, or either of them, conspired to monopolize, attempted to monopolize, or monopolized interstate trade and commerce in citrus fruit juices processed

in California and sold in interstate commerce in violation of the antitrust laws.

5. Plaintiff has failed to prove that defendants, or either of them, had any intent or purpose to monopolize interstate trade and commerce in citrus fruit juices, processed in California and sold in interstate commerce.

6. Plaintiff has failed to prove any public injury.

7. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

8. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or either of them.

9. Plaintiff has failed to prove the amount of damage claimed to have resulted to plaintiff from the alleged injury or injuries.

10. Any cause of action arising from any contract pleaded in the second cause of action, except the TreeSweet contract, is barred by the Statute of Limitations, since it was not pleaded in the original complaint.

11. Plaintiff has failed to prove the second cause of action attempted to be alleged in its amended complaint. [1542]

Third Cause of Action

1. The third cause of action does not state a claim upon which relief may be granted.

2. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for co-operatives by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.

3. Plaintiff has failed to prove that defendants, or either of them, in the course of interstate commerce, discriminated in price between different purchasers of commodities of like grade and quality, or that any purchase included in the claimed discrimination was in interstate commerce, or that the effect of such claimed discrimination might be substantially to lessen competition or to tend to create a monopoly in any line of interstate commerce, or to injure, destroy, or prevent competition with the defendants, or either of them, or with anyone receiving the benefit of such claimed discrimination.

4. Plaintiff has failed to prove that defendants, or either of them, paid or contracted to pay anything to any customer, in the course of interstate commerce, as compensation for any services or facilities furnished by such customer in connection with any products manufactured, sold or offered for sale by defendants, or either of them, without payment or contract to pay being available on proportionally equal terms to all other customers competing in the distribution of such products.

5. Plaintiff has failed to prove that defendants, or either of them, in the course of interstate commerce, were parties to or assisted in any transaction

of sale, or contract to sell, which to their knowledge discriminated against competitors of the purchaser, in that any allowance was granted [1543] to the purchaser over and above any allowance then available to said competitors, in respect of a sale of goods of like grade, quality and quantity.

6. Plaintiff has failed to prove that defendants, or either of them, had any legal obligation to do business with the plaintiff.

7. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

8. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or of either of them.

9. Plaintiff has failed to prove the amount of damage claimed to have resulted to plaintiff from the alleged injury or injuries.

10. Plaintiff has failed to prove the third cause of action attempted to be alleged in its amended complaint.

11. The evidence has affirmatively established that the sale of the carload of canned citrus juice to plaintiff pleaded in paragraph VI of the third cause of action of the amended complaint took place prior to December 14, 1951, and that plaintiff resold and delivered said carload prior to said date. This transaction was not pleaded in the original complaint, and is, therefore, barred as a basis for a cause of action by the applicable statute of limitations.

Dated this 17th day of January, 1956.

FERRIS E. HURD,
THOMAS C. STRACHAN. JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 17, 1956. [1544]

[Title of District Court and Cause.]

No. 13,788-C

MINUTES OF THE COURT
JANUARY 17, 1956

Present: Hon. James M. Carter, District Judge.

Counsel for Plaintiffs': Wm. C. Dixon for plf. and intervening plf.;

Counsel for Intervening Plaintiff: Harry M. Irwin;

Counsel for Defendants: Thos. C. Strachan, Jr., Ross C. Fisher, and Melville C. Williams for deft's Sunkist Growers, Inc., and The Exchange Orange Products Co.

Proceedings:

For further jury trial. Jury is present. Court orders trial proceed.

Robert Hodge, witness for plaintiffs, heretofore sworn, resumes the stand and testifies further.

Plfs' Ex. 78 is admitted in evidence, and

Plfs' Ex. 69 is admitted in evidence.

Ronald Walker, witness for plaintiffs, hertofore sworn, is recalled and testifies further. Plaintiff rests.

At 11:30 a.m., Court orders the jury excused until 2:30 p.m., and the jury leaves the courtroom.

Court recesses to 1:30 p.m. At 1:30 p.m. court reconvenes herein. Counsel are present. The jury is absent.

Defendants file a written motion for directed verdict at close of plaintiffs' evidence, and Attorney Williams argues in support thereof.

At 2:40 p.m. the jury is brought into court and excused until 10 a.m., Jan. 18, 1956, and the jury leaves the courtroom.

Attorney Williams resumes his argument.

At 3:30 p.m. court recesses. At 3:50 p.m. court reconvenes herein.

Attorney Dixon argues in opposition to defendants' motion.

Attorney Williams argues further for defendants.

It Is Ordered that motion of defendants for a directed verdict is denied.

At 4:30 p.m., It Is Ordered that cause is continued to 10 a.m., Jan. 18, 1956, for further trial.

JOHN A. CHILDRESS,
Clerk.

By L. B. FIGG,
Deputy Clerk. [1548]

[Title of District Court and Cause.]

No. 13788-C

MOTION OF DEFENDANTS FOR LEAVE TO AMEND THEIR ANSWERS TO THE AMENDED COMPLAINT

Come now the defendants, jointly and severally, and ask leave to file the attached amendment to their answers, and for grounds of their motion show the Court as follows:

I.

On January 25 and 26, 1956, during the trial of the above action to their great surprise, which was promptly communicated to the Court, defendants were forbidden to show that plaintiff's alleged natural citrus fruit juice products were substantially adulterated by the addition of large amounts of water, citric acid and other ingredients, upon the grounds that the quality of plaintiff's products is not in issue, that plaintiff had had no notice [1568] of such issue, and would itself be surprised and prejudiced were such issue to be injected into the case.

II.

Despite plaintiff's position as aforesaid, the quality of plaintiff's products is and has been an issue in this case from the beginning, as will appear from the ensuing paragraphs.

III.

The Amended Complaint alleges repeatedly that plaintiff was eliminated from competition as a canner of natural citrus fruit juices, especially single strength orange juice, and not as a canner of juices which must be labeled something other than natural citrus fruit juices and which could not be labeled single strength orange juice, because of the addition of water, citric acid and other ingredients. The allegations of the Amended Complaint were denied by the defendants.

IV.

Paragraph VIII (a) of the Amended Complaint alleges that plaintiff was a "first-class juice canner." This allegation was denied by the defendants.

V.

Paragraph VII of the Amended Complaint alleges that by reason of defendants' wrongful acts, plaintiff was eliminated as a competitor and injured in his business, property, good will, and earnings. These allegations are denied by the defendants.

VI.

Paragraph VIII (e) of the Amended Complaint alleges that by reason of defendants' wrongful acts, plaintiff has irreparably lost [1569] patronage for its products. These allegations are denied by the defendants.

VII.

The foregoing and other controverted allegations of the Amended Complaint tendered issues as to the quality of plaintiff's product and whether the quality of plaintiff's product was the cause of plaintiff's injury and damage. That such matters are in issue is also clear from the discovery proceedings.

VIII.

On October 30, 1952, Judge Byrne ordered plaintiff to make available to defendants certain records, including plaintiff's laboratory records (Defts.' Exs. I(1), I(2), I(3) and I(4) for Identification), following an argument in which the then defendant Exchange Lemon Products Company urged that there were issues tendered by the pleadings as to whether plaintiff was a first-class juice canner and whether it was not the quality of plaintiffs' products rather than defendants' conduct which injured the business of the plaintiff (Par. 14 of Exchange Lemon Products' Motion for Production of Records; Exchange Lemon Products' Brief in Support of said Motion, page 8; Tr. ~~85,~~ September 8, 1952; Order of Judge Byrne, October 30, 1952).

IX.

Despite the order of Judge Byrne, plaintiff refused to produce the aforesaid laboratory records of plaintiff on the grounds that they were not material. Exchange Lemon Products Company then moved for an order under Rule 37 establishing that, for the purposes of this action, plaintiff's products must be taken to be of an inferior quality with respect to flavor, percentage of soluble solids, acid and sugar content. Following a hearing on this motion on [1570] March 30, 1953, plaintiff's counsel finally agreed to produce and did produce the aforesaid laboratory records of the plaintiff which have been offered in evidence by defendants.

X.

In addition to the foregoing, plaintiff's evidence itself has tendered the issue of the quality of plaintiff's products. The entire tenor of Mr. Winckler's testimony was to the effect that plaintiff produced a first-class product. Mr. Winckler testified not only that plaintiff's alleged canned citrus fruit juices met U. S. Grade A standards, but that in certain respects plaintiff held its products met even higher standards. He stated flatly that there was nothing in plaintiff's alleged canned citrus fruit juices but natural fruit juice, plus dry sugar where the juice was labeled as sweetened. (Tr. 1031 ff; Tr. 1041 ff; Tr. 1225 ff.)

XI.

Plaintiff is suing defendants for losses resulting from a claimed inability to sell canned natural citrus fruit juices, especially single-strength Valencia orange juice. Plaintiff is not entitled to damages for its inability to sell canned juices, especially orange juice, which, because of their adulteration, were not natural citrus fruit juices at all.

XII.

Plaintiff has long had notice, from the pleadings, from the discovery proceedings, and from the evidence adduced to date, that the quality of plaintiff's products was an issue in the case and that defendants expected to offer evidence to show that it was the quality of plaintiff's products which contributed to plaintiff's downfall. [1571]

XIII.

The evidence offered by defendants concerning the quality of plaintiff's products shows not only that it was the quality of the products that caused plaintiff's injury and damage, but that plaintiff, conducting its business almost continuously in violation of state and federal law and contrary to public policy, was defrauding the public and has come into court with unclean hands.

XIV.

Under the foregoing circumstances, defendants do not believe that they should be required to amend their answers. The issue of the quality of plaintiff's products is raised by the pleadings and was tried throughout the proceedings by the consent of the parties until defendants proposed to show that such products were adulterated, mislabeled and misbranded. So far as "unclean hands" is concerned, this matter need not be pleaded at all but may be raised by any party at any time or by the Court on its own motion. In view of the position taken by counsel for the plaintiff and the ruling of the Court, however, and out of an abundance of caution, defendants ask leave to file the attached amendment to their answers conforming them more expressly to the issues which were tendered by the pleadings and by the evidence heretofore received during the trial.

XV.

Unless defendants are permitted to show that plaintiff's products were adulterated, mislabeled and misbranded in violation of applicable federal and state law and that such adulteration, mislabeling and misbranding contributed to plaintiff's claimed injury and damage, defendants will suffer material prejudice and a failure of justice will occur. [1572]

This motion is based upon the above and foregoing and upon the records and files herein and upon the affidavit of Ross C. Fisher hereto attached and upon the Memorandum of Points and Authorities hereto attached.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,

ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants, Sunkist Growers, Inc., and The Exchange Orange Products Company. [1573]

Affidavit of Ross C. Fisher

State of California,
County of Los Angeles—ss.

Ross C. Fisher, being first duly sworn, on oath deposes and says that he is one of the attorneys for defendants in the above-entitled action; that he has knowledge of the facts and that the facts asserted in the foregoing motion are true and correct to the best of his knowledge and belief.

/s/ ROSS C. FISHER.

Subscribed and sworn to before me this 30th day of January, 1956.

[Seal] /s/ STEPHEN M. FARRAND,
Notary Public in and for the County of Los Angeles, State of California. [1574]

[Title of District Court and Cause.]

No. 13788-C

AMENDMENT OF ANSWER OF DEFENDANTS SUNKIST GROWERS, INC., AND THE EXCHANGE ORANGE PRODUCTS COMPANY TO AMENDED COMPLAINT

Comes now defendants Sunkist Growers, Inc., and The Exchange Orange Products Company and pursuant to leave of court file herein the following amendment to the answer of said defendants to plaintiff's amended complaint:

XXV.

Further Answer to Plaintiff's First, Second and Third Causes of Action

(Plaintiff's Fourth and Fifth Causes of Action having been heretofore [1575] dismissed.)

Plaintiff's alleged elimination as a competitor in the business of processing and selling citrus fruit juices, and any injury or damage claimed to have resulted therefrom, was caused not by any alleged wrongful conduct of the defendants, but by the facts, among other things, that during and prior to the year 1951, substantially all of the alleged citrus fruit juices processed and sold by plaintiff were adulterated by the addition of substantial amounts of water, citric acid and other ingredients and wei mislabeled and misbranded, that plaintiff was aware of and had knowledge of such adulteration, mislabeling and misbranding, that palintiff sold such adulterated, mislabeled and misbranded citrus fruit juices in violation of federal and state law and contrary to public policy, and is in this court with unclean hands and is barred from any right to relief against these answering defendants or either of them.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants, Sunkist Growers, Inc., and The Exchange Orange Products [1576] Company.

Memorandum of Points and Authorities in Support of Motion of Defendants for Leave to Amend Their Answer to the Amended Complaint.

Rule 15 (a) and (b) of Federal Rules of Civil Procedure.

Maltz v. Sax,
134 Fed. (2d) 2 (C.C.A. 7th, 1943).
Proper v. John Bene & Sons, Inc., et al.,
299 Fed. 863 (Dist. Ct. E. D. N. Y. 1924).

[Endorsed]: Filed January 31, 1956. [1577]

[Title of District Court and Cause.]

No. 13788-C

AMENDMENT OF ANSWER OF DEFENDANTS SUNKIST GROWERS, INC., AND THE EXCHANGE ORANGE PRODUCTS COMPANY TO AMENDED COMPLAINT

Comes now defendants Sunkist Growers, Inc., and The Exchange Orange Products Company and pursuant to leave of court file herein the following amendment to the answer of said defendants to plaintiff's amended complaint:

XXV.

Further Answer to Plaintiff's First, Second and Third Causes of Action

(Plaintiff's Fourth and Fifth Causes of Action having been heretofore dismissed.)

Plaintiff's alleged elimination as a competitor in the business of processing and selling citrus fruit juices, and any injury or damage claimed to have resulted therefrom, was caused not by any alleged wrongful conduct of the defendants, but by the facts, among other things, that during and prior to the year 1951, substantially all of the alleged citrus fruit juices processed and sold by plaintiff were adulterated by the addition of substantial amounts of water, citric acid and other ingredients and were mislabeled and misbranded, that plaintiff was aware of and had knowledge of such adulteration, mislabeling and misbranding, that plaintiff sold such adulterated, mislabeled and misbranded citrus fruit juices in violation of federal and state law and contrary to public policy, and is in this court with unclean hands and is barred from any right to relief against these answering defendants or either of them.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants, Sunkist Growers, Inc., and The Exchange Orange Products Company.

[Endorsed]: Lodged January 31, 1956. [1580]

[Title of District Court and Cause.]

No. 13788-C

MOTION TO AMEND AMENDED COMPLAINT TO CONFORM TO THE EVIDENCE

Pursuant to the provisions of Rule 15 (b) plaintiff requests permission of the Court to amend the Amended Complaint to conform to the evidence as follows:

I.

At page 3, line 6, add the following: "Single-strength Valencia orange juice was the principal source of income and profit of the plaintiff and constituted approximately 80% of the total citrus juice products processed and sold by the plaintiff during the years 1949 and 1950. The total sales of the plaintiff of all citrus juice products during said years exceeded $3,000,000. The single-strength Valencia orange juice processed by the plaintiff during said years was sold in interstate commerce in competition with single-strength Valencia juice processed and sold by the defendants, EOP and Sunkist, and co-conspirators [1582] Treesweet and Silzle."

II.

At page 6, line 2, after the word "California." add the following: "In 1951 Sunkist and EOP controlled and accounted for approximately two-thirds of all the product Valencia oranges available in California for processing into single-strength orange juice and other citrus juice products. The product Valencia oranges which are not processed by defendant EOP into citrus juice products or by independent processors for the account of EOP are usually sold by Sunkist to independent processors. In 1951 Sunkist determined the selling price for its product oranges after consulting independent processors who were potential purchasers thereof, including TreeSweet and Silzle. The plaintiff was not included among the independent processors consulted by Sunkist before it established its 1951 selling price for such oranges. The Sunkist selling price for Valencia oranges in 1951 also established the selling price for such Valencia oranges as were offered for sale to independent processors by other suppliers."

III.

At page 6, line 11, after the word "fruit" add the following: "particularly Valencia product oranges."

IV.

At page 6, line 12, after the word "juice" add: "at a price or on terms comparable to those at which Sunkist made Valencia oranges available to other independent processors for processing into citrus juice products, particularly single strength Valencia juice."

V.

At page 6, line 25, after the word "Sunkist." add: "A total of approximately 5,400,000 gallons of single-strength Valencia juice was processed in California in 1951. Of this amount [1583] defendants EOP, TreeSweet, and Silzle processed approximately 4,511,202 gallons, of which amount approximately 3,044,394 gallons were processed by TreeSweet and Silzle under the contracts and arrangement hereinafter described in paragraph III, subdivisions (d) and (e) on pages 11 and 12 of the Amended Complaint herein. Because of the monopoly control by Sunkist and EOP over the quantity and price at which Valencia product oranges were made available to independent processors of single-strength juice other than TreeSweet and Silzle, and the aforesaid contracts, plaintiff was unable to and did not process any single strength Valencia juice in 1951."

VI.

At page 11, line 28, after (d) add the following: "Defendant EOP agreed with TreeSweet to make Valencia product oranges available to TreeSweet, a competitor of Sunkist and plaintiff in the interstate market for single-strength Valencia orange juice, under an arrangement or contract pursuant to which TreeSweet would not be required to purchase product Valencia oranges from Sunkist or any other source, for processing into single-strength Valencia orange juice. Pursuant to said agreement."

VII.

At page 12, line 1, before the word "also" add the words: "among other things."

VIII.

At page 12, line 2, after the word "TreeSweet" add: "at the Sunkist published selling price for 'Sunkist' single-strength Valencia orange juice, less certain discounts and allowances not available to other purchasers, including the plaintiff herein."

IX.

At page 12, line 17, after the word "market" add: "and at the 'Sunkist' published selling price for single-strength Valencia orange juice." [1584]

X.

At page 13, line 12, after the word "defendants," strike the balance of lines 12 to 17, inclusive, and add the following: "and the monopoly control of defendants Sunkist and EOP in 1951 over the amount and price of product Valencia oranges available for processing into single-strength Valencia orange juice by independent processors, all price competition between Sunkist, TreeSweet, and Silzle in the single-strength Valencia juice processed by them and sold in interstate commerce was eliminated; Sunkist determined, dominated, and controlled the price at which such juice was offered for sale in interstate commerce by TreeSweet and Silzle in 1951; plaintiff was unable to process, can, and sell any single-strength Valencia juice in interstate commerce in competition with that sold by Sunkist, TreeSweet, and Silzle; plaintiff in an effort to keep its customers for single-strength Valencia juice purchased from Sunkist for sale and delivery to one of its said customers approximately 1,400 cases of single-strength Valencia orange juice at a price substantially in excess of that at which TreeSweet was then purchasing single-strength juice from Sunkist under the contractual agreement hereinbefore referred to in specification III (d) herein; plaintiff lost the profits on its anticipated single-strength Valencia juice business in 1951 and was forced to file proceedings under Chapter 10 of the Bankruptcy Act on March 19, 1952; was eliminated as a natural and future competitor of defendant Sunkist in the frozen concentrate citrus juice market; and has been damaged in the manner and to the extent alleged in paragraphs VII and VIII herein."

XI.

At page 13, line 25, after the word "and" add the word "coconspirator." [1585]

XII.

At page 13, line 31, after the word "E.O.P." strike the following: "and E.L.P. have attempted to monopolize" and add the following: "and coconspirators E.L.P., TreeSweet and Silzle have conspired to and in fact have monopolized and."

XIII.

At page 14, line 4, after the word "commerce" add the words: "particularly single-strength Valencia orange juice."

XIV.

At page 14, lines 7 and 8, strike the words: "and said attempt to monopolize."

XV.

At page 14, line 10, after the word "juice," strike the words "defendants Sunkist and E.L.P." and add the following: "and in abuse of their monopoly power and control over the product Valencia oranges available for processing into citrus juice products, defendants Sunkist and E.O.P. entered into written agreements with independent processors, Hyland Stanford and General Foods, pursuant to which said companies secured their requirements of Valencia oranges under arrangements which gave defendant E.O.P. 'first call' on the processing facilities of said companies to the exclusion of other marketing co-operative organizations, such as Independent Fruit Growers Association, and."

Respectfully submitted,

/s/ WILLIAM C. DIXON,
Attorney for Plaintiff and
Intervening Trustee;

/s/ BERNARD REICH,
Attorney for Plaintiff;

/s/ HARRY M. IRWIN,
Attorney for Trustee.

Receipt of copy acknowledged.

[Endorsed]: Filed January 31, 1956. [1586]

[Title of District Court and Cause.]

No. 13,788—C

MINUTES OF THE COURT
JAN. 31, 1956

Present: Hon. James M. Carter, District Judge.

Counsel for Plaintiff: Wm. C. Dixon for plf. and intervening plf.;

Counsel for Intervening Plaintiff: Harry M. Irwin;

Counsel for Defendants: Thos. C. Strachan, Jr., Ross C. Fisher, and Melville C. Williams for def't. Sunkist Growers, Inc., and The Exchange Orange Products Co.

Proceedings:

For further trial. At 9:05 a.m. court convenes herein. The jury is absent, having been heretofore on Jan. 27, 1956, excused until Feb. 1, 1956.

Defts' Ex. FD, FE, and FF are marked for ident.

Plaintiffs file and present a motion to amend the amended complaint to conform to the evidence.

Defendants file and present a motion to amend their answers to the amended complaint.

Attorney Dixon argues in opposition to defendants' motion.

Attorney Strachan argues in support of motion.

It Is Ordered that motion of defendants to amend their answers to the amended complaint is denied.

Defts' Exs. ED, EE, EF, EG, EH, EI, EJ, EK, EM, EP, ES, FD, and DF are admitted in evidence.

At 10:50 a.m. court recesses. At 11:45 a.m. court reconvenes herein. Counsel are present. The jury is absent.

Attorney Fisher argues in opposition to plaintiffs' motion filed this morning to amend the complaint.

At 12:10 p.m. court recesses to 2 p.m.

At 2 p.m. court reconvenes herein. Counsel are present. The jury is absent.

Attorney Fisher argues further.

Attorney Dixon argues in support of plaintiffs' motion to amend.

It Is Ordered that motion of plaintiffs to amend the complaint to conform to evidence is granted, and that plaintiffs serve and file its amended complaint by Thursday morning, Feb. 2, 1956, and that defendants may have until Tuesday morning, Feb. 7, 1956, to serve and file their answer thereto.

Defendants move for postponement of the trial for one week, in view of the ruling allowing complaint to be amended. It is ordered that said motion is denied.

Plaintiffs move orally that the third cause of action of the amended complaint be dismissed, and it is ordered that the motion is granted.

Court and counsel confer relative to proposed jury instructions, and thereafter It Is Ordered that cause is continued to 10 a.m., Feb. 1, 1956, for further trial.

JOHN A. CHILDRESS,
Clerk;

By L. B. FIGG,
Deputy Clerk. [1588]

In the United States District Court, Southern District of California, Central Division

Case No. 13788—C

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, a Corporation, and RONALD WALKER, Trustee and Intervener,

Plaintiffs,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a Corporation, THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation, EXCHANGE LEMON PRODUCTS COMPANY, a Corporation, and TREESWEET PRODUCTS COMPANY, a Corporation,

Defendants.

SECOND AMENDED COMPLAINT FOR EQUITABLE RELIEF AND TREBLE DAMAGES UNDER THE FEDERAL AND CALIFORNIA ANTITRUST LAWS

The court having granted the motion of the plaintiff to amend its complaint to accord with the evidence, plaintiff Winckler & Smith Citrus Products Company, alleges, as follows:

General Allegations

I.

Jurisdiction. This amended complaint is filed and these proceedings are instituted under the following Acts of Congress and Statutes of the State of Cali-

fornia:

Section 1 of the Act of Congress of July 2, 1890, Section 2 of the Act of Congress of July 2, 1890, Section 3 of the Act of Congress of July 2, 1890, commonly known as the Sherman Antitrust Act, (15 USCA ss 1, 2), Section 4 of the Act of Congress of October 15, 1914, Section 16 of the Act of Congress of [1590] October 15, 1914, commonly known as the Clayton Antitrust Act (15 USCA ss 15, 26), Section 2 of the Act of Congress of October 15, 1914, as amended by Section 1 of the Act of Congress of June 19, 1936, commonly known as the Robinson-Patman Act (15 USCA ss 13, 13(a) 1; Section 16,700 to 16,758 of the California Business and Professions Code, commonly known as the Cartwright Antitrust Law and Sections 17,000 to 17,101, inclusive of the California Business and Professions Code, commonly known as the Unfair Trade Practices Act.

The unlawful acts and violations hereinafter described, including the unlawful monopoly, attempts to monopolize, combinations and conspiracies to restrain trade and commerce among the several states of the United States and the District of Columbia, and the discrimination in price, services and facilities, and the conspiracies and combinations to discriminate in price, service and facilites, and the unlawful acts done in pursuance thereof, have been and are conceived, carried out, made effective and performed, in part, within this District of the Court, and elsewhere in California and throughout the United States.

II.

(a) Plaintiff. Winckler & Smith Citrus Products Company, is and was during all the times mentioned in this complaint, a California corporation with its principal place of business in the City of Anaheim, California. Plaintiff filed a Petition under Chapter 10 of the Bankruptcy Act, known as No. 53860-c in the files of this court, on March 19, 1952, and, on or about March 26, 1952, plaintiff filed a petition for reorganization under said Act and Ronald Walker, intervener herein, was appointed trustee of the assets of plaintiff by the court, in said proceedings.

(b) Plaintiff's Business. Prior to the bankruptcy proceedings referred to in Par. II(a) herein, plaintiff was a juice canner of by-product citrus fruit, i. e., oranges, lemons and grapefruit, buying the said by-product fruit in Arizona and California, processing and canning the fruit into natural and frozen concentrate juice, in Anaheim, California, and causing the canned juices to be transported and marketed in intrastate and interstate commerce throughout the United States. In 1950 and 1951 plaintiff furthermore caused canned citrus fruit juice to be custom packed for it in the State of Florida and transported and marketed in interstate commerce throughout the United States. Single-strength Valencia orange juice was the principal source of income and profit of the plaintiff and constituted approximately 80% of the total citrus juice products processed and sold by the plaintiff during the years 1949 and 1950. The total sales of the plaintiff of all citrus juice products during said years exceeded $3,000,000. The single-strength Valencia orange juice processed by the plaintiff during said years was sold in interstate commerce in competition with single-strength Valencia juice processed and sold by the defendants, EOP and Sunkist, and coconspirators TreeSweet and Silzle.

III.

Defendants and coconspirators

(a) California Fruit Growers Exchange, (hereinafter referred to as Sunkist) is, and at all times herein mentioned was a California membership corporation with its principal place of business in the City of Los Angeles, California. The name of said defendant was changed to Sunkist Growers, Inc., on or about February 8, 1952. The members of Sunkist produce about 70% of all the oranges grown in the State of California. Sunkist is and at all times mentioned herein was in the business of marketing fresh citrus fruit throughout the United States. Through a subsidiary company, The Exchange Orange Products Company, one of the defendants herein, Sunkist is and at all times mentioned herein was in the business of canning fruit juices and marketing the said fruit juices in intrastate and interstate commerce throughout the United States.

(b) The Exchange Orange Products Company (hereinafter referred to as E.O.P.) is, and at all times herein mentioned was, a California corporation, with its principal place of business in the County of Los Angeles, California. It is and at all times herein mentioned was engaged in the business of processing and canning by-product fruit into natural and frozen concentrate citrus fruit juices. The fruit juices canned directly by E.O.P. are marketed for said defendant in intrastate and interstate commerce throughout the United States by defendant Sunkist.

(c) Exchange Lemon Products Company (referred to hereinafter as E.L.P.) is named a coconspirator herein, and is and at all times herein mentioned was a California corporation [1591] with its principal place of business in the City of Corona, California. Substantially all the lemons produced in the United States are produced in California. The members of E. L. P. produce about 90% of all lemons produced in California. E. L. P. is, and during the year 1951 was among other things engaged in the business of producing lemons and canning natural and frozen concentrate citrus fruit juices. In December, 1950, E. L. P. acquired all the capital stock of Dameral-Allison Company, a California corporation and a processor of citrus fruit juices, and merged the assets of said company with E. L. P., thereafter selling the orange juice and frozen concentrate so acquired in competition with the plaintiff during the year 1951. Substantially all the citrus fruit juices canned by E. L. P. are marketed for it throughout the United States by defendant Sunkist.

(d) TreeSweet Products Company (hereinafter referred to as TreeSweet) is, and at all times herein mentioned was, a California corporation with its principal place of business in the City of Santa Ana, California, and is named as a co-conspirator herein. It is and at all times mentioned was a juice canner of by-product fruit, buying the said by-product fruit in Arizona and California, and causing the canned juices to be transported in intrastate and interstate commerce into the various states of the United States, including states in which plaintiff marketed its canned juices. Said defendant operates and for some time has operated a plant in the State of Florida and does and has transported and marketed canned citrus fruit from that state in interstate commerce throughout the United States.

(e) E. A. Silzle Corporation (hereinafter referred to as Silzle) is a corporation organized under the laws of the State of California, with its principal place of business at Anaheim, California. Said corporation is engaged in the business of processing by-product citrus fruit into natural and frozen concentrate juice and marketing the same in the State of California and other states of the United States. It is named a co-conspirator but is not made a defendant herein.

IV.

Definitions:

"Citrus fruit" refers to oranges, lemons and grapefruit produced for commercial [1592] purposes.

"By-product fruit" refers to citrus fruit not marketed as fresh fruit and marketed to canners for processing into single-strength juice, hot pasteurized concentrate juice and frozen concentrate juice. It is citrus fruit which the growers or marketing agencies consider to be of a quality not satisfactory for or capable of being absorbed by the fresh citrus fruit market.

"Citrus fruit juice" refers to "natural" and "frozen concentrate" juice processed from "by-product fruit."

"Natural fruit juice" refers to "single-strength juice" and "hot pasteurized concentrate juice."

"Frozen concentrate juice" refers to concentrate citrus fruit juice processed under low temperature and quickly frozen.

"Independent packer" refers to a packer of citrus fruit unaffiliated with any cooperative or association such as Sunkist, marketing citrus fruit.

"Custom packing" refers to the practice whereby citrus fruit is delivered to the canner for processing, title remaining in the grower or packer.

V.

The Citrus Fruit Industry

(a) Substantially all of the citrus fruit marketed in the United States is produced in the states of California, Florida, Texas, and Arizona.

(b) Defendant Sunkist is the largest citrus fruit marketing organization in the United States, and through its subsidiary, E.O.P. is the largest single source of by-product oranges in the State of California. In 1951 Sunkist and E.O.P. controlled and accounted for approximately two-thirds of all the product Valencia oranges available in California for processing into single-strength orange juice and other citrus juice products. The product Valencia oranges which are not processed by defendant E.O.P. into citrus juice products or by independent processors for the account of E.O.P. are usually sold by Sunkist to independent processors. In 1951 Sunkist determined the selling price for its product oranges after consulting independent processors who were potential purchasers thereof, including TreeSweet and Silzle. The plaintiff was not included among the independent processors consulted by Sunkist before it established its 1951 selling price for such oranges. The Sunkist selling price for Valencia oranges in 1951 [1593] also established the selling price for such Valencia oranges as were offered for sale to independent processors by other suppliers. As marketing agent for defendant, E.L.P., Sunkist also is the largest marketing organization for lemons, other than by-product lemons, marketed as fresh fruit in interstate trade and commerce throughout the United States.

(c) Coconspirator E.L.P. is the primary and principal source of by-product lemons used by plaintiff and other independent juice canners in producing canned natural and frozen concentrate lemon juice.

(d) Plaintiff's existence as a juice canner depends and at all times herein mentioned was dependent upon the acquisition by it of large quantities of by-product fruit, particularly Valencia product oranges, for processing into canned natural or frozen concentrate juice at a price or on terms comparable to those at which Sunkist made Valencia oranges available to other independent processors for processing into citrus juice products, particularly single strength Valencia juice.

(e) During the year 1951 defendant Sunkist engaged in an extensive advertising program to promote the trade name "Sunkist" as applied to canned natural and frozen concentrate fruit juices marketed by it and for defendant E.L.P., in intrastate and interstate commerce.

(f) Substantially all the canned natural and frozen concentrate citrus fruit juices sold in the United States are canned in the states of California, Florida, Texas and Arizona. Plaintiff is informed and therefore alleges upon information and belief that in 1950, and 1951, approximately 50% and 80% in the respective years, of canned natural and frozen concentrate orange juice produced in California and Arizona and thereafter marketed throughout the United States, was processed by or on behalf of defendant Sunkist. A total of approximately 5,400,000 gallons of single-strength Valencia juice was processed in California in 1951. Of this amount defendants E.O.P., TreeSweet, and Silzle processed approximately 4,511,202 gallons, of which amount approximately 3,044,394 gallons were processed by TreeSweet and Silzle under the contracts and arrangement hereinafter described in paragraph III, subdivisions (d) and (e) on pages 11 and 12 of the Amended Complaint herein. Because of the monopoly [1594] control by Sunkist and E.O.P. over the quantity and price at which Valencia product oranges were made available to independent processors of single-strength juice other than TreeSweet and Silzle, and the aforesaid contracts, plaintiff was unable to and did not process any single-strength Valencia juice in 1951.

(g) Plaintiff is informed and therefore alleges upon information and belief that in the years 1950 and 1951 more than 50% of the canned natural and frozen concentrate lemon juice produced in California and Arizona and marketed throughout the United States was processed by or on behalf of defendants Sunkist and E.L.P.

(h) Defendant E.O.P.'s sole source of supply of by-product fruit in 1951 was defendants Sunkist and E.L.P.

(i) Substantially all the by-product oranges processed by defendant E.L.P. into natural and frozen orange concentrate juice are secured from defendant E.O.P.

(j) Plaintiff is informed and therefore alleges upon information and belief that TreeSweet's principal, if not exclusive source of supply of by-product fruit in 1951 was defendants E.O.P. and E.L.P.

VI.

Interstate Commerce

(a) The business of producing and marketing citrus fruit and the activities of each branch of the industry are either in or directly affect trade and commerce among the several states. In the course of producing and marketing citrus fruit there is a constant, continuous stream of trade and commerce between the states and throughout the United States, consisting of the solicitation and making of contracts; written and wired communications, the assemblage of personnel, property, and materiel in California, Arizona, and Texas, the transportation of fresh fruit from Arizon and Texas to California, the shipping of fresh fruit from California to all the states of the United States, the processing and canning of by-product fruit in California, Arizona, Florida, and Texas, and the shipping of the natural and frozen concentrate fruit juices produced therefrom, throughout the United States.

(b) Plaintiff, as part of the citrus industry during the year 1951, was [1595] engaged at its Anaheim, California, plant in the business of processing by-product fruit into natural and frozen concentrate juice and thereafter selling the same in intra and interstate commerce in competition with natural and concentrate juices processed and sold by defendants and co-conspirators TreeSweet and Silzle. Among other things and in the course of purchasing by-product fruit from defendants E.O.P., E.L.P. and others, plaintiff caused fresh fruit produced in Arizona to be shipped to it by interstate carriers, from Arizona to California. In 1951, plaintiff also purchased some natural juice in the states of Florida and California from processors located in said states, for resale purposes to customers of plaintiff located in the various states of the United States.

(c) Defendant Sunkist was and is engaged in trade and commerce among the several states. There is a constant, continuous stream of trade and commerce in said defendant's business throughout the United States, consisting of the solicitation and the making of contracts, written and wired communications, the assemblage of personnel, property and material in at least fifty cities of the United States, the transportation of fresh fruit from Arizona to the plants of the said defendant and its subsidiary, E.O.P., and co-conspirator E.L.P. At said defendant's instance fresh fruit and canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States.

(d) Co-conspirator E.L.P. is and during the year 1951, was engaged in interstate trade and commerce throughout the United States in transporting canned fruit juices from California to other states of the United States.

(e) Co-conspirator TreeSweet is and was during the year 1951, engaged in interstate trade and commerce throughout the United States in transporting and selling canned fruit juices from California to and in other states of the United States.

(f) Plaintiff, defendants Sunkist, E.O.P. and co-conspirators E.L.P., TreeSweet and Silzle processed or caused to be processed substantially all the canned natural and frozen concentrate orange and lemon juice produced in the State of California during the year 1951. A substantial part of said canned fruit juice was transported in interstate commerce. [1596]

VII.

Damages

Prior to 1951, plaintiff enjoyed an extensive and profitable business and had expended in excess of $500,000.00 in promoting and developing good will, reputation and distribution for its products. By reason of the wrongful acts and conduct of the defendants, as herein alleged, plaintiff was eliminated as a competitive factor in the business of processing and selling citrus fruit juices in intrastate and interstate markets, and has been injured in its business and property, good will, promotions, advertising and loss of earnings in the sum of at least $800,000.00 and will suffer damages in the future in an amount at this time unknown to plaintiff.

VIII.

Threatened Loss and Damage

By reason of the wrongful acts and conduct of the defendants as herein alleged:

(a) The business of the plaintiff as an independent juice canner has been seriously impaired, injured and damaged and plaintiff has suffered great damage and loss of profits and good will, and the reputation and prestige of its business as a first-class juice canner has been seriously and irreparably impaired and injured, and to the unfair, wrongful and competitive advantage of defendants and others:

(b) Plaintiff was compelled to pay unreasonable and discriminatory prices for by-product fruit to the damage and loss of plaintiff and to the unfair, wrongful and competitive advantage of the defendants and others:

(c) Plaintiff has irreparably lost patronage for its products and otherwise continues to be threatened with loss and damage:

(d) Plaintiff is without any plain, speedy or adequate remedy at law, and unless the defendants and each of them are temporarily and permanently restrained and enjoined, pursuant to pertinent statutes and laws, from continuing their unlawful practices and activities as herein alleged, defendants will continue their wrongful acts and conduct and plaintiff will continue to suffer irreparable loss and damage. [1597]

First Cause of Action

I.

Plaintiff realleges with the same force and effect as if herein set forth in full each and every paragraph of the foregoing allegations.

II.

Section I of the Sherman Act

All of the defendants, each well knowing and acquiescing in the actions of the others, and each corporation within itself by and through its officers and employees, have, for many years last past, in the course of interstate trade and commerce, combined and conspired with each other and have entered into contracts which have had the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juice produced and processed in the State of California and marketed throughout the United States with resultant injury and damage to the plaintiff.

III.

Specifications

For some time past, and particularly since in or about the year 1951, the exact date being unknown to plaintiff, the defendants, co-conspirators Tree-Sweet and Silzle combined and conspired and entered into contracts which have had the effect of tending to eliminate plaintiff and of eliminating plaintiff as a competitor in the canned natural and frozen concentrate juice market of the United States and particularly from the single strength orange juice market therein, so as to disable and prevent plaintiff from competing with the defendants in such market.

The defendants and co-conspirators TreeSweet and Silzle have done the things they conspired and combined to do and among other things have entered into contracts, written and oral, which have had the force and effect of eliminating the competition of the plaintiff in such market. Specifically, among other things, said defendants did the following acts:

(a) E.L.P. by oral agreement with defendants Sunkist and E.O.P., agreed to process and did in fact process during the year 1951, oranges made available to E.O.P. by Sunkist for processing into canned, natural and frozen citrus fruit juice, at cost and without profit to E.L.P. During [1598] the canning season, 1950-1951, E.L.P. processed 28,812 tons of oranges for E.O.P. under said oral agreement.

(b) Defendant E.O.P., by oral agreement, agreed to process and did process in 1951, lemons made available to E.O.P. by E.L.P. for processing into canned, natural and frozen citrus fruit juice at cost and without profit to E.O.P., or defendant Sunkist. E.O.P. processed 1,740 tons of lemons for E.L.P. during the 1950-1951 season under said oral agreement.

(c) Defendants Sunkist and E.O.P. agreed to establish and maintain the price of by-product oranges available to independent processors of natural and frozen concentrate juice, such as plaintiff, at a price which would make it impossible for independent processors such as plaintiff, to purchase or acquire by-product oranges from defendant E.O.P. or any other source, at a price, or under any other arrangement that would enable plaintiff and other independent processors to produce and sell canned natural and frozen concentrate juice at a price that would be competitive to the prices charged by defendants and favored processors TreeSweet and Silzle.

(d) Defendant E.O.P. agreed with TreeSweet to make Valencia product oranges available to TreeSweet, a competitor of Sunkist and plaintiff in the interstate market for single-strength Valencia orange juice, under an arrangement or contract pursuant to which TreeSweet would not be required to purchase product Valencia oranges from Sunkist or any other source, for processing into single-strength Valencia orange juice. Pursuant to said agreement defendant E.O.P. and co-conspirator TreeSweet entered into a written custom packing agreement with an effective date of July 23, 1951, which provided among other things for the processing of by-product oranges into natural orange juice for the account of E.O.P. at cost and without profit to TreeSweet. Said contract, among other things, also provided for the purchase by TreeSweet from Sunkist of the "canned juice requirements" of TreeSweet, at the Sunkist published selling price for "Sunkist" single-strength Valencia orange juice, less certain discounts and allowances not available to other purchasers, including the plaintiff herein. The contract had the purpose and effect of enabling TreeSweet to process by-product oranges into natural orange juice [1599] without purchasing by-product oranges from E.O.P. or any other supplier, and to secure its requirements of natural orange juice at a cost to it which prevented plaintiff from competing with Sunkist or TreeSweet in the natural orange juice market. Defendant E.O.P. furnished by-product oranges to TreeSweet during the 1951 orange juice canning season, under said contract, which oranges TreeSweet processed at cost for defendant E.O.P., defendant Sunkist selling and TreeSweet acquiring its requirements of natural orange juice from E.O.P., thereunder, during the latter part of 1951 and the early part of 1952. Substantially all the single natural orange juice processed by TreeSweet and sold by it during the 1951 orange juice canning season was processed under said contract and was sold in competition to that processed and sold by plaintiff to the canned juice market, and at the "Sunkist" published selling price for single-strength Valencia orange juice.

(e) Defendant E.O.P. and co-conspirator Silzle entered into a written contract executed September 10, 1951, but effective as of June 26, 1951, wherein, among other things, defendant E.O.P. agreed to make by-product oranges available to Silzle for processing into canned orange juice under the Silzle label at a cost of $22.50 a ton or substantially below the price at which defendant E.O.P. was then selling or willing to sell by-product oranges of the same quality for processing purposes to plaintiff and other independent processors. Defendant E.O.P. furnished by-product oranges to Silzle and Silzle acquired by-product oranges from defendant E.O.P. during the 1951 canning season under said contract and produced 85,080 cases of canned natural orange juice thereunder, which juice was processed, acquired and sold by Silzle in competition with juice processed and sold by plaintiff in the canned natural orange juice market. Said contract had the purpose and effect of enabling Silzle to acquire by-product oranges at a price substantially below the price then charged other independent processors, such as plaintiff by E.O.P. for by-product oranges and enabled Silzle to acquire its requirements of natural orange juice at a cost to it which prevented plaintiff from competing with co-conspirators TreeSweet and Silzle and defendants Sunkist, E.O.P., in the natural orange juice market.

(f) Defendant E.O.P. refused to enter into a custom packing agreement [1600] with plaintiff for processing oranges during the 1951 canning season comparable to the contracts entered into with co-conspirators TreeSweet and Silzle.

As a direct and approximate result of each of the above acts of the defendants, and the monopoly control of defendants Sunkist and E.O.P. in 1951 over the amount and price of product Valencia oranges available for processing into single-strength Valencia orange juice by independent processors, all price competition between Sunkist, TreeSweet and Silzle in the single-strength Valencia juice processed by them and sold in interstate commerce was eliminated; Sunkist determined, dominated and controlled the price at which such juice was offered for sale in interstate commerce by TreeSweet and Silzle in 1951; plaintiff was unable to process, can and sell any single-strength Valencia juice in interstate commerce in competition with that sold by Sunkist, TreeSweet and Silzle; plaintiff in an effort to keep its customers for single-strength Valencia juice purchased from Sunkist for sale and delivery to one of its said customers approximately 1,400 cases of single-strength Valencia orange juice at a price substantially in excess of that at which TreeSweet was then purchasing single-strength juice from Sunkist under the contractual agreement hereinbefore referred to in specification III (d) herein; plaintiff lost the profits on its anticipated single-strength Valencia juice business in 1951 and was forced to file proceedings under Chapter 10 of the Bankruptcy Act on March 19, 1952; was eliminated as a natural and future competitor of defendant Sunkist in the frozen concentrate juice market; and has been damaged in the manner and to the extent alleged in paragraphs VII and VIII herein.

Second Cause of Action

9

I.

Plaintiff realleges with the same force and effect as if herein set forth in full each and every paragraph of the foregoing allegations.

II.

Section 2 of the Sherman Act

Defendants Sunkist, E.O.P. and co-conspirator E.L.P., have a monopoly control over the production and distribution of fresh citrus fruit [1601] available in California and Arizona for processing into canned natural and frozen concentrate citrus fruit juice in the State of California. By entering into the oral and written agreements and in doing the acts described in Paragraph III (a) to (f) inclusive herein, defendants Sunkist, E.O.P. and co-conspirators E.L.P., TreeSweet and Silzle have conspired to and in fact have monopolized that part of the interstate trade and commerce in natural and frozen concentrate fruit juices which is represented by the production of natural and frozen concentrate fruit juices processed in California and thereafter transported and sold in intra and interstate commerce, particularly single-strength Valencia orange juice, with the resultant damages and injury to the plaintiff as alleged in Paragraphs VII and VIII herein.

Pursuant to a conspiracy to monopolize the aforesaid part of the trade and commerce of the United States in canned natural and frozen concentrate citrus fruit juice, and in abuse of their monopoly power and control over the product Valencia oranges available for processing into citrus juice products, defendants Sunkist and E.O.P. entered into written agreements with independent processors, Hyland Stanford and Mission Dry, pursuant to which said companies secured their requirements of Valencia oranges under arrangements which gave defendant E.O.P. "first call" on the processing facilities of said companies to the exclusion of other marketing co-operative organizations such as Independent Fruit Growers Association, and entered into the oral agreements and contracts and did the acts referred to in Paragraph III (a) to (f) inclusive herein and delivered and sold by-product oranges, in the course of such commerce, to the parties to said contracts, which were thereafter processed into natural orange juice which was purchased by TreeSweet and Silzle from E.O.P., for resale purposes at prices which prevented plaintiff from processing and selling natural orange juice at prices competitive to those at which defendants Sunkist and co-conspirators TreeSweet and Silzle sold natural orange juice in the intrastate and interstate market for such juice, with the resultant injury and damage to the plaintiff as alleged in Paragraphs VII and VIII, herein. [1602]

Wherefore, plaintiff prays as follows:

1. That the Court issue its preliminary, permanent and perpetual injunction restraining the defendants and each of them from any and all unlawful practices, conduct and activities as alleged in this Complaint.

2. That the Court issue its preliminary, permanent and perpetual mandatory injunction directing and requiring the defendants, Sunkist and E.O.P.,

and each of them, to offer and sell by-product fruit to the plaintiff on fair and equitable terms in fair and open competition with any and all competitors, including the defendants, The Exchange Orange Products Company, Exchange Lemon Products Company and co-conspirators TreeSweet and Silzle, and to offer custom packing agreements to plaintiff when defendants E.O.P. and Sunkist offer comparable agreements to co-conspirators TreeSweet and Silzle.

3. That each of the contracts, combinations and conspiracies in restraint of trade and commerce, together with the attempts to monopolize and the monopolization of the same hereinabove described, be declared illegal and violative of the anti-trust laws of the United States and the State of California.

4. That plaintiff have judgment in the sum of $2,400,000.00, the same being threefold damages under the Federal Laws which it sustained for the violations alleged in the First and Second Causes of Action.

5. That plaintiff have judgment, in addition, for its costs including reasonable attorney's fees.

6. For all other proper relief.

Dated: February 2, 1956.

/s/ WILLIAM C. DIXON,
Attorney for Plaintiff and
Intervening Trustee;

/s/ HARRY M. IRWIN,
Attorney for Trustee;

/s/ BERNARD REICH,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 2, 1956. [1603]

[Title of District Court and Cause.]

No. 13788—C

ANSWER OF DEFENDANTS SUNKIST GROWERS, INC., A CORPORATION, SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE, AND THE EXCHANGE ORANGE PRODUCTS COMPANY, A CORPORATION, TO PLAINTIFF'S AND TRUSTEE AND INTERVENER'S SECOND AMENDED COMPLAINT

Come now defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange, and defendant The Exchange Orange Products Company, a corporation, and for answer to plaintiff's and trustee and intervener's Second Amended Complaint filed herein on February 2, 1956, admit, deny and allege as follows:

(For the convenience of the Court, the subheadings used in this answer correspond to those used in the Second Amended Complaint.) [1610]

ANSWER TO GENERAL ALLEGATIONS OF SECOND AMENDED COMPLAINT

I.

Jurisdiction. Admit that plaintiff's Second Amended Complaint purports to be filed and the proceedings purport to be instituted under the acts of Congress and Statutes of the State of California set forth in paragraph I of plaintiff's General Allegations. Deny that any of the Statutes or Acts mentioned on page 2, lines 2 to 7, inclusive of plaintiff's Second Amended Complaint, being the Robinson-Patman Act, the California Cartwright Act or the California Unfair Trade Practices Act, have any application to plaintiff's alleged action, plaintiff having heretofore dismissed the Third, Fourth and Fifth causes of action of its former complaints filed herein.

Deny the allegations of the last subparagraph of paragraph I of plaintiff's General Allegations, and particularly deny that defendants here answering or either of them at any time alleged in plaintiff's Second Amended Complaint, or at all, committed any unlawful act or violation as described in plaintiff's Second Amended Complaint or otherwise, and in that connection particularly deny that either of said defendants committed any unlawful act or violation which included the unlawful monopoly or attempt to monopolize or combination or conspiracy to restrain trade and commerce among the several or any state of the United States, or the District of Columbia, or the discrimination in price or service or facilities, or any conspiracy, or combination to discriminate in price, service or facilities, or that any unlawful act or violation of the character described in plaintiff's Second Amended Complaint, or otherwise, has been conceived or carried out or made effective or performed, in whole or in part, within this District of the Court or elsewhere in California, or throughout the United States or at all.

II.

(a) Plaintiff. Admit the allegations of subparagraph (a) of [1611] paragraph II of plaintiff's General Allegations.

(b) Plaintiff's Business. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph (b) of paragraph II of plaintiff's General Allegations, except that defendants admit that prior to the bankruptcy proceedings referred to in subparagraph (b) of paragraph II of plaintiff's General Allegations, plaintiff was a juice canner of citrus fruit, processing and canning the fruit into natural and frozen concentrate juice in Anaheim, California, and that plaintiff bought citrus fruit in California, the exact nature or amount being unknown to defendants here answering, and except that defendants admit that in the years 1950 and 1951 plaintiff caused citrus fruit juice to be custom packed for it in the State of Florida. Defendants here answering admit that a product alleged by plaintiff to be single-strength

Valencia juice was the principal source of income of the plaintiff during the years 1949 and 1950; deny that said product was a source of profit to plaintiff during either of said years; admit that said product constituted approximately 80% of the total citrus juice products processed and sold by plaintiff during said years. Admit that the total sales of the plaintiff of all citrus juice products exceeded $3,000,000 in the said two years where taken as a whole. Admit that portion of the alleged single-strength Valencia orange juice processed by plaintiff during the years 1949 and 1950 was sold in interstate commerce. Defendants are without knowledge as to whether said alleged single-strength orange juice was sold in competition with single-strength Valencia juice processed and sold by these answering defendants or either of them or by the alleged coconspirators Tree-Sweet and Silzle or either of them.

III.

(a) Defendants. For answer to subparagraph (a) of paragraph III of plaintiff's General Allegations, admit that defendant Sunkist [1612] Growers, Inc., sued herein as California Fruit Growers Exchange (in said paragraph and sometimes herein referred to as Sunkist), is and at all times mentioned in plaintiff's Second Amended Complaint was a California membership corporation, with its principal place of business in the City of Los Angeles, California, and admit that its name was changed to Sunkist Growers, Inc., on or about February 8, 1952, and admit that its member-growers produce about

70% of the oranges grown in the State of California, and allege in that regard that at all of said times said defendant was and is a corporation duly existing under and by virtue of the laws of the State of California, to wit, a nonprofit agricultural co-operative marketing association, and that it is and was organized and instituted for the purposes of mutual help and benefit of its members as producers of agricultural products, and not conducted for profit, and none of its members was or is allowed more than one vote therein, and it did not and does not pay any dividends on membership capital, and did not and does not deal in the products of nonmembers to an amount greater in value than such as are handled by it for its members. Admit that it is now and at all times mentioned in plaintiff's Second Amended Complaint was in the business of marketing fresh citrus fruit of its members throughout the United States and elsewhere. Admit that a subsidiary company of Sunkist, The Exchange Orange Products Company, one of the defendants here answering, is and at all times mentioned in plaintiff's Second Amended Complaint was in the business of canning orange and grapefruit juices, but allege that such juices so canned by defendant The Exchange Orange Products Company were and are marketed by it through Sunkist. Admit that said juices so canned were and are marketed in intrastate and interstate commerce throughout the United States.

(b) For answer to subparagraph (b) of paragraph III of plaintiff's General Allegations, admit that defendant The Exchange Orange Products Company (being referred to in plaintiff's [1615] Second Amended Complaint and sometimes herein as EOP) is and at all times mentioned in plaintiff's Second Amended Complaint was a California corporation with its principal place of business in the County of Los Angeles, State of California. Admit that said defendant is and at all times mentioned in plaintiff's Second Amended Complaint was engaged in the business of processing and canning oranges and grapefruit into, among other products, natural and frozen concentrate fruit juices. Admit that the said fruit juices canned by defendant EOP are marketed by it through Sunkist, and allege in that regard that EOP is and was organized and instituted for the purposes of the mutual help and benefit of the members of Sunkist as producers of agricultural products and not for profit, and it did not and does not pay dividends on stock, and it did not and does not deal in products of nonmembers of Sunkist in amounts greater in value than such as are handled by it for the members of Sunkist. Admit that the said fruit juices canned by EOP and marketed by it through Sunkist are marketed in interstate and intrastate commerce throughout the United States. Deny each, every and all of the allegations of said subparagraph (b) of paragraph III of plaintiff's General Allegations except those specifically herein admitted.

(c) For answer to subparagraph (c) of paragraph III of plaintiff's General Allegations, defendants here answering admit that Exchange Lemon Products Company (being referred to in plaintiff's Second Amended Complaint and sometimes herein as ELP) is and at all times mentioned in plaintiff's Second Amended Complaint was a California corporation with its principal place of business in the City of Corona, California. Admit that ELP is and during the year 1951 was among other things engaged in the business of producing natural and frozen concentrate lemon juice. Deny that it is, and was during said times engaged in the business of producing lemons, and deny that it is and was during said time engaged in the business [1614] of canning natural or frozen orange juice or grapefruit juice. Admit that on or about December, 1950, ELP acquired all of the capital stock of Damerel-Allison Company, a California corporation, which was at the time a processor of citrus fruit juices, and that it merged the assets of said company with ELP. Admit that substantially all of the lemon juices canned by ELP are marketed by it throughout the United States through defendant Sunkist. Allege that ELP at all times mentioned in plaintiff's Second Amended Complaint has been and now is a corporation organized under the laws of the State of California and operated in compliance with the requirements of Section 1190 et seq. of the California Agricultural Code. Allege that it was organized by growers of lemons, for collectively processing, preparing for market, handling and marketing in interstate and foreign commerce lemons and lemon products, and that it is and at all times mentioned in plaintiff's

Second Amended Complaint was operated for the mutual benefit of its members as producers of lemons and that it does not pay dividends and does not deal in the products of nonmembers in amounts greater in value than such as are handled by it for its members. Deny for lack of information or belief each, every and all of the allegations of said subparagraph (c) of paragraph III of plaintiff's General Allegations except those specifically herein admitted. Allege that on or about December 13, 1955, ELP was dismissed as a party defendant in this action.

(d) For answer to subparagraph (d) of paragraph III of plaintiff's General Allegations, admit that TreeSweet Products Co. (being referred to in plaintiff's Second Amended Complaint as TreeSweet Products Company, and being referred to in plaintiff's Second Amended Complaint and in this answer as TreeSweet) is and at all times mentioned in plaintiff's Second Amended Complaint was a California corporation with its principal place of business in the City of Santa Ana, California; that it is and was among other things a [1615] juice canner of citrus fruit; admit that at times during the times mentioned in plaintiff's Second Amended Complaint it bought in California a portion of said citrus fruit canned by it. Admit that it did and does cause a portion of the canned juices to be transported in intrastate and interstate commerce. Admit that said defendant operates and for some time has operated a plant in the State of Florida, and does and has transported and marketed some canned citrus juices from that State in interstate commerce. Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations of subparagraph (d) other than the allegations specifically admitted above. Allege that prior to the service and filing of plaintiff's Second Amended Complaint TreeSweet was dismissed as a party defendant in this action.

(e) For answer to subparagraph (e) of paragraph III of plaintiff's General Allegations, admit that E. A. Silzle Corporation (being referred to in plaintiff's Second Amended Complaint and in this answer as Silzle) is a corporation organized under the laws of the State of California, with its principal place of business at Anaheim, California. Admit that said corporation is engaged in the business of processing citrus fruit into juice and marketing the same. Deny that Silzle is or was at any time mentioned in plaintiff's Second Amended Complaint or at any other time or times, a coconspirator of these answering defendants or either of them, or of any defendant herein, and deny that these answering defendants or either of them, or any other defendant herein, at any time or times mentioned in plaintiff's Second Amended Complaint or at all, ever conspired to or with Silzle in any manner, shape or fashion whatsoever.

Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations of said paragraph (e) other than the allegations [1616] specifically mentioned herein.

IV.

Definitions. Defendants here answering assume that the definitions used in paragraph IV of plaintiff's General Allegations are to be restricted to the purposes of plaintiff's Second Amended Complaint. So restricted, defendants here answering do not question said definitions as so adopted and used by plaintiff. Defendants do allege, however, that said definitions do not correspond in all respects with the accepted use of said terms in the citrus industry. Defendants here answering in this answer will assume that plaintiff in using the terms defined in said paragraph IV intend to restrict the connotation of said defined words to the exact definitions set forth in said paragraph.

V.

The Citrus Fruit Industry

(a) For answer to subparagraph (a) of paragraph V of plaintiff's General Allegations, defendants here answering admit that substantially all of the citrus fruit marketed in the United States is produced in the States of California, Florida, Texas and Arizona.

(b) For answer to subparagraph (b) of paragraph V of plaintiff's General Allegations, the defendants here answering deny each, every and all of the allegations of said subparagraph, except that defendants here answering admit that defendant Sunkist is the largest single citrus fruit marketing organization in the United States, and allege in that regard that Sunkist markets less than one-sixth of the oranges marketed in the United States for utilization in processing (including in the term "processing" the processing of canned single-strength orange juice), and allege that EOP processes less than 2% of the canned single-strength orange juice produced in the United States, and allege that there is substantial competition from other marketing organizations; and further allege in that regard that approximately 90% of the canned single-strength [1617] orange juice which is processed in the United States is processed in the State of Florida. Deny that in 1951 Sunkist and EOP controlled and accounted for approximately two-thirds of all the product Valencia oranges available in California for processing into single-strength orange juice and other citrus products and allege in that regard that the grower members of Sunkist controlled and accounted therefor. Deny that the product Valencia oranges which are not processed by EOP into citrus juice products or by independent processors for the account of EOP are usually sold by Sunkist to independent processors and allege in that regard that EOP processes or has processed for its account by independent processors only such product Valencia oranges as are not sold by Sunkist. Admit that in 1951 Sunkist determined the selling price for its product oranges after consulting independent processors, among others, who were customers of Sunkist, including TreeSweet and Silzle. Admit that plaintiff was not included among the independent processors consulted by Sunkist before it established its 1951 selling price for such oranges and allege in that regard that plaintiff was not a customer or potential customer of Sunkist at the time. Deny that the Sunkist selling price for Valencia oranges in 1951 established the selling price for such Valencia oranges as were offered for sale to independent processors by other suppliers.

(c) For answer to subparagraph (c) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said subparagraph (c).

(d) For answer to subparagraph (d) of paragraph V of plaintiff's General Allegations, defendants here answering deny each, every and all of the allegations contained in said subparagraph (d).

(e) For answer to subparagraph (e) of paragraph V of plaintiff's General Allegations, defendants here answering deny [1618] said allegations, and in that connection allege that in 1951 defendants ELP and EOP advertised the products packed by each of them under the trade-mark Sunkist.

(f) For answer to subparagraph (f) of paragraph V of plaintiff's General Allegations, deny the allegations contained in the first sentence of said subparagraph (f). Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence of said subparagraph (f). Deny the balance of the allegations of said subparagraph (f) except that defendants admit that a total of approximately 5,400,000 gallons of single-strength Valencia juice was processed in California in 1951.

(g) For answer to subparagraph (g) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said subparagraph.

(h) For answer to subparagraph (h) of paragraph V of plaintiff's General Allegations, defendants here answering deny each, every and all of said allegations.

(i) For answer to subparagraph (i) of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said subparagraph (i).

(j) For answer to subparagraph (j) of paragraph V of plaintiff's General Allegations, defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said subparagraph (j). [1619]

VI.

Interstate Commerce

(a) For answer to subparagraph (a) of paragraph VI of plaintiff's General Allegations regarding the citrus industry, defendants here answering admit that the citrus fruit industry as a whole includes the matters set forth in said subparagraph, and allege in that regard that the State of Florida is a very important factor in the citrus fruit industry, particularly in the canned single-strength orange juice field, canning approximately 90% of all single-strength orange juice canned in the United States, and in the frozen orange concentrate field, canning approximately 75% of all frozen orange concentrate canned in the United States.

(b) For answer to subparagraph (b) of paragraph VI of plaintiff's General Allegations, defendants here answering are without knowledge as to the allegations contained in said subparagraph, except that defendants here answering admit that plaintiff's plant was located in the City of Anaheim, California.

(c) For answer to subparagraph (c) of paragraph VI of plaintiff's General Allegations, defendants here answering admit said allegations except the allegations regarding the transportation of fresh fruit from Arizona to the plants of defendant Sunkist and its subsidiary EOP and to ELP, and the allegation that at defendant Sunkist's instance fresh fruit and canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States, and allege in that regard that the only transportation of fresh fruit (i.e., fruit intended for fresh fruit channels) from Arizona to the plants of Sunkist and its subsidiary EOP and to ELP is a small amount of fruit to defendant Sunkist's citrus distributing plants, and allege that at defendants' instance fresh fruit (i.e., fruit intended for fresh fruit channels) is transported by interstate carriers from California and Arizona between the said [1620] states and throughout the United States, and deny that at said defendants' instance canned fruit juices are transported by interstate carriers from California and Arizona between the said states and throughout the United States.

(d) For answer to subparagraph (d) of paragraph VI of plaintiff's General Allegations, defendants here answering deny said allegations, except that they admit that during the year 1951 said ELP transported some canned lemon juice by interstate carriers from California to certain other states of the United States.

(e) Defendants here answering are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said subparagraph (e).

(f) For answer to subparagraph (f) of paragraph VI of plaintiff's General Allegations, defendants here answering deny the allegations contained in the first sentence of said subparagraph (f), and defendants here answering are without knowledge of the allegations contained in the second sentence of said subparagraph (f), except that defendants here and grapefruit juices processed by EOP during the answering admit that a part of the canned orange year 1951 and marketed by it through Sunkist was transported in interstate commerce.

VII.

Damages

Deny each, every and all of the allegations of paragraph VII of plaintiff's General Allegations.

VIII.

Threatened Loss and Damage

Deny each, every and all of the allegations of paragraph VIII of plaintiff's General [1621] Allegations.

Answer to Plaintiff's First Cause of Action

IX.

For answer to paragraph I of plaintiff's First Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answer to plaintiff's General Allegations set forth above.

X.

Section 1 of the Sherman Act

Deny the allegations of paragraph II of plaintiff's First Cause of Action.

XI.

Specifications

For answer to paragraph III of plaintiff's First Cause of Action, defendants here answering deny each, every and all of the allegations contained and set forth in said paragraph, except that defendants here answering admit that effective as of July 23, 1951, it entered into an agreement with TreeSweet on the terms and conditions set forth in said agreement, a full, true and correct copy of said agreement being attached to these answering defendants' answer to Plaintiff's Interrogatory No. 14 of

Plaintiff's Interrogatories dated March 14, 1952, heretofore filed herein, and said contract is by this reference made a part hereof, and that effective as of June 26, 1951, defendant EOP entered into a written agreement with Silzle on the terms and conditions set forth in said agreement, a full, true and correct copy of said agreement being attached to these answering defendants' answer to Plaintiff's Interrogatory No. 14 of Plaintiff's Interrogatories dated March 14, 1952, heretofore filed herein, and said contract is by this reference made a part hereof, and admit that fruit was supplied to each of said processors under said respective agreements, and except that by oral agreement with defendant EOP, ELP processed for EOP in 1951 at cost and without profit to ELP approximately 28,800 tons of [1622] Valencia oranges (some of said oranges were processed into canned single-strength juice and some were processed into canned frozen concentrate), and except that by oral agreement between ELP and EOP, EOP in 1951 custom packed for ELP, at cost and without profit to EOP, about 1,740 tons of lemons (some of said lemons were processed into canned single-strength lemon juice and some were processed into frozen concentrate lemon juice).

Answer to Plaintiff's Second Cause of Action

XII.

For answer to paragraph I of plaintiff's Second Cause of Action, defendants here answering incorporate herein with the same force and effect as if herein set forth in full, each and every paragraph of defendants' answers to plaintiff's General Allegations set forth above, and paragraphs X and XI of defendants' answer to plaintiff's First Cause of Action.

XIII.

Section 2 of the Sherman Act

Deny the allegations of paragraph II of plaintiff's Second Cause of Action.

First Affirmative Defense

For a Separate, Distinct and Affirmative Defense to Plaintiff's Second Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Second Amended Complaint, defendants here answering allege plaintiff's second amended complaint and the General Allegations and the First and Second Causes of Action therein fail and each of them fails to state a claim upon which relief can be granted against the defendants here answering or either of them.

Second Affirmative Defense

For a Second Separate, Distinct and Affirmative Defense to [1623] Plaintiff's Second Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Second Amended Complaint, defendants here answering allege that each, every and all of said alleged causes of action are barred by the applicable statute of limitations, namely, by the provisions of Section 338(1) of the Code of Civil Procedure of the State of California.

Third Affirmative Defense

For a Third Separate, Distinct and Affirmative Defenset to Plaintiff's Second Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Second Amended Complaint, defendants here answering allege that each, every and all of said alleged causes of action are barred by the laches of plaintiff and trustee and intervener in this, that any reliance placed by plaintiff and trustee and intervener upon any acts, contracts or matters alleged in plaintiff's Second Amended Complaint involving the E. A. Silzle Corporation are barred by laches and plaintiff and trustee and intervener are estopped and debarred from raising any of such acts, contracts and matters for the reason that the contract with Silzle, referred to in plaintiff's Second Amended Complaint was disclosed in the answer of defendants here answering to Interrogatory No. 14 of the interrogatories of plaintiff dated March 14, 1952, which answer was filed herein May 26, 1952. Despite this plaintiff did not amend its complaint to include the Silzle contract until on or about December 15, 1954, when plaintiff served and filed its amended complaint, and such long delay has been prejudicial to these answering defendants and plaintiff and trustee and intervener are now estopped and debarred from relying upon any acts, contracts or other matters alleged in plaintiffs' Second Amended Complaint involving alleged coconspirator Silzle. [1624]

Fourth Affirmative Defense

For a Fourth Separate, Distinct and Affirmative Defense to Plaintiff's Second Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Second Amended Complaint, defendants here answering allege that each, every and all of the said alleged causes of action are barred by the laches of plaintiff and trustee and intervener in this, that any reliance placed by plaintiff and trustee and intervener upon any acts, contracts or matters alleged in plaintiff's Second Amended Complaint involving either Hyland-Stanford or Mission Dry are barred by laches and plaintiff and trustee and intervener are estopped and debarred from raising any of such acts, contracts and matters for the reason that the contracts with Hyland-Stanford and Mission Dry referred to in plaintiff's Second Amended Complaint were disclosed to plaintiff on or about November 9, 1955. Despite this plaintiff did not amend its complaint to refer to the contract with Hyland-Stanford until January 31, 1956, during the course of trial, and did not amend its complaint to refer to the contract with Mission Dry until February 4, 1956, after the evidence was all in at the trial and defendants had rested and such long delay has been prejudicial to these answering defendants and plaintiff and trustee and intervener are now estopped and debarred from relying upon any acts, contracts or matters alleged in plaintiff's Second Amended Complaint involving Hyland-Stanford and Mission Dry.

Fifth Affirmative Defense

For a Fifth, Separate, Distinct and Affirmative Defense to Plaintiff's Second Amended Complaint and to the General Allegations and to Each and Every Cause of Action in Said Second Amended Complaint, defendants here answering allege that each, every and all of the said alleged causes of action are barred by the laches of [1625] plaintiff and trustee and intervener in this, that without admitting the truth of the allegations or matters contained in the last paragraph of subparagraph (f) of paragraph III of plaintiff's First Cause of Action any reliance placed by plaintiff and trustee and intervener upon any such allegations or matters is barred by laches and plaintiff and trustee and intervener are estopped and debarred from raising any of such allegations or matters. Plaintiff and trustee and intervener through discovery proceedings in this case and otherwise had knowledge long prior to the trial of this action of the alleged matters upon which they based such allegations and matters despite which plaintiff did not amend its complaint to set forth such allegations and matters until January 31, 1956, during the course of trial and near the end thereof to defendants' great surprise and prejudice, and such long delay has been prejudicial to these answering defendants and plaintiff and trustee and intervener are now estopped and debarred from relying upon any such allegations or matters.

Wherefore, defendants here answering pray that plaintiff take nothing by plaintiff's action; that defendants here answering have judgment for their costs incurred herein against Plaintiff and intervener, and for such other relief as to the Court may seem meet and pr in the circumstances.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendants.

Receipt of copy acknowledge.

[Endorsed]: Filed February 7, 1956. [1626]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the Jury in the above-entitled cause, find in favor of the Plaintiffs, Winckler & Smith Citrus Products Co., a corporation, and Ronald Walker, as Trustee, and against the Defendants, Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Co., a corporation, and assess the damages in the sum of five hundred thousand and no/100 dollars ($500,000).

Dated: Los Angeles, Calif., February 10, 1956.

/s/ JOSEPH C. BERGER,
Foreman of the Jury.

[Endorsed]: Filed February 10, 1956. [1637]

[Title of District Court and Cause.]

No. 13788—C

APPLICATION FOR ALLOWANCE OF ATTORNEY'S FEES

Pursuant to the provisions of Section 4 of the Clayton Act and of the order of this Court, plaintiff submits herewith its application for attorneys' fees in the above-entitled action in the amount of $350,000, with supporting affidavits attached hereto.

Respectfully submitted,

/s/ WILLIAM C. DIXON,
Attorney for Plaintiff and
Intervening Trustee.

/s/ BERNARD REICH,
Attorney for Plaintiff.

/s/ HARRY M. IRWIN,
Attorney for Trustee. [1638]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM C. DIXON IN SUPPORT OF APPLICATION FOR ALLOWANCE OF ATTORNEYS' FEES

State of California,
County of Los Angeles—ss.

William C. Dixon, being first duly sworn, says:

That he is one of the attorneys representing the plaintiff and intervening trustee in the above-entitled action, and that as such attorney he prepared and was in charge of the trial thereof; that this affidavit is made in support of the Application of the plaintiff for attorneys' fees to be added to the verdict of the jury and to be added to and made a part of the judgment to be entered by the Court in the above-entitled action on the said verdict.

Affiant says that he is a member of the bars of California, Ohio, and the United States Supreme Court, and he is a former member of the Supreme Court of the State of Ohio, and a [1639] practicing attorney since 1928. Affiant further says that he was United States, assigned to the Antitrust Division of the Department of Justice for a period of approximately ten (10) years commencing in April, 1944, and ending April, 1954, at which time he resigned from the Department of Justice to enter private practice in the City of Los Angeles, California. Affiant further says that during this said period of service with the Department of Justice of the Government of the United States affiant acted as Assistant Chief of the Trial Section of the Antitrust Division of said Department of Justice and served as Chief of the West Coast offices of the Antitrust Division of the Department of Justice with headquarters at Los Angeles, California, during said period of service. Affiant further says that while a Special Assistant to the United States Attorney General he was Chief Trial Counsel for the Government in many litigated and important antitrust cases, including U. S. v. National Lead Company, 63 F. Supp. 513, 332 U. S. 319; U. S. v. Standard Oil Company of California, et al., 78 F. Supp. 850, 337 U. S. 293; U. S. v. Richfield Oil Corporation, 99 F. Supp. 280, 343 U. S. 922; U. S. v. Nat'l City Lines, Inc., et al., 186 F. (2d) 562 (cert. den. 341 U. S. 916); Local 36 v. U. S., 177 F. (2d) 320 (cert. den.); CO² Fire Equipment Company v. U. S., 197 F. (2d) 489 (cert. den.), and participated in the preparation and trial of many other antitrust cases.

Affiant further says that he entered the instant case for the purpose of preparing and trying the same during the month of September, 1954, and that substantially all of his time since said date has been spent in the preparation and trial of said case; that affiant spent approximately in excess of 2,500 hours of work as an attorney in the course of preparing and trying said case; that the actual trial of said case was approximately 40 trial days, which period of time does not include the time of affiant in court in connection with pretrial and other matters directly related to the [1640] preparation of said case for trial, all of which appears as a matter of record in the files of the instant case.

Affiant further says that the problems encountered in the preparation and trial of said case were unusual and involved many new questions of law on which no direct decisions were applicable; that affiant was without any funds with which to secure proper and investigative assistance in preparing said case for trial; that the only legal assistance available to affiant during the aforesaid period was the assistance of Harry M. Irwin, a member of the bar of California and attorney for the Intervening Trustee in the instant case; that it was accordingly necessary for affiant to personally do much of the investigative and preparatory work aided and assisted by Mr. Irwin and the Trustee, Ronald Walker, in preparing said case for trial; that the defendants in said case were represented by three different law firms, two of which are located in Los Angeles and Corona; the third of which was a leading law firm, Pope & Ballard of the City of Chicago, Illinois, which was represented during the pretrial and trial proceedings by four members from said firm; that in addition thereto complex and involved accounting problems were presented and dealt with during the preparation and trial of said case; that two accountants appeared for the defendants during the trial of the case to give expert opinion testimony; that in their said testimony said accountants admitted the payment of the sum of $39,000 for accounting services rendered to the defendants by said accountants in connection with the preparation of said case prior to the commencement of the trial and for services rendered up to December 1, 1955; that the firm of Pope & Ballard representing the defendants in said action were retained by the defendants for their defense because of their knowledge, reputation, and experience in defending private treble damage antitrust suits; that affiant has reason to believe and therefore avers that the defendants have paid attorneys' fees to counsel representing said [1641] defendants in said case in an amount equivalent to or in excess of the amount requested by affiant herein on behalf of the plaintiff pursuant to the provisions of Section 4 of the Clayton Act before mentioned; that a reasonable charge for attorneys' fees for services rendered the plaintiff in connection with the preparation and prosecution of the within action is accordingly the sum of $850,000.

/s/ WILLIAM C. DIXON.

Subscribed and sworn to before me this 13th day of February, 1956.

[Seal] /s/ WILLIAM J. TIERNAN,
Notary Public in and for the County of Los Angeles, State of California. [1642]

[Title of District Court and Cause.]

Case No. 13788—C

AFFIDAVIT OF BERNARD REICH IN SUPPORT OF APPLICATION FOR COUNSEL FEES

State of California,
County of Los Angeles—ss.

Bernard Reich, being duly sworn, deposes and says:

1. Deponent makes this affidavit in support of the general application for fees; but to avoid confusion and so as not to detract from his associates, he limits this affidavit to his own legal services rendered.

2. Deponent was sole attorney for plaintiff for some [1643] three and one-half years, from the filing of the Complaint on February 1, 1952, to October 21, 1955. Thereafter he became junior to Chief Counsel William C. Dixon.

3. On or about June 17, 1952, deponent, in collaboration with Honorable Harry M. Irwin, became attorney for the Trustee, specially employed to prosecute the above-entitled action. Deponent remained such until his employment ceased on October 11, 1954.

4. Prior to retaining deponent, plaintiff had obtained what it deemed to be an unsatisfactory legal opinion with regard to the proposed litigation. On the other hand, deponent at the outset, and notwithstanding difficulties in connection with a number of

the issues, expressed and continued to express great faith in the lawsuit. When plaintiff corporation went into reorganization, deponent filed a waiver of his retaining fee and consistently maintained that the principal asset of the estate was the lawsuit.

5. In order to serve plaintiff and intervener at top efficiency, deponent learned the citrus fruit business, and to that end deponent held approximately fifty conferences, mostly with plaintiff's president, Nicholas J. Winckler, and some with the Trustee, Honorable Ronald Walker, and attorney for the Trustee, Honorable Harry M. Irwin. Deponent studied the plant at Anaheim on three different occasions and examined into thousands upon thousands of documents and records.

6. Deponent has practiced law since 1937, except for eighteen months in the Armed Services, and for more than half of the years of his practice he has specialized in this and allied [1644] fields.

7. Deponent kept records of the time spent, which records will be made available to Court and counsel. Past experience and some cursory checking demonstrate that the recorded time represents only about 80% of the time actually expended. The records show some 571 hours over a four year period; a fair estimate of the actual time expended, properly adjusted to reflect recorded and unrecorded time, is 685 hours.

8. Using the 20% adjustment in some instances only, an approximate and on the conservative side breakdown of the records for the four year period discloses:

21 court appearances;
Three trips to Anaheim;
Two trips to Corona;
Six depositions of defendants;

Two sessions of depositions of Nicholas J. Winckler (at Corona);

30 motions and petitions;
25 law memoranda;
425 telephone calls;
75 conferences;
250 letters;

150 miscellaneous documents including interrogatories, admissions, memoranda, stipulations, orders and pleadings.

9. The Court is respectfully requested to take judicial notice of the legal papers prepared and filed by deponent herein, as well as the papers filed by the defendants in the first three and one-half years of the litigation. [1645]

10. The difficulties of this lawsuit were seen at the outset when defendants, represented by local and out of state counsel, argued in excess of six hours in an all-out by unsuccessful challenge to the original Complaint, containing five separate and independent causes under federal and California statutes.

11. Discovery was particularly extensive and exhausting including as it did some seven depositions, hundreds of interrogatories, dozens of admissions, and the production of thousands of records and documents.

12. In deponent's own preparation he had ana-

lyzed and digested the pleadings, the depositions, interrogatories and admissions, so that he was able to turn over to Mr. Dixon organized files. Again, this is not stated to detract one whit from Mr. Dixon's and Mr. Irwin's monumental task.

13. Prior to this deponent's obtaining $2500.00 in settlement from a dismissed defendant, plaintiff and intervener were seriously handicapped by the lack of funds with which to prosecute this lawsuit. Deponent was compelled to conduct his discovery in as economical a manner as has probably any other major lawsuit in this area. Each deposition had to be succinct and not wasteful of an extra question. Interrogatories had to be worded so as to avoid production of records at plaintiff's cost. Each hour spent by your deponent had to derive the most benefits. Deponent had to absorb costs which are very often charged to a client. Transcripts of proceedings had to be borrowed from the defendants, therefore read immediately and returned. The fact is that so far as concerns your deponent, and what he knows of his associates it is true of them, this lawsuit was as carefully and as tautly prepared as any lawsuit [1646] in the District.

14. In this lawsuit there was no prima facie government decree. Apart from the normal difficulties of a case of this kind and the normal aggressive resistance of opposing counsel, this case was truly marked by what has been suggested as "a war of attrition" on the part of opposing counsel, particularly out of state counsel representing the defendants during this deponent's more active period.

15. Again, without in the least detracting from the difficulties caused Mr. Dixon and Mr. Irwin by opposing counsel, deponent must allude to the fact that he was subjected alone to the "war" for almost three and one-half years.

16. Finally, reference should be made to a number of intangible problems which beset your deponent, as well as his colleagues: the first was the fact that Sunkist was a great co-operative and the plaintiff's president a foreign-born small processor; the second was the great amount of legal talent and resources which the defendants brought into the lawsuit; and the third was the ability of the defendants not only to wage legal war, but psychological war over a four year period, obtaining continuance after continuance of the trial and ever expanding their discovery and pretrial procedures.

17. Wherefore, because of the unusual difficulties of this litigation, compounded by opposing counsel, in a pioneering lawsuit against a great citrus fruit trust, your deponent prays that Mr. Dixon and Mr. Irwin, as well as himself, be awarded a substantial fee of not less than 25% of the verdict as [1647] trebled, payable to them by defendants.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 12th day of February, 1956.

[Seal] /s/ GLORIA J. SCHWEITZER,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires March 18, 1947. [1648]

[Title of District Court and Cause.]

Nos. 53,860—C and 13788—C

AFFIDAVIT OF HARRY M. IRWIN IN SUPPORT OF APPLICATION TO TAX PLAINTIFF'S ATTORNEYS' FEES AS COSTS

State of California,
County of Los Angeles—ss.

Harry M. Irwin, being first duly sworn, on oath states:

Ever since April, 1952, affiant has been and is attorney for Ronald Walker, as Trustee in Bankruptcy of plaintiff Winckler & Smith Citrus Products Co., and as Intervenor in the above-entitled action, and as such attorney affiant has participated in all of the proceedings in the above-entitled action subsequent to said date.

Affiant is a member of the Bar of the States of California and [1649] Missouri and a member of the Bar of this District Court and continuously since 1916 affiant has engaged in the practice of his said profession in the Courts of the State of California and in this Court, and throughout said time affiant has specialized in the practice of civil law in connection with the business transactions of corporations and of individuals and the legal problems and litigation arising therefrom.

Because of the lack of funds available to said Trustee, affiant has been unable to employ investigators to assist plaintiffs' attorneys in the necessary investigations and preparations for and in the trial of this action, and affiant was required to and did personally and in association with his co-counsel William C. Dixon and with Trustee Ronald Walker, examine and digest the voluminous and complex records and facts of the plaintiff Winckler & Smith Citrus Products Co., and of the defendants pertinent to the issues in this action, and also the questions of law applicable thereto; and affiant avers that he has spent in excess of 2,000 hours in the reasonable and necessary preparation for the trial of said action and in the trial thereof.

Affiant embodies in this affidavit, by reference thereto, and avers all the facts within his knowledge which are set forth in the affidavit of William C. Dixon which is filed concurrently herewith.

Affiant avers that the sum of $350,000.00 is a reasonable sum to be allowed and taxed as costs against the defendants herein for the necessary and proper legal services which have been rendered by plaintiffs' attorneys in the above-entitled action.

/s/ HARRY M. IRWIN.

Subscribed and sworn to before me this 13th day of February, 1956.

[Seal] /s/ BEN M KOCHMAN,
Notary Public in and for said
County and State.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1956. [1650]

[Title of District Court and Cause.]

No. 13788—C

NOTICE OF MOTION OF DEFENDANTS SUNKIST GROWERS, INC., AND THE EXCHANGE ORANGE PRODUCTS COMPANY FOR JUDGMENT IN ACCORDANCE WITH SAID DEFENDANTS' MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE IN THE TRIAL OF THE ABOVE-ENTITLED ACTION

To: Winckler & Smith Citrus Products Co., a corporation, the above-named plaintiff and [1661] to Bernard Reich, Esq., its attorney; and

To: Ronald Walker, Esq., trustee and intervener, and to Harry M. Irwin Esq., attorney for said trustee; and

To: William C. Dixon, Esq., attorney for plaintiff and said intervening trustee.

Please Take Notice that the undersigned will bring the attached motion by defendants Sunkist Growers, Inc., and The Exchange Orange Products Company, for judgment in accordance with said defendants' motion for a directed verdict at the close of all the evidence in the trial of the above-entitled action, and the memorandum of points and authorities in support thereof attached thereto, on for hearing before this court in the courtroom of the Honorable James M. Carter, District Judge, United States Post Office and Court House Building, located at

Temple and Spring Streets in the City of Los Angeles, County of Los Angeles, State of California, on the 24th day of February, 1956, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated this 17th day of February, 1956.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for Defendant Sunkist Growers, Inc., and The Exchange Orange Products Company.

Receipt of a copy of the foregoing Notice of Motion and of Motion referred to therein and of accompanying Memorandum of Points and Authorities is acknowledged this 17th day of February, 1956.

/s/ WILLIAM C. DIXON,
Attorney for Plaintiff and Intervening Trustee.

/s/ HARRY M. IRWIN,
Attorney for Trustee;

By /s/ RONALD WALKER. [1662]

Good cause appearing therefore, the hearing on the foregoing mentioned motion is hereby set for Friday, February 24, 1956, at 10:00 a.m. of said day, and the clerk is directed to set said notice of motion and motion for hearing on said day. Defendants are directed to serve and file said notice of motion and motion upon opposing counsel on or before Monday, February 20, 1956.

Dated this 17th day of February, 1956.

/s/ LEON R. YANKWICH,
District Judge. [1663]

[Title of District Court and Cause.]

No. 13788—C

MOTION OF DEFENDANTS FOR JUDGMENT IN ACCORDANCE WITH THEIR MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE

Now come the defendants, jointly and severally, after the verdict rendered for plaintiff on February 10, 1956, and pursuant to Rule 50(b) of the Federal Rules of Civil Procedure move the Court to set aside such verdict and to enter judgment for the defendants, and each of them, in accordance with their motion for a directed verdict at the close of all the evidence; and for grounds of said motion urge the following, which were the grounds of their motion for a directed verdict at the close of all the [1664] evidence:

First Cause of Action

1. The first cause of action does not state a claim upon which relief may be granted.

2. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for the defendants by Section 6 of the Clayton Act and Section 1 of th Capper-Volstead Act.

3. Plaintiff has failed to prove that defendants, or either of them, engaged in a combination or conspiracy in restraint of interstate trade or commerce or entered into or performed any contract in restraint of such trade or commerce. Furthermore, any cause of action arising from any contract or refusal to supply plaintiff with Valencia oranges, that is pleaded in the first cause of action, except the Tree-Sweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint.

4. Plaintiff has failed to prove that defendants, or either of them, had any intent or purpose to restrain interstate trade or commerce.

5. Plaintiff has failed to prove any restraint of interstate trade or commerce, either substantial or insubstantial.

6. Plaintiff has failed to prove any public injury.

7. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

8. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or either of them.

9. Plaintiff has failed to prove the amount of damage claimed to have resulted to plaintiff from the alleged injury or injuries.

10. Plaintiff has failed to prove any fixing of prices of either fruit or of citrus fruit juices. [1665]

11. Plaintiff has failed to prove the first cause of action attempted to be alleged in its second amended complaint as amended.

Second Cause of Action

1. The second cause of action does not state a claim upon which relief may be granted.

2. Plaintiff has failed to prove that defendants, or either of them, had monopoly control over fruit grown and available for processing in California and Arizona.

3. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for defendants by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.

4. Plaintiff has failed to prove that defendants, or either of them, combined or conspired to monopolize, or monopolized interstate trade and commerce in citrus, fruit juices, or any citrus fruit juice processed in California and sold in interstate commerce in violation of the antitrust laws.

5. Plaintiff has failed to prove that defendants, or either of them, had any specific intent or general intent or any intent or purpose to monopolize interstate trade and commerce in citrus fruit juices processed in California and sold in interstate commerce.

6. Plaintiff has failed to prove any public injury.

7. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

8. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or either of them.

9. Plaintiff has failed to prove the amount of damage claimed to have resulted to plaintiff from the alleged injury or injuries. [1666]

10. Any cause of action arising from any contract pleaded in the second cause of action, or refusal to supply plaintiff with Valencia oranges, except the TreeSweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint.

11. Plaintiff has failed to prove that citrus fruit juices, or any citrus fruit juice, produced or processed in California, constituted an identifiable market or any area of effective competition that is subject to being monopolized.

12. Plaintiff has failed to prove that any appreciable part of interstate trade and commerce was monopolized or was the subject of a conspiracy or combination to monopolize.

13. Plaintiff has failed to prove the second cause of action attempted to be alleged in the second amended complaint as amended.

Dated this 17th day of February, 1956.

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
FRANK F. ~~FOWLE~~,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER,
Attorneys for
Defendants. [1667]

Memorandum of Points and Authorities in Support of Defendants' Motion for Judgment in Accordance With Their Motion for Directed Verdict at the Close of All the Evidence

1. A claim was not stated or proved upon the first cause of action.

Canella v U.S.
157 Fed. (2d) 470 (C.A. 9th, 1946).

2. Defendants are exempt from the antitrust laws and no conduct outside the exemption was proved.

Clayton Act, Sec. 6, 15 U.S.C. Sec. 17.

Capper-Volstead Act, Sec. 1, 7 U.S.C. 291.

California Agricultural Code, Secs. 1213, 1216, 1218, and 2021.

Cape Cod Food Products v National Cranberry Assn., 119 Fed. Supp. 900, 907, 908 (Mass., 1954).

3. Any claim, except upon the TreeSweet contract, is barred by the statute of limitations.

California Code of Civil Procedure, Sec. 338, Subd. 1.

Burnham Chemical Co. v Borax Consolidated, 170 Fed. (2d) 569, 572 (C.A. 9th, 1948), cert. den. 336 U.S. 924.

Suckow Borax Mines Cons. v Borax Consolidated, 185 Fed. (2d) 196, 207 (C.A. 9th, 1950), cert. den. 340 U.S. 943.

4. In order to prove a claim plaintiff must allege and prove a public injury.

Shotkin v Gen. Electric Co.,
171 Fed. (2d) 236 (C.A. 10th, 1938). [1668]

Emich Motors Corpn. v General Motors Corpn. 181 Fed. (2d) 70, 75 (C.A. 7th, 1950) and other cases cited in defendants' final brief filed herein November 23, 1955.

5. No legal right owned by plaintiff was invaded.

Patten v Dennis, 134 Fed. (2d) 137. (C.A. 9th, 1943).

Sidebotham v. Robison, 216 Fed. (2) 816, 831 (C.A. 9th, 1954).

Keogh v Chicago & Northwestern Ry. Co., 260 U.S. 156, 163 (1952).

6. There was no monopoly by defendants of either product citrus fruit or citrus fruit juices.

U.S. v Aluminum Co. of America, 148 Fed. 2d) 416 at p. 424, (C.A. 2d, 1945).

Cape Cod Food Products v National Cranberry Assn., 119 Fed. Supp. 900, 907, 908 (Mass., 1954).

Respectfully submitted,

FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
ROSS C. FISHER,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,
DONALD D. STARK,

By /s/ ROSS C. FISHER.

[Endorsed]: Filed February 17, 1956. [1669]

[Title of District Court and Cause.]

No. 13788-C

Answer to Plaintiff's Application for Allowance of Attorneys' Fees and Points and Authorities in Support of Said Answer

Come now the defendants, Sunkist Growers, Inc., and The Exchange Orange Products Company, by attorneys, and answer plaintiff's application for attorneys' fees filed herein on February 13, 1956, as follows:

Answering plaintiff's application itself (p. 1, ll. 20-23), defendants submit to the Court that an allowance of $350,000 for attorneys' fees for services rendered in the above-entitled action would be unreasonable and excessive and would result in manifest [1677] injustice to these defendants; and defendants further submit that any allowance in excess of $100,000 to $125,000 would be unreasonable and excessive.

Further answering said application, defendants state that none of the attorneys for plaintiff are of such eminence, ability and standing at the bar of this Court or other local courts, or have commanded such fees or daily or hourly rates as would entitle plaintiff to any such allowances as is sought here.

The Dixon Affidavit

Answering the affidavit of Mr. Dixon, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the statement (p. 2, 11. 24 to 27) that Mr. Dixon spent substantially all of his time since September, 1954. in the preparation and trial of this action, or as to the truth of the statement that he spent approximately in excess of 2500 hours of work as an attorney in the course of preparing and trying this action; and in this connection defendants state that Mr. Dixon has informed their counsel that during the period from September 27, 1954, to December 8, 1954, he spent approximately 116½ hours on this case as shown by his time records to that date, and that since that time he has kept no record of the time spent by him on the case. Defendants further state that the number of trial days was 33.

Further answering the affidavit of Mr. Dixon (p. 3, 11. 3 to 5), defendants state that, while there may have been problems or questions of law on which there were no decisions directly in point, these problems or questions of law in no way complicated the preparation and presentation of plaintiff's case or the cross-examination of defendants' witnesses.

Further answering the affidavit of Mr. Dixon (p. 3, 11. 3 to 14), defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the statement that Mr. Dixon was without any funds with which to secure proper and [1678] investigative assistance in preparation for trial, or the truth of the statement that the only legal assistance available to him was the assistance of Harry M. Irwin, or the truth of the statement that it was accordingly necessary for Mr Dixon personally to do much of the investigative and preparatory work; and in this connection defendants state that whether plaintiff was with or without sufficient funds is not relevant to the question of what is the reasonable value of the services of plaintiff's attorneys in this case; and defendants further state that if, as Mr. Dixon says, it was necessary for him to spend a substantial part of his time doing the work of a law clerk or the work of investigator, such portion of his time, the amount being unknown to defendants, should be evaluated by the Court on a substantially lower basis than time spent by him as an attorney in the actual preparation and trial of the case.

Further answering Mr. Dixon's affidavit (p. 3, ll. 16-19), defendants state that prior to March 21, 1955, the firm of Pope & Ballard represented only ELP; that until about July, 1955, only two members of the firm spent any substantial time on the case, that thereafter there were occasionally four but for the most part only three members of the firm working on the case, and that during the immediate pretrial and actual trial of the case there were three members of the firm actively engaged in the case.

Further answering Mr. Dixon's affidavit (p. 3, ll. 21 to 27), defendants say that the compensation of defendants' accountants is in no way relevant to the question of what is the reasonable value of the services of plaintiff's attorneys in this action.

Further answering Mr. Dixon's affidavit (p. 3, ll. 31-32, p. 4, ll. 1-4), defendants state that the amount paid by defendants to their attorneys for defending this action, whether such amounts were reasonable or unreasonable, has no bearing whatever upon the reasonable value of the services of plaintiff's attorneys in this case. Without in anywise admitting that the amount paid by [1679] defendants to their attorneys is a proper factor for the Court's consideration, defendants deny that such amount has or will begin to approach the $350,000 asked for by plaintiff.

Further answering Mr. Dixon's affidavit (p. 4, ll. 4-6), defendants deny that $350,000 is a reasonable charge for services rendered to plaintiff by its attorneys in this action.

The Irwin Affidavit

Answering Mr. Irwin's affidavit (p. 11. 27-31), defendants deny that Mr. Irwin has been attorney for the trustee in bankruptcy of the plaintiff since April, 1951.

Further answering Mr. Irwin's affidavit (p. 2, ll. 7-16), defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the statement that Mr. Irwin spent in excess of 2000 hours in the preparation and trial of this action; and in this connection defendants state that Mr. Irwin has informed their counsel that he has kept no complete or accurate records of the time spent by him on this case. Defendants further state that it is plain from Mr. Irwin's affidavit that his services, being largely those of an investigator and assistant to Mr. Dixon, should be valued on a substantially lower basis than the services rendered by Mr. Dixon as an attorney.

Further answering Mr. Irwin's affidavit (p. 2, ll. 20-23), defendants deny that the sum of $350,000 is a reasonable sum to be allowed herein for the necessary and proper legal services rendered by plaintiff's attorneys.

The Reich Affidavit

Answering paragraph 2 of Mr. Reich's affidavit, defendants deny that Mr. Reich was the sole attorney for the plaintiff until October 21, 1955, or that he became junior to Mr. Dixon on that date. Defendants are without knowledge or information as to whether Mr. Reich rendered any service for any party in this case after he withdrew as attorney for the trustee on or about October, 1954. [1680]

Further answering Mr. Reich's affidavit, defendants are without sufficient knowledge or informamation to form a belief as to the truth of the statements contained in paragraphs 4, 5, 6, 7, and 8, except that defendants admit that Mr. Reich made a number of court appearances and participated in the taking of various depositions.

Answering paragraph 10 of Mr. Reich's affidavit, defendants state that their challenge to the original complaint was well taken, as is borne out by the fact that the Court directed plaintiff to file an amended complaint in December, 1954, and that ultimately the theory of plaintiff's second cause of action was substantially altered and the third, fourth, and fifth causes of action were abandoned by the plaintiff altogether.

Answering paragraph 11 of Mr. Reich's affidavit, defendants state that the discovery in this cause was no more extensive than is customary in a treble damage action of this sort. The record in this case shows that Mr. Reich opposed defendants' discovery at nearly every opportunity, that he was ordered to file additional answers to many of defendants' interrogatories because of his failure to file adequate answers in the first instance, and that his opposition to the production of plaintiff's records for the inspection of defendants' attorneys very substantially increased the amount of time required to be spent by defendants' attorneys in discovery, with the result that many of plaintiff's files were not made available to defendants until the eve of the trial, and in a few instances, until after the trial had commenced.

Answering paragraph 12 of Mr. Reich's affidavit, defendants are without knowledge of information sufficient to form a belief as to the truth of the statements therein.

Answering paragraph 13 of Mr. Reich's affidavit, defendants are without knowledge or information sufficient to form a belief as to the truth of the statements therein.

Answering paragraphs 14 and 15 of Mr. Reich's affidavit, [1681] defendants deny that they carried on any "war of attrition" or that they did anything other than to defend to the best of their ability against an action which they still believe to be entirely unfounded. Defendants state that much of what Mr. Reich describes as a "war of attrition" was simply defendants' refusal to be thwarted by Mr. Reich's opposition to the discovery which defendants were entitled to obtain, and in large part ultimately did obtain, under the Federal Rules of Civil Procedure.

Answering paragraph 16 of Mr. Reich's affidavit, defendants state that the comparative size and importance of Sunkist and plaintiff and the foreign birth of plaintiff's president are wholly irrelevant to the question of what is the reasonable value of the services rendered by plaintiff's attorneys. Defendants deny that they sought or obtained continuance after continuance of this action and state that, except for illness, the only grounds on which they sought the one or two continuances they did seek were that plaintiff had failed or refused to make its records available to defendants' counsel in accordance with the orders of this Court.

Defendants deny the allegations of paragraph 17 of Mr. Reich's affidavit.

Further answering plaintiff's application for attorneys' fees, defendants deny that in excess of 5000 hours were reasonably and properly expended by plaintiff's attorneys in the preparation and trial of this action, or if this number of hours had actually been reasonably necessary and proper that plaintiff's attorneys would be entitled to fees which amount to approximately $70 per hour for the time spent, irrespective of whether it was Mr. Dixon's time or Mr. Irwin's time or Mr. Reich's time, and irrespective of whether the time was spent in important legal work or in work which could have been performed by junior attorneys or clerical or investigative personnel.

Further answering plaintiff's application for attorneys' [1682] fees, defendants are informed and believe and therefore state the fact to be that substantial portions of the time spent by Mr. Dixon involved work which could have been as well performed by a junior attorney or by a clerk, that substantial portions of Mr. Irwin's time was spent in work which is normally performed by an assistant, or junior attorney, or in work which is normally not performed by a lawyer at all, and that substantial portions of Mr. Reich's time were likewise spent in work which is normally performed by a junior, or assistant attorney, and that in each such case the time involved should be valued accordingly.

Further answering plaintiff's application for attorneys' fees, defendants are informed and believe and therefore state the fact to be that there was substantial duplication of effort between Mr. Reich and Mr. Dixon when Mr. Dixon entered the case; and defendants deny that the time spent by Mr. Dixon in such duplication of work performed by Mr.

Reich should be considered as time reasonably and properly expended in the preparation and trial of this action.

Further answering plaintiff's application for attorneys' fees, defendants are informed and believe and therefore state the fact to be that a substantial portion of the time expended by plaintiff's attorneys was spent in connection with the liability of TreeSweet Products Company and Exchange Lemon Products Company, both of which companies were dismissed as defendants on plaintiff's motion, and in connection with establishing and proving the third, fourth and fifth causes of action and the alleged attempt to monopolize on the part of Sunkist, Exchange Orange Products Company and Exchange Lemon Products Company, all of which causes of actions and claims were voluntarily dismissed by the plaintiff. Defendants deny that the time so spent by attorneys for the plaintiff was time reasonably and properly expended in the preparation and trial of this action. [1683]

Wherefore, defendants deny that the attorneys' fee of $350,000 sought by plaintiff is a reasonable fee under all the circumstances, and allege that any allowance of fees in excess of $100,000 to $125,000 would be unreasonable and excessive.

ROSS C. FISHER,
FRANK F. FOWLE,

By /s/ ROSS C. FISHER,
Attorneys for Defendants.

State of California,
County of Los Angeles—ss.

Ross C. Fisher, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendants in the above-entitled action; that he has read the foregoing answer and is familiar with the contents thereof and believes the same to be true and correct.

/s/ ROSS C. FISHER.

Subscribed and sworn to before me this 23 day of February, 1956.

[Seal] /s/ STEPHEN M. FARRAND,
Notary Public in and for said
County and State. [1684]

Defendants' Memorandum of Points and Authorities Re Plaintiff's Application for Attorneys' Fees

Plaintiff has obtained a jury verdict against the defendants in the amount of $500,000. Application has been made to the Court for an allowance of attorneys' fees of $350,000, pursuant to Section 4 of the Clayton Act (15 U.S.C.A., Sec. 15). This memorandum is submitted in opposition to plaintiff's application for fees.

The courts have very generally recognized that the matter of fixing attorneys' fees is a matter of great difficulty and delicacy. No iron-clad and in-flexible rule can be laid down as to what constitutes a reasonable fee, but the courts have usually approached the problem as one of quantum meruit, and have applied the principles entirely on that doctrine. In all of the cases dealing with allowances for professional services the courts have taken the position that judges should be reluctant to engage in what Taft, Ch. J., has called "vicarious generosity," Re Gilbert, 276 U.S. 294.

The determination of what is a reasonable attorneys' fee rests largely in the discretion of the trial judge, provided that he has given consideration to proper factors and not to improper elements and that his discretion has not been improvidently exercised. Milwaukee Towne Corp., v. Loew's, Inc., 190 F. 2d 561 (C.A. 7, 1951).

The factors which are considered proper in determining a reasonable fee have been held to be the following. (See Rogers v. Hill, 34 F. Supp. 358, 363.)

5

1. The time and labor which has been fairly and properly expended in the case.

2. The novelty and difficulty of the questions presented and the quality of skill demanded in the case.

3. The skill employed by counsel.

4. The amount involved as it reflects the risk of the client and the commensurate responsibility of the lawyer. [1685]

5. The result achieved.

6. The eminence, ability and standing of the counsel.

7. The testimony of experts.

The factors which are not to be taken into consideration in determining what is a reasonable fee are the following:

1. The ability of the defendants to pay.
2. The financial condition of the plaintiff.
3. Uncertainty of the fee.
4. Punitive damages resulting from trebling the verdict.
5. Fees paid to defendants' attorneys.

I.

Matters to Be Considered

1. The time fairly and properly devoted to the case.

The general rule is that the amount of time reasonably necessary for the accomplishment of the work performed, rather than the actual time consumed, is the proper standard of time to be considered in determining a reasonable fee. Rogers v. Hill, 34 F. Supp. 358 (S.D. N.Y. 1940).

The general rule is, further, that the amount to be determined as a reasonable counsels' fee is not to be measured by the number of attorneys involved, but rather by the value of the services performed. Re Vicksburg Bridge & Terminal Co., 29

F. Supp. 225 (S.D. Miss., 1938); Waters v. Hamilton Gas Co., 29 F Supp. 436 (S.D. W. Va., 1939).

It is well established that unnecessary duplication of effort is not compensible in a statutory fee proceeding. Waters v. Hamilton Gas Co., 29 F. Supp. 436, supra; Re N.Y., N.H. & Hartford Ry., 46 F. Supp. 214 (D. Conn., 1942); Strauss v. Baker Co., 87 F. 2d 401, 408 (C.A. 5, 1937).

2. The novelty and difficulty of the question presented and the quality of skill demanded in the case. [1686]

A factor to be considered in the determination of reasonable attorneys' fees is the degree of difficulty involved. See 143 A.L.R. 672, 678; Cf. Milwaukee Towne Corp., v. Loew's, Inc., 190 F. 2d 561, 570-571, supra.

Defendants submit that the questions involved in this action are no more complicated or difficult than the questions involved in the usual antitrust case and that any competent trial lawyer could have made the necessary preparation and tried the case properly.

3. Skill employed by counsel.

Defendants concede that the case was well and ably tried by Mr. Dixon. It was as skillfully tried as the necessities of the case required, but it was tried no better than would have been expected from any reasonably able trial lawyer. Conceding that

Mr. Dixon prepared and tried the case well, it still does not follw that $70 an hour is a reasonable fee for 2,500 hours of Mr. Dixon's time, when admittedly a great deal of it was devoted to work which could have been as well performed by junior attorneys or investigators; nor does it follow that $70 an hour was a reasonable fee for 2000 hours of Mr. Irwin's time, or 571 hours of Mr. Reich's time, when it does not appear that they brought any unusual skill to the case at all. Cf. Milwaukee Towne Corp., v. Lowe's, Inc., 190 F. 2d 561, 570-571, supra.

4. The amount involved as it reflects the risk of the client and the commensurate responsibility of the lawyer.

Since the plaintiff was insolvent, it had everything to win and nothing to lose. The plaintiff itself risked nothing in this case and there was consequently no commensurate responsibility of counsel.

5. The result achieved.

The result achieved is, of course, a factor in determining what constitutes a reasonable fee for legal services performed. While the verdict in the instant case was substantial, examination of [1687] similar cases and the fees allowed therein indicates that the fees sought by counsel for the plaintiff are greatly excessive and substantially larger than have customarily been allowed in comparable cases. See Milwaukee Towne Corp. v. Loew's, Inc., 190 F. 2d 561, 570-571, supra (verdict $431,959.42, fees of

$225,000 reduced to $75,000); Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846 (C.A. 8, 1952) (verdict $375,000 fees of $150,000 reduced to $100,000 including fees on appeal); Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251 (1946) (verdict $120,000, fees $30,000); Applebaum and Sims v. Paramount Pictures, Inc., C.C.H. Trade Cases 1950-1951, par. 62944 (U.S.D.C., S.D. Miss., 1951) (verdict $150,000, fees $40,000); Cape Cod Food Products v. National Cranberry Ass'n., 119 F. Supp. 242 (D. Mass., 1954) (verdict $175,000, fees $35,000); and see annotation in 143 A.L.R. 672-958. It should also be observed that the courts have generally taken the position that the relative amount of fees should be reduced as the verdict or judgment becomes larger. Hodgman, et al., v. Atlantic Refining Co., 8 F. 2d 777 (D. Del., 1925).

6. Ability and standing of counsel.

An important reason why the application for attorneys' fees in the sum of $350,000 in this case is manifestly unreasonable and excessive is that it not only assumes that all of the counsel for plaintiffs were top grade trial lawyers, but that all of their time should be compensated for at top rates, although admittedly a very substantial part of their time was devoted to matters that could be handled, and normally are handled, by lawyers of less than top ability, or by clerks. Obviously, much of the work in question could have been performed by a

$5 or $10 an hour clerk, and much of it could have been performed by $10 and $15 an hour junior attorneys. If a senior lawyer chooses to perform those duties, he must do so at the rate of the job. As the court said in Re Charles v. Glass, Inc., 47 F. Supp. 428, 430 (S.D. Cal., C.D., 1942):

> "* * * An attorney should not be compensated at [1688] lawyer's rates for the work which a clerk or amanuensis can do cheaper, if not better."

See also, Milwaukee Towne Corp. v. Loew's, Inc., 190 F. 2d 561, 570-571, supra.

7. The testimony of experts.

It is customary, in cases of this kind, for courts to receive expert testimony. Milwaukee Towne Corp. v. Loew's, Inc., 190 F. 2d 561, 570, supra. Since, however, this memorandum is being submitted in advance of the hearing on plaintiff's application for attorneys' fees, it is not possible to refer to the testimony of experts, even if such testimony should be received or considered by the Court.

II.

Items Not Properly Considered in Determining Attorneys' Fees

There are a number of factors which it is generally recognized are not to be considered in determining reasonable attorneys' fees. These are the following:

1. The ability of the defendants to pay.

2. The financial condition of the plaintiff.
3. Uncertainty of the fee.
4. Punitive damages resulting from trebling the verdict.
5. Fees paid to defendants' attorneys.

1. The ability of the defendants to pay.

While it is recognized that the poverty of a defendant may be a factor to be considered in reducing a fee below what might be considered reasonable compensation for services rendered, it is equally clear that the wealth of a defendant cannot be considered to enhance the fees for services above what constitutes reasonable compensation for services actually rendered. Canon 12 of the Canons of Professional [1689] Ethics provides as follows:

> "A client's ability to pay cannot justify a charge in excess of the value of the services, though his poverty may require a less charge, or even none at all."

It is obvious that this principle should control in fixing the compensation of counsel under a statute which sets the standard of a "reasonable" attorneys' fee.

2. The financial condition of the plaintiff.

While no authority has been found on this subject, it is submitted that the reasonable value of the services of plaintiff's counsel can and must be determined without regard to the financial condition of plaintiff and that there should be included in the judgment against defendants no more than the reasonable value of these services, whatever the financial condition of the plaintiff. Cf. Cape Cod Food Products v. National Cranberry Ass'n., 119 F. Supp. 242, supra.

3. Uncertainty of the fee.

The fact that an attorney's compensation is contingent upon his success may be taken into consideration in an action as between him and his client, but where an allowance of attorneys' fees is sought under a statute providing for "reasonable attorneys' fees," it is held that the fact that counsel was serving under a contingent fee arrangement may not be taken into consideration in determining what constitutes a reasonable fee for the services performed. Dumas v. King, 157 F. 2d 463, 466 (C.A. 8, 1946); Business Men's Assurance Co. v. Campbell, 18 F. 2d 223 (C.A. 8, 1927); Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846, supra; Milwaukee Towne Corp. v. Loew's, 190 F. 2d 561, supra; Applebaum and Sims v. Paramount Pictures, Inc., supra.

4. Punitive damages resulting from trebling the verdict.

The amount which is to be considered in determining a "reasonable" fee is the actual amount of the damages and not the [1690] punitive recovery resulting from the trebling of the verdict. The statute provides for the trebling of plaintiff's dam-

ages but says nothing about trebling the fees of their counsel. Milwaukee Towne Corp. v. Loew's, 190 F. 2d 561, supra; Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846, supra; Applebaum and Simes v. Paramount Pictures, Inc., supra.

5. **Fees paid to defendants' attorneys.**

Defendants submit that the amount of fees paid by the defendants to their attorneys is entirely irrelevant to the question of what is a reasonable fee for the services of plaintiff's attorneys. Defendants' attorneys may have been paid more or less than the reasonable value of their services; and in an action of this sort it is clear, in any event, that the reasonable value of the services of defendants' attorneys would differ from the reasnable value of services of plaintiff's attorneys. One may be very sure that there would be strenuous objection from the plaintiff if defendants, having paid their lawyers less than what plaintiff is seeking, contended that plaintiff's attorneys were entitled to no more than defendants' attorneys. See Eggleston v. Bordman, 37 Mich. 14 (1877); Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889).

It is respectfully submitted that a reasonable fee to be allowed plaintiff in this case should not exceed $100,000 to $125,000, and might properly be considerably less.

/s/ ROSS C. FISHER.

[Endorsed]: Filed February 23, 1956. [1691]

In the United States District Court Southern District of California, Central Division

No. 13788-C

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation, and RONALD WALKER, Intervening Trustee,

Plaintiffs,

vs.

SUNKIST GROWERS, INC., a Corporation, THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation, et al.,

Defendants.

FINAL JUDGMENT

The above-entitled cause came on regularly for trial on the 13th day of December, 1955, before the court, the Honorable James M. Carter presiding, sitting with a jury; William C. Dixon appearing for the plaintiff and intervening trustee, and Harry M. Irwin appearing also for the intervening trustee; Ferris E. Hurd, Thomas C. Strachan, Melville Williams, Donald D. Stark, and Ross C. Fisher appearing for the defendants Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Company, a corporation; Bernard Reich being attorney of record also for the plaintiff; evidence both oral and documentary having been introduced, and the plaintiff and intervening trustee having been granted leave to file and having filed a Second Amended Complaint for treble damages and equitable relief, and the defendants having filed their answer thereto, and the case having been argued and the jury instructed by the Court, and the cause submitted to the jury for its verdict, and the jury having [1712] returned its verdict on February 10, 1956, in favor of the plaintiff and the intervening trustee and against the said defendants in the sum of $500,000 and defendant TreeSweet Products Co., a corporation, having paid to the intervening trustee the sum of $2,500 as only partial compensation for the damages alleged in the complaint in the above-entitled action to have been suffered by the plaintiff, and the plaintiff having dismissed said action against defendant TreeSweet Products Co. without prejudice and without costs, and the plaintiff and the intervening trustee having made application pursuant to the provisions of Section 4 of the Clayton Act for a reasonable attorney's fee, and evidence, both oral and documentary, having been introduced thereon, and said application and the evidence thereof having been argued and submitted to the Court and findings on attorneys' fees, having been waived in open court, and the Court having found and determined that the sum of $195,000.00 is a reasonable attorney's fee in the above-entitled action to the date hereof, and that the plaintiff and the intervening trustee are entitled to recover said amount from the defendants as and for a reasonable attorney's fee in said action;

Wherefore, by virtue of the provisions of Section 7 of the Sherman Act, (26 Stat. 210, 15 U.S.C. Sec.

15) and Section 4 of the Clayton Act (38 Stat. 731, 15 U.S.C. Sec. 15) and the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed as follows:

(1) Plaintiff Winckler & Smith Citrus Products Co., a corporation, and Ronald Walker, Intervening Trustee, do have and recover from the defendants Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Company, a corporation, and from each of them, the sum of $1,500,000 or three-fold the damages found by the jury to have been suffered by the plaintiff and Intervening Trustee, less the sum of $2,500 which the Intervening Trustee has received from TreeSweet Products Co. as partial compensation for said damages, viz.: The sum of $1,497,500, together with costs and disbursements incurred in this action in the sum of $705.54.

(2) Plaintiff and Intervening Trustee do have and recover from the defendants Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Company, a corporation, and each of them, as and for a [1713] resonable attorney's fee the sum of $195,000.00.

(3) The Court reserves jurisdiction of the issues of equitable relief requested by the plaintiff and the Intervening Trustee and finds that there is no just reason for delay in entering judgment on the verdict of the jury and hereby orders that final judgment in the amount of $1,692,500.00 be entered

accordingly against the defendants Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Company, a corporation, and each of them, as provided for herein.

Dated: March 5, 1956.

/s/ JAMES M. CARTER,
Judge of the District Court.

Approved as to form.

FERRIS E. HURD,
THOMAS C. STRACHAN,
MELVILLE WILLIAMS,
DONALD D. STARK,
ROSS C. FISHER.

By /s/ ROSS C. FISHER,
Attorneys for Defendants,

[Endorsed]: Filed March 5, 1956.

Docketed and entered March 5, 1956. [1714]

[Title of District Court and Cause.]

No. 13788-C

MEMORANDUM TO COUNSEL

The court heretofore, as the close of the hearing on attorney's fees indicated to counsel what it thought to be the appropriate factors to be considered, and what it thought to be the inappropriate factors which should not be considered. As to two items, the court was in doubt, (1) whether the trebling of the verdict could be taken into account in fixing attorney's fees, and (2) whether the amount paid to counsel for the defendants was a proper matter for consideration.

The court now reiterates its position as to the factors to be considered and not considered, and also states its views on the two matters left open.

The Rent and Price Control cases, although involving a treble damage suit and a provision for attorney's fees similar to the one involved in this case are not helpful; [1716] the amounts were small; the problem of considering the trebled amount has not been considered. Several cases have considered the treble damage provisions of the antitrust statute and have held that the amount as trebled, may not be considered in fixing attorney's fees. This court does not approve or disapprove of such cases. It states that in fixing the award of attorney's fees, it has not specifically looked to the trebling of the verdict.

This court thinks that the amount paid to the defendants as attorney's fees is a factor that may be considered but is only to be considered in connection with all the other evidence and facts in the case.

The court has considered:

1. The time and labor which have been fairly and properly expended by the attorneys in this case;

2. The novelty and difficulty of the questions

presented and the quality of skill demanded in the case;

3. The high degree of evidence and skill demonstrated by Messrs. Reich, Dixon, and Irwin;

4. The amount involved as it reflects the risk of the client and the commensurate responsibility of the lawyer;

5. The result achieved, namely the verdict for $500,000 in a difficult and hard fought case;

6. The eminence, ability, and standing of the counsel for the plaintiff. Reich was previously associated with an outstanding law firm in the community which had handled antitrust matters, and he had handled and participated in the handling of them while with the firm. He analysed the situation and prepared the original complaint. Mr. Dixon is an outstanding authority in the field of antitrust; has had long and distinguished service with the government and has been eminently successful in the handling of antitrust matters [1717] entrusted to him. Mr. Irwin is a long time member of this Bar and an able practitioner who diligently assisted in this case;

7. The court has considered the testimony of experts, but to a very small extent. None of the experts participated in the trial or sat through it, and the Court feels it is more competent to form an opinion on the value of the services than are the experts who answered hypothetical questions, or reviewed the pleadings and affidavits and then rendered an opinion. Finally, the court has called

upon its memory of the trial and proceedings, and to a large degree has been influenced by what transpired during the trial. The Court, although considering the sums paid to defense counsel, has attached no particular significance to the amounts, and the amount now awarded by the court for attorney's fees bears no relationship so far as the court can ascertain, to the fees paid to defense counsel. The Court has definitely not considered the matter as a contingent fee, and has not considered the punitive damages, and has not considered the financial condition of the defendant or its ability to pay.

The Court now fixes the attorney's fees in the sum of $195,000.00.

[Endorsed]: Filed March 5, 1956. [1718]

[Title of District Court and Cause.]

No. 13788-C

MOTIONS OF DEFENDANTS SUNKIST GROWERS, INC., A CORPORATION, SUED HEREIN AS CALIFORNIA FRUIT GROWERS EXCHANGE, AND THE EXCHANGE ORANGE PRODUCTS COMPANY, A CORPORATION, TO SET ASIDE THE VERDICT AND JUDGMENT HEREIN AND FOR A NEW TRIAL

Come now defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange, and defendant The Exchange Orange Products Company, a corporation, and jointly and severally move the Court to set aside the verdict and judgment herein and to grant a new trial of the above-entitled cause, and further move the Court to stay the execution of any and all proceedings to enforce said judgment pending disposition of the aforesaid motion for new trial; and

In support thereof defendants show the following grounds [1731] and reasons, namely:

1. The Court erred in denying defendant's motion for judgment at the close of plaintiffs' opening statement.

2. The Court erred in denying defendants' motion for a directed verdict at the close of plaintiffs' evidence.

3. The Court erred in denying defendants' motion for a directed verdict at the close of all of the evidence.

4. The Court erred in submitting any issues to the jury.

5. The verdict is contrary to law.

6. There was no substantial evidence to sustain the verdict and the evidence was insufficient to justify the verdict in the following particulars:

First Cause of Action

601. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct

which was outside the exemptions provided for the defendants by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.

602. Plaintiff has failed to prove that defendants, or either of them, engaged in a combination or conspiracy in restraint of interstate trade or commerce or entered into or performed any contract in restraint of such trade or commerce. Furthermore, any cause of action arising from any contract or refusal to supply plaintiff with Valencia oranges, that is pleaded in the first cause of action, except the TreeSweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint. [1732]

603. Plaintiff has failed to prove that defendants, or either of them, had any intent or purpose to restrain interstate trade or commerce.

604. Plaintiff has failed to prove any restraint of interstate trade or commerce, either substantial or insubstantial.

605. Plaintiff has failed to prove any public injury.

606. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

607. Plaintiff has failed to prove that plaintiff was injured as the proximate result of any act or breach of duty of defendants, or of either of them.

608. Plaintiff has failed to prove the amount of damage or that any damage resulted to plaintiff from the alleged injury or injuries.

609. Plaintiff has failed to prove any fixing of prices of either fruit or of citrus fruit juices.

610. Plaintiff has failed to prove the first cause of action attempted to be alleged in its second amended complaint as amended.

Second Cause of Action

611. Plaintiff has failed to prove that defendants, or either of them, had monopoly control over fruit grown and available for processing in California and Arizona or over products thereof.

612. Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for defendants by Section 6 of the Clayton Act [1733] and Section 1 of the Capper-Volstead Act.

613. Plaintiff has failed to prove that defendants, or either of them, combined or conspired to monopolize, or monopolized interstate trade and commerce in citrus fruit juices, or in any citrus fruit juice processed in California and sold in interstate commerce in violation of the antitrust laws.

614. Plaintiff has failed to prove that defendants, or either of them, had any specific intent or general intent or any intent or purpose whatsoever to monopolize interstate trade and commerce in citrus fruit juices processed in California and sold in interstate commerce.

615. Plaintiff has failed to prove any public injury.

616. Plaintiff has failed to prove that any legal right of plaintiff was invaded.

617. Plaintiff has failed to prove that plaintiff

was injured as the proximate result of any act or breach of duty of defendants, or either of them.

618. Plaintiff has failed to prove the amount of damage or that any damage resulted to plaintiff from the alleged injury or injuries.

619. Any cause of action arising from any contract pleaded in the second cause of action, or refusal to supply plaintiff with Valencia oranges, except the TreeSweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint.

620. Plaintiff has failed to prove that citrus fruit juices, or any citrus fruit juice, [1734] produced or processed in California, constituted an identifiable market or any area of effective competition that is subject to being monopolized.

621. Plaintiff has failed to prove that any appreciable part of interstate trade and commerce was monopolized or was the subject of a conspiracy or combination to monoplize.

622. Plaintiff has failed to prove the second cause of action attempted to be alleged in the second amended complaint as amended.

7. The verdict is contrary to the evidence.

8. The verdict is against the weight of the evidence.

9. The verdict is excessive with respect to the amount of damages and appears to have been given under the influence of passion or prejudice. [1735]

10. The Court erred in receiving over the objections of defendants the following evidence:

1001. Plaintiff's exhibit 4 (Exchange Orange pool returns for 1950-51 season)—In overruling defendants' objection to that portion of the exhibit relating to navel oranges (Tr. 247, lines 1-6, inc.).

1002. Plaintiff's exhibit 6 (Sunkist (Citrus Distributing Plant) shipping records of fruit to Silzle) —In overruling defendants' objection as to materiality as being outside the claimed causes of action and as any claim on the Silzle contract as being barred by the statute of limitations (Tr. 343, line 1 to Tr. 344, line 14, inc.).

1003. Plaintiff's exhibit 7 (Sunkist (Citrus Distributing Plant) shipping records of fruit to Silzle)—In overruling defendants' objection as to materiality as being outside the claimed causes of action and as any claim on the Silzle contract as being barred by the statute of limitations (Tr. 343, line 1 to Tr. 344, line 14, inc.).

1004. Plaintiff's exhibit 11 (Statistics on production by TreeSweet and Silzle under contracts)—In overruling defendants' objection on the grounds of materiality and relevancy to that portion of the exhibit with respect to the Silzle contract on the grounds of the statute of limitations (Tr. 393, line 16, to Tr. 394, line 11, inc.).

1005. Plaintiff's exhibit 25 (Exchange Orange-Silzle 1951 contract)—In overruling defendants' objection on the grounds of materiality and [1736] relevancy and on the grounds of the statute of limitations (Tr. 561, line 5, to Tr. 562, line 15, inc.).

1006. Plaintiff's exhibit 49 (Voucher check, invoices, shipping orders, etc., in connection with Sunkist sale of carload of juice to plaintiff—In overruling defendants' objection on ground that claim on account of the transaction was barred by the statute of limitations (Tr. 989, line 1, to Tr. 990, line 4, inc.).

1007. Plaintiff's exhibit 50 (TreeSweet purchase orders)—In overruling defendants' objection on the grounds that claim on account of the transaction was barred by the statute of limitations (Tr. 996, lines 3 to 14, inc.).

1008. Plaintiff's exhibit 58 (Letter Exchange Orange of 8-19-48 to Winkler & Smith re furnishing of oranges to enable plaintiff to comply with Government contrat in 1948)—In overruling defendants' objection to its materiality (Tr. 1765, line 1, to Tr. 1766, line 15, inc.).

1009. Plaintiff's exhibit 66-A (Hodge computations re Silzle purchasing agreement) (revision of previous plaintiff's exhibit 66, withdrawn from evidence)—In overruling defendants' objections thereto (Tr. 3830, lines 4 to 21, inc.).

1010. Plaintiff's exhibit 69-A (Hodge computations re TreeSweet purchasing agreement) (revision of previous plaintiff's exhibit 69, withdrawn from evidence)—In overruling defendants' objections thereto (Tr. 3827, line 1, to Tr. 3828, line 22, and Tr. 3833, lines 2-12, all inc.). [1737]

1011. Plaintiff's exhibit 71 (EOP inter-office memorandum 8-9-50 Arvel Smith to Finley, Hiby, Franklin, and Hogan re Case-Swayne)—In overruling defendants' objection on the ground of the statute of limitations (Tr. 2215, line 10, to Tr. 2218, line 6, inc.).

1012. Plaintiff's exhibit 72 (Excerpt from EOP Executive Committee meeting of 1-2-51)—In overruling defendants' objection on the ground of immateriality to the portion relating to navel oranges (Tr. 2220, lines 1-5, inc.).

1013. Plaintiff's exhibit 74 (Excerpts from EOP Executive Committee meeting of 6-13-51)—In overruling defendants' objection on the ground of immateriality (Tr. 2223, lines 16-20, inc.).

1014. Plaintiff's exhibit 79 (Check No. 4472, dated 6-9-49, from Winckler & Smith to N. J. Winckler, in amount of $340.00)—In overruling defendants' objection on the grounds of irrelevancy and immateriality (Tr. 2961, line 8, to Tr. 2962, line 5, inc.).

1015. Plaintiff's exhibit 80 (Check No. 4415, dated 5-4-49, from Winckler & Smith to N. J. Winckler, in amount of $21.33)—In overruling defendants' objection on the grounds of irrelevancy and immateriality (Tr. 2961, line 8, to Tr. 2962, line 5, inc.).

1016. Plaintiff's exhibit 82 (letter 4-26-50 O. E. Hanson of Bank of America to G. B. MacFarland, Kansas City, Mo., re good credit standing of W/S Co.)—In overruling defendants' objections on the grounds of irrelevancy and immateriality [1738] (Tr. 3181, line 15, to Tr. 3182, line 2, inc.).

1017. Plaintiff's exhibit 83 (letter 11-6-51 Ned Lewis of Wilbur Ellis Co., Los Angeles, to W/S re proposed investment in W/S business)—In overruling defendants' objection on the ground of immateriality (Tr. 3191, line 11, to Tr. 3192, line 3, inc.).

1018. By receiving evidence of processing arrangements in effect during periods subsequent to the filing of the Complaint down to the date of trial (Tr. 476, line 25; 485, line 9).

1019. By requiring and allowing Finley to testify hypothetically upon assumptions contrary to and not supported by the evidence (Tr. 642, line 25; 645, line 24; 661, line 20).

1020. By receiving testimony of Clark as to conversations had outside the presence of defendants or any representative of defendants (Tr. 817, line 20, to 821, line 11).

1021. By receiving opinion testimony by Winckler based on assumptions not supported by and contrary to evidence that plaintiff would have made a profit in the year 1951 if it had secured processing arrangement comparable to TreeSweet (Tr. 1007, line 18 to 1008, line 20).

1022. By allowing Winckler to testify over objection from "second hand knowledge." (Tr. 3823, line 18 to 3824, line 10).

1023. By allowing Hodge to testify over objection to his opinion as to the meaning and effect of the Chapter II proceedings and of an order entered therein and appearing herein as [1739] Exhibit 84 (Tr. 3825, line 13, to 3838, line 22).

1024. By allowing Hodge over objection and motion to strike give his opinion and interpretation of evidentiary matters (Tr. 3844, line 7 to 3849, line 14). [1740]

11. The Court erred by excluding the following evidence offered by defendants:

1101. Defendants' exhibit A (Complete application by Winkler & Smith Citrus Products Company (hereinafter referred to as W/S) to California Division of Corporations)—(Tr. 3752, lines 1-7, inc.).

1102. Defendants' exhibit E (Letter 10/29/48 from Lynch, W/S receiver, to The Exchange Orange Products Company (hereinafter referred to as EOP) re payment for oranges under Government contract)—(Tr. 3755, line 1 to Tr. 3756, line 20, inc.).

1103. Defendants' exhibit F (W/S federal income tax returns for periods 2/1/51-1/31/52, 2/1/50-1/31/51, 2/1/49-1/31/50; and California returns 2/1/51-1/31/52, 2/1/50-1/31/51)—(Tr. 3756, line 21 to Tr. 3758, line 12, inc.).

1104. Defendants' exhibit F-1 (Schedules accompanying WS income tax returns for year ending 1/31/50 showing loss carryovers for 1948 and 1949, etc.)—(Tr. 3756, line 21, to Tr. 3758, line 12, inc.).

1105. Defendants' exhibit I-1, I-2, I-3 and I-4 (W/S Laboratory reports)—(Tr. 3046, line 19 to Tr. 3088, line 7, inc.; and Tr. 3786, line 18 to Tr. 3787, line 23, inc.).

1106. Defendants' exhibit J (W/S production records)—(Tr. 3760, line 11 to Tr. 3765, line 5, inc.).

1107. Defendants exhibit P (Letters 2/2/50 and

2/6/50 from Pavey & Co. to W/S, re Navels)—(Tr. 1420, line 3 to Tr. 1422, line 21, inc.). [1741]

1108. Defendants' exhibit Q (Letter 3/22/50 Bagley & Co. to W/S, Anagold complaint)—(Tr. 1321, lines 10 to 16, inc.; and in striking the exhibit from the evidence (Tr. 1435, lines 5-14, inc.).

1109. Defendants' exhibit T (Letters 5/3/51, 7/16/51 and 11/21/51 Davenport Brokerage Co. to W/S, Anagold complaints)—(Tr. 1463, line 10 to Tr. 1465, line 5, inc.).

1110. Defendants' exhibit U (Letter 5/8/51 Fleming Co. to W/S; letter 9/25/51 W/S to Fleming Co.; letter 8/9/51 Davis Co. to W/S; letter 11/6/50 Fleming-Lacy-Walker to W/S; letter 11/14/50 W/S to Fleming-Lacy-Walker; letters 11/16/50 and 8/7/51 Fleming-Lacy-Walker to W/S)—(Tr. 1465, line 15 to Tr. 1467, line 1, inc.).

1111. Defendants' exhibit AB (Letter 5/16/49 to Mississippi Sales Co., and letter 5/18/49 Mississippi Sales Co. to W/S)—(Tr. 1465, line 15 to Tr. 1466, line 13, inc.; and Tr. 1572, line 9 to Tr. 1573, line 5, inc.).

1112. Defendants' exhibit AC (Letter 6/25/49 F. O. Gray to W/S)—(Tr. 1465, line 15 to Tr. 1466, line 13, inc.; and Tr. 1574, lines 9 to 16, inc.).

1113. Defendants' exhibit AD (Letter 7/25/49 George F. Seewagen to W/S)—(Tr. 1465, line 15 to Tr. 1466, line 13, inc.; and Tr. 1577, line 1 to Tr. 1580, line 18, inc.).

1114. Defendants' exhibit AE (Letter 9/8/49 J. B. Morris Co. to W/S—(Tr. 1465, line 15, to Tr.

1466, line 13, inc.; and Tr. 1582, line 14 to Tr. 1585, line 8, inc.). [1742]

1115. Defendants' exhibit AK (Letter 5/24/49 Irwin R. Tucker Co. to W/S; and letter 5/26/49 W/S to Irwin R. Tucker Co.)—(Tr. 1465, line 15 to Tr. 1466, line 13, inc.; and Tr. 1592, lines 7 to 22, inc.).

1116. Defendants' exhibit AL (Letter 6/3/49 W. L. Young Brokerage Co. to W/S)—(Tr. 1465, line 15 to Tr. 1466, line 13, inc.; and Tr. 1592, lines 7 to 22, inc.).

1117. Defendants' exhibit BA (W/S partners' original contribution, writeup of fixed assets, and allocation of writeup to partners)—(Tr. 2399, line 9 to Tr. 2401, line 13, inc.; and Tr. 3787, line 24 to Tr. 3790, line 11, inc.).

1118. Defendants' exhibit BH (Cost to corporation of lease and repurchase agreement with stockholders)—(Tr. 2683, line 7 to Tr. 2685, line 13, inc.; and Tr. 3790, line 13 to Tr. 3791, line 25, inc.).

1119. Defendants' exhibit BI (Withdrawals by N. J. Winckler for Salary, Bonus, Forgiven Debt and Expenses, 2/1/49-1/31/52)—(Tr. 2690, line 3 to Tr. 2699, line 20, inc.; and Tr. 3790, line 13 to Tr. 3793, line 7, inc.).

1120. Defendants' exhibit BJ (Summary of earnings (Hodge-prospectus-Actual), 1/31/47-1/31/51)—(Tr. 3790, line 13 to Tr. 3793, line 7, inc.).

1121. Defendants' exhibit BS (Statement of projected results of operations by W/S on processing 12,000 tons of Valencia oranges under TreeSweet contract terms)—(Tr. 2988, line 16 to Tr. [1743] 2990, line 13, inc.).

1122. Defendants' exhibit BT (Combined statement of income including actual results for year ended 1/31/52, and projected results of processing 12,000 tons of Valencia oranges under TreeSweet contract terms)—(Tr. 2991, lines 11 to 24, inc.).

1123. Defendants' exhibit BV (Production, Juices, Packs, and season closing prices paid by canners for Florida oranges, 1948-49 to 1950-51)—(Tr. 3773, line 4 to Tr. 3776, line 8, inc.).

1124. Defendants' exhibit BY (Valencia oranges purchased in 1951 by Mutual Citrus Products Company)—(Tr. 2609, line 4 to Tr. 2610, line 8, inc.).

1125. Defendants' exhibit CD (Statement of projected results of operations by Winkler & Smith Citrus Products Co. on processing 12,000 tons of Valencia oranges under TreeSweet contract terms)—(Tr. 2992, line 24 to Tr. 2995, line 22, inc.).

1126. Defendants' exhibit CM (Method of calculating addition of water and sugar, from laboratory record)—(Tr. 3228, line 19 to Tr. 3233, line 1, inc.; and Tr. 3786, line 18 to Tr. 3787 line 23, inc.).

1127. Defendants' exhibit CN (Amount of sugar and water added by W/S to stretch their canned sweetened orange juice)—(Tr. 3228, line 19 to Tr. 3233, line 1, inc.; and Tr. 3786, line 18, to Tr. 3787, line 23, inc.). [1744]

1128. Defendants' exhibit CO (The California Fruit Growers Exchange system, booklet, Circular C-135, May, 1950, by Farm Credit Administration,

U. S. Dept. of Agriculture)—(Tr. 3301, line 25 to Tr. 3302, line 20, inc.).

1129. Defendants' exhibit CP (Letter 9/24/45 Arthur L. Johnson Co. to California Fruit Growers Exchange)—(Tr. 3313, line 24 to Tr. 3314, line 22, inc.).

1130. Defendants' exhibit CQ (Letter 5/27/49 W/S to Mississippi Sales Co.)—(Tr. 3315, line 9 to Tr. 3316, line 6, inc.).

1131. Defendants' exhibit CR (Anagram 6/8/49)—(Tr. 3316, line 7 to Tr. 3317, line 4, inc.).

1132. Defendants' exhibit CT (Letter 7/7/49 W/S to D. V. Brown of Brown-Bell Brokerage Co.)—(Tr. 3321, lines 8 to 24, inc.).

1133. Defendants' exhibit CW (Letter 2/13/50 E. H. Karl & Co. to W/S)—(Tr. 3323, lines 18 to 24, inc.).

1134. Defendants' exhibit CX (Letter 2/17/50 W/S to E. N. Karl & Co.)—(Tr. 3323, line 25 to Tr. 3324, line 9, inc.).

1135. Defendants' exhibit DA (Letter 3/30/50 Brake & Sons, Inc., to W/S)—(Tr. 3326, lines 4 to 11, inc.).

1136. Defendants' exhibit DB (Letter 4/10/50 W/S to Seavey & Flarsheim Brokerage Co.)—(Tr. 3326, line 12 to Tr. 3327, line 11, inc.).

1137. Defendants' exhibit DE (Letter 12/15/50 Brake & Sons, Inc. to W/S)—(Tr. 3330, lines 1 to 18, inc.).

1138. Defendants' exhibit DK (Letter 6/21/51 W/S to Calkins & Co.)—(Tr. 3340, lines 1 to 23, inc.).

1139. Defendants' exhibit DT (Letter 8/10/51 W/S to John N. Canavan Co.)—(Tr. 3344, line 5 to Tr. 3345, line 16, inc.).

1140. Defendants' exhibit DV (Telegram 8/24/51 W/S to Dickensheets-Potter)—(Tr. 3346, line 11 to Tr. 3350, line 5, inc.).

1141. Defendants' exhibit DW (Letter 8/28/51 W/S to Joseph H. Fleming Co.)—(Tr. 3350, lines 6 to 21, inc.).

1142. Defendants' exhibit DX (Letter 9/4/51 W/S to Parrott & Co.)—(Tr. 3351, line 22 to Tr. 3351, line 20, inc.).

1143. Defendants' exhibit DY (Letter 9/7/51 Parrott & Co. to W/S)—(Tr. 3351, line 21 to Tr. 3353, line 5, inc.).

1144. Defendants' exhibit EL (Excerpt from minutes of regular Executive Committee meeting of EOP held 9/19/50)—(Tr. 3391, lines 3 and 4.).

1145. Defendants' exhibit EQ (Excerpt from minutes of regular Board of Directors meeting of EOP held 5/9/51)—(Tr. 3392, line 1).

1146. Defendants' exhibit ER (Excerpt from minutes of regular Board of Directors meeting of California Fruit Growers Exchange held 7/18/51) —(Tr. 3392, line 2).

1147. Defendants' exhibit ET (Excerpt from minutes of regular executive committee meeting of EOP held 7/31/51)—(Tr. 3393, lines 2 to 6, [1746] inc.).

1148. Defendants' exhibit EU (Excerpt from minutes of regular meeting of Board of Directors of EOP held 8/8/51)—(Tr. 3393, lines 6 to 22, inc.).

1149. Defendants' exhibit EV (Excerpts from minutes of regular Executive Committee meeting of EOP held 8/13/51)—(Tr. 3393, lines 22 to 25, inc.).

1150. Defendants' exhibit EW Excerpts from minutes of regular Executive Committee meeting of EOP held 9/19/51)—(Tr. 3393, line 25 to Tr. 3394, line 3, inc.). [1747]

1151.

1152. By excluding evidence offered on cross-examination of Winckler with respect to the items composing his indebtedness which the corporation forgave without consideration (Tr. 1290, line 4 to 1294. line 10).

1153. By restricting cross-examination of Browne as to whether the consideration of facts appearing of record would, if known to the witness, have affected his appraisal (Tr. 1533, lines 15 to 24).

1154. By restricting cross-examination of Hodge so as to preclude showing by this witness that machinery and equipment was reflected on plaintiff's books at fictitious values (Tr. 1948, line 14 to 1949, line 18).

1155. By restricting cross-examination of Hodge so as to preclude showing by this witness that had the books of plaintiff been kept so as to reflect facts as they actually occurred, there would have been reflected a loss rather than a profit for the six months ended 7/31/49 (Tr. 1996, line 25 to 1997, line 13).

1156. By restricting cross-examination of Hodge so as to preclude showing by this witness that as of the year ended 1/31/51, the witness set up as an asset items of expense incurred during the year, and that the items so set up as assets were deducted in each of two year for income-tax purposes (Tr. 2017, line 13 to 2019, line 22).

1157. By excluding evidence offered on cross-examination of Hodge to show that the forgiveness of the indebtedness of Winckler to the plaintiff occurred in the year ended January 31, 1950, and that items of expense in the amount of approximately $19,000 were carried over as capital assets from one year to the next and were [1748] deducted as expense for income-tax purposes for both years (Tr. 2112, line 5 to line 21).

1158. By excluding cross-examination of Hodge, with respect to increases of cost levels between 1949 and 1951 (Tr. 2138, line 19, to 2139, line 20).

1159. By excluding and striking from the record testimony of the witness Lynch with respect to the loss reported by plaintiff for Federal income-tax purposes for the year ended January 31, 1949 (Tr. 2421, line 1 to line 16).

1160. By excluding and striking from the record testimony of the witness Lynch that the balance sheet for the year ended January 31, 1950, received in evidence, incorrectly reflects profit or loss for the period (Tr. 2430, line 30, to Tr. 2431, line 15).

1161. By refusing to require plaintiffs to give defendants access to plaintiff's income tax return for year ended January 31, 1950, and in ruling that the offered proof of facts contained therein should be excluded (Tr. 2454, line 2, to Tr. 2456, line 1).

1162. By excluding from the record testimony of Lynch offered to show that Winckler converted corporate assets to his own use (Tr. 2462, line 19, to Tr. 2465, line 24).

1163. By excluding testimony of Lynch offered to show by items writeups in the book value of assets (Tr. 2486, line 17, to Tr. 2487, line 4).

1164. By excluding Exhibit BS and by requiring defendants to limit their showing with respect to the computations therein made to only so much of those computations as were included in Exhibit CC (Tr. 2966, line 15, to 2967, line 3).

1165. By striking from the record the testimony of [1749] Opal Smith and in excluding her offered testimony as to the practice of the plaintiff company to add water and otherwise adulterate citrus juices manufactured and sold by it and the further evidence of the witness to show actual knowledge by Winckler of such practices (offered Tr. 3083, line 8 to 3087, line 18; excluded line 22).

1166. By excluding the offered testimony of Frank Gilbert as to the practice of the plaintiff company to add water and otherwise adulterate citrus juices manufactured and sold by it, as to actual knowledge of Winckler as to these practices, as to the unsatisfactory performance by Winckler of a 1947 processing agreement (Tr. 3089, line 3 to 3091, line 11, excluded line 14).

1167. By excluding offered testimony of Rogers that the mechanical conditions of TreeSweet plant were not comparable to those of plaintiff company (Tr. 3119, line 25 to Tr. 3120, line 11).

1168. By excluding testimony of Rogers that extractors of plaintiff company did not produce single-strength orange juice of quality comparable to those used by other canners (Tr. 3124, line 12 to Tr. 3124, line 23).

1169. By striking out testimony of Rogers the underlined portion of the following answer: "Well, the citromat does not extract as much juice from a given ton of fruit of a quality of juice which would be considered one which we would use in single-strength purposes." (Tr. 3125, line 14 to Tr. 3126, line 21.)

1170. By excluding testimony of Rogers as to discussions between the witness and Winckler of reasons for replacing citromat extractors (Tr. 3126, line 5 to Tr. [1750] 3126, line 18).

1171. By excluding testimony of Rogers that citromat extractors were not used or useable in the production of first-quality orange juice (Tr. 3127, line 24, to Tr. 3128, line 12).

1172. By excluding offered testimony of Rogers as to the practice of plaintiff company to add water and other materials to orange juice and that when he recommended to Winkler installation of more effecient extracting machinery, Winckler said he woudln't do it as long as he could make up for deficiency by adding water (Tr. 3133, line 16 to Tr. 3134, line 6).

1173. By excluding testimony of Nels Warner with respect to the productive capacity of citromats as compared with other extractors in the production of single-strength Valencia juice (Tr. 3212, line 23 to Tr. 3213, line 4).

1174. By excluding and striking from the record testimony of Nels Warner that plaintiff company was the only processor that attempted to process Valencia oranges for single-strength packing by the use of citromats (Tr. 3213, line 11 to Tr. 3213, line 18).

1175. By excluding testimony of Warner as to mechanical conditions of plaintiff company's plant during the period from 1946 to 1951, and in requiring that testimony be limited to the year 1951 (Tr. 3214, line 4 to line 13).

1176. By excluding testimony of Warner as to procedures of plaintiff company for grading and culling fruit going to extractors (Tr. 3215, line 4 to line 9).

1177. By rejecting testimony of Warner offered with respect to the inferior quality of juice produced by citromat, as to the poor quality of product produced by plaintiff [1751] company, as to the inadequacy of culling and grading and use of bad fruit, as to lack of sanitation in the plant, and as to bad physical condition of plant (Tr. 3222, line 19 to Tr. 3226, line 6).

1178. By excluding testimony offered by Templeton to corroborate testimony of Warner (Tr. 3222, line 19 to Tr. 3226, line 6).

1179. By excluding testimony of Ralph H. Higby, Chief Chemist of defendant EOP, as to knowledge of poor quality, lack of sterility and dirt in products manufactured by plaintiff company and as to his examination of books and records of plaintiff company to determine the fact that juice was adulterated and to establish the extent of adulteration and that the adulteration and marketing of these products constituted a violation of Federal law (Tr. 3226, line 22 to Tr. 3231, line 25).

1180. By excluding the testimony of Finley offered to show the reasons which the growers had for entering into participation arrangements (Tr. 3639, line 5 to line 16).

1181. By excluding testimony of Finley offered to show certain of the reasons, beliefs, knowledge and state of mind upon which defendants in 1951 refrained from entering into a grower-participation arrangement with W/S (Tr. 3674, line 9 to 3692, line 18). [1752]

1182. By excluding testimony of Finley offered to show certain of the reasons and purposes of defendants in entering in 1951 into grower-participation arrangement with TreeSweet (Tr. 3739, lines 10 to 20).

1183. By excluding offered testimony of Regan that computations made by Hodge misconstrue the TreeSweet processing arrangement and were based upon assumptions with respect to comparability of W/S and TreeSweet which were in error and contrary to evidence appearing in the record. (Tr. 2930, line 4, to 2936, line 25; 2995, lines 7 to 24.) [1753]

12. The court erred in giving, over defendants' objections, the following instructions (Tr. 4697, line 3 to 4700, line 16):

1201. Civil 12A (Tr. 4648, lines 18 to 25).

1202. Civil 12B (Tr. 4649, lines 1 to 8).

1203. Plaintiffs' No. 2 (Tr. 4652, line 10 to 21).

1204. Plaintiffs' No. 7 (Tr. 4652, line 22 to 4653, line 8).

1205. Plaintiffs' No. 8 (Tr. 4653, lines 9 to 19).

1206. Court's K (Tr. 4654, line 23 to 4656, line 21).

1207. Court's B (Tr. 4658, line 9 to 4659, line 24).

1208. Court's Q (Tr. 4663, line 15 to 4664, line 5).

1209. Plaintiff's No. 4 (Tr. 4664, lines 7 to 11).

1210. Plaintiffs' No. 3 (Tr. 4664, lines 12 to 19).

1211. Plaintiffs' No. 5 (Tr. 4664, line 20 to 4665, line 1).

1212. Plaintiffs' No. 13 (Tr. 4666, lines 18 to 20).

1213. Plaintiffs' No. 37, Revision No. 2 (Tr. 4666, line 21, to 4668, line 4).

1214. Plaintiffs' No. 6 (Tr. 4669, line 13 to 4670, line 3).

1215. Plaintiffs' No. 32 (Tr. 4670, lines 4 to 6).

1216. Plaintiffs' No. 33 (Tr. 4670, lines 16 to 21).

1217. Court's N (Tr. 4671, lines 1 to 3).

1218. Plaintiffs' No. 28 (Tr. 4671, lines 4 to 8).

1219. Plaintiff's No. 29 (Tr. 4671, lines 9 to 17).

1220. Plaintiff's No. 12 (Tr. 4671, line 18 to 4672, line 3).

1221. Plaintiffs' No. 27 (Tr. 4672, lines 4 to 24).

1222. Plaintiffs' No. 34 (Tr. 4672, line 25 to 4673, line 17).

1223. Plaintiffs' No. 35 (Tr. 4673, line 18 to 4674, line 13).

1224. Plaintiff's No. 36 (Tr. 4674, lines 14 to 21, and 4674, line 25 to 4675, line 17). [1754]

1225. Defendants' No. 16a, as modified (Tr. 4675, lines 18 to 24).

1226. Plaintiffs' No. 38 (Tr. 4675, line 25, to 4676, line 11).

1227. Plaintiffs' No. 30 (Tr. 4676, lines 12 to 23).

1228. Plaintiffs' No. 15 (Tr. 4677, lines 3 to 6).

1229. Plaintiffs' No. 19, Revision No. 1 (Tr. 4677, lines 7 to 23, and 4678, lines 2 to 7).

1230. Court's P (Tr. 4679, lines 1 to 4).

1231. Defendants' No. 7, Revision No. 1 (Tr. 4679, line 5, to 4680, line 6).

1232. Defendants' No. 17a, as modified (Tr. 4680, line 7, to 4681, line 3).

1233. Defendants' No. 9A, first Revision, as modified (Tr. 4681, lines 7 to 17).

1234. Court's R (Tr. 4681, line 20, to 4685, line 17 (includes interpolations)).

1235. Court's D (Tr. 4685, line 18, to 4686, line 7).

1236. Court's E (Tr. 4687, lines 1 to 8).

1237. Plaintiffs' No. 23, Revision No. 1 (Tr. 4688, line 22, to 4689, line 10).

The Court also erred in repeating to the jury, after it had retired, the substance of Court's Instruction B (Tr. 4717, line 10, to 4719, line 23) over defendants' objections (Tr. 4720, lines 8 to [1755] 22).

13. The Court erred in failing and refusing to give, either in form or substance, the following in-

structions requested by defendants (Tr. 4697, line 3 to 4700, line 16):

1301. Defendants' Nos. A and B.

1302. Defendants' No. 2.

1303. Defendants' No. 4, and failing this, defendants' No. 4 as modified (Tr. 4033, line 17, to 4034, line 11).

1304. Defendants' Nos. 5 and 6.

1305. Defendants' No. 7, and failing this, defendants' No. 7 as modified (Tr. 4060, line 25, to 4068, line 15).

1306. Defendants' No. 8, and failing this, defendants' No. 8 as modified (Tr. 4083, line 4, to 4084, line 13).

1307. Defendants' proposed (unnumbered) instruction that there could be no verdict for plaintiff unless the jury found that the acts of defendants complained of directly and necessarily excluded plaintiff as a competitor, or that the acts complained of were performed with the specific intent of excluding plaintiff as a competitor (Tr. 3523, lines 10, to 18, 4085, lines 10 to 21).

1308. Defendants' Nos. 9, 9a, 9A (first revision), 10, 11, 12, 13, 14, 14a, 14b.

1309. Defendants' No. 15, and failing this, defendants' No. 15 as modified (Tr. 4103, lines 1 to 14).

1310. Defendants' No. 16, and failing this, defendants' No. 16 as modied (Tr. 4128, line 9, to 4129, line 4).

1311. Defendants' Nos. 16a and 16b.

1312. Defendants' No. 17a, and failing this, defendants' No. 17a as modified (Tr. 4164, lines 10 to 19).

1313. Defendants' No. 18, and failing this, defendants' No. 18 as modified (Tr. 4170, line 15, to 4172, line 25).

1314. Defendants' Nos. 20 to 25, both inclusive, and failing this, defendants' Nos. 20 to 25, both inclusive, as modified (Tr. 4173, line 21, to 4174, line 4).

1315. Defendants' Nos. 25b and 25d. [1756]

1316. Defendants' No. 25-1, and failing this, defendants' No. 25-1 as modified (Tr. 4207, lines 1 to 23; 4210, line 24, to 4211, line 6).

1317. Defendants' No. 34, and failing this, defendants' No. 34 as modified (Tr. 4182, line 9, to 4183, line 2).

1318. Defendants' No. 34a, and failing this, defendants' No. 34a as modified (Tr. 4249, lines 11 to 12).

1319. Defendants' Nos. 35, 36a, 39, 41 and 43.

1320. Defendants' No. 44, and failing this, defendants' No. 44 as modified (Tr. 4284, line 24, to 4286, line 3).

1321. Defendants' No. 45.

14. The Court erred in denying the "motion of defendants for leave to amend their answers to the amended complaint" (Tr. 3372, lines 18 and 19; 3377, line 22).

15. The Court erred in allowing plaintiffs' "motion to amend amended complaint to conform to the

evidence" (Tr. 3477, lines 6 and 7); and in allowing plaintiffs' motion further to amend the second amended complaint (Tr. 4205, line 11 to 4206, line 6). [1757]

16. Further errors in law were committed at the trial and there were irregularities in the proceedings and abuses of discretion by which defendants were prevented from having a fair trial, which errors, irregularities and abuses of discretion were as follows:

1601. The Court erred and materially prejudiced defendants by the manner and extent of his participation in the trial in the following respects:

(a) By participating in and assisting plaintiffs in the examination of witnesses and permitting and inviting plaintiffs' witnesses to make argumentative, self-serving and explanatory statements as follows:

The witness Kelly: Tr. 356, line 14 to 357, line 4.

The witness Finley: Tr. 416, line 1 to 417, line 17; 449, line 24 to 452, line 22; 463, line 9 to 464, line 4; 587, line 23 to 589, line 4; 620, lines 5 to 25; 639, lines 8 to 10; 645, line 24 to 669, line 3; 693, line 20 to 699, line 2.

The witness Winckler: Tr. 852, line 8 to 854, line 10; 887, lines 1 to 15; 888, lines 10 to 24; 911, lines 5 to 11; 918, lines 17 to 22; 935, lines 7 to 15; 943, lines to 14; 1279, line 19 to 1281, line 11; 1754, line 1 to 1756, line 19. [1758]

The witness Browne: Tr. 1519, lines 17 to 25; 1534, lines 3 to 16.

The witness Ward: Tr. 1720, lines 1 to 24; 1746, lines 1 to 10.

The witness Hodge: Tr. 1788, line 6 to 1790, line 1; 1790, line 12 to 1800, line 10; 1800, line 24 to 1801, line 7; 1801, line 23 to 1802, line 7; 1807, line 20 to 1809, line 20; 1810, lines 7 to 14; 1813, line 14 to 1814, line 4; 1815, line 12 to 1817, line 16; 1819, line 13 to 1822, line 14; 1823, line 18 to 1824, line 5; 1827, line 3 to 1828, line 6; 1830, line 1 to 1832, line 16; 1840, lines 5 to 24; 1842, line 23 to 1843, line 14; 1858, lines 1 to 14; 1860, lines 8 to 17; 1867, line 11 to 1888, line 13; 2172, line 25; 2179, line 17; 1846, line 24 to 1848, line 14; 1861, line 20 to 1862, line 10.

(b) By permitting and inviting plaintiffs' witnesses while on cross-examination to evade questions, make unresponsive answers, and volunteer argumentative, self-serving and explanatory statements as follows:

The witness Winckler: Tr. 1023, lines 6 to 25; 1049, line 24 to 1051, line 5; 1065, lines 3 to 23; 1067, line 12 to 1068, line 20; 1096, line 4; 1095, line 21 to 1097, line 5; 1107, line 5 to 1108, line 13; [1759] 1112, line 13 to 1113, line 22; 1149, line 11 to 1150, line 17; 1473, lines 11 to 14; 1021, lines 3 to 6; 1023, lines 6 to 24; 1049, line 17 to 1051, line 5; 1055, lines 12 to 15; 1065, lines 3 to 21; 1067, line 12 to 1068, line 20; 1279, line 19 to 1289, line 11.

The witness Hodge: Tr. 1986, line 1 to 1988, line 5; 2097, line 20; 2106, line 10.

(c) By restataing, interpreting and emphasizing before the jury certain testimony of witnesses as follows:

The witness Kelly: Tr. 356, line 14 to 357, line 4.

The witness Finley: Tr. 416, line 1 to 417, line 17; 449, line 24 to 452, line 22; 463, line 9 to 464, line 4; 645, line 24 to 669, line 3; 646, line 16 to 649, line 2.

The witness Browne: Tr. 1519, lines 17 to 25; 1534, lines 3 to 16.

The witness Ward: Tr. 1720, lines 1 to 24; 1746, lines 1 to 10.

The witness Hodge: Tr. 1788, line 6 to 1790, line 1; 1790, line 12 to 1800, line 10; 1801, line 3 to 1802, line 7; 1807, line 20 to 1809, line 14; 1810, line 14; 1813, line 14 to 1814, line 4; 1815, line 12 to 1817, line 16; 1819, line 13 to 1822, line 14; 1823, line 18 to 1824, line 5; 1827, line 3 to 1828, line 6; 1830, line 1 to 1832, line 16; 1840, lines 5 to 24; 1843, lines 1 to 14; 1858, [1760] lines 1 to 14; 1860, lines 8 to 17; 1867, line 11 to 1888, line 13; 1940, line 9 to 1941, line 18; 1942, lines 4 and 5; 1942, lines 24 and 25; 1943, line 10 to 1945, line 4; 1948, lines 4 and 5; 1949, line 24 to 1953, line 25; 1962, line 6 to 1965, line 2; 1966, line 20 to 1967, line 7; 1989, lines 12 to 14; 1992, lines 1 to 13; 1997, lines 5 to 12; 1998, line 21 to 1999, line 24; 2005, line 13 to 2009, line 8; 2018, line 1 to 2019, line 22; 2023, line 4 to 2024, line 5; 2030, line 1 to 2031, line 10; 2144, lines 2 to 6; 2147, line 21 to 2149, line 11; 2180, line 20 to 2181, line 3; 2190, line 5; 2199, line 13; 2239, line 22 to 2241, line 1; 2254, lines 12 to 20; 257, line 3 to 2261, line 2; 2263, line 4 to 2264, line 5.

(d) By interfering with the right of defendants to uninterrupted cross-examination and conducting interrogation during the cross-examination of plaintiffs' witnesses so as to assist plaintiffs and prejudice defendants as follows:

The witness Winckler: Tr. 1023, lines 6 to 18; 1049, line 24 to 1051, line 5; 1065, lines 3 to 23; 1067, line 12 to 1068, line 20; 1072, line 15 to 1077, line 24; 1096, line 5 to 1097, line 5; 1107, line 5 to 1108, line 13; 1109, line 13 to 1111, line 8; 1112, line 13 to 1113, line 22; 1116, line 10 to 1137, line 12; [1761] 1149, line 11 to 1150, line 17; 1253, line 1 to 1261, line 19; 1279, line 19 to 1281, line 11; 1479, lines 1 to 17.

The witness Hodge: Tr. 1940, line 9 to 1941, line 18; 1942, lines 4 and 5; 1942, lines 24 and 25; 1943, line 10 to 1945, line 6; 1948, lines 4 and 5; 1949, line 24 to 1953, line 25; 1962, line 6 to 1965, line 2; 1966, line 20 to 1967, line 7; 1986, line 1 to 1988, line 5; 1989, lines 12 to 14; 1992, lines 1 to 13; 1997, lines 5 to 12; 1998, line 21 to 1999, line 24; 2005, line 13 to 2009, line 8; 2018, line 1 to 2019, line 22; 2023, line 4 to 2024, line 5; 2030, line 1 to 2031, line 10; 2097, line 20 to 2106, line 10; 2144, lines 2 to 6; 2147, line 21; 2149, line 11; 2180, line 15 to 2181, line 3; 2190, line 5 to 2199, line 13; 2239, line 22 to 2241, line 1; 2254, lines 12 to 20; 2257, line 3 to 2261, line 2; 2262, line 4 to 2264, line 5.

(e) By interposing rulings without objections having been made as follows:

Tr. 1940, line 9 to 1941, line 18; 1942, lines 4 and 5; 1942, lines 24 and 25; 1943, line 10 to 1945, line 4; 1948, lines 4 and 5; 1949, line 24 to 1953, line 25; 1962, line 6 to 1965, line 2; 1966, line 20 to [1762] 1967, line 7; 1986, line 1 to 1988, line 5; 1989, lines

12 to 14; 1992, lines 1 to 13; 1997, lines 5 to 12; 1988, line 21 to 1999, line 24; 2005, line 13 to 2009, line 8; 2017, line 13 to 2019, line 22; 2023, line 4 to 2024, line 5; 2030, line 1 to 2031, line 10; 2097, line 20 to 2098, line 12; 2106, lines 7 to 10; 2144, lines 2 to 6; 2147, line 21 to 2149, line 11; 2180, line 20 to 2181, line 3; 2190, line 5 to 2199, line 13; 2239, line 22 to 2241, line 1; 2254, lines 12 to 20, 2257, line 3 to 2261, line 2; 2262, line 4 to 2264, line 3. [1763]

(f) By engaging in colloquies and arguments and discussing theories and contentions of the parties in the presence of the jury as follows:

Tr. 646, lines 6 to 8; 991, line 14 to 994, line 16; 1098, line 25 to 1101, line 6; 1269, line 16 to 1274, line 7; 1487, line 10 to 1489, line 9; 2399, line 7 to 2401, line 11; 2410, line 5 to 2413, line 20; 2419, lines 11 to 19; 2431, line 15 to 2432, line 19; 2435, lines 6 to 9; 2486, lines 14 to 25; 2660, lines 1 to 25; 2684, line 4 to 2689, line 25; 2705, line 4 to 2708, line 6; 2760, line 10 to 2761, line 5; 2988, line 24 to 2990, line 14; 3665, line 22 to 3667, line 17.

(g) By impugning in the presence of the jury the proprietly of the conduct of counsel for the defendants as follows:

Tr. 797, line 17 to 798, line 20; 1007, line 21 to 1008, line 2; 1116, line 10 to 1137, line 12; 1235, line 6 to 1239, line 1; 1253, line 1 to 1255, line 24; 1487, line 10 to 1489, line 9; 2392, line 8 to 2395, line 6; 2399, line 7 to 2401, line 11; 2419, lines 11 to 19; 2431, line 15 to 2432, line 19; 2684, line 4 to 2689, line 25; 2691, line 5 to 2694, line 5; 2764, lines 14 to

21; 2876, line 21 to 2879, line 15; 3088, lines 4 to 9; 3641, line 20 to 3642, line 3; [1764] 3655, line 22 to 3667, line 17; 3740, lines 1 to 16.

(h) By cross-examining defense witnesses as follows:

The witness Lynch: Tr. 2406, line 20 to 2407, line 15; 2428, line 9 to 2429, line 22; 2664, line 9 to 2671, line 18; 2808, line 20 to 2809, line 15; 2812, line 13 to 2814, line 25.

The witness Walker: Tr. 2635, line 25 to 2637, line 1.

The witness Swayne: Tr. 2745, line 23, to 2747, line 4.

(i) By giving undue emphasis to limitations upon the evidentiary purposes of the defendants' evidence as follows:

Tr. 1653, line 1 to 1660, line 10; 1667, lines 6 to 20; 1670, line 8 to 1674, line 11; 1681, lines 1 to 4; 1682, line 17 to 1683, line 2; 3593, line 13 to 3597, line 6.

(j) By interrupting the direct examination of defendants' witnesses and making comments on their testimony and on the method of presentation of evidence as follows:

Tr. 2392, line 8 to 2395, line 6; 2396, line 11 to line 23; 2399, line 7 to 2401, line 13; 2410, line 5 to 2414, line 9; 2419, line 5 to line 19; [1765] 2428, line 9 to 2429, line 23; 2431, line 15 to 2432, line 19; 2435, lines 5 to 19; 2486, line 14 to 2487, line 4; 2664, line 9 to 2671, line 18; 2685, line 9; 2689, line 24; 2691, line 5 to 2694, line 5; 2751, line 5 to 2752, line 12; 2758, line 14 to 2762, line 21; 2764, lines 14 to 21;

2868, line 8 to 2874, line 4; 2876, line 18 to 2879, line 15; 2886, line 2 to line 16; 2988, line 24 to 2991, line 24; 2996, lines 8 to 14: 3120, lines 11 and 12; 3122, line 15 to 3123, line 14; 3126, lines 18 to 22; 3128, lines 12 to 17; 3192, lines 1 to 3; 3665, line 22 to 3667, line 17. [1766]

1602. The Court erred and materially prejudiced defendants by stating to the jury while giving instructions, "If I am wrong in this, the defendants aren't hurt, because then they have error."

1603. By denying motions of defendants for access to and discovery of documents in possession of plaintiffs (Tr. 1235, line 6 to 1239, line 1; 2445, line 1 to 2456, line 1).

1604. The Court erred by imposing limitations upon the evidentiary purposes for which certain exhibits offered by defendants were received, and by instructing the jury as to the limitations erroneously imposed:

Exhibits Z, AA, AF. AG, AH, AI, AJ (Tr. 1565, line 5 to 1588A, line 24; 1653, line 5 to 1660, line 10).

Exhibits CS, CA, CB, CY, CZ, DC, DD, DF, DG, DH, DI, DJ, DL, DM, DN, DO, DQ, DR, DS, DU, EA, EB, EC, ED, EE, EF, EG, EH, EI, EJ, EK, EM, EN, EP, ES and FD (Tr. 3593, line 4 to 3597, line 9).

17. The Court erred by overruling the motion of defendants for judgment in accordance with defendants' motion for a directed verdict at the close of all of the evidence in the trial of the above-entitled action. (Tr. 4765, lines 13 and 14.)

18. The Court erred by ruling that the sum of $2,500 paid by TreeSweet to plaintiffs should not be credited against the damages assessed in the verdict and in ruling that it should be credited only against the threefold damages (Tr. 4773, lines 12 to 16).

19. The Court erred in allowing to plaintiffs attorney's fees unreasonable and excessive in amount [1767] and not supported by the law or the evidence.

Wherefore, defendants jointly and severally move the Court to set aside the verdict and judgment herein and grant a new trial of the above-entitled cause; and further move the Court to stay the execution of any and all proceedings to enforce said judgment pending disposition of the aforesaid motion for new trial.

This motion is based upon the above and foregoing and upon the records and files herein and upon the Memorandum of Points and Authorities hereto attached.

ROSS C. FISHER,
FERRIS E. HURD,
THOMAS C. STRACHAN, JR.
FRANK F. FOWLE,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc. and The Exchange Orange Products Company.

[Endorsed]: Filed March 14, 1956. [1768]

[Title of District Court and Cause.]

No. 13788-C

ORDER

A motion to set aside the verdict and the judgment herein, and for a new trial having been made by the defendants and the court having inspected the same; and the court having recalled that in certain instances a continuing objection was allowed to the defendants; but it further appearing that numerous matters and grounds assigned by the defendants are not supported by any objection in the record;

Now Therefore, It Is Ordered, that the defendants specify in writing and file on or before March 22, 1956, a document referring to their grounds by the numbers used in the said motion and listing thereafter the place in the record by page and line where the objection, if any, appeared; and if no objection was made, so specifying.

It Is Further Ordered, for the convenience [1772] of the court's calendar, that the said motion to set aside the verdict and judgment, and for a new trial, be heard at 10 a.m. instead of 2 p.m. on March 26, 1956.

Dated: March 15, 1956.

/s/ JAMES M. CARTER,
U. S. District Judge.

[Endorsed]: Filed March 15, 1956. [1773]

[Title of District Court and Cause.]

No. 13788-C

SPECIFICATION OF OBJECTIONS, PURSUANT TO ORDER OF MARCH 15, 1956.

Come now defendants, Sunkist Growers, Inc., and The Exchange Orange Products Company, and pursuant to the order of this court made March 15, 1956, do hereby specify the grounds of their objections and wherein in the record such objections were made in those instances where in defendants' Motion to Set Aside the Verdict and for Judgment Herein and for a New Trial such grounds and record references do not appear.

I.

Defendants understand that such specification is not [1793] required for the grounds specified in Points 1 to 9, inc., 11 to 15 inc., and 17 to 19 inc. of their Motion for New Trial under the said order. With respect to the other points defendants will hereinafter specify the grounds of objection and indicate the record reference where the objection appeared, specifying where there was no formal objection made. This will be done by the numbers used in defendants' Motion for New Trial. Omitted numbers will indicate that the Motion for New Trial does specify the grounds and the record.

II.

Point 10 of Motion for New Trial:

The court erred in receiving evidence over the objections of defendants.

1001. Plaintiff's Exhibit 4. Grounds: Immaterial and irrelevant.

1005. Plaintiff's Exhibit 25. Grounds: In addition to other references: Continuing objection on the grounds of the statute of limitations, which objection was permitted by the court to be a continuing objection. (Tr. 393, line 21 to Tr. 394, line 8.)

1006. Plaintiff's Exhibit 49. Defendants were granted a continuing objection to the entire transaction of the sale of the carload of juice on the grounds of the statute of limitations. (Tr. 989, line 1 to Tr. 990, line 4, inc.)

1009. Plaintiff's Exhibit 66-A. In admitting this exhibit which was a revision of plaintiff's exhibit 66, the court overruled all objections of defendants to Exhibit 66. However, on re-examining the transcript we find no formal objection was made by defendants to Exhibit 66. (Tr. 1864, line 3 to Tr. 1883, line 22.)

1010. Plaintiff's Exhibit 69-A. In admitting this exhibit which was a revision of plaintiff's Exhibit 69, the court overruled all objections of defendants to Exhibit 69. On re-examining the transcript we find objections were made by defendants [1794] to Exhibit 69 although no formal objection was made, and it is not altogether clear that Exhibit 69 was received in evidence. (Tr. 2166, line 5 to Tr. 2204, line 5; Tr. 2267, line 9 to Tr. 2270, line 4.)

1018. Grounds of defendants' objection—immateriality.

1019. Grounds of defendants' objection—Objection that question based upon assumed facts not in evidence and could not be used in establishing damages, and question immaterial and irrelevant.

1020. Grounds of defendants' objection—Hearsay and prima facie case of conspiracy not shown.

1021. Grounds of defendants' objection—Not proper subject for opinion evidence, calls for a conclusion of the witness, argumentative, and invades the province of the jury. (Tr. 1006, line 12, to Tr. 1008, line 2.)

1022. Grounds of defendants' objection—That witness was testifying to "second hand knowledge" and answers were argumentative and conclusions.

1023. Grounds of defendants' objection—That the order in the Chapter XI bankruptcy proceedings (Ex. 84 and 84A) would have to speak for itself and witness Hodge could not construe the order. (Tr. 3835, line 13 to Tr. 3838, line 22.)

1024. Grounds of defendants' objection—That testimony of Hodge was argumentative and that Hodge testimony was interpreting testimony of witess Finley, a jury function.

III.

Point 16 of Motion for New Trial:

The errors, irregularities and abuses of discretion referred to in paragraph 16 of the motion for new trial, that is, that the Court erred and materially prejudiced defendants by the manner and extent of his participation in the trial in certain [1795] respects, were not objected to during the trial upon the grounds urged in said paragraph 16, except in the following instances:

1601 (a). Winckler having answered "no" to the question on direct examination whether $3.53 included all of the cost items in producing a case of 12/46s, was allowed to explain his answer over defendants' objection that the question had been answered. (Tr. 935, lines 7 to 15.)

1601 (a). Winckler was allowed on redirect examination to explain at length what he meant when he testified on direct examination that he had no knowledge of any broker or customer dissatisfaction at all except on products which contained navel juice or was pure navel juice, over defendants' objection that there was no ambiguity in Winckler's answer that would justify an explanation. (Tr. 1754, line 1, to 1756, line 19.)

1601 (a). Hodge was permitted to state that it was very obvious why plaintiff lost $152,000 in the first six months of the year beginning February 1, 1951, over defendants' objection that Hodge was not qualified to give his opinion. (Tr. 1846, line 24, to 1848, line 14.)

1601 (a). Hodge was permitted to give and explain why plaintiff lost $184,000 in the year ending January 31, 1952, over defendants' objection that no foundation was laid for such opinion evidence from Hodge. (Tr. 1861, line 20, to 1862, line 10.)

1601 (b). Winckler was allowed to commence a dissertation on citrus tonnage, despite the defendants' request that the Court admonish the witness to answer questions. (Tr. 1021, lines 3-6.)

1601 (b) and (d). Winckler was permitted, over defendants' resistance, to give a long explanation about complaints on navel juice products, although defendants were asking him simply to name the products on which complaints had been received. (Tr. 1049, line 17, to 1051, line 5.) [1796]

1601 (b) and (d). Winckler was permitted to explain an answer, although defendants suggested he do so on redirect, the Court saying he may explain it now, since it is customary for a witness to explain his answer at the time. (Tr. 1065, lines 3-21.)

1601 (b) and (d). Winckler was permitted to state his realization that plaintiff's plant was worth substantially more than it was sold for in 1949. despite defendants' motion to strike Winckler's realization as being no proper part of his explanation which was denied, Winckler being allowed to continue with his explanation. (Tr. 1095, line 21, to 1097, line 5.)

1601 (b) and (d). Winckler was permitted, despite defendants' efforts to obtain a "yes" or "no" answer. to give a lengthy explanation concerning the write-up by appraisal of plaintiff's property after it was re-acquired in 1951. (Tr. 1107, line 5, to 1108, line 13.)

1601 (b) and (d). Winckler was allowed to explain an answer of "no" to a question on cross-examination concerning the date of an appraisal, despite defendants' remonstrance that no question was pending, the Court commenting, "He may explain it counsel. Everything in the world is not black or white." (Tr. 1112, line 13, to 1113, line 22.)

1601 (f). The Court overruled defendants' request that the jury be instructed to disregard the plaintiff's and the Court's statements as to plaintiff's contentions and theories with respect to the sale by defendant EOP to plaintiff of a carload of orange juice in October, 1951. (Tr. 991, line 14, to 994, line 16.)

1601 (j). The witness Ned Lewis having testified on direct examination that plaintiff's supposed inability to obtain fruit had nothing to do with his decision not to invest in plaintiff's business, contrary to Winckler's earlier testimony, and the plaintiff having offered as part of cross-examination a letter of Mr. Lewis, and the defendants having objected to it as being [1797] immaterial, the Court overruled the objection with the comment that the letter was not much more pertinent than the witness' testimony on direct. When defendants objected to the Court's comment as being prejudicial, the Court instructed the jury to disregard his comments about the letter. (Tr. 3192, line 1, to 3194, line 18.)

IV.

While it is the general rule that a party who wishes to complain on appeal of the conduct of the trial court must have objected to the conduct of the court during the trial, there are exceptions to this rule as illustrated in the cases cited in the defendants' Memorandum of Points and Authorities in support of their Motion for New Trial filed March 16, 1956, and in the attached Memorandum of Points and Authorities.

V.

Defendants have discovered certain mistakes in the transcript references in this Motion for New Trial, and invite the Court's attention to the following corrections, and ask that their Motion for New Trial be considered to be amended accordingly:

1. Page 9, line 15: after "line 25," delete the semicolon and the number "645," and insert "to 646."

2. Page 10, line 1: Tr. 3825 should be Tr. 3835.

3. Page 19, line 2: Transcript reference should be Tr. 2111, line 7, to 2112, line 21.

4. Page 19, line 10: delete words "and striking."

5. Page 19, line 14: transcript reference should be Tr. 2430, line 15, to 2431, line 15.

6. Page 28, line 24: 669 should be 649.

7. Page 28, line 25: substitute Clark for Winckler.

8. Page 28, line 26; insert "The witness Winckler" before the number 887. [1798]

9. Page 29, line 9: after "line 3," remove the semicolon and insert "to."

10. Page 29, line 12: after "line 12," remove the semicolon and insert "to."

11. Page 29, line 14: after "line 18," remove the semicolon and insert "to"; the same after "line 3."

12. Page 29, line 19: after "line 25," remove the semicolon and insert "to."

13. Page 29, lines 28 to 31: delete lines 28-31, through "line 4."

14. Page 30, line 2: delete "1473, lines 11 to 14."

15. Page 30, line 4: delete "1055, lines 12 to 15."

16. Page 30, line 5: change 1289 to 1281.

17. Page 30, line 8: after "line 20" remove the semicolon and insert "to."

18. Page 31, lines 4-5: delete "1943, line 10, to 1945, line 4."

19. Page 32, line 7: delete "1943, line 10, to 1945, line 6."

20. Page 32, line 18: after "line 21" delete the semicolon and insert "to."

21. Page 32, lines 26-28: delete lines 26-28 through "line 4."

22. Page 33, lines 6-8: delete lines 6-8 through "line 12."

23. Page 33, lines 12-13: delete "2239, line 22 to 2241, line 1; 2254, line 12 to 20."

24. Page 33, line 15: add "3088, lines 4-9" (striking testimony of Opal Smith on Court's own motion).

25. Page 34, line 8: 1497 should be 1487.

26. Page 34, line 22: 116 should be 1116.

27. Page 36, lines 14-15: reference should be Tr. 3192, line 1 to 3194, line 18. [1799]

28. Page 37, line 4: insert "(Tr. 4685, lines 12-13)."

Respectfully submitted,

ROSS C. FISHER,
FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc. and The Exchange Orange Products Company.

Memorandum of Points and Authorities

In re Golden's Estate, 4 Cal. (2d) 300 (1934); 48 Pac. (2d) 962;

In re Etzel v. Rosenbloom, 83 Cal. App. (2d) 758 (1948); 189 Pac. (2d) 848;

Podlasky v. Price, 87 Call. App. (2d) 151, 164, 171 (1948); 196 Pac. (2d) 608.

Respectfully submitted,

ROSS C. FISHER,
FERRIS E. HURD,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,

By /s/ ROSS C. FISHER,
Attorneys for Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 22, 1956. [1801]

[Title of District Court and Cause.]

No. 13788-C

MOTION OF DEFENDANTS FOR LEAVE TO AMEND THEIR MOTION FOR A NEW TRIAL BY ADDING THERETO A PARAGRAPH 20

Come now defendant Sunkist Growers, Inc., sued herein as California Fruit Growers Exchange, and defendant, The Exchange Orange Products Company, a corporation, and jointly and severally move the Court for leave to amend their Motion for New Trial filed herein on March 14, 1956, by adding thereto on page 38 the following paragraph:

"20. The Court erred in interrupting the closing argument of counsel for the defendants (Tr. 4592, line 23, to 4593, line 17) and stating [1804] that Defendants' Exhibit AV had been received for impeachment purposes only, and limiting the manner in which counsel could argue this exhibit to the jury."

This motion is based upon the above and foregoing and upon the records and files herein and upon the Court's ruling receiving Defendants' Exhibit AV in evidence generally and without objection of the plaintiff. (Tr. 1703, lines 5-16.)

Respectfully submitted,

ROSS C. FISHER,
FERRIS E. HURD,

THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,

By /s/ ROSS C. FISHER.

Affidavit of Service by Mail attached.

[Endoresd]: Filed March 26, 1956. [1805]

[Title of District Court and Cause.]

No. 13,788-C

MINUTES OF THE COURT
MARCH 26, 1956

Present: Hon. James M. Carter, District Judge;

Counsel for Plaintiffs Wm. C. Dixon for Plf and Intervening Plaintiff;

Counsel for Intervening Plaintiff: Harry M. Irwin;

Counsel for Defendants: Ross C. Fisher and Att'y Frank F. Fowle for def't Sunkist Growers, Inc., and Exchange Orange Products Co.

Proceedings:

For hearing motion of defendants Sunkist Growers, Inc., and The Exchange Orange Products Co., filed March 14, 1956, to set aside the verdict and judgment and for new trial.

Attorney Fisher presents a motion to amend its motion for new trial, and It Is Ordered that said motion to amend is granted, and it is deemed that the said motion to amend be an amendment to the motion for a new trial.

Attorney Fisher argues in support of the motion for the new trial.

At 12:05 p.m. court recesses to 3:20 p.m.

At 4:15 p.m. court reconvenes herein, and all being present as before,

Attorney Fisher argues further; Attorney Fowle argues in support of motion; and Attorney Dixon argues in opposition;

It Is Ordered that cause as to said motion of defendants Sunkist Growers, Inc., and The Exchange Orange Products Co. to set aside the verdict and judgment and for new trial stand Submitted.

JOHN A. CHILDRESS,
Clerk,

By L. B. FIGG,
Deputy Clerk. [1808]

[Title of District Court and Cause.]

No. 13,788-C

MINUTES OF THE COURT
MARCH 30, 1956

Present: Hon. James M. Carter, District Judge;

Counsel for Plaintiff and Intervening Plaintiff: William C. Dixon;

Counsel for Intervening Plaintiff: Harry M. Irwin;

Counsel for Defendants: Ross C. Fisher for Def'ts Sunkist Growers, Inc., and Exchange Orange Products Co.

Proceedings:

The Court having taken under submission the motion of defendants to set aside the judgment and verdict and for a new trial, and having considered said motion.

It Is Ordered that the said motion be, and hereby is denied. (Counsel not present at time of this ruling.)

Later, at 2 p.m., court convenes herein, Samuel Goldstein, Reporter, William C. Dixon, counsel for plaintiff and intervening plaintiff, and Harry M. Irwin, counsel for intervening plaintiff, and Ross C. Fisher, counsel for defendants Sunkist Growers, Inc., and Exchange Orange Products Co., being present;

Defendants move to fix supersedeas bond on appeal (to be taken) in the sum of $2,000,000.00, including cost bond on appeal.

Attorney Dixon makes a statement in opposition, in behalf of plaintiffs, as to the amount of bond, and requests it be fixed at $2,300,000.00.

It Is Ordered that defendants' motion is granted and supersedeas bond is fixed in the sum of $2,000,000.00, including costs on appeal, and

It Is Further Ordered that said bond may be by approved corporate sureties, or by deposit of government bonds as provided in 6 U. S. Code 15; and

It Is Further Ordered that defendants are granted a stay of execution on the judgment herein for a period of ten days from and after the filing of their notice of appeal, and that the supersedeas bond be posted within said ten-day period.

JOHN A. CHILDRESS,
Clerk,

By L. B. FIGG,
Deputy Clerk. [1809]

[Title of District Court and Cause.]

No. 13788-C

NOTICE OF APPEAL TO COURT OF APPEALS FOR THE NINTH CIRCUIT (UNDER RULE 73b)

Notice Is Hereby Given that Sunkist Growers, Inc., a corporation, and The Exchange Orange

Products Company, a corporation, defendants above named, hereby jointly and severally appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 5, 1956, and from the whole thereof, and from the order of this Court entered on March 30, 1956, denying said defendants' motion to set aside the [1821] verdict herein and the judgment entered herein and for a new trial.

ROSS C. FISHER,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,

By /s/ ROSS C. FISHER,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 27, 1956. [1822]

[Title of District Court and Cause.]

No. 13788-C

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL

This matter having this date come on for hearing before the undersigned, judge of the above-entitled court, upon the motion of Sunkist Growers, Inc., and The Exchange Orange Products Company, defendants-appellants above named, for an order extending the time for filing the record on appeal and docketing the appeal of the defendants-appellants, and the court having determined that notice [1834] of the hearing of said motion is not necessary;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the time for filing the record on appeal and docketing the appeal of Sunkist Growers, Inc., and The Exchange Orange Products Company, defendants-appellants, be, and the same is hereby, extended to and including July 26, 1956.

Done this 24 day of May, 1956.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed May 24, 1956. [1835]

In the United States District Court, Southern District of California, Central Division

No. 13788-C

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation,

Plaintiff,

and

RONALD WALKER, as Trustee in Bankruptcy of Winckler & Smith Citrus Products Co.,

Intervening Plaintiff,

vs.

SUNKIST GROWERS, INC., a Corporation; EXCHANGE ORANGE PRODUCTS CO., a Corporation; EXCHANGE LEMON PRODUCTS CO., a Corporation; TREESWEET PRODUCTS CO., a Corporation; DOE I CORPORATION to DOE IV CORPORATION, Inclusive, and DOE I to DOE X, Inclusive,

Defendants.

Honorable James M. Carter, Judge Presiding.

REPORTERS' TRANSCRIPT OF PROCEEDINGS

(In Chambers)

Wednesday, November 24, 1954

Appearances:

For Intervening Plaintiff Ronald Walker:

HARRY M. IRWIN, ESQ., and

WILLIAM C. DIXON, ESQ.

For Defendant Sunkist Growers, Inc., and Exchange Orange Products Co.:
FARRAND & FARRAND, By
ROSS C. FISHER, ESQ.

For Defendant Exchange Lemon Products Co.:
CLAYSON, STARK & ROTHROCK, By
MELVILLE WILLAMS, ESQ.

The Court: This is Winckler & Smith v. Sunkist, No. 13788, and is part of our pretrial procedures. [3*]

* * *

Accordingly, if you have a civil conspiracy and one overt act is done, it is true all the defendants who conspired may be responsible for that act, but the injury is the act that is done and not the conspiring. So that distinction has to be followed through on down the line.

Now, in going over this Complaint, with all due respect to our learned colleague who is not present, it is not an artful complaint. From what little I know of antitrust laws, and that is not very much, I think I could probably draw a better complaint.

Now, probably our colleague could have, too, if some of these matters had been pointed out to him. But we are forced down to the question of what the defendants did, as shown in this Complaint.

There was just the one complaint. There was no amendment, was there?

Mr. Williams: That is right.

---

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Fisher: That is right.

The Court: So we look to overt acts that are set forth on page 9 of the Complaint, Paragraph III of the so-called specifications, and it will be noted there in the very first paragraph of it it says, "* * * the said defendants contracted, combined and conspired in such manner as to tend to [6] eliminate plaintiff from the canned citrus fruit juice market and particularly," and so forth.

I have already commented on the word "contracted." Looking at that part of the case that might concern the contracting, that might be sufficient.

But going back again to the "combined and conspired" we look further, and there are listed (a) to (f) on page 10.

Well, a refusal to sell doesn't take us very far. And then we come to (b), that "Defendants combined, agree and undertook, directly and indirectly, to have the defendants TreeSweet, E.O.P. and E.L.P. purchase by-product fruit for defendant Sunkist * * *"

And then there follows the language, "* * * so that said defendants could market canned citrus fruit juice and particularly single-strength orange juice at a price which plaintiff could not possibly meet."

It seems to me that that paragraph comes nearest to stating the overt acts or the acts of the defendants, but it still lacks a lot.

You have to interpret the word "undertook" as meaning seeing to it that something was done, and that it was in fact done.

And the words "so that said defendants could market" would give some support to that, namely, an indication of what was done. But it doesn't seem to me that in this case, [7] with the amount of time it will take to try it, and the fact that we want a final determination, it doesn't seem to me that that is a sufficient allegation of overt acts or damage done.

Now, I may be wrong, but I don't see any reason why this Complaint can't be amended now. I don't see that the statute of limitations enters into this picture at all, if the real issue in the case is, as I contemplate it is, namely, this:

That here was Sunkist occupying a monopolistic position but doing so legally. And had it stopped there there could have been no complaint.

It then enters into contracts with competitors, which are advantageous to Sunkist and the competitors, and are disadvantageous to other people in the industry.

Now, those contracts, I understand, continued on to within a period within the statute of limitations. Is that right?

Mr. Dixon: That is correct.

The Court: In other words, those contracts didn't terminate back in August of '51.

Mr. Fisher: Yes, it terminated. The delivery of fruit under the contracts, I would imagine, terminated probably by the 1st of November. I don't know exactly.

Mr. Dixon: I think that is probably true, Judge, but the purchases of the juice canned thereunder or processed by [8] the defendants under that contract continued on until the inventory built up by the processing was exhausted by the purchases made by the defendants from Sunkist.

Mr. Williams: I assume that is true, but I am not sure. I think it probably was true.

Mr. Fisher: I would imagine there would be some purchase of the end product after the first of 1952.

Mr. Dixon: Yes.

Mr. Fisher: I am not sure of that.

The Court: That brings us then under that theory of the case which is the major theory of the case, looked at from the conspiracy standpoint, of what were the acts done that caused the injury, or what were the overt acts?

I don't like this word "overt" acts in a civil situation. These cases that I read point out that each time an act is done the statute starts to run again. Therefore, you can't say that when the contracts were entered into that was the sole act. As a matter of fact, if Sunkist and competitors had only entered the contracts and done nothing more, then the contracts would never have been carried out and there conceivably could have been no injury. It again would be similar to the conspiracy without the act.

What were the acts done? The acts done were entering the contracts, doing the various things called for by the contracts, processing the fruit and then finally putting the [9] manufactured product out on the market at a resulting price which put the squeeze on other competitors in the business.

If that is true, I don't see any reason why this Complaint can't be amended, and be within the statute, to allege the thing that is really in issue in this case, because, as we said before. if this were only a Robinson-Patman Act violation we wouldn't be here. If there is any merit to the other theory, then we are definitely in court to find out whether it holds up.

It took me a little while to get pounded into my thick head what Mr. Williams was talking about on this matter of the injury, and I think I finally agree that I have to twice subdivide (b) there on page 10 and give it a very broad construction to add (f) that constitutes the overt acts or the acts that were done that caused the injury. [10]

* * *

One other matter where I had a little trouble keeping company with you was on page 13 of your brief. You say, "What is the unreasonable restraint of trade injuring the public?"

Now you are talking about first cause of action. And [12] you say, "If it is merely a tendency to eliminate plaintiff from the canned single-strength juice market, which is what the Complaint alleges, only a private injury to plaintiff is involved."

You cite the Emick Motors Corporation case and Wilder Manufacturing Company case.

There is no question but what, if only a private injury to the plaintiff is involved and no public injury is involved, there is no case. And there is language in these cases backing you up on that, and there is no dispute about that. These cases are not authority for the fact that on a situation such as contended for by plaintiff there could not be a public injury.

In other words, assume the Complaint alleges the monopolistic position of Sunkist, the contracts with competitors, the impact on interstate commerce. You then have your public injury.

Then you next have your problem of whether there is a causal relation between any damage suffered to the plaintiff and the wrongful act of the defendants.

I don't have any doubt in my mind but what there either has been or can be properly alleged the public as well as a private injury under 1 and 2 of the Sherman Act. [13]

* * *

Mr. Williams: I have some general comments on the Robinson-Patman point. I suggest that we don't try to decide it today; that it really goes to the merits, the question whether that issue should be dismissed out of the case. Perhaps our further discussion will sharpen the issue and then we can present it to you.

The question that still exists in my mind is what are the acts pursuant to the conspiracy alleged in the Complaint that actually caused the damage? To us the only act alleged in the first cause of action, that is, the Sherman Act conspiracy under Section

1, and also under Section 2, is the refusal of Sunkist to sell oranges to plaintiff at a price as low as he wanted. And until we get that act determined, or whatever those acts are, it seems to me that we can't proceed to identify the other issues that are raised by the pleadings that will have to be tried.

Perhaps in view of your views on the question of amendment, perhaps the plaintiff will desire to amend the Complaint, and at that time we can see what he puts into it and raise [19] the issue.

With respect to the statute of limitations, our views are that the continuing performance under the contract would not be an act injuring the plaintiff, and we did not attempt to brief that fully in this brief, because it hadn't been raised at that time. So we would like an opportunity to brief that before it is finally decided, if we may have that opportunity.

The Court: Why do you think, though, just on the matter of logic, then, that continuing performance under the contracts would not be the injury? You start out with the proposition, first, the contracts are executed; no damages have been sustained by anybody. All right. One shipment is made, a very small amount of damage has been sustained by somebody.

Mr. Williams: There wouldn't be any injury on merely making a shipment pursuant to the contract. You have to have another fact there, and that is the refusal to sell oranges to the plaintiff. If the plaintiff was able, as he was in prior years, to obtain oranges from his original supplier, then he would suffer no damage whatsoever. So that to us the injury to him is the refusal to supply him with oranges. He normally obtained them from somebody else. But the injury, his real injury arose from his inability to get oranges at the price he wanted. If he had been able to obtain them [20] the contract wouldn't have hurt him at all—the shipments under the contract wouldn't have hurt him.

The Court: Supposing he never asked you for oranges, never ask you for oranges at all, but because of these contracts there would be no sense for him to buy oranges at the market, because of the situation that resulted between Sunkist and the competitors, couldn't there be damage to him?

Mr. Williams: Not unless you put in another fact, your Honor, and that would be that Sunkist had done something to prevent him from getting oranges on the market at a suitable price.

The Court: Don't forget that Sunkist occupies, and the defendants occupy a dominant place in this industry in California, and to the extent that they have that dominance, to that extent his ability to get oranges outside is limited.

Mr. Williams: No, your Honor, that is not true. It is limited to the extent that it cuts down the supply of oranges; but the facts will show that although the Sunkist price was $40.00, that the plaintiff bought oranges as low as $25.00 a ton from outside sources during 1951.

The Court: But my point is this: Supposing Sunkist had a hold on ten per cent of the oranges and there was 90 per cent of the market available to the plaintiff. All right. He could get a certain number of oranges at a certain price. But supposing, conversely, Sunkist had 60 or 70 per cent [21] of the oranges, then the available market available to him was cut down to 30 or 40 per cent. Doesn't that change the situation?

Mr. Williams: I am not sure it does, your Honor, because the 70 per cent is a legal position. There is no question it legally has that position under the Capper-Volstead Act.

Now, the question arises whether any injury that flows from that legal position is the kind of injury one can recover from, because it is a legal position. It is not like an illegal monopoly where you might attribute to it that all results necessarily are harmful in violation of law.

So in this case it seems to me that the plaintiff has to go further.

We are going beyond our prior discussion considerably here.

The Court: Yes, we will have to take that up later. I realize that. I don't know all the facts that plaintiff thinks it has. We will have to see. But I propose to permit the plaintiff to amend if the plaintiff wants to.

Mr. Williams: Your Honor, will you allow us to submit—after the amendment may we submit a brief on this question?

The Court: Certainly.

Mr. Williams: We just want an opportunity to be heard on that point. [22]

The Court: I would assume that the ordinary procedures will be gone through with that; you will file motions that raise points that you want to raise, and we will argue them out.

Mr. Fisher: After the amendment is made?

The Court: Yes. And my position in permitting the plaintiff to amend, if they so do, is in accordance with the rules of the federal court. It is very lenient. That is what we do at pretrial. I take it there will be no objection to amendment?

Mr. Williams: Not the general idea.

The Court: You are reserving your right to attack the Complaint as amended?

Mr. Williams: Yes.

The Court: Then that solves that problem for this stage of the proceeding.

How much time do you want to amend?

Mr. Dixon: Well, I will naturally, Judge, endeavor to get an amendment prepared and filed as soon as possible. I must say at this time that I am still in the process of endeavoring to secure additional information that I think will develop certain phases of this case that I think should be presented to the court on the trial of the case. As to time—

The Court: Why don't we fix a date, and then extend it if the problem arises? [23]

Mr. Dixon: I will endeavor to get it in within 30 days, and sooner if possible.

The Court: Then, say, 20 days thereafter to file your motion?

Mr. Fisher: We would like 30 days.

The Court: 30 days will take us just before Christmas, to file the Complaint.

The Clerk: 20 days from service of the Complaint?

The Court: 30 days.

The Clerk: 20 days from service of the Complaint to respond?

The Court: No. 30. 30 and 30. What date would that be? Christmas comes on——

The Clerk: It depends on when the Complaint will be served. You meant 30 days from service?

The Court: Yes. December 24th is a Friday. December 24th to file the Amended Complaint, and 30 days after service to make your motions. All right?

Mr. Williams: That is fine.

Mr. Fisher: Yes.

The Court: With the understanding that if either side needs more time, we are not going to quibble about that part of it.

Mr. Dixon: I am again frank to say that had I drawn this Complaint in the first instance it probably would have [24] been a little different complaint, and the allegations would have been different. I think, however, it is broad enough to present, even in its present form, to present the evidence that we want to present. I agree, however, that the issues as may be determined by the Complaint in its present form are not as sharp a focus and are not as clearly presented as they should be to enable the court to properly present the case to a jury under proper instructions. [25]

* * *

In the United States District Court, Southern District of California, Central Division

No. 13788-C Civil

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, a Corporation, et al.,

Plaintiffs,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a Corporation, et al.,

Defendants.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Monday, February 14, 1955

Appearances:

For the Plaintiff and Intervening Trustee:
WILLIAM C. DIXON, ESQ.

For the Plaintiff:
BERNARD REICH, ESQ.

For the Defendant Exchange Lemon Products Co.:
CLAYTON, STARK & ROTHROCK, By
D. E. STARK, ESQ., and
POPE & BALLARD, By
M. C. WILLIAMS, ESQ.

For Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company:
FARRAND, FISHER & FARRAND, By
ROSS C. FISHER, ESQ.

The Clerk: No. 5 on the calendar. No. 13788-C Civil, Winckler & Smith vs. Sunkist.

The Court: Mr. Williams.

Mr. Williams: I want to explain to your Honor why we made this motion.

Our first inclination on this case was to file an answer, so we would speed things along. The more we studied the complaint the more we found a lot of the ambiguities of the old complaint were still in this one, and that is the same problem, you recall, that we ran into on the pretrial conference. It became impossible, when you started to analyze the complaint, to tell exactly what the cause of action of the plaintiff was, or the causes of actions, and therefore the plaintiff was given leave to amend.

We felt that if we pointed out the questions that had to be decided on pretrial conference, in order to ascertain what the issues were, it would be helpful to the court, and we had a duty to the court to make the motion and point out these matters, ambiguities, that had to be decided in order to determine what the issues were in this case. So we considered this motion not in the status of a motion made to a complaint that has just been filed, but we considered this motion as being a [2*] continuation of our pretrial conference and our statement of the issues as pointed out in the complaint that needed clarification..

---

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

With that introduction, I would like to take up the first point of our motion. And I am going to follow our memorandum of points and authorities. Our first point was that the amended complaint did not identify the acts of the defendants, committed pursuant to the conspiracy, that are alleged to have invaded the interests of the plaintiff and thus formed the gist of a cause of action.

You will recall that was the point that we discussed at our pretrial conference, and the court ruled that the act was the important item in the cause of action.

Now, looking at this complaint in the first count, it has six subparagraphs set forth from (a) to (f). Each of those paragraphs allege certain acts of the defendant.

Now, if it the theory of the plaintiff that each one of those acts caused damage to the plaintiff, so as to give rise to a cause of action for damages that are the proximate result of that act, that is fine. We thought it would aid the court and would aid us and the parties in deciding the issues if the plaintiff would state which of these acts they have relied upon.

If it wishes to state it relies upon all of them as causing damage, why, that is fine; if it wishes to state that it [3] relies on one of them, that is fine.

Here is the problem. If you take the first act, which is (a), subparagraph (a), page 11, it says:

"Defendant E.L.P., by oral agreement with defendants Sunkist and E.O.P., agreed to process and did in fact process during the year 1951, oranges made available to E.O.P. by Sunkist for processing into canned, natural * * *" and so forth "* * * juice."

It says it was done without profit.

Now, how could that act possibly injure the plaintiff?

The mere fact that E.L.P. agreed to process oranges for E.O.P. under a custom packing agreement during that season?

That is our problem.

Does the plaintiff have a theory that that caused damage?

We just can't see how that could happen.

The only one of these acts, it seems to us, that really fits the nature of an act injuring plaintiff and forming the basis of a cause of action is (f). So, therefore, in our motion we suggested that this paragraph be stricken with leave to amend, in order that these acts which form the basis of our action, which identify the causes of action, are stated.

That is the first point.

I suggest, your Honor, that perhaps we might move faster if we take these points as they arise, instead of my talking to all of them and then having discussion on all of them. [4]

The Court: Mr. Dixon, what, briefly, is your reply to counsel?

Mr. Dixon: May it please the court, I think one of the charges in this complaint is that it is conspiracy among these defendants to eliminate the competition of the plaintiff in the industry described in the complaint. Certainly one of the acts of the defendant E.L.P. in processing the oranges of the other defendant Sunkist, without cost—I mean at cost and without profit to E.L.P., would indicate that they were a party to the conspiracy charged in the complaint. Because, certainly, ordinarily you don't do these things for somebody with whom you are presumably dealing at arm's length and with whom you are also in competition, without some reason. And I think that allegation speaks for itself as one of the things which the defendant E.L.P. did under this conspiracy.

It would be a question for the jury to decide whether or not they entered into the conspiracy, and if so, whether that was one of the things they did to promote it.

Mr. Williams: That act might be evidence, but it is not the kind of an act that could form the basis of a claim for damages. The act of E.L.P. to enter into the agreement to process oranges for E.O.P. could not cause monetary damages to the plaintiff and form the basis of a cause of action. It didn't invade any right that he had.

The Court: Isn't the law of criminal conspiracy the same [5] as civil conspiracy on that point, that although the damage flows from overt acts, if the evidence shows that A. B and C are conspirators, and if A commits the overt act that causes damage, aren't B and C liable?

Mr. Williams: That is not the point here.

I agree with your statement of the law, but here is a case where we are asking that they identify what the acts of A were.

B in this case, as we see it, E.L.P., did not commit any act causing the damage. This act identified in (a) is to us not an act that could possibly cause any damage to the plaintiff. The only act that could cause damage is the one in (f) where it alleges that E.O.P. refused to give the plaintiff a custom packing agreement.

That might have caused plaintiff damage, but this agreement betwen E.O.P. and E.L.P is not the kind of an act that could form a foundation of a cause of action, because it didn't cause the damage. It might be an act in the conspiracy, yes, and it might tie E.L.P. in. But what we want segregated is which of these acts caused the damage, so we won't have to prepare a case on the theory that all of these acts caused damage, and we have a lot of issues that explode when we come to trial.

We are just trying to identify the issues.

The Court: Go to your next point. [6]

Mr. Williams: The next point is identification of the conspiracy.

Normally, a conspiracy is pleaded in terms of the agreement that constitutes the conspiracy.

No place here is there any statement of what that agreement consists of. You can't have a conspiracy, unless you have an essential agreement between the conspirators to accomplish some objective. There is no statement here of any objective.

In our brief we state the complaint failes to disclose how many conspiracies are claimed.

In the reply brief Mr. Dixon stated there was only one claimed. And he has disavowed any claim, apparently, of conspiracy within a company among the officers and directors and the company itself. So he talks now only about one conspiracy.

The Court: We are talking now about count 1, aren't we?

Mr. Williams: I am talking about count 1.

The Court: It says: "had the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juice produced and processed in California."

Mr. Williams: That kind of a broad general statement does not identfy the conspiracy as required under this kind of a statute. Where you have a statute in such general terms as the Sherman Act, you can't just plead the conspiracy in [7] terms of the statute, because it doesn't identify it. You have to go into particulars. And that, I think, is true of both civil and criminal conspiracy law and applies here.

The Court: The next paragraph, "conspired and entered into contracts which had the effect of tending to eliminate and of eliminating the plaintiff as a competitor."

Mr. Williams: That is the defect. It talks only in terms of effect. It says there was a conspiracy that had the effect of restraining trade.

Was it a conspiracy to fix prices? Was it a conspiracy to boycott? What was the nature of the conspiracy?

Now, the way these things are normally pleaded has been developed by the Antitrust Division in many cases. They generally start out with a general statement, which this might meet the requirements, and then they descend in this paragraph—this is the key paragraph stating the terms of the conspiracy, that we think this complaint ought to have:-

The aforesaid combination and conspiracy has consisted of continuing agreements—that alleges an agreement among all the defendants, which is not alleged here—a continuing agreement and concert of action among the defendants, the substantial terms of which have been and are—then it sets forth in several subparagraphs what those terms are. [8]

Here we don't have any unifying plan alleged. What was the planned objective of these defendants?

Nothing but the vague term to restrain trade.

That is not sufficient to allege a conspiracy. Going to trial, we can't prepare to meet that kind of vague allegation.

In our pretrial conference it will be necessary to nail down, to identify, what the objective unifying element of this conspiracy is that binds these various parts into a whole.

As the pleading now stands, it is just a conglomeration of acts by the defendant and fails to state the thread that ties them together. It is like a mass of beads in the hand without a thread to string them together and make a necklace.

The Court: This first cause of action has to be read in light of Section 1 of the Sherman Act, and as I understood Mr. Dixon's statement at the last meeting, it was to the effect that—it probably applies to both counts 1 and 2, that these cooperatives exercise, possess and exercise an exempt position because of their nature, so long as they tend to their knitting.

When they get beyond the scope of that monopoly, which they may legitimately have by virture of the statute, then they have crossed the line.

I read this first count in the light of section 1, and I read the second count in the light of section 2 of the Sherman Act.

Mr. Williams: That is right, your Honor, but Section 1 [9] does not shed light on the charge here, because this does not set forth what the nature of that restraint is.

What was the restraint of trade in this case?

It wasn't fixing prices.

It isn't clear what the restraint is.

It merely repeats the language of the statute, but it doesn't tell you what the objective of the conspiracy was, what any common objective was.

In a normal conspiracy that is always stated. In mail fraud cases they have the conspiracy to defraud, which is not here.

The Court: I would say that one of the purposes stated was to eliminate the plaintiff.

Mr. Williams: If that is the objective, that perhaps is all that we want.

The Court: I don't think there is any contention here that there was any price fixing in the ordinary sense?

Is there that contention?

Mr. Dixon: No, there isn't.

Mr. Williams: Under this language it would be available to the plaintiff to say, "We allege restraint of trade, and price fixing is a restraint of trade, so now at the trial we claim price fixing."

The Court: But, Mr. Williams, you are a very able lawyer in the field of antitrust, I think Mr. Dixon is too—I think [10] both of you have had a good bit of experience, you both have been with the government and have wrestled with these cases—I haven't any doubt but what you and Mr. Dixon could sit down at a pretrial conference and know what you are shooting at in two or three minutes, and perhaps do a better job than worrying me.

Mr. Williams: That is really the basic question here. It is really just a continuation of the pretrial conference. If we can sit down and work this thing out and specify in writing——

The Court: If it is a continuation of the pretrial conference, then the first thing you should do before you come to me is sit down together and see what you can work out. Because that is the way we ordinarily work out pretrials. The parties see what they can do themselves, and after they run into a stone wall, then the court picks up and takes over where they can't.

Mr. Williams: Would your Honor be available at any time Tuesday or Wednesday?

The Court: No. I am going to Santa Barbara and will be there all of this week, and then I go back next week for a series of other condemnation trials, so I won't be back here until the first of the month. I will rule on this motion. I will be available later from time to time on your pretrial conferences. [11]

Mr. Williams: In this connection, with respect to these specifications more accurately defining the conspiracy, there is an order entered by this court, pursuant to one of our interrogatories, requiring the plaintiffs to state the terms of the conspiracy.

That is exactly what we are asking for here. If it is stated here, or is stated there, we have it for the purposes of the pretrial order, and then, again, it would be reduced to writing.

The Court: To assist you in working with Mr. Dixon and with counsel for the plaintiff on the pretrial order, I think, just as I directed Mr. Dixon before, to spell out what the causes of action were under the other complaint, that I would again direct him now to, as a pretrial procedure only, and not as a matter of striking from a complaint or monkeying around with it any further, I would direct him to informally present you with his views as to these various causes, and start from there and see what you can work out.

Mr. Williams: Perhaps we can work out some of these points, particularly these we have been discussing. [12]

* * *

The Court: I have my own idea on this, and that is this: It seems to me that E.L.P. has a legal monopoly presently under [20] the way it is set up.

Mr. Dixon: Correct.

The Court: If E.L.P. acted on its own within the limits of this right that it has, which is a pretty extensive right, it is hard for me to see how you would have a monopoly of E.L.P. alone.

I think this largely hinges on concert with other defendants.

Mr. Dixon: That is correct.

Mr. Williams: But he is using the word "attempt." That causes us considerable difficulty in making a motion for summary judgment, which we would still like to make in this case when we get the pleadings nailed down and concrete.

Mr. Dixon: If the Court please, during my ten years of service with the government in the Antitrust Division I drafted many complaints and indictments. I do not point to that fact necessarily for anything that it may mean or not mean with reference to this complaint, except that I do feel that this complaint in every respect adequately advises all of the defendants of the charges that may be made against them—I mean that are made against them in the complaint, and which they would have to meet in the trial of this case.

Now, I know we have a trial date here now of March 22nd, and even after we filed our amended complaint, or even before that, I endeavored to work with the defendants to get a stipulation [21] here, to move this case along, on facts that were not in dispute, based upon the two years of depositions and interrogatories that are already in the files of this case, and then we were met with these motions.

To me, I could only state that I feel that this complaint does give the defendants all the information that they need to prepare an answer, or any other defense that they may have to the charges made. And I don't want the plaintiff here at this stage of the proceeding, or at any other stage, to be prejudiced on being able to have submitted to the jury any one of the possible charges that are sustained or borne out by the evidence under Section 1 or Section 2, which means simply this: With reference to what Mr. Williams is now talking about, it may well be that the charge of an attempt to monopolize any part of the ~~citrus~~ fruit industry, I mean the juice industry, on the part of his client, on all the evidence, may not be borne out. I am not saying that it will. I don't pass upon that question at this time. We are still in the process of completing discovery. But it doesn't mean that a comparable charge of attempt to monopolize might not be borne out against the other defendant, Sunkist, in this case.

What Mr. Williams is asking at this stage of the proceedings, based upon the complaint, as I understand it—he says, "I don't know whether we are charged with an attempt to monopolize, a conspiracy to monopolize, under count 2, or what." [22]

I say he is charged with all of those provisions of the statute at this time, and I don't know of any reason why he should be limited.

I think the allegations of the complaint can well satisfy any of the charges, I mean the details of the complaint can well satisfy any of the charges made in counts 1 and 2, or the first and second causes of action.

Mr. Williams: It makes quite a difference, your Honor, if we are charged with an attempt, as apparently plaintiff intends to do, as to what it is that we attempted to monopolize. The language here, "attempted to monopolize in natural and frozen concentrate fruit juices"—if the plaintiff really means that, it means we have to prepare a defense on grapefruit and orange juice, as well as lemons.

What we are asking is if that is the charge, we think it should be stated in a separate paragraph, or at least in a separate paragraph in the pretrial order, so we know exactly what it is that we are to meet in this case at the trial.

There is another problem here, and that is the problem of joint attempt. The language of the Sherman Act does not speak of any joint attempt to monopolize. It speaks of monopolize, attempt to monopolize, and conspiracy to monopolize. Is there going to be some claim here that a joint attempt to monopolize is different than a conspiracy to monopolize?

It seems to us if the parties agree to do something, that [23] constitutes a conspiracy. And a joint attempt, if they didn't do anything, and did something by parallel action, that that is not an offense under the Supreme Court decision in the Paramount case.

Mr. Dixon: To answer that, your Honor—I

don't mean to interrupt, but I assume that Mr. Williams would like the answer from the plaintiff at this time on that question. I don't know of any cases that hold that you can have two attempts to monopolize in the same case, without it being a conspiracy to monopolize. And that is charged in the complaint here as to all of the defendants. But in the same breath they are also charged individually with an attempt to monopolize, insofar as the cause of action is concerned.

To me it seems as clear as could be stated in the amended complaint.

Mr. Williams: As I understand it, there is no claim of any joint attempt——

Mr. Dixon: It would be a conspiracy if it were a joint attempt.

Mr. Williams: The next point is also in connection with this second cause of action.

The subject of the monopoly is said to be natural and frozen concentrate fruit juices processed in California.

Our point here is that there is nothing set forth in the complaint to show that such fruit juices are an identifiable [24] part of commerce.

Obviously, if fruit juice is processed in California, the same as they are in Florida, and you have the relation as you do, that the California production is a small percentage of the total production—I don't recall the precise figures, but I think it runs five to ten times as much production in Florida—even if you have all of, say, 10 or 15 per cent of the market, you can't possibly have a monopoly. So we say that this complaint ought to have facts in it showing that there is something peculiar, something unique, something distinct about these California juices——

The Court: Where do you come from, counsel?

Mr. Williams: South Dakota.

The Court: I thought so. We all out here know what we mean by California orange juice and California grapefruit juice, and I think people all over the United States do. You don't want to get this issue submitted to a jury of people out here in California.

Mr. Williams: Your Honor, it would certainly assist me if these matters which might be judicial knowledge in the State of California, and wouldn't be in other courts, would be set forth in the complaint.

I submit your point is well taken, because my clients advised me of that, and I asked them why, and they are not so sure. [25]

The Court: This is not a charge to monopolize the entire or total frozen fruit juice industry.

Mr. Dixon: Correct.

The Court: But that which involves the West.

Mr. Williams: It must be an identifiable part. It has to show some unique characteristics.

The Court: Don't all these canned juices come from California say, "California orange juice"?

Mr. Williams: You have to have some difference in the market. Supposing California and Florida are chosen equally by people in the market place, then a monopoly of California obviously could have no economic effect, it is such a small part of the market. So there should be facts set forth showing that it is an identifiable segment of the total juice market.

The Court: I am not going to do anything about it here. You take it up with Mr. Dixon and see what you can work out on it.

It may involve some factual issue that has to be submitted.

Mr. Williams: I think it does.

The Court: I will tell you now if you submit any factual issue to the jury out here as to whether there is such a thing as a difference between California juices and eastern juices, your answer will be obvious. They will know the difference. [26]

Mr. Williams: It is a question of whether it is only a fact or local pride, which is intangible, or whether it has some economic significance.

For instance, in the linen rug case we cited, the linen rugs were unique and could be a subject of monopoly because if you dropped a cigarette on them, they would merely scorch, it wouldn't burn a hole like a wool rug; they could be used in a hall where people come in with wet feet and they wouldn't rot with water, where a wool rug might, and that made them unique and an identifiable part of commerce.

It is that type of thing which should be shown here also. [27]

* * *

Mr. Williams: There is another point, that is the Silzle contract, which, again, was entered into more than [35] three years prior to the amended complaint, and it was not mentioned at all. Would you care to argue that?

Mr. Fisher: Yes.

That was a point that I was very much interested in, your Honor.

The Court: Silzle was made a defendant in the first action, was he not?

Mr. Fisher: He was not.

The Court: Was he named as an unknown——

Mr. Fisher: There were John Doe defendants named. The original complaint was filed on February 1, 1952, and the named defendants were Sunkist, E.O.P., E.L.P., and Treesweet. There were John Does named. There was a typical John Doe allegation.

When the amended complaint came down, those were eliminated.

Silzle is not a party defendant in the action. It was not named as a party defendant. Now, the allegation of the original complaint was that "all of the defendants"—now, the defendants would be the four named defendants—"each well knowing and acquiescing in the action of the others, contracted, combined, and conspired with each other."

The same is true of the allegation of the second cause of action. They are attempting to bring in the Silzle contract, saying Silzle is a co-conspirator but not a defendant. [36]

The acts which were done, the delivery of fruit, which was the thing that might have caused the damage under the Silzle contract, all happened more than three years prior to the filing of the amended complaint.

We think the point is well taken that the Silzle contract is barred by the statute of limitations.

The Court: What do you say to that, Mr. Dixon?

Mr. Dixon: Well, in the first place, your Honor, the Silzle contract was brought out and gone into in the depositions and the interrogatories. Up to that time there was no specific reference to the Silzle company in the complaint, except insofar as it might have been referred to as one of the John Doe conspirators. However, the original complaint clearly alleges that the defendants, plural, entered into contracts which were in restraint of trade.

Now, this is one of the contracts that the defendant Sunkist entered into. And if it isn't proper to now allege that Silzle was one of the co-conspirators, I submit that all the antitrust law that I have ever learned is without any foundation or basis.

Mr. Fisher: But I point out, again, that the allegation of the complaint was that the defendants contracted with each other, and Silzle was not a defendant.

The Court: There are various allegations in there. That is one that you refer to. If Silzle, himself, was opposing [37] being made a party, or something, it might be different.

Your argument sounds to me like the kind of an argument that Silzle would make if he were brought in now as a defendant in this case. But he is not a defendant. He is merely named as a co-conspirator.

There are general allegations about the various contracts that these defendants had.

Now, supposing the plaintiffs want to rely upon some other contract. They probably would have a right to rely on the contract, whether the other contractor was named as an unindicted co-conspirator, or not. I don't think it makes a lot of difference, except it is in the nature of pointing up to you, informing you of the particular thing that the plaintiff intends to rely upon.

Mr. Fisher: But the point is, your Honor, that the fruit which was delivered under the Silzle contract, the acts which might have caused damage under the Silzle contract, all occurred more than three years prior to the filing of the amended complaint.

The Court: Supposing I struck out from the complaint all reference to Silzle as an unindicted co-conspirator, do you think that you could resist the introduction of evidence that your company had contracted with Silzle, as well as with 20 or 30 other people, sold them certain fruit at certain prices, and bought fruit at certain prices, and so forth? Wouldn't the [38] transactions that the defendants had with Silzle, or anybody else, have a bearing under these allegations of contracts in restraint of trade?

Mr. Fisher: But the allegation of contract, in the original complaint—and that is what we have to go back to in testing here—was that they contracted with each other, the named defendants.

Mr. Williams: Your Honor, there is another point, and this relates to E.O.P. because they charge a conspiracy with Silzle, and they are using the Silzle contract as a basis to enlarge their damages. If we are tied into the conspiracy, we are affected by this contract. So the point we wish to stress is that the Silzle contract was not identified or charged in the first complaint as an act causing damage, and therefore under the theory that I just expounded of the continued conspiracy with the various acts committed to cause damage, and the statutes starting to run from the commission of the act, that if they claim that the Silzle contract was an act causing damage to the plaintiff, they did not plead that act in the original complaint and they cannot plead it now, because more than three years have gone by.

It is on that basis that we stress the Silzle contract should be stricken from the complaint.

The Court: You can point the problem up in a pretrial stipulation. I know Mr. Dixon will cooperate with you in getting [39] the problem pointed up. You may renew your contentions. Presently, I don't think they are good. [40]

* * *

Tuesday, November 29, 1955, 10:00 A.M.

The Court: Call the case.

The Clerk: No. 13788-C Civil, Winckler & Smith Citrus Products Company and others vs. Sunkist Growers, Inc., and others. Jury trial.

Mr. Dixon: Ready for the plaintiff, your Honor. I wish to state, however, that before proceeding further I have a motion that I wish to make to the

Court. I am not sure whether you wish it to be heard at this time or not.

The Court: I think you had better come in to chambers and I will hear the motion. Mr. Reporter, Mr. Clerk.

(The following proceedings were had in the chambers of the Court in the absence of the jury panel:)

The Court: The record will show who is present here. The reporter, the clerk, Mr. Dixon, Mr. Irwin, Mr. Strachan——

Mr. Hurd: I am Mr. Hurd. Mr. Strachan isn't here today.

The Court: ——Mr. Fisher, Mr. Stark, Mr. Williams, and Mr. Walker.

Mr. Dixon: May it please the Court, I wish at this time to move the dismissal of the amended complaint as against the defendant Lemon Exchange Products Company or Exchange Lemon Products Company.

In view of the fact that the plaintiff company is in the jurisdiction of this Court under Section 10 and creditors are [2*] involved in this proceeding and in this decision, I feel that I should make a statement for the record in connection with this motion.

At the time I entered this case over a year ago the materials made available to me by the plaintiff consisted primarily of extended depositions, rather extended answers to numerous interrogatories. I examined material then available and came to the conclusion that there was sufficient evidence at that time in the record which was submitted to me to justify the continuance and the presentation of this case insofar as the defendants Sunkist and Exchange Orange Products was concerned. There was, however, some doubt in my mind about the defendant Exchange Lemon Products Company. I discussed the matter with the trustee at that time and informed him of this fact, but indicated that I did not feel that I would care to take the responsibility of making any recommendation to him with reference to the dismissal of any of the defendants in this case until I had adequate opportunity to fully inform myself further concerning the case by further discovery proceedings. [3]

---

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

It was on that basis that the amended complaint was filed and, as the record will show in this case, pretrial negotiations or proceedings were had.

It is perhaps stating the obvious to state that the financial condition of the plaintiff did not permit the extended investigation of the case that I would have liked to have made had the finances been available to employ or to hire those personnel or the personnel that would be necessary to conduct such an investigation. I therefore have had to rely primarily upon further discovery proceedings in this matter in preparing it for trial as to all defendants.

During the course of those proceedings, it became apparent to me that there were several latent ambiguities in the answers to the interrogatories of defendants Sunkist and EOP, which required further clarification. I believe I mentioned some of those to the Court in previous pretrial proceedings.

To make the record clear on the matter, we resorted to what I call, for want of a better description, the last three or four months informal trial procedure conferences in which we endeavored, working with counsel for defendants, to clarify these ambiguities, and to also secure further information that I felt was necessary before I was to proceed or able to proceed to the trial of this case.

To indicate or illustrate the situation, your Honor, it was only yesterday that Mr. Stark brought to me, representing [4] Exchange Lemon, some clarification of the answers to one of the interrogatories, namely Interrogatory 14, addressed to Sunkist and Exchange Orange, pursuant to which the figures with reference to the amount processed by Exchange Lemon for Exchange Orange were varied considerably, and in a sense it did make some difference in the cost computations, among other things, with reference to the amounts paid to ELP by EOP for those processing arrangements which were conducted on a so-called cost basis.

I do not mean to suggest and I do not want the record to in any way carry any inference that we have not had the fullest co-operation from counsel for Exchange Lemon, Mr. Stark, and Mr. Hurd and Mr. Fisher, during the last three or four months. I think substantial progress has been made in securing information I thought was necessary before we went to trial in this case.

All of which brings me to my motion, that I feel that I am now in a position and have recommended to the Trustee, and, as I have said, this has been under consideration really from the outset, that the case be dismissed as to Exchange Lemon, and the Trustee has accepted my recommendation and, therefore, for the record, I am making the motion, based upon the facts heretofore submitted to the Court in connection with the motion, which I feel is necessary in view of the fact that creditors are involved in this proceeding, and [5] that, therefore, the record should show the reason for this motion.

* * *

Mr. Hurd: I have no objection to the dismissal of Exchange Lemon provided it is with prejudice, and I assume that is what Mr. Dixon means.

It does raise a collateral question. Mr. Stark and Mr. Williams have both represented Exchange Lemon from the beginning of the proceeding, but in more recent times, going back to certainly around the beginning of this year, each of them has been very active in problems relating to the entire case. I have assigned them segments of the preparation from time to time without particular regard to the client of their original representation. Consequently, I should like to have them available to participate and assist me in the trial of the case, and if it is necessary to present formal motions with affidavit support, or any other support, I will need a little time to do that. If they may be admitted for the purpose of representing the remaining two defendants, Sunkist and Exchange Orange, without the formality of motions, that is a different situation.

The Court: Well, the motion definitely raises that question. Whether that has anything to do with whether the motion to dismiss should be granted or not is another thing. [6]

As Mr. Dixon was talking, I was looking at the rule. The dismissal has to be by order of Court. It is not by stipulation, nor is it a voluntary dismissal prior to answer, and the Court could impose such terms as it saw fit. One of the terms, of course, would be that it be with prejudice.

Did you make the motion with prejudice?

Mr. Dixon: Your Honor, I am not concerned about that except, of course, the allegations of the complaint. We will still proceed with the trial on the theory set forth in the complaint. It will, therefore, be necessary to undoubtedly call some of the witnesses or at least one or two of the witnesses from Exchange Lemon, and the only concern that I have is that if we do call them, we want them to be called under Rule 43(b). I have no concern about the dismissal with prejudice apart from that. [7]

The Court: You are still going to rely upon the fact—or, are you—that Lemon is a co-conspirator in this case?

Mr. Dixon: That's right.

The Court: Will there be any contention raised that if a dismissal was with prejudice it would prevent the plaintiff from making that contention? I can't see that there could be. A dismissal is not the equivalent of release of a joint tort feasor. Plaintiff has ordinarily the right to elect who he is going to proceed against.

Mr. Hurd: I would not want to commit myself offhand, but my initial reaction, your Honor, is that a dismissal with prejudice would operate as res judicata from a legal standpoint, but I would doubt that estoppel by judgment, a verdict, would apply, which is the estoppel as to facts, and my offhand reaction would be that even though Exchange Lemon were dismissed out of the case with prejudice, which would be a bar to ever suing them again for that, it wouldn't be a restriction on their proof as to conspiracy in this case.

I don't want to commit myself. I am just telling you my offhand reaction.

The Court: That is my offhand reaction, too. In other words, when a person is a party you get a judgment against him. If he is not a party, you can't. But you can claim that certain people are co-conspirators even though they are not made parties. You do that at the inception, and I don't see any [8] reason why you couldn't do it subsequently.

My reaction is the same. However, I think I would like to have something more definite as to what our position is going to be before I grant this dismissal with prejudice on that point.

We will pass that for a minute. [9]

* * *

The Court: I am going to grant the motion to dismiss the complaint as to Lemon. It will be with prejudice. The order is being made on the assumption, which I think is correct, the plaintiff may still have whatever value there is in contending that Lemon is a co-conspirator in the case. [21]

* * *

The Clerk: Do you want Mr. Dixon to prepare a formal written order of dismissal on this?

The Court: Yes, I think we had better have a written order of dismissal.

Mr. Dixon: All right, your Honor, I will prepare such an order.

The Court: Is there anything further?

Mr. Dixon: I might say at this time, also, that I believe, your Honor, that we will also move to further limit the issues in this case by dismissing the fourth and fifth causes of action which deal solely with the application of the state law to the evidence.

The Court: Are you doing that or just talking about it?

Mr. Dixon: Well, I think we can do that at any time, so, to answer your question, I will not do it at this time.

The Court: Is it your intention to do that?

Mr. Dixon: I think so, your Honor. [22]

* * *

December 7, 1955, 2:00 P.M.

The Clerk: No. 13788-C Civil, Winckler & Smith Citrus Products Company vs. Sunkist Growers, and others. Further pretrial hearing.

Mr. Dixon: Ready for plaintiff.

Mr. Fisher: Ready for the defendants.

The Court: The purpose of calling you together was to spend some little time on issues. I think both sides received a copy of some material which I forwarded.

Mr. Fisher: We did, your Honor.

Mr. Dixon: We did, your Honor.

The Court: This is certainly not a list of all the issues, but it is a list of the issues that probably are in the case. There are probably more.

I wanted to indicate some tentative rulings in some of these matters. Some of them I think can be disposed of pretty readily. [3*]

* * *

With reference to these issues, on the item listed as No. 1, "Allegations of Public Injury," I have read considerable law on that subject, I Sheppardized and read every case that cited Shotkin, and my view is presently that there need be no express allegation in so many words that there was public injury. The question is whether or not from the allegations of the complaint it would appear that there is public injury.

And, secondly, my opinion is that the complaint so states public injury.

I have in mind the language in U. S. vs. Employing Plasterers Association, 347 U. S. 186, and a very excellent opinion by Judge Sugarman in the District Court of New York. I will take that back. It is not by Judge Sugarman. It is a decision in Boerstler vs. AMA, 16 Federal Rules Decisions 437.

---

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

My thought is that the defendant should have a right to do those things necessary in their opinion to preserve the record. Unless you have contrary views, I think this should end discussion on public injury.

Let me add one other thing.

Of course after the case is tried there will still be the question as to whether or not sufficient facts have been shown at the trial to bring it within the public injury rule. I indicated in the outline, first, a question of law, [5] and then secondly (b) after plaintiff's case is in it wll be tested by the facts.

Dd you want to comment on this, Mr. Fisher?

Mr. Fisher: Just very briefly, your Honor, and that is we would desire to object to the introduction of any evidence, because in our opinion—we still are of the opinion that the complaint fails to state a cause of action; that it does not properly allege public injury.

I think that is as far as we need go.

The Court: I might also point out that it is in the Court's discretion, of course, to always permit an amendment to conform to proof. Whether that will be necessary or advisable I am not passing on at this time. You may at any time during the trial make such motions or objections as will preserve your record.

It would seem to me that a motion at the inception of the case after the jury was impaneled, an objection to the introduction of any evidence on that ground, and probably again at the close of the plaintiff's case, and at the close of the entire case, and again in your instructions, should amply preserve your record.

Mr. Fisher: Yes.

The Court: The second item I wanted to comment on, skipping around a little bit, is No. 9. Section 3 of the Robinson-Patman Act, Section 13a, is an antitrust statute. [6] I found a lot of cases that say it is, and only one case—I will not limit it to one, but some that express some doubts, and Law Review articles expressing to the contrary.

Moore vs. Mead Bakery is a case involving Section 3 of the Robinson-Patman Act. The Supreme Court reversed the Circuit and reinstated the decision of the District Court, based upon those sections.

Mr. Stark: It is still our position, your Honor, that the matter is not finally and conclusively determined by the Moore case, or other decisions, and we still take the position that Section 13a is not an antitrust statute.

We have taken occasion to review the briefs, contentions, and so forth, behind the decision in the Moore case, and it is our view that the case did not involve that question, basically; that the manner in which it was argued and the basis upon which it was decided does not necessarily preclude the point, so it is our desire to continue in our position.

The Court: Will it be satisfactory that you raise that point, for the purpose of the record, in the same manner that we indicated for the other point?

Mr. Stark: I believe that will be sufficient.

The Court: All right.

Some of these other matters are matters of general law. [7]

No. 6, the question of co-conspirators, the right of plaintiff to rely upon acts of co-conspirators, Tree-Sweet, though dismissed, and Lemon, though dismissed.

Is there going to be any contention on that point?

Mr. Stark: I think at the last hearing, at the time the defendant Exchange Lemon Products Company, was dismissed, Mr. Hurd stated as an offhand matter that seemed to be generally in accord with his understanding of the law as to TreeSweet and Exchange Lemon, but we haven't had a chance to review that; and I haven't had a chance to talk with him since, so I think we are pretty much in the same state there.

As to the first group, the names in the amended complaint, I would assume that refers primarily to Silzle, and that would get us back into the same statute of limitations provision.

We feel that the amended complaint, to the extent that it purports to bring in Silzle, is setting up a new and different conspiracy which is barred by the statute. But perhaps I shouldn't get off into that at this point.

The Court: No. We will take that up later.

Of course, the conspiracy is alleged to be between Sunkist, Orange, Lemon, and I take it there is going to be no contention that presently there is any prohibition against proving that a subsidiary conspired with the parent corporation. [8]

Mr. Stark: That there will be no contention that a subsidiary did conspire?

The Court: Cannot conspire, I mean.

This subject was discussed by Judge Yankwich in Balian Ice Cream Company vs. Arden Farms, 104 F. (2d) 790.

Mr. Stark: I don't believe, so far as its applicability to these defendants, that is, to exempt cooperatives under the Capper-Volstead Act is concerned, that we necessarily concede the applicability of general cases relating to relationships between a parent and subsidiary corporation.

The Court: Judge Yankwich in his opinion points out that at one time there was some question about this problem, but he flatly states that corporations dealing with subsidiaries may be guilty of antitrust violations, and cites in Note 8 a number of cases.

Now, I am inquiring whether you are going to raise that point in this trial.

Mr. Stark: Perhaps I should defer to Mr. Williams on this point. I know that it is a matter that he has done some research on.

Mr. Williams: Your Honor, there are the cases that Judge Yankwich refers to. I think that we will not take a flat position that a parent can never conspire with subsidiary, but we will wish to take the position that in this case the proof will not show a conspiracy falling within the [9] Sherman Act between the parent and subsidiary. [10]

* * *

No. 15. The burden of proof is on the plaintiff on Counts 1 and 2, and on Count 3 the burden shifts to the defendant after a prima facie case is made.

Mr. Stark: As to 1 and 2 of course I don't believe there is any question. On 3, we gather that what your Honor is doing in these notes is paraphrasing the provisions of the Robinson-Patman Act, so far as the burden shifting on justification for discrimination. So far as we are presently aware, that is correct, it is the statutory language. However, the burden doesn't shift, so far as proving the discrimination, as such, by simply a prima facie showing, as we understand it. [12]

The Court: We are in agreement on that, aren't we? Part of your case would require that you show the discrimination, would it not, Mr. Dixon?

Mr. Dixon: Oh, yes, your Honor, we naturally expect to do that.

The Court: All right.

Some of the rest of these may not be so easy.

No. 2——

Mr. Stark: Mr. Williams had one further comment on this that he might make, your Honor.

Mr. Williams: Your Honor, the provision referred to about shifting the burden is in Section 2b of the Clayton Act, and it is my understanding that relates only to a price discrimination under Section 2a.

The complaint also alleges a violation of the Robinson-Patman Act, Section 2d of the Clayton Act, and also Section 3. It is my understanding that this provision of shifting the burden relates only to 2a and not to the other charges in Count 3.

The Court: What is your view, Mr. Dixon?

Mr. Dixon: I think, your Honor, that the cases we cited in our trial brief support the view that once a discrimination has been established by the plaintiff claiming that discrimination, that the burden shifts and it doesn't make any difference under what section of the Act the evidence is [13] shown, if it is part of the proof required under the section; that the showing of the discrimination establishes that fact to the extent that the burden shifts at that point to justify it.

The Court: We are probably on an academic question, because the plaintiff's proof will probably attempt to show the discrimination, and certainly any justification would have to be shown by the defendants.

Isn't it largely academic?

Mr. Stark: In all probability one of the major issues, as far as Robinson-Patman is concerned, is going to be whether or not there is, in fact, a discrimination in goods of like kind and grade. Not a matter of justification of one of the statutory justifications, but whether in fact these are goods of like kind and grade, and whether, in fact, there were two sales, or two sales at a reasonably comparable time. As to those items, it is our understanding that under either section the plaintiff has the burden on those. He has more than a prima facie burden; he has the burden of proving those.

If he makes a prima facie showing on those, and we desire to make any justification under the statute, meeting competition, and so forth, that we of course have the burden ~~of~~ establishing that affirmative defense or justification. But it seems to me as we understand the facts, the major [14] issue on Robinson-Patman is going to be whether, in fact, there was any discrimination such as is covered by the statute.

The Court: Well, possibly you had better look at the cases Mr. Dixon referred to if you haven't done so already.

Mr. Stark: We will.

The Court: And we will discuss this further at some time.

On point 2, as to the alleged exempt position of the defendants, I think the statute is clear that the defendants have a certain statutory exemption.

As I understand it, there are no cases directly in point on this exemption as applied to facts such as we have alleged here. Is that correct?

Mr. Fisher: Well——

The Court: At least no one has cited any to me. My reasoning in the matter is that the problem is akin to that, for instance, of the trade union, which is exempt from antitrust laws as long as it tends to its knitting, if we can put it that way; that the concerted action of trade union members, even though causing damage to the employer, gives rise to no legal cause of action. The Apex Hosiery case and others.

On the other hand, if the trade union conspires with employers, then the exempt character, as it were, of the trade union is immediately lost and the trade union stands or falls like any other party to a proceeding. [15]

Judge Yankwich's case, the San Francisco plumbing case, in I think 51 Fed. Supp., and we had the problem up in the Las Vegas case. There are various other authorities available, and I think they are cited in the Las Vegas case.

I am, therefore, of the tentative view that this is a question of fact for the jury under proper instructions. Instruct the jury that in certain instances these defendants have exempt positions under the antitrust laws, but that these exempt positions could be lost by acts, conduct, contracts. It is a question of fact for the jury whether or not the defendants, as it were, lost their exempt position by alleged conduct engaged in.

Mr. Fisher: May the court please. I would like to break it down in really two parts.

First, with reference to the exempt position of the defendants. Refer to paragraphs 3, 4 and 5 of the Stipulation of Facts, which was signed a few days ago, in which it is stipulated that each of the then three defendants, namely, Sunkist Growers, Inc., Exchange Orange Products Company, and Exchange Lemon Products Company are all exempt co-operatives, that each of them is.

Therefore, the exempt status is, I take it, stipulated to, and there is no question about that.

That is correct, is it not, Mr. Dixon?

Mr. Dixon: No, I wouldn't say it was, Mr.

Fisher. I [16] don't like the use of the word "exempt," and the use to which counsel for the defendant places that term.

The law gives the right to any group of producers to organize into corporations or to associate themselves together for the purpose of marketing, collectively speaking, the products that they grow and produce.

That is the full limit of the extent of the so-called exemption that is granted the marketing co-ops, so-called, that are operating throughout the country in various industries, of which the citrus industry is one.

I think the Borden case we cite in our brief and the milk case, Maryland and Virginia Milk Producers case, as well as the Cape Cod Food Products case, all involved so-called co-ops, marketing co-ops, organized under the various statutes permitting that type of association of producers to join together for the purpose of marketing their products, period.

Now, to that extent it can perhaps be said that they are not subject to the conspiracy phases of the antitrust laws, which would otherwise make illegal that type of association of individual businessmen or producers if those provisions of the law were not there to permit them to do collectively what they could not otherwise do.

So when Mr. Fisher says that there is a stipulation or an agreement that the defendants are exempt from the antitrust [17] laws, I cannot agree to that, and there isn't anything in the stipulation that so provides.

The stipulation provides that they are organized under the laws of California as corporations not for profit; but it also provides that they are operating for the profit of the members.

The Court: Well, let me asked you this. You concede that they cannot run afoul of the conspiracy sections in carrying on these purposes for which they are organized?

Mr. Dixon: Yes. In other words, they are permitted to do collectively that which would otherwise be illegal.

The Court: Do you contend they could run afoul under the monopoly section?

Mr. Dixon: Definitely, your Honor. I think the cases referred to in our brief support that position. In other words, let us assume for the moment that they have what we might call a legal monopoly, in other words, they are organized under——

The Court: I didn't state my question artfully.

Mr. Dixon: I am sorry.

The Court: Apart from activities such as alleged in connection with Silzle and TreeSweet, they are permitted to monopolize a part of industry, and they can run afoul of the monopoly section, your position is, as well as they can run afoul of the conspiracy section, if they step outside [18] of the purposes for which they are organized?

Mr. Dixon: That is right, your Honor. In other words, to apply the facts of this case to the law that we are discussing, the defendants Sunkist and their wholly-owned subsidiary Exchange Orange, could conspire or combine with TreeSweet, which is an independent corporation, not a co-op at all, and with Silzle, or with anybody else that is not a co-op, for the purposes of restraining commerce, and the acts which they performed if they had the effect of restraining commerce would violate the anti-trust law.

The Court: I have two questions and then I will hear from Mr. Fisher.

Mr. Fisher: May the court please, that was the very purpose of my breaking it down into two points.

The Court: Let me ask two other questions, if I may.

Is it your contention, Mr. Dixon, that assuming Sunkist has a co-operative status, and Orange has a co-operative status, that there could be a conspiracy between those two alone?

Mr. Dixon: Yes, your Honor.

The Court: Is it your contention that either Sunkist or Orange could violate the Clayton Act or the Robinson-Patman Act?

Mr. Dixon: Definitely, if the evidence would justify that finding, yes. [19]

The Court: All right.

Mr. Fisher: May I say that we take issue, as your Honor stated it, with Mr. Dixon's position?

The Court: I didn't state anything. I asked two questions, "Is it your position?" and Mr. Dixon gave an answer. I haven't said what my position is on that yet.

Mr. Fisher: I didn't mean your position. Mr. Dixon's position, with respect to the question.

I think if you take the two of them alone they could not conspire in violation of the antitrust law.

I may say that it will be our position, and that follows a fortiori, I think, that the general rule with reference to the conspiracy between a parent and a subsidiary I do not think would apply to the situation that we have here where both the parent and the subsidiary are co-operatives, exempt co-operatives.

Now, there is one further point that I would simply like to clear up, and I think it is really cleared up by the stipulation of facts, and that is it is conceded, we take it, that each of the two remaining defendants, and the Exchange Lemon Products Company, are corporations complying with the Capper-Volstead Act.

Is there any question on that score?

The Court: Complying in their organization and structure is what you mean, I take it. [20]

Mr. Fisher: Yes. That is to say, that there are three subdivisions to that:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"And in any case to the following:

"Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members."

As to that, you have my assurance, Mr. Dixon, that each of the three defendants are in compliance with each one of the provisions.

The Court: Are the defendants going to rely on that third subdivision in connection with the Silzle and TreeSweet contracts?

Mr. Fisher: Yes.

Maybe I don't understand your Honor's question. But as I understood it, would the operation of the TreeSweet and Silzle contracts take them out from under the percentage amount here? It would not.

The Court: In other words, the defendants' position is [21] going to be that they dealt with TreeSweet and Silzle within that third subdivision?

Mr. Fisher: Yes.

The Court: What is your position on that, Mr. Dixon?

Mr. Dixon: I would concede the first two propositions, but I will have to deny the third, your Honor, because I think that is a question to be proved in this case. I don't know. I know generally what the facts are as I have been able to discover them through rather extensive discovery proceedings, and the primary product involved here is single-strength Valencia juice. Whether they dealt in that product in an amount in excess of that produced by themselves would depend I presume on a lot of the evidence produced in this case, which might raise a question of fact on which the Court might find it necessary to instruct the jury as to the law on the third point, and let the jury determine if the evidence justifies it, whether that provision of the law was applicable.

But even those three provisions don't go to what I regard as the basic purpose here. If the third proposition or fact that Mr. Fisher just referred to were found against them, then they would be completely out as far as any exemption that they might have by reason of their being organized under the state laws for co-operatives or the federal act that might be applicable to them. But let's assume that all three of [22] those provisions are applicable, they are still not placed outside of the application of the antitrust laws under the evidence as we expect will be introduced in this case in support of the allegations of the complaint.

Mr. Fisher: We recognize that there is the Borden case, of course. I am not claiming that if you had a Borden case that the defendants would be exempt as to that transaction.

(b) Of this statement, "Exempt Position of Defendants," the statement "Instruct that exempt position may be lost by acts, conduct or contracts." I wouldn't concede that the exempt status of the defendants as non-profit co-operatives would be lost even were there a violation of the antitrust laws, by itself. I don't think your Honor intended that.

The Court: I don't know that we are talking about the same thing.

Mr. Fisher: I don't believe so.

The Court: They would still be non-profit cooperatives, but if there was a violation of the anti-trust laws, they might be liable for damage.

Mr. Fisher: Expressed in that way, I think it is correctly stated, had you such a case.

The Court: I didn't prepare these notes for you gentlemen, to start with; I prepared them for myself and then I merely had the girl type them out and mail them to you, so they haven't been done artfully. [23]

Anything further on this No. 2 question, Mr. Fisher?

I am going to do some further work on it. I will be glad to have both of your views on it.

Will you have any matter on which you want to preserve your record as you go along?

Mr. Fisher: Yes, we would want to preserve our record to preserve this point.

The Court: You might give some attention to formulating some kind of a motion or objection which would raise this particular point so it wouldn't have to be raised every time a witness answered a question.

Mr. Stark: Your Honor, wouldn't it arise much as you have indicated at the time of instructions?

The Court: That is certainly when we will be up against the gun on it, at the time of instructions.

Mr. Stark: I wonder if I could go back just for a moment to clarify what I think may have been some misunderstanding on your question as to whether defendants relied on the third section of the Capper-Volstead Act for the Silzle and Tree-Sweet contracts.

I think what Mr. Fisher was stating was that the Silzle and TreeSweet contracts would be non-member business, and would be in the aggregate a part of the non-member business to be balanced against member business.

The third section as such I don't believe is relied on [24] for the legality or illegality of the particular contract. But I think the thing Mr. Fisher was trying to get at was just as a preliminary matter it is a rather obvious fact that Mr. Dixon in his discovery found that these corporations do comply to the extent that there is protection from the Capper-Volstead Act.

Mr. Dixon: Oh, yes.

Mr. Fisher: That is what I was trying to reach.

Mr. Dixon: Maybe I misunderstood you, Ross.

If there has been any misunderstanding, may the record show, your Honor, that I am not denying the fact that the defendants here are incorporated under the laws of California which provide for this type of organization, and so forth. If that is what you meant, Ross.

Mr. Fisher: And that——

Mr. Dixon: But that doesn't give you exemption from the antitrust laws is my position.

Mr. Fisher: But there is a compliance with the provisions of the Capper-Volstead Act, as far as the exemption provisions of that act would carry you.

I think what we are arguing about is how far the exemption provisions of the Capper-Volstead Act carry you.

The Court: I understand there is no restriction on your agreement except as to 3.

Mr. Dixon: That is correct, your Honor. [25]

The Court: I think you are talking the same language in maybe different words.

I am going to do some further work on this, but my present view is that this case will go to the jury on the proper instructions as to the status of these defendants on what would be legal and what would be illegal activities.

We will take up this question of the statute of limitations.

I had another work sheet that I handed to you. The original complaint was filed on February 1, 1952, and this amended complaint on December 14, 1954.

I understand the defendant's contention is that the matters in the amended complaint insofar as they refer to Silzle are without the statute of limitations, and not within the statutory period. Two affirmative defenses set up. The third relying on Section 338(1) CCP, and the fifth alleging some sort of laches and estoppel, which I will be very frank it is rather hard for me to follow. I couldn't make much out of the fifth affirmative defense.

My tentative view is that the original complaint alleged that the defendants contracted, among other things. Certainly the defendants knew they contracted. Any proceedings to find out what those contracts were was a matter of discovery, and in the matter of discovery the Silzle contract turned up, having been revealed apparently on May 26 in [26] answers to interrogatories. And the Silzle contract has an amendment in it which was dated February 6, '52.

It is a very remarkable amendment, by the way, in that Sunkist agreed that Silzle may sell outside of California and Arizona a certain number of cases at a fixed price.

Here was an amendment to the contract in February of '52 with acts, I suppose the proof will show, done thereafter, and those acts are clearly within the statute of limitations. Although Silzle was not mentioned by name in the original contract, contracts were mentioned, and I suppose the only way the plaintiff can find out what contracts a private concern has is to engage in discovery.

I don't see any particular problem about the statute.

The amendment relates back, under the rules, to the date the original complaint was filed.

I want to compliment defendants on how diligently they found everything that I had ever written, that had any possible bearing on this case. I even saw DeFranco pop up from Federal Rules Decisions Service.

Of course you haven't seen the case. If you looked at the case, rather than the Service, you would discover that I held that the amended complaint was proper, that no new theory was interjected into the case, and that it would lie.

Of course there the problem was more than naming of the parties. The same principle runs through all these cases: [27] Was the defendant put on notice? And in these cases that involve different parties plaintiff you will find a distinction in the two situations. If you are changing a party defendant, well, you may be in trouble, because you have been proceeding against X and all of a sudden you want to get Y into the case who never knew about the lawsuit. But if it is a change of parties plaintiff, and the defendant knows from the beginning what the general cause of action was which the plaintiff was asserting, the mere fact that there is almost a complete change of parties plaintiff, as some of the cases cited in De Franco would indicate, isn't fatal.

So my tentative view is that the amended complaint is not subject to attack by the statute of limitations; that we will have a question of law and fact, when the case is completed, as to what was proved and what wasn't proved.

Who wants to talk about this?

Mr. Fisher: Your Honor, we have been over this ground somewhat before. I may want Mr. Williams to supplement what I have to say. First, with reference to the applicable period of time, the three-year statute governs.

I want to mention that for the reason that in chambers the other day your Honor, I think, raised the question as to whether perhaps the new four-year statute under the amendment made by Congress to the antitrust laws might govern. [28]

I may say in that regard that the Act of Congress was July 7, 1955. It provides that it shall not become effective until January 7, 1956. It provides for the four years after the cause of action accrued. Then there is a statement: No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

I mention it simply to clear the way that it is, I think, the three-year statute which would govern.

The Court: All right.

Mr. Fisher: Now, I don't think that we dispute (b) of your paragraph 3, where you state "within three years from acts causing damage."

I think where we get into the dispute is about when does a cause of action accrue? And it has been our position that the cause of action, as stated in the statute, the injury, that it must necessarily arise under a complaint, and I am referring now to the original complaint, at the time that Winckler was refused the contract, at the time the contract was entered into with TreeSweet or Silzle and he wasn't given a like contract. That, if you please, was in mid summer of 1951. All right. There is no cause of action on account of the acts carrying out the contract. The cause of action arises in the inception, as I have stated.

The Court: Logically how could that happen? Supposing two people contracted but never did anything to carry out the [29] contract, how could you have any damage?

That seems to me to be a matter of logic. In other words, it is what is done under the contracts generally, rather than this question of when a contract was entered into, that gives rise to the damage.

Now, in your brief you talk about this case as if it rested upon the defendants' refusal to give Winckler a contract.

Maybe under the Clayton and Robinson-Patman Acts you do, but I don't think the Sherman Act violations have anything to do with that.

If that was all that there was in the case, that Winckler had asked for a contract and handn't gotten it, the plaintiff couldn't state a case here.

I take it that the plaintiff's case cuts deeper and wider across Sections 1 and 2 of the Sherman Act than mere refusal of the defendants to give Winckler a contract.

Am I stating plaintiff's position?

Mr. Dixon: Very well, your Honor.

The Court: All right.

Mr. Fisher: However, your Honor, if you refer to plaintiff's trial brief, pages 5, 19 and 20, it is quite clearly pointed out by him that it is the refusal to give Winckler the contract on which they rely.

The Court: There I think the matter being discussed— [30] I would have to check it—is the Clayton and Robinson Act violations.

It seems to me the Sherman Act violations rest on the contention that you gentlemen fixed prices with Silzle and TreeSweet. And that is where the heavy gravamen of plaintiff's charge is under the Sherman Act.

Mr. Fisher: Your Honor, according to my recollection there is no such charge, that we fixed prices, in the complaint.

Your Honor, I would like it if you would hear from Mr. Williams in furtherance of this point. We feel very strongly with respect to it.

The Court: All right.

Mr. Williams: Your Honor, at the moment I merely wanted to call the court's attention to the fact that the pages cited by Mr. Fisher are under the heading, "The violations of Sections 1 and 2 of the Sherman Act and the California Cartwright Act." The heading appears on page 17 of plaintiff's trial brief, and the discussion on pages 19 and 20. which were referred to, are still under that heading.

Further, the amended complaint alleges the refusal to enter into the contract specifically. I believe it is the last or next to the last paragraph of the first cause of action, which is the conspiracy. It is subparagraph (f) of the first cause of [31] action.

It states:

"Defendant EOP refused to enter into a custom packing agreement with plaintiff for processing oranges during the 1951 canning season comparable to the contracts entered into with defendant Tree-Sweet and co-conspirator Silzle."

Mr. Dixon: May it please the court, there seems to be some confusion here as to what the position of the plaintiff is on this point, and I will therefore attempt to clarify it.

I endeavored to state our position on page 23 of our brief, in which I stated as follows:

"The discriminatory contracts between EOP and the independent processors TreeSweet and Silzle"——

And I meant to infer there, necessarily, the performance of those contracts, also.

"——coupled with the refusal of EOP to enter into a comparable agreement"——

In other words, an agreeemnt under which oranges would have been made available to this plaintiff under comparable terms and conditions as those at which they were made available to TreeSweet and Silzle.

"——had the necessary purpose and effect of eliminating its competition in the single strength [32] California valencia juice market in 1951, * * *"

Now, the position of the plaintiff under Section 2 of the Sherman Act, which is primarily a monopoly section, as your Honor well knows, is directed to the abuse of the monopoly power, assuming it to exist here—and I think it does, and your Honor may instruct upon that point, or perhaps may decide to leave it to the jury, I don't know—but I am assuming in my discussion that they had the monopoly power, that if they abused the power—and they did abuse it, your Honor—under Section 2, by entering into these contracts, which gave TreeSweet and Silzle these discriminatory acts as to the single strength market. They were competitors of this plaintiff, and a refusal on the part of the defendants to make a comparable arrangement available to the plaintiff adds up to a violation of

Section 2 of the Sherman Act, wholly apart from any conspiracy charge that might also be made under Section 2 of the Sherman Act.

The Court: Wouldn't the charge lie whether or not Silzle had ever asked for a contract?

Mr. Dixon: Yes. You mean whether the plaintiff had asked for it?

The Court: Yes.

Mr. Dixon: I think so. Although I think that the fact that the plaintiff asked for one and was refused is further evidence of the intent on the part of these defendants to [33] eliminate the plaintiff here as a competitor, not only of the defendants, but also of the co-conspirators TreeSweet and Silzle, in the single strength market. And that is what happened, as a matter of fact.

Mr. Fisher: May the court please, we still get back, I think, to our fundamental proposition, and that is that the act causing injury was the refusal to give the contract during the 1951 season to the plaintiff.

That refusal was in the mid summer of 1951.

The Court: Mr. Dixon just told you, in response to my question, that had that never occurred, he would still contend that there was a cause of action under Section 2, and I suppose likewise under Section 1, in which event the injury would result, as I reason it out, from the time that acts were done under the TreeSweet and Silzle contracts; that it, therefore, had an impact on the plaintiff and damaged the plaintiff.

Mr. Fisher: Well, there must be an injury to the plaintiff. That injury occurred, if there be an injury, at the time of the refusal to make the contract with Winckler.

The Court: Well, I am not in agreement. I will give you a further chance to write something out to set forth your position, but I am not in agreement on that.

I read one very excellent case. This Sherman Act and these Clayton-Robinson-Patman Act things seem to be very [34] complicated, and sometimes it seems to me that counsel and judges in writing and talking about them just make them more complicated. I read Judge Sugarman's decision in the trial court in the Interborough News vs. Curtis Publishing Company case, 127 Fed. Supp. 286. When you turn to the decision, it looks like it takes about 100 pages, don't be discouraged, because the preliminary parts of it have a lot of factual matter which is very similar as to the various defendants, and in the court's discussion the court talks enough about the facts so that you can understand what happened, and the guts of the decision runs from about 297 or 298 to about 301.

But there it seemed to me that Judge Sugarman did an excellent job in analyzing what was meant by a monopoly case and what was meant by a Section 1 case. His decision was a verdict to the plaintiffs, but he broke it down with simplicity.

If you haven't read it, I recommend it for your reading. I would like to see you try to break this thing down in the same way that he broke that one down.

Mr. Fisher: We will try to do so, because it is a point that we feel strongly about, and we want to preserve our record on it.

The Court: Does the plaintiff expect to show that there were acts done under the Silzle and TreeSweet [35] contracts within three years prior to December 14, 1954? That would be acts done on and after December 14, 1951.

Mr. Dixon: Yes, your Honor. For example, some of the sales that were made under that contract, of the defendants in this action, were made as late as February, 1952.

The Court: That is Silzle?

Mr. Dixon: Silzle, and TreeSweet as well. In other words, it was an inventory that was carried over on these contracts that was ultimately disposed of, and it was all disposed of at a price here which was impossible for anyone to meet.

The Court: Was it also disposed of at a price fixed by the defendants?

Mr. Dixon: That was the way the contract read. In other words, the selling price of that and the price at which they were sold, I think they are substantially the same, because there were very few sales that were not made at that price, as I understand it, was set forth in the contracts, or referred to by the Sunkist selling price—I mean their price list—and whenever these sales were made, depending upon the time at which they were made, and that is an important factor, they were geared to the market, the Sunkist selling price, they received the preferential discounts and various allowances that were not made available to anyone else, including the plaintiff, and were not made [36] available to him under this contract.

The Court: The statute of limitations problem boils itself down into two parts. No. 1, there isn't any possible argument that even if this amended complaint is treated as a new complaint, that acts done in the three-year period from December 14, 1951, on are within the statute and can be proved, but that is a last ditch proposition for plaintiff.

The plaintiff's other contention is that the complaint relates back, and since it relates back to the date of the filing of the original complaint, the original complaint dictates the statute of limitations.

Now, that is the most reasonable interpretation to put on it as I read the cases.

And this other contention, that acts had to be done after December 14, 1951, is merely a last ditch proposition on plaintiff's part.

Mr. Fisher: We are approaching this on the question of whether it relates back.

The Court: You have the two problems.

Mr. Fisher: But the acts which were done in performance of the contract, they aren't the acts which caused the injury. In other words, the claim arose, if it did arise, early in '51.

The Court: Well, the original complaint was clearly within the statute of limitations, was it not? [37]

Mr. Fisher: I beg your pardon?

The Court: The original complaint was clearly within the statute of limitations, was it not?

Mr. Fisher: So far as TreeSweet was concerned, it was. Not so far as Silzle was concerned. Silzle was not mentioned in the original complaint.

The Court: If Silzle had been a defendant you might have some point. He would have had no notice that he was being sued for that matter. But Silzle is not a defendant. Silzle is one of the people that the plaintiff says you contracted with. It is just a matter of proof is all.

I can't see the emphasis you place on this, but I will tell you what I am going to do about it. I want to cover some other points and get your views.

Mr. Dixon: Pardon me, your Honor. May I make this further suggestion for what it is worth?

As the record shows, there were several John Doe defendants so-called, and Silzle was not made a defendant, but he was named a co-conspirator in this case when the amended complaint was filed. I say if any legal theory was necessary, they were put on notice that there were other parties and other acts that might have been performed, if that is necessary. I don't think it is necessary.

The Court: I will make the suggestion that on this statute of limitations each of you see how succinctly you [38] can write out what your position is.

Mr. Dixon: There is nothing further, your Honor, that I think that I can add to what I have already said.

The Court: I was going to say that since I am apparently dissatisfied with the defendants' contention I think they should do that. I see no reason why you couldn't do that by Monday or Tuesday, a succinct statement of what your position is on the statute of limitations. Treat it two ways. In other words, assume the amended complaint dates back to the original complaint.

Of course, if that applies, you have no point. The only question then is what could be proved in that situation.

On the other hand, the amended complaint has to be effective as of the date of filing.

Your reasons why that would be true and what could be proved.

And if plaintiff is not satisfied that its position is made clear upon receipt of that, it may file a counter statement.

I am going to take a short recess. What other points would you like to discuss in the limited time that we have available?

Mr. Fisher: Are you asking me which ones?

The Court: I will ask you and I will ask Mr. Dixon.

Mr. Fisher: I take it that what has been said regarding [39] the statute of limitations applies to both 3, 4 and 5, is that correct?

The Court: Yes. My outline isn't very intelligible, but it seems to me there is no problem about the Silzle contract going into evidence, for the reason that an act done under it was done clearly within the statute. The only problem is whether the amended complaint dates back.

Certainly on another theory, acts done even without the statute would be admissible to show intent. You have various rules that would apply.

So the problem is not the admissibility of the Silzle contract. But if you have a point. It is in connection with what things caused the injury, and I am not convinced that it was the execution of a contract. Certainly not by itself. So your statement had better cover 3, 4, and 5 of this outline.

Mr. Fisher: Yes. [40]

* * *

Mr. Stark: Yes, we probably should clarify the point that your Honor had in mind in No. 12, because I think that is based on a misunderstanding of what was in our brief.

The Court: All right, I will hear you after the recess on that.

Mr. Dixon, do you have some points that you want to discuss?

Mr. Dixon: I would like to comment on the monopoly phase of the case, which I think is going to be an important phase of this whole lawsuit.

Mr. Stark: We would like to suggest one other item that isn't on the sheet that your Honor furnished. It perhaps could be disposed of today.

Mr. Dixon indicated at the time of the last hearing on this matter that the plaintiff was considering dismissing the fourth and fifth causes of action. If possible,. I thought that might well be taken care of today.

The Court: Yes.

That reminds me of another question. There must be pertinent issues that will come up in this case upon which I should do some work and we should have some discussion besides these that I have listed. Have either one of you made a further list of issues, or in my blundering way have I covered most of the hot spots of this case? [41]

Mr. Dixon: I would say you have.

Mr. Fisher: I have restricted my attention to trying to meet these.

The Court: You haven't been worried about what other issues there might be?

Mr. Fisher: I haven't had, really, the opportunity to consider what other issues there might be.

The Court: I wish you both would give some thought to that.

We will take a short recess and then I will hear you on these others.

(Recess taken.) [42]

The Court: Mr. Stark.

Mr. Stark: The first item, I don't believe, your Honor, requires anything extensive, except an explanation of what we understood by some of the language of our brief.

In point 12 on the memoranda you question the statement at page 8 of the defendants' brief,

"Plaintiff has failed to include any discussion in its trial brief of the charges made in the complaint that the defendants entered into 'contracts in restraint of trade.' It is assumed, therefore, that these charges have been abandoned * * *."

You have observed that, in a manner of speaking, this case turns upon contracts, and that therefore you wonder about that language that the plaintiff has abandoned the contracts.

What was meant by that was the term, "contracts in restraint of trade," that is a per se contract in restraint of trade, on its face, without any of the factual operation—what we had in mind was the fact that although the critical item of proof from the plaintiff's standpoint is going to be the proof of these contracts, that we come back again to the point that we have gone over quite a little today, that as we understand the matter, the cause of action, if any cause of action exists, is the damage which resulted to plaintiff by the refusal to grant him contracts. And the reference to the plaintiff having abandoned his claim of contracts in [43] restraint of trade was that in the original complaint it appeared that there might be a charge that these were, or that there were per se violations of contracts in restraint of trade.

The Court: Plaintiff doesn't say that in his brief, but if they fixed prices, they are per se violations, are they not?

Mr. Stark: The price fixing feature, I must say that until we received the memorandum we hadn't considered at any point in this case that there was a charge of price fixing, or any damage resulting from price fixing. And that feature of the case, so far as I am concerned, is completely new.

The Court: It might have two impacts on the case. One, it might be part of the general proof that there was a public injury, a violation of the Sherman Act.

The second question is, does plaintiff or can plaintiff show any damage from the price fixing contracts?

I don't know what will appear on the latter part, but it seems to me—I may be wrong, but it seems to me fairly clear that those contracts and their price fixing features would be in the case under the general allegations of the Sherman Act, and I am amazed that you tell me that although you knew they had price fixing features you never considered that that feature had any impact on the case.

Mr. Stark: I didn't mean to say that I was aware of [44] price fixing features in the contracts. I am not presently aware of price fixing features in the contracts. Perhaps because I haven't looked at the contracts with that in mind. Whether they are or are not, or do or do not contain price-fixing features is something that I hadn't frankly reviewed. But at the time the brief was written that particular point hadn't been brought into focus as an element in the case.

In reviewing this I wanted to point out that we were not attempting to confuse the court or to set up a false issue, as we understood the thing there was no longer any allegation on which to base a charge of per se violation by reason of a contract in restraint of trade.

The other item in the memorandum that Mr. Dixon indicated he wanted to say something about the conspiracy provisions, perhaps it would be best if he commented to the extent that he wanted to comment.

The Court: First, what is your view as to point 16, where I mention per se violations? Maybe I am injecting an issue in this case that doesn't belong here.

Mr. Dixon: Your Honor, in a conspiracy case, as your Honor well knows, a lot of facts necessarily come into the record. If the evidence here, cross-examination, would indicate, as I am inclined to believe that it will, that these contracts in operation resulted in the sales of the juice purchased thereunder by TreeSweet and/or Silzle at substantially the [45] same prices at which Sunkist was selling its product, then I think a question of fact might well be presented as to whether or not that was part of the conspiracy charged here in the complaint between the defendants and the co-conspirators in violation of Sections 1 and 2 of the Sherman Act.

Now, you always, of course, in a private lawsuit. have the question as to whether or not assuming that that act was illegal per se, and the jury so found under proper instructions, as to whether or not it contributed in any way, on the proximate cause angle, to the damage of the plaintiff. But certainly it would be competent evidence of the existence of an illegal combination of the type charged in the first and second causes of action, and admissible solely for that purpose to the same effect.

Let us assume that the evidence here shows a violation of the Robinson-Patman Act by direct discrimination in sales products to the plaintiff as against the sales made to Silzle and TreeSweet under their contract, I think that the jury might be entitled to consider—in other words, if they find that there is a violation, is it a part, also, of the conspiracy charged? It is a question of fact under proper instructions for the jury to determine. In other words, the jury is going to consider here all of the competent evidence. They are going to consider, perhaps, three particular situations.

One. Whether there was a conspiracy of the type charged [46] in the complaint;

Two. Whether there was an abuse of the monopoly power by the defendants under Section 2 of the Sherman Act, wholly apart from the conspiracy question;

Three. Whether or not the defendants or one of the defendants violated the Robinson-Patman Act in any manner.

Now, then, of course there is a charge made under the fourth and fifth causes of action of state violations, concerning which I have reserved comment or judgment at this time as to whether we will dismiss, but there again let us assume that the commerce question comes in as the defendants may well argue, it is suggested in their brief that there isn't and couldn't be any Robinson-Patman Act violations here because the sales made were in commerce. Now, the State law still would apply, if those sales intrastate contained a secret rebate, for example, which was given to TreeSweet and Silzle and not available to this plaintiff. I think that type of evidence would be admissible, not necessarily to support a judgment of a violation of the unfair practices act of the State of California, but as evidence of the fact that the defendants here were engaged in a conspiracy and in the course of the conspiracy committed certain illegal acts which had the effect required by the Sherman Act to constitute a violation of that Act.

An antitrust case, as your Honor has suggested, particularly [47] a conspiracy type of case, depends 100 per cent, if that is possible, more than any other type of lawsuit, upon the facts and the evidence, of course, from which inferences can be drawn.

It is usually based on evidence from which inferences must necessarily be drawn, because there is a lack of direct evidence of the type necessary to constitute an affirmative violation of the law as such.

So in the conspiracy angle I think that type of evidence would be admissible to go to the jury on the question of whether or not they were engaged in the conspiracy of the type charged.

I don't think it is necessary to prove that the defendants committed all the acts charged in the conspiracy. It is only necessary to prove that the conspiracy existed, and that the defendants—or the plaintiff, rather, was damaged as a result of some act committed pursuant to that conspiracy.

There may be several acts, but that is again a question for the jury to determine which act or acts,

if any. But the primary question is for them to determine whether it was a conspiracy.

The Court: All right. Now do you want to comment on this monopoly question?

Mr. Dixon: Yes, your Honor. I don't think there is any question, I think the defendants must necessarily concede that [48] the defendants controlled—by "controlled" I mean they accounted for and had for disposition in the markets of the country — more than two-thirds of the Valencia oranges produced in the states of California and Arizona. It seems to me that fact cannot be seriously disputed, and I don't think that it is disputed.

I think the facts here and the evidence will also show that of the total amount of Valencias available during the 1951 processing season, that more than two-thirds of the amount available was under the control or disposition by the defendants. Therefore, I think we must assume and conclude that the defendants had monopoly control over the product, which was necessary for this plaintiff to remain in the single-strength juice and the related parts of the citrus juice business in Califorina during that year.

The same might be said of the lemons, only to a much greater extent. I think the percentage of control there was something like 87 per cent of the total production.

Of grapefruit it is not as high. It is around about, as I recall it, 50 per cent.

So that I don't think that we are directly concerned with the question whether there is a monopoly here in the sense that they have control over the product necessary for this plaintiff to function and remain in business.

It is true the balance of the Valencia oranges were in a [49] sense available, but there are other co-ops in this business, and they have their own arrangements, too, but they don't control in the sense that I have indicated the raw product here that is necessary for the processing of the citrus juice that is primarily involved in this case.

I would like to ask the defendants if they don't concede that they had that kind of control, at least as far as the production figures are concerned, because I am prepared to show that they do, if it is questioned.

Mr. Stark: Your Honor, to begin with, it is our position that we go about this wrong. If we go to what in a normal nonco-operative situation would be the middle step of finding out whether there is or is not a monopoly, Mr. Dixon's statement of facts was, I think, erroneous to begin with so far as he says that there are other co-operatives and other sources of supply, but they do not have the same kind of control. The ownership of fruit by the owners of co-operatives, whether it is Mutual Orange Distributors, Ventura, Coastal Lemon Company, American Fruit Growers, or others, is substantially identical.

The percentages that Mr. Dixon gave of the orange crop are generally correct, although they are half of the story, because they are percentages of a portion, a minority portion of the fruit which is available for the national market. It excludes the entire Florida influence. But we feel that this goes back perhaps to the Robinson-Patman question, whether or [50] not there is liability for a co-operative is not going to turn on whether or not it is said that they have or do not have a monopoly. Monopoly, if it has any significance in that sense, cannot mean illegal monopoly. It must mean an economic monopoly.

We take the position that were there 100 per cent of the California-Arizona fruit in one co-operative organization, that it could still be a legal monopoly. Out of that control of fruit there grow certain obligations in the exercise of the power resultant from that control. When we come to the facts of this case, and it comes to submitting it to the jury, the court is going to have to determine whether or not those facts show that the defendants were in a position, did they have certain obligations, did they have an obligation to sell to everybody and anybody, or could they select their customers? Did they have to give processing contracts?

These are facts which will develop from the case and the testimony as to the industry, other sources of supply, the plaintiff's reliance on the defendants, but they don't go to a simplified question, is this a monopoly?

We don't feel that monopoly should be tied to a determination of a particular percentage.

But assuming it were, we don't believe that a finding by the court or by the jury that the defendants are or are not a monopoly is going to be determinative, because whether they [51] are or are not a monopoly, if there is anything legal or illegal in itself is probably the one thing that is fairly clearly protected by the Capper-Volstead Act.

We don't think it does a great deal of good to determine as such that the defendants have a monopoly, because then you still have to proceed, if you assume that, do they have such a monopoly that they have an obligation to sell to everybody, or an obligation to give processing contracts to everybody?

Therefore we don't feel that, really, the inquiry should be phrased in terms of monopoly.

If I may for just one moment go back to the previous point.

I think Mr. Dixon's statement was generally in accord with our understanding at the time of our brief, and that was that as I understand him the contracts would be introduced as evidence relating to the conspiracy, perhaps evidence of acts relating to the conspiracy, but not as contracts illegal per se.

That was our understanding in writing the brief.

He mentioned just briefly a thing which has bothered us for some time, and that is, what the alleged purpose of the conspiracy was. I thought I got an indication that perhaps he feels the purpose of the conspiracy was to fix prices.

We have never gotten any definition, not of the acts pursuant to the conspiracy, but we have never gotten a very clear definition of what the purpose of the conspiracy was, [52] what did these people supposedly agree to do. We would appreciate knowing that if Mr. Dixon has it readily at hand.

Mr. Dixon: If the court please, I sat down because I posed a question which I thought Mr. Stark would answer, after which I intended to take off from that point to further elaborate on the monopoly question.

I said I expect the evidence will clearly show here that under any percentage test applied by the courts, or any other rule that has heretofore been applied, that the evidence will show that as far as the product Valencia oranges is concerned that the defendants here, Sunkist and EOP, had that kind of monopoly control. We start from that premise, your Honor.

I concede the point that monopoly control under this type of organization may not necessarily be illegal. As Mr. Stark has suggested, they might have 100 per cent of the Valencia orange market and it might not be illegal. I grant that. But that isn't the evidence and the charge made in this case.

We start from the fact that the plaintiff here is an independent processor of citrus juices. He is not a producer of the product. He depends upon the defendants and other growers for the product which he must have to remain in the citrus juice business in this area, and there are a few others, and he went into business relying on that fact, and the record will show, your Honor—I mean the evidence will show—that the defendants always had a surplus of Valencia oranges which [53] were made available to the market for independent processing by independent processors. They had control of what happened to them, and that is where this case begins to jell. Abuse of the monopoly control or power. What did they do with it?

They made these contracts. I am not going to go into them now, unless your Honor wants me to. I have referred to them, and the effect of them in the brief. But they made these contracts. The plaintiff didn't know about them at the time. He asked for a contract or an arrangement, knowing there must be one with the others, that would enable him to have access to the raw product fruit, so that he could process juice as his competitors were doing, and continue to supply the market that this company had built up over a five or six year period.

The evidence will show that in 1949 and '50, in other words, before '51, plaintiff corporation had sales in excess of one million and a quarter dollars in all citrus products; that they made a profit.

Now, the abuse of the monopoly power is the thing that I am getting at, because it is not based upon conspiracy. Of course it could be. But the cases clearly indicate, in my judgment, that even if you have a legal monopoly, it doesn't make any difference how you get it, if you have a monopoly, and you abuse the monopoly power with the purpose and effect of injuring competition, or of restraining competition, that [54] you violate Section 2 of the Sherman Act.

The cases that I have cited in my brief, I believe, support that proposition. And that is going to be my contention in the trial of this case with reference to the application of Section 2 of the Sherman Act to these contracts and all the other evidence, the effect of them on the plaintiff, and so forth.

Now, it may not have been necessary to make a demand on the defendants here for a comparable arrangement, but that demand was made, and it was refused, which is additional evidence, coupled with the other contracts, of the discriminatory practices of these defendants, of their intent insofar as any legal intent is required, and it doesn't have to be a specific intent—of an intent to eliminate competition or restrain trade and commerce in citrus juices that are produced and processed in California and sold in commerce.

I have made rather an extensive statement of the position of the plaintiff here on this point, because it is the position that I expect to argue and urge in the trial of this case. I am satisfied that it is soundly based on the law, and that it doesn't make any difference under the law whether this monopoly is legal or illegal insofar as the plaintiff is concerned. But the law is that legal or illegal you can't abuse the monopoly power that you have if the effect of that abuse is to eliminate competition or to damage a competitor. [55]

And these contracts here, there again, were made by the defendants with their competitors, supposedly, with competitors that were competing with the plaintiff, as well as with the defendants, so it goes around in a circle.

I submit that the clarification of the monopoly charge insofar as it may be applicable to this case is based upon the facts, statements that I have made, and that it does have an important part in this case. In addition to the conspiracy charge, which is also, of course, a question of fact for the jury to determine. But the monopoly charge, the abuse of the monopoly power does not depend—and this is the point that I want to suggest to your Honor—does not depend upon the conspiracy phase of the charges made in the complaint.

Mr. Stark: This statement of Mr. Dixon, your Honor, has been very helpful to us. It is the type of thing that we have been trying to get on the Section 1 and Section 2 charges. This is, I think, the best statement that we have had on the monopoly phase, and I don't know that we disagree with the law. We just are satisfied that he can't find the facts for it.

But I would very much appreciate it if we could have comparable clarification as to the purpose of the conspiracy charge under Section 1. Is the conspiracy a conspiracy to abuse the monopoly power, or is it a different conspiracy?

This is something that in earlier stages perhaps the plaintiff couldn't clarify, but it seems to me that two or [56] three days before trial he should have a pretty good idea of what the illegal purpose of this supposed conspiracy was.

The Court: I don't know, I will ask Mr. Dixon.

but the complaint alleges that the defendants contracted, combined and conspired to tend to eliminate plaintiff from the market, and combined and agreed to have defendants TreeSweet, EOP, ELP, purchase fruit from defendant Sunkist below Sunkist's scheduled price, and maybe other allegations.

Mr. Dixon.

Mr. Dixon: Your Honor, I think the complaint speaks for itself. I don't know what I could add to it. It seems to me it is perfectly clear. I don't know what isn't clear in the minds of the defendants with reference to the charges made. It is a conspiracy to restrain and eliminate competition and to monopolize the citrus juice market, of citrus juices processed here in California and sold in California and interstate markets.

It is just as simple as that.

The Court: In the interstate markets?

Mr. Dixon: And interstate markets, yes.

Plaintiff was engaged in interstate commerce.

The Court: I don't have the difficulty the defendants do as to Count One. Count Two, I have been aided by what has been said. The gist of Count One is not merely a conspiracy to violate the antitrust laws. That would give no cause of [57] action. It is a conspiracy to violate the antitrust laws and thereby injure the plaintiff.

How?

By tending to eliminate him from the market, and by entering into contracts which hurt him, which contracts were performed.

Is that what your complaint says?

Mr. Dixon: That is correct, your Honor.

And I may add, by way of comment in that respect, that you probably read a lot of decisions on Sections 1 and 2, where 1 and 2 counts are charged. If I had drawn this complaint originally, I wouldn't have drawn it as Count One and Count Two, your Honor, because the cases indicate and refer frequently to the fact that an abuse of monopoly power may restrain competition in violation of Section 1. In other words, if you have monopoly power and you abuse it, with the result of restraining trade and commerce or eliminating competition, Section 1 of the Sherman Act makes elimination of competition and restraining of competition in interstate commerce a violation. Section 2 merely says monopoly power and conspiracy to monopolize and attempt to monopolize—— [58]

* * *

The Court: Counsel for the defendants indicates that maybe these percentage figures you gave were correct, but he contends there was no monopoly but a legal monopoly. Mechanically how do you do this? Do you instruct a jury that if they find—do you leave it to the jury wide open, if you find there has been a monopoly or attempt to monopolize, and so forth? Or do you give them a numerical figure percentagewise, or do you rule as a matter of law that the evidence is sufficient and then leave it to them to determine as to whether there has been the damage from the Section 2 charge?

Mr. Dixon: Your Honor, I naturally expected we would go to trial some time before we are going to trial, so I therefore prepared some requested instructions to the jury. I know they are not technically in order now, but I will be glad to file them and submit them to the court. I think it will clarify or answer perhaps some of the questions that you have asked of me on this point.

If you would like me to file them now I would be glad to do so. [59]

The Court: You may file them. [60]

* * *

December 13, 1955; 9:45 A.M.

* * *

Mr. Fisher: Mr. Williams has a motion.

Mr. Williams: We have already submitted to your Honor and to Mr. Dixon our written motion to dismiss the fourth and fifth causes of action, upon the ground that this court has no jurisdiction to entertain them.

The Court: Mr. Dixon.

Mr. Dixon: I think, Judge, to clarify the issue we may as well dismiss the fourth and fifth causes of action. I think we can bring in rebates which we claim were granted under the contract, under the Robinson-Patman Act provision.

The Court: The motion is granted.

The Clerk: The formal order, I suppose, would be incorporated in the final judgment in the case?

The Court: Unless you want it filed earlier.

The Clerk: We don't need a separate one unless counsel want one. [27]

* * *

The Court: It is my general view that absent the Silzle and TreeSweet contracts, defendants have no obligations to sell to anybody. It then becomes a question of fact if the Silzle and TreeSweet contracts are believed by the jury to create a certain situation, then it may well be the defendants did have some obligation.

Certainly they had no obligation to sell to anybody, absent those contracts.

Mr. Dixon: That is our position, Judge.

The Court: In other words, there is no law saying you have to sell to anybody.

Mr. Dixon: We would not be here were it not for the Silzle and TreeSweet contracts. [34]

The Court: That it seems to me is a question of fact. If the jury finds there were these contracts, and that they had an impact on interstate commerce, either under Section 1 or 2, then it seems to me that the refusal to sell becomes material.

That is my analysis of it after studying the case.

I think you are certainly right that without things like the Silzle and TreeSweet contracts, Winckler could have gone around and stood on their front door with his hat in his hand forever and there would have been no obligation to sell to him.

It is only the combination of the circumstances that would make that material. It still is a question of fact for the jury. [35]

* * *

VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record
In .... Volumes

Volume II
(Pages 481 to 972)

Appeal from the United States District Court for the
Southern District of California,
Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

December 13, 1955—2 P.M.

Ladies and gentlemen, we will now have the plaintiff's opening statement.

An opening statement is not evidence, it is not argument, it is merely the plaintiff's way of explaining to you the outline of its case. It is not evidence in the case.

You may proceed, Mr. Dixon.

Mr. Dixon: May it please the court, ladies and gentlemen of the jury. It now becomes my privilege to tell you what this case is all about insofar as the plaintiff is concerned.

As the court has indicated, what I will say to you is not evidence, but is merely for the purpose of telling you what the plaintiff expects the evidence will prove, so that you may better understand the case and be better able to pass upon the evidence as it may come before you during the trial.

Now, as his Honor has indicated, this case involves what is known as the Sherman Antitrust Law and the Robinson-Patman [118] Act.

His Honor will of course instruct you concerning that Act at the proper time during the trial of this case. Suffice for me to say at this time that the action that the plaintiff has brought, and concerning which you are going to pass upon the evidence, involves Sections 1 and 2 of the Sherman Antitrust Law, and the so-called Robinson-Patman Act.

Now, Sections 1 and 2 of the Sherman Act or the Sherman Law, Antitrust Law, provides that combinations or conspiracies for the purpose of restraining trade or commerce, that is, interstate trade or commerce, and contracts which have that effect, or combinations, or conspiracies, which may be entered into between parties—and there must be more than one party to have a conspiracy—for the purpose of monopolizing any part of the trade and commerce of the United States, or any attempt to monopolize any part of the trade and commerce of the United States, is made illegal. [119]

The Robinson-Patman Act that his Honor has referred to deals primarily with what we refer to as discriminatory trade practices, that is to say. the selling of the same product to different purchasers at different prices would be an example of that type of act, and it is with that type of practice that we expect the evidence will deal in this case.

Now, the commerce that is involved here is the citrus juice industry insofar as it relates to citrus juices that are processed in California and are sold in intrastate and interstate commerce. In other words, the citrus juices that are processed in California and sold throughout the rest of the country are part of the trade and commerce in citrus juices.

The industry involved here, of course, relates to the oranges, the grapefruit and the lemons that are processed into citrus juices in California. In other words, you all know that there is, of course, a substantial amount of oranges and lemons and grapefruit that are grown, not only in California, but in Arizona, our adjoining state. A very great part of that, as a matter of act, a substantial part of that type of citrus fruit is sold as fresh citrus fruit. In other words, we are not concerned with that kind of citrus fruit because it does not go into the citrus juice products, but about less than a third of the total product of oranges, lemons and grapefruit that are not sold as fresh citrus fruit [120] in commerce are processed into citrus fruit juices here in California, and also in Arizona, where they are grown.

The fruit that goes into citrus juices is known as product fruit. In other words, it is better described because certain products result from the processing of those citrus, such as lemons, oranges and grapefruit, into citrus product. Generally speaking, those products may be classified into three different types of groups.

The first may be referred to as single-strength juice product. In other words, product oranges are subjected to a processing arrangement, and the result is what is called a single-strength orange juice product. That product is canned and sold as single-strength orange juice. In California, it is processed here and the canned single-strength juice is sold throughout the rest of the country as well as in California.

Then there is a second type of product which is called a concentrated juice product, and that is the product which is canned and to which water is added after you buy it at the store and you have a product that is comparable to regular orange juice.

The third type of product is what is known as the frozen citrus juice product, and there is a variety of products there. You have frozen orange juice, frozen lemon juice, and you may have many types of products there, but the [121] frozen single juice product is relatively new, as many of you housewives on the jury may know. In other words, it has come into the market as a food product within the last five years, and was not known really as far as consumption is concerned on a national scale prior to that period of time. [122]

So that the product and the commerce that we are going to deal with in this case is citrus juices, and we are going to deal with primarily single-strength Valencia orange juice.

Now, I say "primarily," because as you know there are two types of oranges. There are navel oranges and there are Valencia oranges. The navel oranges do not make a particularly good single-strength juice, because it isn't as sweet as the Valencia oranges. Therefore the single-strength juice comes primarily from the Valencia orange. And about 50 per cent of all of the Valencias that are grown in the United States are grown here in the State of California.

As I suggested a little while ago, most of those are sold as fresh oranges in the various markets of the country, and the balance that isn't is sold to independent processors by the grower or the supplier, or it may be processed by the grower himself, or itself into various products and sold in commerce.

Now, that is the kind of commerce that we are going to deal with in this case.

Before I proceed further I want to say a word about the parties to this lawsuit. The plaintiff, first.

The plaintiff is what is known as an independent processor. At least I am going to call him that, or it that, in the trial of this case. By independent processor I mean that the plaintiff did not have any access to the raw fruit [123] that it was necessary for it to have in order for it to process that fruit into the various types of citrus juices that I have referred to. It, therefore, had to go out in the market and buy this fruit from a supplier. And that was its principal source of supply.

Now, the plaintiff was organized back in 1945. I am not going to go through its history with you. In 1948, it did have some financial difficulties and went through reorganization proceedings under Paragraph 11 of the Bankruptcy Act. In 1949, it was operating at a full scale of operations. Its sales in that year in citrus juice products were in excess of $1,000,000. It had a profit of over $120,000 in that year of operation.

In 1950, it also operated at a profit, although the profits that year were not as large as they were in 1950.

In 1951, we had a situation that I will go into at length in a moment. I just wanted you to know what the business was that the plaintiff was engaged in, and it did process citrus juices, including some frozen juice products, as well as concentrated and single-strength juices here at its plant in Anaheim, California, and those products were sold in California and in the various other states of the United States.

The defendants involved in this case are what is now called the Sunkist Corporation, I believe it is. It used to be known as the California Fruit Growers

Exchange. That is [124] the first defendant in this lawsuit, that is one of the two defendants in this lawsuit, and that corporation was organized back in 1905, I believe it was, and is an association of growers of oranges and citrus juice products. It is really a marketing organization for the growers. And in connection with the marketing of the products which the growers, its members, raised, it of course sold the fresh oranges that its members grew, and the grapefruit, and the lemons, in interstate commerce in the fresh fruit market. [125]

But there again there was a substantial part of the products, by that I mean about 18 or 20 per cent, shall we say, of the product that went into this product fruit market, that is to say, that part of the oranges and grapefruit and lemons that were not sold as fresh fruit were processed into these various kinds of citrus juices and were sold in the various states of the United States in interstate commerce.

Now, the other defendant in this case, Exchange Orange Products, that is a separate corporation that was formed during the 1940's, I believe it was, but that corporation is a wholly-owned subsidiary of Sunkist and deals primarily, almost entirely, with product fruit. That is to say, it sells the product oranges and other citrus products that are not processed by Exchange Orange itself to independent processors. The products, therefore, which is makes, namely citrus juices of single strength, Valencia oranges, for example, are in direct competition with the products of these independent processors, such as the plaintiff in this case. That is to say, the plaintiff corporation, dependent upon the product fruit as a source of its means of processing citrus juices which it sold and the juices which it processed from the citrus products, were in competition with those which were processed by Exchange Orange Products Company, the 100 per cent subsidiary of the Sunkist defendant in this [126] case.

There are some other companies involved here, namely, the TreeSweet Products Company, the TreeSweet Orange Products Company, and Silzle Corporation—we will refer to them as TreeSweet and Silzle during the trial of this case—who were also independent processors of citrus juices, but they only processed single-strength juices, that is primarily Valencia orange juice. I will deal with some of the arrangements that were made between TreeSweet and Silzle and Exchange Orange Products Company in a moment.

At this time I merely want to say that the evidence will show that they were producing products that were also in competition, not only with the products of Exchange Orange, but also the products which the plaintiff corporation made, primarily single-strength Valencia orange juice.

Now, that is the situation with reference to the plaintiff and the defendants in this lawsuit.

I should add further, perhaps, that the evidence will show that the defendant Sunkist markets all of the juice products that are produced by its subsidiary, as it does all of the fresh fruit products grown by its members.

Now, there is another company that will come into this case known as Exchange Lemon Products Company. That is a separate corporation. It is in some respects comparable to the defendant Sunkist because, while it is primarily an association [127] of growers of lemons, and the lemon company and the orange company have a joint arrangement between themselves whereby, as I said, the lemons that are grown by the lemon company are sold by Sunkist and some of the lemon citrus juice products that are made from the lemon by-product fruit is not only processed from time to time by Exchange Orange, the other defendant in this case, but they are the marketing agent. In other words, Sunkist is the joint marketing agent for all of the oranges and the lemons that are grown by the members of Sunkist and the members of Exchange Lemon Products.

Now, we expect the evidence will show in this case that the defendant Sunkist, that is the members of that defendant association, produced in excess of two-thirds of all of the oranges grown in the state of California.

That Exchange Lemon Corporation that I have just referred to produced in excess of 86 or 87 per cent of all of the lemons that are grown in California, and I might say here that California accounts for almost 99 per cent plus of all of the lemons that are grown in the United States.

So that that is the position of these two companies. Sunkist and Exchange Lemon, with reference to the availability or the volume of oranges and lemons that are grown in this area.

The members of Sunkist also produce about 50 per cent of all the grapefruit that are grown. I might say grapefruit [128] isn't too important a product in this case, and it is used primarily for making grapefruit juice and sometimes for blending purposes, perhaps, but the primary product that we are concerned with here is Valencia oranges, and we will deal with that primarily during the course of this case.

Now, as I have suggested, the defendant Sunkist controlled about two-thirds of all of the oranges produced in the area, and it therefore, to a very great extent, set or determined the price at which process oranges would be sold to independent processors. That is something I will deal with in a moment.

Suffice to say at this time that in the year 1951, which we are going to deal with particularly, the price list put out to independent processors, including this plaintiff as a potential buyer of product oranges, remained stable during the year 1951. In other words, there was just the one price list that was put out by the defendant Sunkist or Exchange Orange Products during the year 1951.

The evidence will show, then, that the plaintiff to a very great extent was dependent directly or indirectly upon the amount of oranges, that is Valencia oranges, product oranges, that were available in the market for processing into single-strength juice, primarily from, first, the defendant Sunkist.

Now, the defendant Sunkist did not furnish many [129] oranges, at least the plaintiff corporation did not buy many oranges from the defendant Sunkist after 1949, although it had purchased many tons of fruit from it prior to that time, and it secured most of its product oranges from other sources, but the price at which those oranges were available, whether they were acquired from Sunkist or whether they were acquired from such independent producers as make them available to independent processors, the price was substantially the same, no matter where they were acquired.

Now, I suggested to you, and the evidence will show that the plaintiff corporation here had developed a substantial interstate market for its citrus juice products. The evidence will show that in 1949 its markets, that is, its total sales, were in excess of $1,000,000, as they were in 1950, citrus juice products.

The evidence will also show that in the year 1949 about 80 per cent or more of the product, that is the single-strength product, which it made, was sold in interstate commerce. [130]

In 1950, about 75 per cent, and in 1951. its products in the single-strength orange juice market went down to about 55 or 60 per cent, practically all of which was purchased by the plaintiff in Florida. In other words, in 1951, the single-strength market, into which the plaintiff sold its products, were interstate in character, as they were in the years 1949 and '50, but it was unable to produce, the evidence will show, any single-strength Valencia orange juice, which was its principal product, and its principal source of income and profit, during the year 1951.

The total sales of the plaintiff in 1951, were slightly in excess of a half million dollars. In other words, there was a substantial dropoff in the volume of its production, and the volume of its sales in single-strength citrus juice products in 1951.

I have mentioned TreeSweet, this other corporation, and Silzle, to you as being independent processors of single-strength citrus juice, that is orange juice. We expect the evidence will show that in 1951, the defendant Sunkist during that year had substantially, again, more than two-thirds of all the Valencia product oranges that were available in California for processing into single-strength juice.

We expect the evidence will show that during that year the price at which the defendant Exchange Orange Products, that is, this other defendant, and a 100 per cent subsidiary [131] of Sunkist, sold such Valencia oranges to independent processors, and that price remained the same throughout the canning or processing season.

Now, the price of oranges, Valencia product oranges, is determined on the basis of what is known as solids or soluble content.

We expect the evidence will show, for example, that if a processor paid $40 for a ton of Valencia oranges, regardless from what source it was able to get those oranges, that if he paid $40 for that ton, that that ton was supposed to have, say, 120 pounds of soluble content.

I don't want to be technical, and we will explain that during the course of the trial. Suffice to say that the average ton of oranges, Valencia oranges, would produce about 100 gallons of single-strength juice. For that, shall we say, you would pay an average price of $40 a ton.

Now, if you were buying that, that is, the evidence will show if the plaintiff bought a ton of oranges and paid $40 a ton for it, and it was based on 120 pounds of soluble content, that that would produce on an average about 100 gallons of single-strength juice.

We expect the evidence will also show that the cost of producing or processing that ton of oranges into 100 gallons of single-strength juice would be about $35 a ton. In other words, there would be the processing cost for turning the [132] 100 tons of Valencia oranges into single-strength juice.

We expect the evidence will show that the average-sized can of single-strength oranges—there are several sizes, but the one that was principally sold was what is known as the 12-46, that is a dozen of 46 ounce cans of single-strength orange juice to a case; that a case of 12 46's would have, say, four gallons and three-tenths of single-strength juice in that case.

So, you see, by converting the cost of the oranges to the processor, and the manufacturing cost of processing that into single-strength juice, you would get $40 plus $35, which would be about $75 a ton. And to use round figures, if you got 100 gallons of juice out of a ton that would be about 40 cents a gallon, or a case. It would be about 40 cents a gallon.

Now, we expect the evidence will show that while the price of oranges that were available for processing into single-strength juice in 1951 was stable, that is, there was just the single price all during the canning season, that the so-called opening price for single-strength orange juice in 1951, as indicated by the price lists of the defendant Sunkist, was around about $2.20 a case.

We expect the evidence will show, therefore, that with the price of oranges remaining stable, as they did, and the opening price of Sunkist, which was the competition which [133] any processor of single-strength orange juice would have to meet, was this price of $2.20 a case, that no independent processor could purchase oranges at the going price of $40 a ton, process them into single-strength juice, put them in a case of 12 46's, and sell them for under $3.20 a case. In other words, the independent processors, such as the plaintiff in this case, were really —the orange squeeze was really on in 1951, so that it was impossible for the plaintiff corporation at that time to process any single-strength orange juice in California, because of the price of oranges, and because of the fa[illegible] that it would cost the plaintiff in the neighborhood of $1 more per ton—I mean per case—to produce and sell a case of single-strength orange juice in competition with that which was processed and sold by Sunkist.

Now, we expect the evidence will show, further, that being obviously aware of that fact, it was just a matter of mathematical computation, the defendant Exchange Orange Products, a 100 per cent subsidiary of Sunkist, entered into a contract with

TreeSweet, which was in competition with Sunkist and with this plaintiff; that TreeSweet processed and sold only single-strength Valencia orange juice; that in 1951, the time that I have mentioned and just referred to, that Exchange Orange Products gave and entered into a contract with TreeSweet, its competitor, pursuant to which it made Valencia oranges available to TreeSweet under circumstances whereby the oranges were acquired on a consignment basis. In other words, TreeSweet did not pay for the oranges as they were delivered, they did not have to put up any cash for them when they were delivered; that the contract called for TreeSweet to process those oranges which were delivered to it by Sunkist into single-strength juice, and the contract provided that TreeSweet would be paid the entire processing costs incurred by it in processing those oranges into single-strength juice, and also be guaranteed or have a profit on that operation. and then TreeSweet under this contract purchased all of the juice which it processed under this contract from Sunkist at the Sunkist selling price, say $2.20 a case, less certain discounts, namely an advertising discount. and an allowance of so much a case, a label allowance of so much a case, and in addition thereto it was given a 15 per cent further discount from the total selling price of the case of single-strength orange juice. [135]

So that what actually happened, and we expect the evidence will show, is that under this arrangement a competitor of this plaintiff was able to secure oranges from the defendant Exchange Orange Products Company on this basis. It did not have to pay for the oranges. It did not have to pay for the products it processed, except as it sold those products in commerce, and then it remitted to Sunkist for the juice that it had sold on the basis of the Sunkist selling price, less these various discounts and allowances I have mentioned.

Now, we expect the evidence will further show that at the same time during 1951 the defendant Exchange Orange Products entered into another contract with Silzle which was substantially of the same type and character. I will not go into it at this time.

The evidence will show that the effect of both of these contracts was that TreeSweet, a competitor of this plaintiff, was able to in fact secure oranges at a cost, if you want to transfer the product I have mentioned back into tons of oranges, at a cost to it of about $12 to $14 a ton as against a price of $40 a ton which the plaintiff would have had to pay no matter from what source it secured the product.

And the same was true with reference to the availability of oranges to the competitor Silzle. [136]

We expect the evidence will show that TreeSweet and Silzle under this contract sold the product that they processed, not under a Sunkist label, none of this juice that was processed was processed and sold under the Sunkist label at all, or under the Exchange label, which was the other label used by the defendant Sunkist, but was sold under the TreeSweet label and the Silzle label.

Now, we expect the evidence will further show that as a result of this kind of a deal, or the making of Valencia oranges available to the competitors of this plaintiff under the contracts that I have mentioned, TreeSweet was able and in fact made a net profit per ton of around $6.00 a ton on every ton that it processed under this contract, and there was about 24,000 tons as to TreeSweet. The net profit per ton to Silzle was a little less, and the amount that they produced was considerably less. Silzle only processed about 7,000 tons under this contract.

But the profit which they made not only was the amount I have suggested on each ton that they were able to process under this arrangement, but the important thing was that the provisions of these contracts between TreeSweet and Silzle and Exchange Orange provided that TreeSweet and Silzle would be paid the processing cost incurred by them according to a stipulated amount, namely, approximately, shall we say this $35 a ton figure I mentioned to you a few minutes ago. [137]

Now, we expect the evidence to show that that was of vital importance to the companies processing single-strength juice during this period under these contracts, because the overhead of any independent processor, of course, depends upon the extent to which it can keep its plant processing fruit during the processing season, and this plaintiff corporation, we expect the evidence will show, had made plans for expanding its operations, particularly into the frozen field, that is the frozen citrus juice product, in 1951, and was preparing to do so during that year, but that its primary source of profit and the item upon which it depended for its operation was the processing of single-strength Valencia orange juice that I have mentioned.

So that the competitors of this plaintiff, who were also competitors of Sunkist, selling the same product, the single-strength orange juice, had the advantage of this kind of a contract that we expect the evidence will show had this effect. As a result of this arrangement the plaintiff corporation produced practically no single-strength juice in 1951. It had theretofore built up a substantial amount for it, insofar as this plaintiff corporation was concerned, for that produced.

It was thus eliminated in effect from the single-strength interstate juice market in 1951, while its competitors under the arrangements that they had with Sunkist [138] and Exchange Orange Products, were able to and did in fact expand their market, keep the market that they had, and in effect the single-strength juice market, insofar as California single-strength juice, Valencia juice, is concerned, and in 1951 it had entirely, substantially 100 per cent, gone to the defendants Exchange Orange Products, TreeSweet and Silzle, to the exclusion of any other competitors for that kind of a product.

We expect the evidence will further show that in 1950 the defendant Sunkist had decided to embark upon an extensive advertising program for the Sunkist label products. In that year, namely, 1950, it had purchased the right to the Sunkist name and had paid therefor a million and a quarter dollars.

It had also set up a budget, advertising budget, to promote and develop the Sunkist name and the Sunkist products, particularly in the frozen juice market, in which the plaintiff corporation was then embarking.

The evidence will show that there was in fact, according to our sales reports, a scarcity of this so-called California Valencia juice in 1951. They had to withdraw from the market once or twice during the season. This plaintiff, of course, was out of the market in its entirety.

We expect the evidence will further show that following the reorganization of this plaintiff in 1948, early part of 1949, during the years 1949 and 1950, it had [139] expended in excess of $100,000 in new equipment in its plant, that it had made arrangements in 1950 and it had secured the approval of the California Corporation Commission to issue some additional stock for further operating capital to take care of the expanding operations of this company.

The evidence will further show that the plaintiff corporation undersold the Sunkist product and the TreeSweet product insofar as the price at which its single-strength Valencia juice was sold in commerce.

As a result of all this, we come to the question of damages. It isn't going to be an easy question for you to decide, but under the proper instructions of his Honor you will have ample guides to show you how to arrive at any damages that you may determine the plaintiff has suffered as a result of any of the violations charged by the plaintiff in this case. But before I discuss the damage question or tell you what we expect the evidence will show with reference to damages, I think I should deal with this problem about damages by stating to you what and how and why we expect damages in this case.

It is the theory of the plaintiff in this case that the defendants Sunkist and Exchange Orange Products combined together with Exchange Lemon Products, TreeSweet and Silzle to restrain interstate trade and commerce in citrus juice products, particularly single-strength Valencia juice [140] products processed in California and sold in interstate commerce, and that the parties and corporations I have mentioned combined together for the purpose of monopolizing the citrus juice market as represented by that part of the market which comes from the citrus juices that are processed in California and sold in interstate commerce; and that their conduct in this case constituted an attempt to monopolize that market and that it had that effect.

In other words, we expect the evidence will show that as a result of these agreements that I have mentioned the defendant Exchange Orange Products, TreeSweet and Silzle processed substantially all the single-strength juice that was processed in California in 1951 and sold in interstate commerce, and that the conduct of the defendants in this case constituted, if you find that they had monopoly control over the availability of the raw product here, namely, the product oranges, that an independent processor had to have to process and sell citrus juices in interstate commerce, that their conduct constituted an abuse of that monopoly power and an unreasonable restraint of trade, and that these contracts in fact in which the products which were processed by TreeSweet, Silzle and Exchange Orange Products, all of which were supposedly in competition with each other and also in competition with this plaintiff, were sold at the same price, namely, at Sunkist prices. [141]

That the effect of that was to eliminate the competition of this plaintiff on an interstate market for citrus juice products in violation of the law.

Now, we expect the evidence will further show with reference to the Robinson-Patman Act—withdraw that.

We expect the evidence will further show that the plaintiff corporation in 1951, when the processing season for Valencias got under way, and that is about the middle of June, 1951, could not understand how its competitors, TreeSweet and Silzle, were able to process single-strength juice and to sell it in interstate markets, for the reasons that I have mentioned, that is to say, the price at which oranges were available for processing being $40 a ton, the manufacturing cost $35 a ton, that the actual costs of processing a ton of oranges into juice would be in excess of the selling price for that product. They felt that there must be something there, so its plant being practically idle, its facilities being unusable, because it couldn't obviously buy oranges at $40 a ton and pay $35 for processing them, and then sell them at a loss. They just didn't produce any. They contacted Exchange Orange Products and said, "We have facilities available for processing oranges, would you be interested in processing your products in our plant under any arrangement that is acceptable to you?"

A letter was written to the same effect, making the same [141] request, not only of Exchange Orange Products Company, but also of Exchange Lemon Products Company.

We expect that the evidence will show that Tree-Sweet had an arrangement or there was an arrangement between Exchange Lemon Products and Tree-Sweet whereby lemons were made available to it under an arrangement. It wasn't the same kind of arrangement, but it was an arrangement where they were processed, and then they bought the juice from Exchange Lemon Products. But that in spite of the requests of the plaintiff corporation to make its facilities available for processing to Sunkist and Exchange Lemon Products, they were not taken advantage of, and it was turned down.

Now, his Honor will charge you, I am certain, with reference to any obligation of anyone to sell to someone else. I am not going to go into that at this time.

It is the contention of the plaintiff in this case that all of these facts, which we expect the evidence to show to be the facts, clearly indicated that the defendants had combined together for the purposes that I have mentioned, in restraint of interstate trade and commerce.

As further evidence of that we expect the evidence will show that in the Silzle contract it appears right on the face of the contract that oranges were made available to Silzle, over 500 tons of them, at a price of $20 per ton, and on the price list which we will submit to you as being [142] the price list of the defendant Sunkist, there isn't any $20 fruit on that price list.

Furthermore, we expect the evidence to show that as the plaintiff lost its customers in single-strength juice, that it made a request of the defendant Exchange Orange, when it was losing its business, that it sell a carload of single-strength orange juice. That the defendant did so, but that the price at which that carload of orange juice was sold to this plaintiff was the Sunkist selling price, less only a brokerage discount, which is given ordinarily to any purchaser under those circumstances where the seller did not have to pay a brokerage, and that was the extent of the discount made available to this plaintiff on that sale.

But that at the same time under the contract that I have mentioned the defendant was allegedly selling single-strength juice to the competitor of this plaintiff at a price which not only gave it an advertising allowance—and they were not advertising any Sunkist brand when they were selling their own brand, the evidence will show—but in addition to that there were other discounts that were made available to TreeSweet and Silzle that were not available to this plaintiff who was trying its best to keep a market for its product. That it spent $40,000, a small amount compared to the mililons spent by Sunkist, in developing an advertising program for its label, but nevertheless to this corporation an advertising [143] cost, in an effort to keep that market. That this plaintiff did not get the 15 per cent discount after all these other discounts that were made available to TreeSweet when it bought the juice that it processed from the oranges made available to it by Sunkist, and neither did it get the 12½ per cent discount that was made available to Silzle when Silzle bought the oranges—I mean paid for the juice that it processed under this arrangement.

The evidence will further show discriminations of that character. That TreeSweet and Silzle didn't have to pay, even, for the orange juice, until they had sold it in commerce to their customers.

Now, we expect the evidence will support these charges, therefore that they add up to a combination to restrain trade and commerce in citrus juice products; that they add up to a combination to monopolize that part of the trade and commerce which is represented by the citrus juices that are processed in California and sold in commerce. That as a result of these discriminatory contracts and arrangements the plaintiff was eliminated as a factor and lost its business in 1951, when it was on the threshhold of developing and expanding its market for frozen citrus juices, which brings us back to what we expect the evidence will show on damages.

We expect the evidence there will show that during the years 1949 and '50 the plaintiff corporation's sales were in [144] excess, as I may have mentioned before, of $1,000,000; that during 1949 its profit was in excess of $120,000; that in 1950 it was approximately $40,000.

There are two guides, or guides which we expect the evidence will show, you may use under proper instructions from his Honor on the item of damages to this plaintiff.

In addition to that we expect, and it is the position of the plaintiff, the theory of the plaintiff on damages here, that it was entitled as an independent processor, in view of the monopolistic position of the defendant Sunkist in this industry, whereby the price was determined for the product fruit, and to some extent the availability of that fruit was determined by that position, that the plaintiff was entitled to at least comparable consideration to that given its competitors TreeSweet and Silzle.

That based upon that consideration we expect the evidence will show that in 1950 this plaintiff when it had a profit of $120,000 processed in excess of 12,000 tons of oranges; that that, therefore, is some guide as to the extent of the loss of profits by reason of the alleged violation in this case, but that the important loss here, and the 1951 operating reports of the plaintiff corporation, we submit, will show a loss of around about $170,000. That a substantial part of that loss is attributable to overhead of the plaintiff corporation. That is to say, there is always in the operation of [145] any business an item known as overhead, which goes on whether one case or 50 cases or 5,000 or 500,000 cases are processed. That that item was taken care of for Silzle and TreeSweet when they were paid the processing costs in their contract.

The contracts will show, as I suggested, and the evidence will show, that that was a profit given to TreeSweet and Silzle which covered that important item of operating costs, namely overhead, in their contracts.

So that it will be for you to determine under all the evidence whether this plaintiff was discriminated against by reason of these acts, and whether such discrimination constituted a violation of the antitrust laws, and if so, as to whether or not this plaintiff was entitled to comparable treatment, and so request of the defendant, to at least the extent given its competitors.

And if you reach that position, then the figures on the profit available per ton, plus overhead, will be available to you as a yardstick to determine the loss or the damages which may be returned by you in a verdict for the plaintiff in this case.

We, therefore, submit that the evidence in this case will show a violation of the antitrust laws, Sections 1 and 2 of the Sherman Act, and of the Robinson-Patman Act, and that the plaintiff suffered damage of substantial nature by reason of being eliminated from this market. And in 1952 [146] it had an RFC loan on its property~~, which~~ was being called, of $50,000; that it had reduced in 1950 the balance then due on that mortgage from $100,000 to $50,000; that it was required by reason of that action to go into Federal Court, this court, and to file under what is known as Chapter 10 of the Bankruptcy Act, which permits the reorganization of the affairs of this corporation.

It was pursuant to that action that Mr. Walker, the trustee here, was appointed by this court to take over the affairs of this company.

We expect the evidence will show that there being no market for this type of product, I mean of plant, that it was ultimately forced to dispose of it, the trustee was forced to dispose of it for the sum of $100, subject to the prior lien and claim of the RFC, and such other claims as might have been made against it by the creditors of the plaintiff corporation.

That, ladies and gentlemen of the jury, is the evidence that we submit will be developed and presented by the plaintiff.

I appreciate your careful consideration, and that you have borne with me while I have tried in a general way to outline to you and to simplify for you what may perhaps seem rather a complicated and involved lawsuit, but we think when the evidence is all in and you consider it, you will find [147] that there has been a violation here of the antitrust laws by the defendant, and that plaintiff has been damaged as a result of that violation.

Thank you very much.

The Court: Do the defendants care to make an opening statement at this time or reserve it until the conclusion of their case? If so we will have a recess first.

Mr. Williams: Your Honor, we have certain motions that we would like to make first.

The Court: Well, do you or do you not intend to make an opening statement?

Mr. Hurd: If the court please, it depends somewhat upon the outcome of the motions to which Mr. Williams refers, but we probably will make it in the event the outcome is one way——

The Court: All right. We will take a recess, then, ladies and gentlemen of the jury.

You have heard no evidence whatsoever, so there is no way you can make up your mind about anything. Remember what I told you before, my admonition to you, do not discuss this case among yourselves or with anyone else, do not permit anyone to discuss it with you, do not form or express any opinion on the merits of the case until it is finally submitted to you for your decision.

You will be excused for a short recess. [148]

(The following proceedings were had in the absence of the jury:)

The Court: The record will show the jury is now absent. Do you want to make the motions before or after the recess?

Mr. Williams: Whichever your Honor prefers.

The Court: I think we will take our recess and then hear your motions before the jury are brought down.

Mr. Williams: All right.

(Recess.)

The Court: The record will show counsel present and the jury absent in the case. Mr. Williams?

Mr. Williams: May it please the court, the defendants object to taking of any evidence in this case and move to dismiss the action upon two grounds.

First, that plaintiff's opening statement has failed to state any claim upon which relief can be granted and, secondly, that the amended complaint fails to state a claim upon which relief can be granted.

As to the motion with respect to the amended complaint, as to the first cause of action, the grounds of said motion are as follows:

It is couched in the words of the statute and does not set forth the terms of any conspiracy, combination or contract in unreasonable restraint of interstate trade or commerce. [149]

Second, it fails to plead any facts showing or otherwise to allege any conspiracy, combination or contract tending to prejudice the public interest.

Third, it fails to plead any facts showing or to otherwise allege that any legal right of the plaintiff was invaded by the alleged refusal of Exchange Orange to enter into a custom packing agreement with plaintiff for processing oranges during the 1951 canning season comparable to the contracts entered into with defendant TreeSweet and the alleged co-conspirator Silzle.

Fourth, it fails to plead any facts showing or otherwise to allege that the claimed contract, conspiracy and combination had any substantial effect upon interstate commerce.

As to the second cause of action, the grounds of said motion with respect to the complaint are as follows:

One, it fails to state a cause of action separate and distinct from the first cause of action.

Second, that it is couched in the words of the statute and does not set forth facts showing terms of any conspiracy to monopolize, any monopoly, or any attempt to monopolize.

Third, it fails to plead any fact showing or otherwise to allege any tendency to prejudice the public interest.

Fourth, we rely upon the same grounds as [150] those stated as to the first cause of action.

As to the third cause of action, the grounds of said motion with respect to the amended complaint are as follows:

First, it is couched in the language of the statute and does not set forth facts showing discrimination in price, allowances, services, and facilities, either lawful or unlawful.

Second, it does not appear from the amended complaint that any supposed discrimination of any kind against the plaintiff was in the course of interstate commerce.

With respect to our motion based on the opening statement of the plaintiff, it is based as to the first cause of action upon these grounds.

First, it fails to state any fact showing any conspiracy, combination or contract in unreasonable restraint of interstate trade or commerce.

Second, it failed to state any fact showing any conspiracy, combination or contract tending to prejudice the public interest.

Third, it failed to show any legal right of the plaintiff was invaded by the alleged refusal of EOP to enter into contracts comparable to that entered into with TreeSweet and Silzle during 1951.

Fourth, the statement failed to show any facts showing [151] that the contracts, combinations or conspiracies had any substantial effect upon interstate commerce.

And as to the second cause of action, our motion is based upon the ground that there were no facts showing any alleged unlawful monopoly, any unlawful intent to monopolize, or any unlawful conspiracy to monopolize.

And upon the further ground that the statement did not show any tendency to prejudice the public interest.

Also, as to the second cause of action, the motion is based upon the ground that the statement did not show any legal right of the plaintiff was invaded by any act of a defendant or any act of the defendants.

As to the third cause of action, our motion with respect to the opening statement is based upon the ground that no discriminations in price, allowances, services and facilities were stated and upon the additional ground that the statement did not show that any of the supposed discriminations with respect to prices, allowances, services or facilities occurred in the course of interstate commerce.

The Court: All right. Both motions are denied on all grounds.

I take it this is largely a motion made to preserve your record, and I don't think it needs a lot of comment on my part except to say this. The original complaint filed in this action alleged that the defendants contracted [152] to eliminate the plaintiff. The defendants are not surprised. They have known for a long time what contracts the plaintiff was talking about. This isn't a case of an amended complaint going off on some ground that was not indicated in the original complaint. Through discovery the Silzle contract turned up and the general allegation we began with, that the defendants had contracted and conspired, seems to be entirely proper and the Silzle contract to be part of the amended complaint, and that the amended complaint dates back to the original complaint in connection with the Silzle contract.

Public interest, I have commented on that before. It is not the allegation of public interest that is important. It is the showing of sufficient facts and sufficient allegations to show an effect on the public interest. The Supreme Court in the plasterers case expressly referred to conclusionary allegations in the matter of pleadings, and sufficiency of pleadings is largely within the trial court's discretion.

This is not a case where you have any problem about knowing what you are charged with. I don't think any one of the defense counsel could stand on his feet and tell me that you are being charged with something which you don't know you are being charged with. You know what you are being charged with and have known it for a long time, and the manner of expressing those charges, the sufficiency of the pleadings is, as I say, a matter within the trial court's discretion. [153]

It is not a situation where you are taken by surprise and it is not a situation where you can't tell what the charge is. It doesn't come within any of those exceptions.

I don't think any further comment is necessary. We have been over most of these problems before.

The motions are denied.

Mr. Hurd: The defense will make an opening statement at this time, may it please the court.

The Court: Bring the jury down, Mr. Bailiff.

(The jury returned to the courtroom at 3:20 o'clock p.m.)

The Court: The record will show the jury and the alternates in their proper places. Mr. Hurd?

OPENING STATEMENT ON BEHALF OF THE DEFENDANTS

Mr. Hurd: May it please the court, ladies and gentlemen of the jury: First, I would like to apologize to the court and to the jury for the condition of my voice. I hope you will not be too irritated by it. Let me assure you I do not have a cold, so you needn't worry about catching any germs. I just rode in the wrong taxicab at the right time, or rode in the right taxicab at the wrong time, and ended up with my face here instead of where it should have been. I hope I will be able to continue with you throughout the trial and [154] I hope my voice will improve, also, with time.

You have undoubtedly heard some new expressions or terms today which may seem to you at first a little unusual, strange and confusing. It seems as though there is something about an antitrust case that tends to appal people, even lawyers I guess, and induces us to become more complicated in our thinking than we need to be.

I agree with Mr. Dixon that in the end you will find that the issues in this case are really quite simple and they will not be as complicated and appalling as they might seem at the present time. You can be assured Mr. Dixon and I will do everything within our power to see that all the terms that may be unusual that are used in this case are explained to you as we go along. In fact, of course, that is one of the purposes of the opening statement, to give you a little bit of background as to what we expect will come later, sort of a preview of what we anticipate the evidence is going to be.

I want to assure you at the beginning that although I may not at all times say that we expect the evidence will show this or that, I am always implying that introduction to everything I say. Of course, nothing I say is evidence. I am merely telling you what I honestly believe the evidence will show. It is up to you later on to see whether or not I am right, that it does show that. [155]

So even though I don't always say, "I believe the evidence will show so and so," that is what I mean.

I also must realize, of course, that you ladies and gentlemen, having been residents of California, the State which is so famous for its citrus industry, probably know a great deal more about that industry than the attorneys, or I should say at least I do, and if I at times appear to be boresome in explaining some terms that you already know, I hope you will excuse it on the ground that I am really a foreigner.

As a matter of fact, I guess neither Mr. Dixon nor I are natives of California, although he has lived here for some time, whereas I was born and raised in Iowa and I have spent my professional life in Chicago, a fact, I hope, you won't hold against my clients.

To go to some of the terms that you will be hearing in the course of this proceeding, I would like to talk for a moment about the subject of co-operatives. You probably will hear that expression used a great deal.

Now, there are 20,000 citrus growers in California and Arizona, 20,000 farmers that are growing citrus crops. Most of these growers have organized into various groups for the purpose of having assistance in the preparation of their crops for market, and the marketing of their crops, and these organizations are frequently referred to—I am not speaking [156] in any technical sense now, but in the sense that you will have the expression used many times—as co-operatives.

There are several co-operatives in California and Arizona of the citrus farmers. The largest of those is the defendant Sunkist Growers, Incorporated. We lawyers call it Sunkist Growers, Inc., I-n-c. It will generally be referred to as Sunkist or Sunkist Growers.

And you probably should have a little more of the background as to just what the Sunkist system is as it will be unfolded by the ~~evidence~~.

To give you that background perhaps I should approach it from the historical standpoint, as I am sure the evidence will. Some years ago Sunkist didn't exist, in fact co-operatives didn't exist, and what you had was 20,000 odd farmers with their little groves scattered around California and Arizona, largely central and southern California and Arizona, each with his own little grove, with his own problem of how he was going to make his little grove grow and develop properly, his own problem of when he was going to pick his fruit and how he was going to pack it once he grew some fruit. And when he got all through if he had some packages here of his fruit, what was he going to do with them.

Perhaps there was some in Paducah, Kentucky, who would be delighted to have his fruit, but he didn't know about the man out here who had it, and the man out here didn't know [157] about the man in Kentucky.

How was he going to get it marketed?

The result was that in time one little grower would get together with his neighbor, and then with the next neighbor, so that you have the growers in a particular area develop what was called or generally is now called a packing house. The packing house is primarily for the purpose of assisting the farmer with a grove to decide when he should pick his fruit, to pick it for him, to wash it, to pack it, and to get it ready for market.

Of course when that was done there was still this problem of how he was to get it to market.

And in another neighborhood you would have farmers getting together there and forming their little packing house. They had the same problem, how would they market it.

So in time the packing houses joined together and they formed what are now known as district exchanges, and their purpose was to assist in getting this fruit on to the public.

The district exchanges would pass on sales terms, make negotiations for the sales of the product, and handle whatever was necessary in connection with that aspect of it.

Of course, as you had a number of these district exchanges each with its own problem, perhaps it was nothing but a normal step that they then got together and they formed what is now called Sunkist Growers, Inc. [158]

Sunkist Growers, Inc., act as the marketing agent for this fruit that the district exchanges receive from the packing houses who got it from the growers.

Today, during the period that we are concerned with in this particular case, there have been approximately 12,000 farmers or citrus growers that are in this Sunkist system, Sunkist organization. The average acreage of these farmers is approximately 16 acres.

You have been told that there are in a way two types of citrus fruit. One for use in the fresh market and one for products fruit.

Of course this organization is confronted with that problem.

Now, there is only a certain amount of the citrus fruit that can be sold on the fresh fruit market, that is, for use on the table as fresh fruit. The balance of it has to be made into some type of product or else thrown away, or left on the tree. Quite early, quite a number of what Mr. Dixon refers to, and I will accept his terminology for this purpose, quite a number of independent organizations grew up whose business it was to make the surplus fruit into some type of a product. The growers that were in the Sunkist organization, of course, were able to dispose of some of their surplus fruit to these independent organizations. However, there was a limit as to how much those groups would take. The growers, therefore, [159] decided to and did create their own company or organization for the purpose of using their surplus fruit to make it into products of various types, and that organization and the Sunkist system as it is today, as far as oranges are concerned, is called Exchange Orange. For the purpose of making products out of lemons, it is called Exchange Lemon.

Exchange Orange, as Mr. Dixon said, is owned by Sunkist. As to Exchange Lemon, all of the members of Exchange Lemon are members of Sunkist. They are required to be.

In the early days there weren't too many products that could be made out of the surplus fruit. It is really in relatively recent years that that industry has blossomed to the point where almost all of the oranges can at least be made into some type of product that will bring a reasonable return.

There are a number of different products to make.

Mr. Dixon has referred to single-strength orange juice. He has referred to frozen concentrated orange juice. There is also the hot concentrated orange juice, there is pectin, and the peel can be used for some kind of stock feed. I believe now they even have certain pharmaceutical products. Then of course there can be blends of different types.

The Sunkist organization each year is confronted with the problem as to how much the crop is going to be of its farmers, 12,000-odd farmers, how much of that can go into the fresh fruit market. That brings the biggest price, of [160] course. And then how much is going to be left over.

Whatever is left over will have to be either thrown away or put into products of some kind.

They carry on a great number of studies to anticipate what these various figures are going to be, and determine how much they will have to put into products and what they can do to make the most money for their firms out of those products.

In the Sunkist system the oranges that don't go to the fresh fruit market may either be sold by Sunkist to the so-called independent processors to make various kinds of orange products, or if the independents can't take them all, whatever is left is then dumped on this Exchange Orange, this products company in the Sunkist system that growers have of their own, and it is up to that company to use up the balance of those oranges no matter how it goes about doing it.

It is its duty to use them in a manner that would bring the greatest financial return to the farmers, but they have to be used some way. And if there is no way that any more juice can be made or nobody to make any more juice, or no market for any more juice, then they have to use the peel and throw away the juice, which has happened many times in the past. But whatever is left over after the fresh fruit is taken care of and the independents have taken all they can buy, then the Products company has to use it some way or another to get rid of it.

As far as lemons are concerned, it goes much the same way, [161] except that the products lemons are all turned over to the Lemon Products Company, and they will either sell them to the independents or have to make them into products themselves.

Many years it results in their being made largely into acid, because they don't have any more market for the juice. It has to be turned out to whatever will bring the farmers the most money.

We aren't perhaps, at all concerned with lemons in this proceeding, although there is reference to Exchange Lemon.

We are concerned with products oranges, as Mr. Dixon has said.

I would like to describe to you briefly just how they go about selling these products oranges to the so-called independent processors. [162]

During the period that is involved in this particular lawsuit there was one man in the Sunkist organization who had that responsibility. It was his duty to sell the products oranges to the independent groups, and it was his duty to set the price at which he would sell those. As Mr. Dixon has said, we are primarily concerned here with Valencias.

You undoubtedly know better than I do your Valencias start coming along in the spring, in April, May, June and get heavier in the summer time, and sort of trail off in the fall.

This particular man in Sunkist who had this responsibility of selling the products oranges to the independents, his name was Kelly. I believe it is Sam Kelly. Each year early in the year Kelly would start investigating as to how many oranges he would probably have on his hands. He would try to find out, he would find out from Sunkist, because they have their studies, what the anticipated crop was going to be, and he would find out from them what the anticipated sale would be to the fresh fruit market. Then whatever is left over has to be products fruit of some kind.

Next he would check on what was going on in Florida. Perhaps it is not new to you, but it was a bit surprising to me to find out Florida makes a larger part of the orange products in this country than Cailfornia. In fact, I think perhaps almost 90 per cent of all the single-strength [163] juice made in this country is made from Florida oranges, and approximately 90 per cent of the frozen concentrate is made from Florida oranges.

The Florida crop comes on in the fall, late fall, starts in November and December and January and February, and in March it is about through. So that it is finished just about the time your Valencia crop starts in.

Because Florida makes such a large part of the orange products, it controls the prices of those products, and in determining what price Kelly would charge for his oranges that he sold to the independents, he had to know what had gone on in Florida that winter. He had to know what the crop had been. Had they had a frost? Had they had a hurricane? Had they had a large crop or had they had a small crop? He had to know what they had done with it. Did they put it up in single-strength juice? Did they put it up as frozen concentrate? Did they put it up as hot concentrate, or what?

Then he had to find out what had happened to the juice after it had been made. Were they selling it fast or did they have a large inventory?

Then he had to know what was the price of that Florida product.

After he got all this information, he would reach a tentative conclusion in his own mind as to what an independent [164] in California could probably pay for these Sunkist oranges. After he got that tentative conclusion, he would go to his customers—by and large he had the same customers, same independents buying year after year from him, and he had to tell them what he had in mind charging for these oranges that he sold them. He would ask them for their honest opinion as to whether that was a fair price or was not a fair price.

After he had their views, he would go over to the Exchange Orange people, the people that made products out of whatever is left over here in the crop, and tell them what he had in mind charging these independents, and ask them did they think that was a fair price? Could the independents make money on that? And get their views.

After he had consulted everyone that he could, he made up his own mind as to what the price should be. I believe he will testify that in making his decision as to what price he would charge these so-called independents for oranges, he had two basic tests.

No. 1, he wanted to get all the money he could for them, for the farmers, because he was representing the growers of these oranges, so he had to get all the money he could for their product.

No. 2, he had to charge a price that would enable the independent to make money, because if the independent did not make money, the independent would be out of business [165] and he would lose a customer, so he tried to draw a line between the two, and to give the farmer all the money that it was reasonable to obtain and at the same time enable his customers to make a profit.

Now, I want to take this up with respect to the year 1951, because that is the year we are basically concerned with in this lawsuit. Early in 1951 Sam Kelly obtained the information from Sunkist as to what the crop looked like out here. It looked like a big crop, like one of the biggest.

He obtained from them information as to how much would probably go on the fresh fruit market and, by the way, I think the evidence will show the amount you can sell on the fresh fruit market is controlled by some federal government order, so subtracting that from the total crop gave him the tons of oranges that he would probably have that would have to go into products of various kinds.

He then checked the Florida situation and found what kind of a crop they had had that year, and he found what they had done with it, and he found what their price trends were for their products.

Basically, there are three types of juice products made out of your Valencia oranges. One is the so-called hot concentrate. That is a concentrated orange juice made through some hot process, and that is used largely by the beverage [166] industry. Your orange soda, for example, is made out of that hot concentrate. The hot concentrate is largely not sold to the public on grocery shelves or things like that, but it is sold to the beverage industry.

Then there is the single-strength juice you have heard about. Single-strength juice is just about what the name suggests. It is the juice as it comes out of the orange, it is pasteurized and then put in cans and sold on the grocery shelves, and you ladies know about it better than I do.

The third product is the frozen concentrate. That is largely a development since the war and, of course, you know about that. You buy one can of frozen concentrate, keep it in the frozen compartment of your refrigerator, and when you get ready to use it, you dump it in and add so many cans of water and you are supposed to get orange juice again.

Now, those are the three basic things. You can have blends and mixtures and whatnot, but basically those are the three products you get out of the Valencias here, and they are made in that order.

Your first Valencias aren't too good for single strength, but they are all right for this hot concentrate that goes into the beverages. Then later on they make single strength, and then in the summer they make more of the frozen concentrate, and normally the return to the man [167] that makes the juice, the processor, runs in the same order. He gets the least money for his hot concentrate, gets more for his single strength, and gets the most for his frozen concentrate.

Now, I say that is normally, and just like everything else, I suppose the normal never happens, but that is the way it should happen. There are variations. It doesn't always follow that, but generally speaking that is the trend, namely, hot concentrates first, and you get the least money, single strength next, and you get a little more money, and then frozen, and you get the most money.

Kelly in fixing his price knew that he would be selling oranges for this hot concentrate first, the stuff that would bring in the least money to the processor, and he tried to fix a price, not only in 1951, but as a general proposition, a price that he would not have to reduce. Now, he could raise it later on if single strength was bringing in more money, and frozen was bringing in more money, he might raise it more as the season went on, but he endeavored to fix a price he wouldn't have to reduce.

He figured if he sold oranges for hot concentrate at a price which would return the least money, and a little later on reduced the price, then the fellow that still had the stuff on hand might be hurt, so he tried to fix a price that he wouldn't have to reduce, but that he might increase. [168]

In 1951, as a result of all this study that he made, consulting his customers, consulting Exchange Orange, he hit on a price of $40 a ton. Mr. Dixon has referred to some formula. I think it is $40 a ton for oranges having a solid content of 120 pounds. But, anyway, whatever the facts are will come out in the evidence. It was $40 a ton for oranges having a certain juice content, the price which Kelly thought the man making hot concentrate could afford to pay and make money, and the price later on for single strength and frozen would be the same or would be higher.

In reaching this conclusion, he based it to a large extent upon the Florida prices, and he watched those. The price in Florida had just increased in February over January, and it increased in March over February, increased in April over March, and was on the way up.

So that was the price he set, and Kelley turned out in 1951 to be dead wrong. Between April and the middle of August, the Florida price of single-strength juice was cut in half, and if the Florida price was cut in half, and they have 90 per cent, that meant that the California price had to follow, and it did.

So much for Kelly's efforts in dealing with his customers. The evidence will show that he fixed an honest price based upon fair considerations, and through no fault whatsoever of Sunkist, the defendants, or anybody Mr. Dixon [169] has mentioned, the bottom fell out of the price that year due to Florida.

Now, to turn a little bit to the Orange Products Company, I said whatever is left over is dumped on Orange Products and they had to use it in some way. The man who ran the Orange Products Company during the period of time involved in this case is named Finley, F-i-n-l-e-y, Sam Finley. Sam Finley went through much the same study and survey that Kelly did in making his own plans, that is, he knew whatever oranges weren't sold as fresh fruit and whatever weren't sold by Sam Kelly to so-called independents, would be dumped on him and he would have to do something with them.

He made studies early in the year as to how much of the product would probably end up as products fruit, and then he studied the Florida situation to see what they had done down there. Finley reached the conclusion and this was early in 1951, that Florida had underestimated the demand for this new product of frozen concentrate. That, as I say, had been developing since the war, but the demand for it was increasing faster than the production of it. Florida had been increasing its production of the frozen concentrate very materially in 1948 and 1949 and 1950, but not as fast as the demand, in Finley's opinion. His conclusion was that Florida had underpacked on frozen concentrate during the [170] previous fall and winter when their fruit was available, and that they were going to run out of stuff pretty soon, and that meant that whereas normally they had 90 per cent of all the frozen concentrate, they weren't going to have any of it left, and California would have all of it, and the price was going to go up on frozen concentrate.

It was his opinion that everybody in California who could make frozen concentrate and make it a salable product and have a market for it, ought to do it, because that is where the money was, that is where the demand was, and people were going for this frozen concentrate.

He studied the amount that he thought he could make, how much capacity would Exchange Orange have to make it. He could make quite a lot of it, but he couldn't touch the oranges that he anticipated would be rolling in, as it was a large crop.

He decided the thing to do was to go out to any independent concern that he could find in which he had confidence and see if he couldn't get them to take the oranges off his hands, because it was better that he sell them to them, at least the juice part of it, rather than throw them away, or he might be left with them on his hands. He anticipated he was going to have a larger crop than he could possibly handle that year.

This was not particularly new. For some [171] years Finley had had more oranges dumped on him than he had capacity to handle, and if he didn't do something with them, didn't make juice out of them or get somebody else to do it, all he could do was throw away the juice and save the peelings and make them into cattle feed, and the farmers didn't get very much for that.

So he started in very early in 1951 trying to find other people to help him out in making orange products, either for their own account or for him, anything to get them made.

I want to mention some of the efforts that he made to get the so-called independents to assist him in using up this big crop. As early as March of 1951, Mr. Finley contacted two independent organizations, one known as Hyland Stanford, which we will hear more about, and one known as Mission Dry. In each case he arranged for them to pack hot concentrate both for themselves and for Exchange Orange. That is the lowest paying thing. That is what the companies were in a position to make.

Not every independent is in a position to make all three of these. Sometimes they can only make hot concentrate, sometimes they can only make single-strength juice, and sometimes they can only make the frozen. Sometimes two of those and sometimes three.

These people could make hot concentrate. He went [172] to them as early as March to get them to take some of these oranges off his hands. In that way the farmers would make more money and the processors would make more money than if he would just throw the juice away and use the peels for feed.

He did enter into arrangements with them that they would make hot concentrate, both for their own account and for the account of Exchange Orange. That was in March.

In April he went to another concern, the Bireley Division of General Foods, and he arranged for them to make both hot and frozen concentrate for Exchange Orange. He knew that he didn't have enough facilities to make all he would like to have. He arranged for them to make it for him.

In all three of these cases, he had dealt with the people in prior years on a satisfactory basis. He had had them help him out in using up his surplus before.

Early in June, when he was still anticipating he was going to have oranges running out of his ears, he contacted four more houses to see if they would help make some products for him. One of these was a company known as Harts Food Products Company. [173]

They arranged to make frozen concentrate for Exchange Orange.

He then approached a concern known as Cold Gold and made preliminary arrangements for them to make some frozen concentrate for him. He was trying to get all the frozen made that he could, because anticipating this great rise in price when Florida ran out.

This arrangement with Cold Gold fell through later on, because they couldn't make a product satisfactory to Exchange Orange that would fit in with their specifications, so it had to be dropped. But he did make his arrangements in June, and he just had to give it up later on when they couldn't make the product.

He then went to a concern known as Case Swayne and asked them to make single-strength juice, and they turned him down. He was told that they were already committed to get oranges from somebody else to make all the single-strength juice that they could make, so they wouldn't do it.

Then he went to the Silzle people that you have heard about, and he arranged for them to make single-strength juice.

In these cases he wasn't selling oranges; he was arranging with the houses to process the fruit for him, and in most cases arrangements were made that the oil, which is quite valuable, from oranges, and the peel, would remain the product of Exchange Orange, and they would get to sell it and get [174] whatever money they could out of it. So these concerns might be making the juice, either single-strength juice or hot concentrate, or frozen, either for their own account or for the account of Exchange Orange, as I mentioned. It varied from agreement to agreement.

That was early in June when he contacted those four. In the middle of June he contacted the TreeSweet people that you have heard a great deal about and arranged for them to make single-strength juice. This wasn't a new arrangement with TreeSweet. He had had similar arrangements with TreeSweet for some years.

I believe the evidence will develop a history of those transactions. I think it will show that Tree-

Sweet was one of the early California companies to have a national product, have a product that was known throughout the nation. They didn't manufacture for the purpose of just filling the orders they might have today, but they made it for inventory and sold it throughout the year.

They had an excellent name, they made a very fine product, and Mr. Finley was always happy to deal with the TreeSweet people, thinking that the more California juice TreeSweet sold the better California juice would become known nationally, and the more it helped all the people in California making juice out of California oranges, and the more it helped Exchange Orange. [175]

In fact, there was a time when TreeSweet was better known than the product made by Exchange Orange.

He was very happy to have the advertising of California juice that he obtained through this procedure.

He arranged in the middle of June for TreeSweet to make single-strength juice, similar to the arrangements he had in prior years, which will all be shown to you.

Early in July Finley was still worried about having too many oranges. He approached Mutual Citrus Products Company, another independent organization, regarding the making of frozen concentrate, and had a general understanding that they would do this for him, they would make frozen concentrate for Exchange Orange. However, this arrangement fell through, because in the middle of July the oranges stopped coming in—the oranges that Finley thought were going to be coming in all over him all the time let up. The deliveries became irregular about the middle of July.

In August there was an absolute shortage.

That didn't mean that anybody had made a mistake as to how many oranges had been grown. All it meant was that the growers weren't turning in their oranges, they were leaving them on the trees, and that is their prerogative. Sunkist or Exchange Orange, neither one controls when the farmers will send in their oranges. That is their decision. Although the packing houses decide when they will pick them and when [176] they will send them in. It happened that unexpectedly the farmers decided they would apparently get a higher price a little later on, so they wouldn't send any more in for the present, so his deliveries became irregular in the middle of July, and there was a shortage in August.

So that although he made this arrangement with Mutual Citrus Products early in July, actually they never made any for him because he didn't have the fruit. He shipped some cans to them, and they had to be returned because he didn't have the fruit furnished them.

Now, in the middle of July Winckler comes into the picture. I am not sure who the technical plaintiff is in this case. I assume it is the trustee in bankruptcy. But throughout the trial I think that you will find that we generally refer to the plaintiff as being, not the technical trustee in bankruptcy, but the corporation that went into bankruptcy, and that was run and owned substantially by Mr. Winckler. That is where the case got its name, Winckler & Smith Products Company, I believe it is. Winckler was the fellow that ran that company, and you will hear him referred to.

He has been sitting at the table of counsel for plaintiff.

In the middle of July Mr. Winckler wrote to Jim Finley and said, in substance—you will be shown the letter—"I will be glad for you to use my facilities for making some products," and Finley turned him down. [177]

In September Winckler again approached Finley about using his facilities, and again Finley turned him down. And Finley told him that he didn't have fruit available. Which was true. In the middle of July the flood had suddenly ceased, it had become irregular.

A lot of these contracts that he made he couldn't go through with them because he didn't have the fruit.

In August you had a great shortage. In September the shortage became even worse. In fact, Jim Finley had to cut down TreeSweet's quota by 50 per cent. He just didn't have the oranges. And he turned down Winckler because he just didn't have the fruit, and which I believe the evidence will substantiate, that the fruit was not available for a period in July or in September.

The tide turned again in October. That fruit was still out there, the growers had been holding it for a higher price, it was getting late, they had to dump it, and they dumped it in October, and Finley did have it coming out of his ears again in October. He had to use Exchange Lemon to help him out and process some of the oranges in October.

You will notice that in the year '51, Jim Finley, the head of Orange Products Company, scoured the waterfront, so to speak, to find people to make juice. He made all sorts of different arrangements with them. Some of them to make hot concentrate, some single strength, some to make frozen; [178] some to make for themselves, some for him, some for both; some to pay him for it based on the Sunkist juice price at the time they sold the product, some based on the price that the independent sold the product for; various arrangements, whatever he could get.

But he didn't give Mr. Winckler a contract. He turned down Mr. Winckler. He turned him down at times when he actually didn't have fruit. But he didn't approach Mr. Winckler at the times when he was looking for someone to help him out.

Now, the evidence will show why Mr. Finley did not go to Mr. Winckler and ask him to process oranges for him at a time when Finley was desperate for somebody to use up these oranges that he thought he would have.

I am not going to go into all the detail as to what the evidence is going to show as to why, but I will give you just a little general summary of it.

Finley had dealt with Winckler before. He dealt with him in 1947. Winckler hadn't been in business very long at that point, and he approached Mr. Finley for a contract to make some hot concentrate for him. Finley didn't know Winckler too well, but he gave him a contract to make it.

It did not turn out to Finley's satisfaction. The product, at least large parts of it, were not pasteurized. They had what I believe the witnesses refer to as bugs [179] in them. They had specks in them, large specks, which made it impossible to use the product. They had what is referred to as poor cloud stability, as the pulp separated from the liquid. Some of this got mixed in with some of Exchange Orange's products that it was making and going to sell, and the whole batch had to be dumped down the sewer, and what was left over Finley finally had to re-do, reprocess. This is hot concentrate. He had to get the specks out. What he had to do was first thin it out so he could. He had to add water back into it. As he got it thinned out, he had to strain it, then he had to reconcentrate it, himself, and then pasteurize it.

And Finley was not entering into any more arrangements with Mr. Winckler.

That was only one of his reasons. He had other reasons. They will all come out in the evidence, what Mr. Finley heard of Mr. Winckler's reputation as to the type of product that he made, what he had heard as to his financial reputation.

You must remember that if Mr. Finley is making a contract with TreeSweet or Silzle, or Winckler, or anyone else, either the product is to be paid for immediately or else credit is given for it, and I think you will find in most of these contracts that they are on a deferred payment basis. That means that Finley would be producing the fruit today, getting paid sometime later for the juice, or whatever was made out [180] of it.

And Mr. Finley considered that Mr. Winckler's reputation was such that he could not extend credit to Winckler, or the Winckler corporation. I don't mean any reflection on Mr. Winckler individually. I am talking about his business. That he couldn't extend credit to that corporation, and that meant that he would have to rely upon the product Winckler made as the security. In other words, the credit wasn't any better than the product he made, and Finley considered that the product that Winckler had the reputation of making, and which he had made, to his own knowledge, was not such that he wanted to use that as security.

It was his financial reputation, his reputation as far as the product was concerned, and Finley's own experience with him, that induced Finley to stay away from Winckler, although he was doing his best to find someone to use up his oranges.

Some reference has been made by Mr. Dixon to Sunkist being the traditional supplier of Winckler, and then Mr. Dixon changed it slightly by saying that they had not been since his first period through the Bankruptcy Act in '48.

That is true. Mr. Winckler had not relied upon the Sunkist organization for his fruit since his '48 bankruptcy proceedings. He had been getting his fruit from other sources. [181]

Now, there were various other sources. An independent was not limited to what he could get from Sunkist. There were various other sources.

Sunkist does have the largest number of growers, the largest tonnage in its organization, but there are many others, and Winckler, in '49, in '50, was not buying oranges from Sunkist; he was buying them from another source.

What happened in '51, it is true Winckler didn't make much single-strength juice, and he did have difficulty obtaining oranges. But he had difficulty in obtaining them form his traditional supplier. His supplier—it had nothing to do with the defendants in this case—decided to sell his oranges or fruit to someone else, and Winckler lost his supply through no fault of any of the defendants.

But for that I assume we would never have had the lawsuit.

Just a word about what has happened to the Winckler organization.

It is true that the Winckler organization went back into bankruptcy in 1952, and I think it is fair to say it is true that it was broke.

We went to considerable expense to try to find out why it was broke. Perhaps one of the basic issues in this case is, Did Winckler go broke because of some illegal acts of the defendants, or did he go broke because of some other reason? [182]

December 14, 1955—10:00 A.M.

* * *

Mr. Dixon: May it please the court and ladies and gentlemen of the jury, I would like to at this time read into the record certain stipulations of fact that have been agreed to by the plaintiff and the defendant.

Item No. 1. The plaintiff is a corporation organized under the general corporation laws of California on October 29, 1945. It operated a plant for processing citrus product fruit into citrus juices and other citrus fruit products at Anaheim, California, until March 26, 1952, after which time such products as were processed at its plant were produced [188] by the trustee and intervener herein acting under the supervision and control of this court by virtue of the provisions of Section 10 of the Bankruptcy Act.

Paragraph 3. Sunkist is a California nonprofit cooperative marketing corporation incorporated on March 27, 1905. It has no capital stock and is a membership corporation, the members of which are about 22 district exchanges. [189]

The members of the latter are marketing associations and growers of citrus fruit. Sunkist maintains offices in various cities of the United States, through which it sells fresh citrus fruit. It also maintains offices in cities of the United States through which it sells citrus fruit products processed from products citrus fruit by Exchange Orange and Exchange Lemon, which sales are made by Sunkist as the exclusive marketing agent of Exchange Orange and Exchange Lemon, respectively. As a "non-profit" corporation Sunkist was organized, not to make profit for itself as such or for its members as such, but only for its members as producers.

4. Exchange Orange, sometimes referred to as EOP, is a California nonprofit co-operative marketing corporation incorporated on October 11, 1920. It it a wholly-owned subsidiary of the defendant Sunkist. Exchange Orange processes products oranges and grapefruit and markets the products therefrom in intrastate and interstate commerce through its exclusive marketing agent, the Products Department of Sunkist. [190]

* * *

Mr. Dixon: As a "Nonprofit" corporation EOP was organized, not to make profit for itself as such, or for its stockholder Sunkist as such, but only for the producer members of Sunkist.

5. Exchange Lemon, sometimes herein referred to as ELP, is a California nonprofit co-operative marketing corporation incorporated on January 9, 1915. It has capital stock which is owned by various marketing organizations——

Mr. Fisher: Correction. "associations."

Mr. Dixon: Thank you. (Continuing)—associations, and growers of lemons, which associations and growers are also members of the District Exchanges that comprise the membership of the defendant Sunkist. [191]

All lemons grown by the stockholders of ELP and sold in fresh fruit channels are marketed through the defendant Sunkist. All products lemons grown by the stockholders of ELP are marketed by it, that is ELP, either in the form received (by sale to other processors) or in processed form. The products produced from the products lemons processed by ELP are marketed in intrastate and interstate commerce through its exclusive marketing agent, the products department of Sunkist. As a nonprofit corporation ELP was organized not to make profit for itself as such, but only for its members as producers.

TreeSweet is a California corporation——

The Court: This is 6, paragraph 6?

Mr. Dixon: No. 6—is a California corporation organized under the general corporation laws of California on July 1, 1937. It is a processor of citrus fruit into citrus juices which are marketed by it in interstate commerce. It operates a processing or canning plant at Santa Ana, California, and a processing or canning plant in the State of Florida. It's California plant has a processing capacity of 220 tons of oranges, 70 tons of lemons, and 100 tons of grapefruit per eight-hour shift. The principal product processed at the California plant is single-strength orange juice, and the principal product processed at the Florida plant is blended grapefruit juice. [192]

7. Silzle is a California corporation for profit organized under the general corporation laws of California. It is a processor of citrus products fruit into citrus juices. It operates a processing plant at Anaheim, California. Its principal product is single-strength orange juice, which it markets in interstate commerce.

11. Sunkist sold about 59.2 per cent of the Valencia oranges grown by its member-growers in 1951. The Valencia oranges not sold by Sunkist in 1951 for consumption as fresh fruit were either sold by

Sunkist independent processors or were processed by or at the direction of EOP—that is Exchange Lemon.

The Court: Exchange Orange.

Mr. Dixon: I am sorry. Exchange Orange.

12. The greater part of the following percentage of the total amount of oranges, lemons and grapefruit produced in California and Arizona during the following years was processed into citrus fruit juices. The balance not so processed was processed into cattle feeds or other products.

Oranges—this is for the year 1949—37 per cent; lemons 22 per cent: grapefruit 40 per cent.

1950, oranges 34 per cent; lemons 31 per cent; grapefruit 61 per cent.

1951, oranges 31 per cent; lemons 39 per cent; grapefruit 37 per cent. [193]

The total amount of Valencia product oranges produced by Sunkist grower-members and made available by them in 1951, including the fruit season and until the close of the pool year on November 24, 1951, was approximately 318,000 tons, which was about 40.8 per cent of the Valencia oranges produced by grower-members of Sunkist during that year. Of this amount EOP processed—that is the defendant EOP processed approximately 164,000 tons itself. About 31,200 tons were processed in the plants of ELP—that is Exchange Lemon—for EOP. Sunkist sold approximately 46,000 tons of said oranges to independent processors.

No. 13.

Mr. Williams: Just a minute.

Mr. Dixon: Yes.

Mr. Williams: We object to the first sentence of paragraph 13 as being immaterial and irrelevant to any issue in this case.

The Court: Have you the stipulation in the file, Mr. Clerk?

The Clerk: No, your Honor, we don't have it in the file.

The Court: The stipulation has not been filed.

Mr. Dixon: I have a copy for you, your Honor.

The Court: You object to the first sentence of what?

Mr. Williams: Of paragraph 13 of the stipulation.

The Court: Line 27 to line 32? [194]

Mr. Williams: Yes.

The Court: On what ground?

Mr. Williams: On the ground it is immaterial and irrelevant.

The Court: Overruled.

Mr. Dixon: 13. The member-growers of ELP produced the following percentage of the total lemon crop grown in the United States and marketed either as fresh or products fruit in the following years: 1949—88 per cent; 1950—88 per cent; 1951—87 per cent. About 99.9 per cent of the lemons produced in the United States in 1951 were grown in California and about 0.1 per cent in Arizona.

ELP marketed as product lemons or lemon products the following percentage of the total lemons produced in California and Arizona during the following years: 1949—20.6 per cent; 1950—23.1 per cent; and in 1951, 34.1 per cent. [195]

15. ELP had a processing plant at Corona and another at Covina, California, in 1951. The capacity of the Corona plant of ELP to process concentrated juices during 1951 was approximately 150 tons of lemons per day. During the years 1948-1949 it had no capacity to can frozen single-strength juice. It had a capacity to can and freeze approximately 125 tons of lemons per day into single-strength juice in 1950 and 1951. It also had a capacity to process approximately 125 tons of lemons into pasteurized single-strength juice per day during the years 1949 to 1951, inclusive.

The Covina plant could process approximately 300 tons of citrus fruit into concentrated juices per day. Its capacity to can and freeze single-strength orange and lemon juice was 125 tons per day. It did not process pasteurized single-strength juice.

Neither plant processed any grapefruit or blended single-strength or concentrated citrus juices. Canned lemon juices processed by ELP at its plants were shipped into 20 states of the United States during the year 1949, and into 27 states in 1950, and into 44 states in 1951.

EOP processed product lemons——

The Court: What paragraph is that?

Mr. Dixon: I am sorry. 18.

EOP processed product lemons for ELP at the Ontario, California, processing plant of EOP during 1949, 1950, and 1951, into lemon juice products, and ELP processed product [196] oranges for Sunkist into juice products at ELP processing plants at cost during the years 1949 and 1951 under oral agreements.

No. 26. An average ton of product Valencia oranges can be converted into approximately 100 gallons of single-strength juice and approximately 25 gallons of concentrate juice. [197]

* * *

PAUL S. ARMSTRONG

called as a witness by and on behalf of the plaintiff, under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follow: [198]

* * *

Direct Examination

By Mr. Dixon:

Q. And your address, Mr. Armstrong, your residence address?

A. 6849 North Vista Street, San Gabriel, California.

Q. Your position with Sunkist?

A. General manager.

Q. What other positions do you occupy with Sunkist? A. No other positions.

Q. It is a fact, is it not, that you are member of the four-man management committee of Sunkist and EOP, or do you regard that as a position?

A. I would not regard that as a position.

Q. Are you also a member of the executive committee of Sunkist and EOP and ELP?

(Testimony of Paul S. Armstrong.)

A. No, I am not. No, sir, I am not, because that committee is composed exclusively of directors, and I am not a director. [199]

* * *

Q. How long have you been with Sunkist?

A. Ever since I left school. 40 years.

* * *

A. I have been general manager 24 years.

Q. Do you hold any office at all in the Sunkist organization? I mean by that an elected office.

A. Unless you might term general manager being an elected office.

Q. How long have you been general manager of Sunkist? A. 24 years. Since 1931.

Q. Up until 1952, was it, Sunkist was known as California Fruit Growers Exchange, was it?

A. Yes, sir.

Q. And at that time it changed its name to Sunkist Growers, Inc., is that correct?

A. That is correct.

Q. Is that the time that Sunkist purchased the trade name Sunkist? A. No.

Q. Or about that time? [201]

A. That was purchased, as I recall it, Mr. Dixon, about 1950.

Q. Do you recall what Sunkist paid for the name at the time it purchased that name Sunkist?

* * *

A. One and a quarter million dollars was paid to California Packing Corporation for their share

(Testimony of Paul S. Armstrong.)

of the Sunkist trade-mark, which was a divided trade-mark and had been since about 1908.

Q. I have seen the name Sunkist on, I think, various other products. I think there is Sunkist raisins. Does Sunkist have anything to do with that product?

A. No, sir.

Q. It has no interest, then, in the Sunkist raisins as such?

A. It is hard for me to make categorical answers to some of your questions, Mr. Dixon. If I could explain the background, please?

Q. Yes. I would be glad to have you do that, and I am sure the jury will.

A. The Sunkist name was conceived as a coined word about 1908. Who conceived it is a matter of some dispute. But at least it was adopted and used by California Fruit [202] Growers Exchange at that time, and it was also used by the J. K. Armsby Company, which later became a part of the California Packing Corporation. When each of those organizations tried to register the same name in the Patent Office, they ran into conflict, naturally, and that conflict was finally settled and registration granted by the Patent Office to each in their respective class of goods, because at that time the Patent Office took the view that goods might be of separate descriptive properties, and the same name or trade-mark might be appropriately used by two different fields of operations as long as there was no public confusion.

(Testimony of Paul S. Armstrong.)

So an official trade-mark registration was granted both to the California Fruit Growers Exchange for fresh citrus fruits, and granted to the J. K. Armsby Company for canned goods, dried fruits, and things of that sort.

I think it was about 1915 that an agreement was made between J. K. Armsby and California Fruit Growers Exchange in which each recognized the right of the other in their respective fields. Under that agreement the rights of California Fruit Growers Exchange to the trade-mark Sunkist were recognized by the other party when applied to citrus fruits or the products thereof. The rights recognized by California Fruit Growers Exchange in respect to the J. K. Armsby trade-mark concerned dried fruits, canned fruits, [203] and other items ordinarily sold by wholesale grocers, was the way the agreement expressed it.

As the years went along, the California Fruit Growers Exchange invested large sums of money collected from its grower-members in the name Sunkist, which was continually advertised since 1908.

The J. K. Armsby Company, when it merged with the other three elements forming the California Packing Corporation, adopted the trade-mark Del Monte as their particular trade-mark and just used Sunkist as a secondary trade-mark, although both parties had agreed in the agreement and maintained that agreement to use the Sunkist name only on first quality merchandise.

Q. May I interrupt there? Perhaps the jury doesn't know, and I am sure I don't know. What do you mean by first quality merchandise?

A. First grade or what you might call U. S. 1 in some products, top quality, such as Sunkist is used on oranges today.

Q. You are referring then to the use of that terms as applies to fresh fruits?

A. Yes, and as applied by the California Packing Corporation to canned peaches or raisins, or whatever they might put out under the Sunkist trade-mark.

As our retailing has become more complicated and the [204] stores larger and more things are handled in the same store, the opportunity for confusion of the public in thinking that both canned fruit and the fresh citrus fruit might come from the same source, grew. Our trade-mark attorneys cautioned us for a long time that we should acquire the rights possessed by California Packing Corporation in that trade-mark, and that was brought to a very sharp focus by the passage of the Lanham Act some five years ago or more, which was the first trade-mark legislation, as I recall it, of basic character since 1905.

While it did not destroy the rights granted to trade-mark holders under the laws of 1905, it did establish some new standards, and our trade-mark counsel, Lyon & Lyon, recommended very strongly that we acquire the trade-mark rights of California Packing Corporation in the Sunkist name which they were using in a less major way than we were.

Also, we were confronted with this predicament. When you can orange juice, for example, is that a product of citrus fruit or is it a canned product? It was sort of a no-man's-land that neither one of us could resolve. So neither of us used Sunkist on our products goods because of our agreement, one with another, which we faithfully kept all these years.

It was for that reason and to give us the opportunity without dispute and without going back on any agreements, [205] that we acquired that trademark right from California Packing Corporation, for which we paid $1,250,000.

Q. I believe you used to use the Exchange label or brand on some of your products?

A. Yes~~, sir~~.

Q. Was ~~the~~ product bearing that label the same as the product which bore the Sunkist label when you put ~~the~~ Sunkist label on the product?

A. Approximately so. Of course, when Sunkist was put on it, we adopted much more rigid and exacting standards than had heretofore been applied to the name Exchange, but that was a top grade, you might say, of the products of both lemon and orange products.

* * *

Q. Now, the stipulation that we read—you heard it [206] read, I believe? A. I did.

Q. Reference was made there to Sunkist as a non-profit corporation. That language was used. I

(Testimony of Paul S. Armstrong.)

think we all understand that a hospital, perhaps, or a school, that is a university, or something, may be non-profit. Is Sunkist in that classification as far as it is concerned, just using that as a comparison, as a non-profit corporation?

A. It would not be considered in the same class as a hospital or educational institution. It is a business organization, but it operates without profit to the corporation in that the proceeds of sale which it makes on behalf of its grower-members through their associations and their district exchanges are returned in toto to the—eventually to the growers less only the actual cost of operation, the corporation retaining nothing except minor reserves for contingencies and bad debts, things like that, to itself.

Q. Sunkist then, if I understand you correctly, is really a broker or a marketing agent for the citrus products that are grown by its members, is that a fair statement?

A. I would call it a non-profit marketing agency, rather than a broker. The term broker usually is applied to an operation for profit.

Q. But it is selling its products for the profit of its growers, is it not?

A. Yes, sir, we hope. [207]

Q. And it operates for the purpose of making money on what it sells for the growers, does it not?

A. For the grower, but not for itself.

Q. Of course, Sunkist is just an association, the

(Testimony of Paul S. Armstrong.)

members of which are somewhat like stockholders, are they, in a private corporation?

A. Yes, but they are much more intimately related than are the stockholders to a corporate structure. Their very livelihood depends upon the success of Sunkist.

Q. The members, for example, of Sunkist, the producers that grow the oranges and the grapefruit, do they own or have any interest in the Sunkist Building from which you conduct the operations of selling its products of its members?

A. Yes, they do.

Q. The primary function, then, I take it, that Sunkist performs is really to, first, sell as fresh fruit all of the products, that is, the oranges and grapefrut that are grown by its members; is that a fair statement, Mr. Armstrong?

A. That is correct, Mr. Dixon.

Q. And the fresh fruit of its members that it doesn't sell, that is what we call by-product or product fruit, is that a fair statement or description?

A. As a general term, that is correct.

Q. And this product fruit, what happens to it insofar as Sunkist is concerned? Does it have the responsibility of [208] disposing of that fruit, as well as the fresh fruit? A. Yes, it does.

Q. What kind of an organization is set up by Sunkist, if any, to dispose of the product fruit?

A. I might preface that answer by saying that the decision as to whether fruit is shipped to the fresh market or goes to the products destiny is made by the association that ships the fruit, not by Sunkist, the central organization.

Q. But it is marketed by Sunkist, is it not?

A. It is marketed by Sunkist.

Q. For the association member of Sunkist?

A. That's right. The farmers——

Q. Pardon me. I didn't mean to interrupt you, but the association member—or what did you call it, district exchange, did you use that term?

A. I used that term.

Q. The district exchange cannot in and of itself, without further consultation with someone at Sunkist, just on its own, sell the fruit of its exchange, can it?

A. No, it cannot. The contract that is in effect and is subject to annual withdrawal by the association or the district exchange provides that all fruit under the control of such association or such district must be marketed through the Sunkist growers organization in whatever form it may be marketed. Part of it is marketed as fresh fruit, and [209] part of it is marketed as processed products. The Sunkist organization contains as a part of the system two products companies which have been referred to here, one being Exchange Orange and the other Exchange Lemon. The function of those companies is to receive the fruit of products classification on which the decision not to ship to fresh market has been made by the association, and to recover from it all of the valuable constituents that they can.

The orange company, Exchange Orange, does that for oranges and grapefruit; and Exchange Lemon does it in respect to lemons.

Q. Now, getting back to this product fruit, let's talk about oranges for a moment. What does Sunkist do with that fruit and how is it handled and disposed of?

The Court: Fresh fruit are you referring to?

Mr. Dixon: No. I am talking about the products fruit.

The Witness: The products fruit is sent to the products company, either the orange or grapefruit to Exchange Orange, or the lemon to the Exchange Lemon. It is processed into products, and then the products made from such fruit are turned over to the Products Department of Sunkist Growers to sell in the markets.

Q. (By Mr. Dixon): If I understand your answer correctly, Mr. Armstrong, the Exchange Orange Company, then, that is this 100 per cent subsidiary of Sunkist, is the company that [210] handles the product oranges and grapefruit of the members of Sunkist; is that correct?

A. It is the processing facility of Sunkist Growers for oranges and grapefruit.

Q. And it actually processes some of the fruit that comes into its control? A. Most of it.

Q. And it also sells some of the oranges ~~and~~ lemons which come into its control, does it not?

A. No. At the time you are speaking of the oranges that were not processed by the Exchange

Orange Company were sold by Sunkist Growers through another department to outside processors.

Q. I guess I didn't make a fair statement. I must admit that I am somewhat confused now. I thought that all of the product oranges and lemons —let's confine this to 1951——

A. That is what I am talking about.

Q. ——was handled by Exchange Orange Products; is that or is that not the fact?

Mr. Stark: Was that oranges and lemons or oranges and grapefruit?

Mr. Dixon: I am sorry, counsel. Oranges and grapefruit. Thank you.

The Witness: The oranges and grapefruit are under contract to Sunkist Growers. When the association decides not to [211] ship to the fresh market the products portion of that fruit is disposed of by Sunkist Growers by sending a portion of it to the Exchange Orange Products Company for processing and selling to other processors through its sales department some of such fruit, the amount varying greatly depending upon supply and demand.

Q. (By Mr. Dixon): Supposing I was an independent processor of oranges and lemons in 1951 —I am sorry—oranges and grapefruit, and I wanted to buy some oranges for processing purposes into citrus fruit juices, where would I go to find out in your organization whether you had any oranges or grapefruit that I could buy or otherwise get under any other arrangement fro processing into citrus juices?

(Testimony of Paul S. Armstrong.)

A. In that year you would have gone to the citrus distributing plant, which is located on Ninth and Alameda Streets, and where the selling operation for that portion of the fruit is centered, at that time under the direction of Mr. Sam Kelly.

Q. Then I would go to Sunkist, I take it.

A. Oh, yes.

Q. And I wouldn't go to Exchange Orange?

A. Correct.

Q. So that if I bought any I would be buying the product that I wanted to get from Sunkist and not Exchange Orange? A. Yes, sir. [212]

Q. Now, you have mentioned something about your arrangement with Exchange Lemon; can you tell us a little bit more about that? It is not a part of Sunkist as such, is it?

A. It is part of the Sunkist system, but its genesis is a little bit different than the Exchange Orange Products Company. The making of by-products out of citrus fruit was a rather daring adventure when that was started. In 1915 nobody had the know-how, you couldn't read the chemistry of it out of books, and you had to learn the hard way how to do it. Not all of the associations were willing to risk their capital and incur the cost involved in making such products, so a portion, less than all, of the association members at that time organized the Exchange Lemon Products Company, and they undertook to learn how to make various products out of lemons, like citric acid and lemon oil, and later on some of the juice products. But as it became necessary under the federal marketing agreement to have a place to which the fruit not shipped as fresh fruit could go, so as not to be wasted, it was made a requirement of California Fruit Growers Exchange, now known as Sunkist Growers, that any association shipping lemons through the Sunkist organization must, as a prerequisite, be a member of Exchange Lemon Products Company.

The Orange Products Company, I might add, was started in much the same fashion in 1916 and had one very great failure when we undertook to make marmalade on a big scale and ran [213] into World War I, when sugar I think was 30 cents a pound, and you either—well, I don't want to go into that.

That was a rather sad chapter in the Orange Products history. That discouraged a lot of the associations that had grubstaked the venture to start with, and it took a year or two to reorganize it.

That went along owned by the association shipping oranges and not by all of the association members of Sunkist, until about 1931, when, because of the necessity of having a place to put all of the oranges not shipped as fresh fruit, the Sunkist organization undertook to make those facilities available to all of its member associations, and to that end it purchased from those who then owned it, less than all of the associations, their equity, and ever since it has been a wholly-owned subsidiary of Sunkist. [214]

The Court: Now, can we sum this up by saying

(Testimony of Paul S. Armstrong.)

that as far as Exchange Orange is concerned, it is wholly owned by Sunkist?

The Witness: Yes, your Honor.

The Court: But as far as Exchange Lemon is concerned, it is a membership corporation which is owned in turn by an association at San Dimas or one at Escondido, all over Southern California?

The Witness: That is correct, your Honor, except it is a stipulated requirement all lemon associations shipping through Sunkist must be members of Exchange Lemon Products Company.

The Court: I see. But as far as carrying out the duties of processing for Sunkist, Lemon performs the same function for lemons that Exchange Orange performs for oranges, for Sunkist?

The Witness: That is correct, your Honor, with the additional statement that it is mandatory that the lemons not shipped as fresh fruit are under contract to Sunkist Growers and it turns the products lemons over to ELP company—Exchange Lemon Company, as its processing facility. [215]

* * *

Mr. Dixon: Plaintiff offers Exhibits 1, 2, and 3 in evidence.

Mr. Williams: No objection.

The Court: Exhibits 1, 2, and 3 received in evidence.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 1, 2, and 3.)

* * *

Q. (By Mr. Dixon): When we recessed, Mr. Armstrong, you were starting to tell us something about the arrangement [217] between Sunkist and Exchange Lemon. Will you refer to Plaintiff's Exhibit 1, and particularly paragraph 24 therein, and state if you can whether that deals in any way with the arrangement between Sunkist and Exchange Lemon?

By the way, we might tell the jury that Exhibit 1 is known as 1940 Exchange District Exchange Association Agreement.

The Court: You have too many "Exchanges."

That right, 1940 Exchange District Exchange Association Agreement, you are right.

(The question was read by the reporter.)

The Witness: The exhibit referred to, No. 1, is the contract between the Exchange, which is now known as the Sunkist Growers, the 22 district exchanges, and the associations that comprise the Sunkist system.

The Court: In other words, this was the master contract which Sunkist Growers, then known as California Fruit Exchange, signed, and in turn was signed by the various exchanges and associations throughout the area?

The Witness: Correct, your Honor, each part representing one instrument, they all signed it, both the districts and the associations.

Section 24 thereof reads:

"Exchange Lemon Products Company

(Testimony of Paul S. Armstrong.)

"Associations handling lemons agree to execute the Exchange Lemon Products Company 'Agreement Subscribing for [218] Stock and Creating Exchange By-products Company Revolving Fund,' and amendments thereto."

That is the provision in the contract which requires, as I stated previously, that all associations shipping lemons in the Sunkist organization must as a prerequisite be also members of the Exchange Lemon Products Company. [219]

Q. So that in fact, then, any member of Exchange Lemon is also a member of Sunkist; is that a fair statement, Mr. Armstrong?

A. It is not quite as simple as that, Mr. Dixon.

Q. I am trying to simplify it, if I can.

A. The real basic members of Sunkist are the farmers, the growers. There are some 12,000 of them. They are organized into different groups for different purposes. They have their association for packing. They have a district exchange for selling. The associations have these products plants for processing.

In the broad sense, the growers of one are also members of another by virtue of these facilities that have been set up for their use, but corporately they are not.

Q. Please refer to Plaintiff's Exhibit 2, the same being an agreement between Sunkist, Exchange Orange and Exchange Lemon, dated April 6, 1949. Is there anything in that exhibit that will

(Testimony of Paul S. Armstrong.)

help us and the jury to understand the relationship between Exchange Lemon and Sunkist?

A. Yes, I think there is a great deal in that agreement that would be helpful.

Q. Do paragraphs 1 and 2 of that agreement fairly state the arrangement?

A. Those two paragraphs are helpful in setting forth that arrangement, but to be completely informed, you should [220] include also paragraphs 3 and 4.

Q. Well, you mean paragraphs numbered 3 and 4?

A. No. The preamble, the complete preamble, you might say, prior to the numbers.

Q. Well, perhaps it might be helpful to read this to the jury. A. It would.

Mr. Dixon: It is my understanding that this document will be available to you, ladies and gentlemen of the jury, as part of the evidence in this case, but to enable you to perhaps more easily understand the relationship, I will read this to you at this time.

The Court: Before you start to read it, in the very first paragraph the word Exchange is used, and I take it that means the old California Fruit Growers Exchange.

Mr. Dixon: That is my understanding.

The Court: Which is now Sunkist.

Mr. Dixon: That's right.

The Court: So in reading it——

Mr. Dixon: We can perhaps make that change.

(Testimony of Paul S. Armstrong.)

The Court: Call that Sunkist.

Mr. Dixon: Is that agreeable, counsel?

Mr. Williams: That is agreeable.

The Court: Then call it Sunkist.

Mr. Dixon: Sunkist is incorporated for the purpose of [221] providing the facilities through which its members may market their citrus fruits and the products thereof. In an agreement entitled "1940 Exchange District Exchange Association Agreement"——

That is Plaintiff's Exhibit 1, which we have referred to, and now continuing to quote:

"The responsibility of marketing all of the citrus fruits and products of its members rests with Sunkist. Products companies are corporations incorporated for the purpose of developing and manufacturing products of citrus fruits. The only stockholder of the Exchange Orange is Sunkist, and the stockholders of Exchange Lemon under the terms of the aforementioned '1940 Exchange District Exchange Association agreement' "——

That is Plaintiff's Exhibit 1, which we have heard about.

"are all associations shipping lemons affiliated with Sunkist. Sunkist in observation of its responsibility to market all the fruit and products therefrom of all its members, by resolution of its board of directors dated September 4, 1940, designated products companies as agencies for the ultilization and disposal of oranges and lemons not sold for consumption as fresh fruit. In further recognition of the obligation to market all of the fruit of [222] its members, Sunkist has established a department for the distribution and sale of citrus fruits in by-product or processed form known as 'Products Department, Sunkist.' It is the desire of the parties hereto to establish certain principles for the most effective use as a joint sales agency of products department.

"In consideration of the foregoing, it is agreed by and between the parties hereto as follows:

"1. Sunkist hereby delegates to a joint executive committee the managment of products department in all of its operations with authority to execute contracts for the sale of products marketed under its jurisdiction, provided, however, that in respect to any operations of products department in which the fresh fruit interest of Sunkist is directly involved, the nature of which interest Sunkist shall be the judge, Sunkist may approve or disprove any policy or course of action of products department."

The Court: This means that a department of Sunkist was set up called products department which was run by a joint executive committee of 16 members, eight of which came from Exchange Orange and eight from Exchange Lemon?

The Witness: Yes, your Honor. [223]

The Court: With Sunkist keeping a veto power on anything involving fresh fruit?

The Witness: Yes, sir. [224]

Q. (By Mr. Dixon): This products depart-

(Testimony of Paul S. Armstrong.)

ment, that wasn't a separate corporation, was it, Mr. Armstrong?

A. No, sir; it was a regular department of Sunkist Growers, it was not incorporated.

Q. This executive committee that was referred to, was that the committee of four so-called, or 15 members? In other words, I am somewhat confused, and that is why I am asking the question. As I understand it, there were two committees, one of 15 members, which was referred to as the joint executive committee, and then there was another joint executive committee composed of four members; is that correct? A. No.

Q. Well, will you straighten me out and tell me what the difference is between the two committees, if there were two committees?

A. The joint executive committee is named in this instrument. Each company, Exchange Lemon and Exchange Orange, is entitled to have eight members representing it upon this committee of 16. That is the committee to which has been delegated by Sunkist Growers the authority to manage the operations of Products Department, which would ordinarily be managed, just as any other department, by the general manager, but in this instance it is managed by this committee, because it is a tool or a facility for selling products only [225] which are not sold through our fresh fruit sales organization, and are managed by this committee.

Now, the other committee to which you refer is merely an informal consultation of the plant managers, the lemon plant manager, the orange plant manager, the general manager of Sunkist, and the manager of the products department, just like we have department head meetings. They have no authority, no formal status, but it is merely the exchange of information and views.

The Court: What do you call that committee of four?

The Witness: We call it a management committee, because it is made up of managements. But they have no authority to manage, except their own company. It is not like the management committee of an ordinary corporation which usually has a lot of authority.

Q. (By Mr. Dixon): Then if I understand your answer, Mr. Armstrong, this 15 member executive committee——

The Court: 16.

Q. (By Mr. Dixon): 16, was charged with the responsibility of marketing or disposing of the product fruit of Sunkist and Exchange Lemon, is that correct?

A. Well, not exactly the way you state it, Mr. Dixon.

This joint executive committee has the right of supervision and direction on policy of the products department. The products department is made up of employees who are on [226] the payroll of Sunkist Growers, and——

Q. May I interrupt?

(Testimony of Paul S. Armstrong.)

A. The management of the actual selling, of course, is done by the salaried employees.

Q. The products department that you have referred to of Sunkist, they are all employees of Sunkist, are they not? A. Yes, surely.

Q. And paid by Sunkist? A. Yes.

Q. Are they under the supervision or control in any way of this joint executive committee that you are talking about?

A. Yes, they are. That is exactly what the joint executive committee is for.

Q. Can they be hired and fired, for example, by that committee? A. Yes, sir.

Q. And have any of them ever been hired or fired by that committee to your knowledge?

A. Yes, sir, and their compensation is fixed by that committee.

Q. Would their compensation, and so forth, be set forth, or anything in connection with it, in the minutes of this 16 member executive committee?

A. Yes, it would. [227]

Q. This four member executive committee that you have referred to, that is what you call an executive management committee, is that correct?

A. Well, I called it a committee of managers, because it is made up——

Q. Who appoints the members of that committee? A. Nobody. We appoint it ourselves.

Q. Do you mean it is a self-operating committee?

(Testimony of Paul S. Armstrong.)

A. Yes, we just get together to talk over what is going on in the business as a whole.

Q. And the members of that committee consist of yourself? A. Yes.

Q. And Mr. Finley? A. Mr. Finley.

Q. Of Exchange Products?

A. Exchange Orange.

Q. I mean Exchange Orange.

A. Yes. Mr. McMillan of Exchange Lemon, and Mr. Don Thompson, the manager of the products department, and Mr. Wilcox, assistant general manager of Sunkist. Now, they don't meet regularly——

The Court: That is five.

Q. (By Mr. Dixon): Is it a five-man committee?

A. We call it five. It has no authority or no status. [228] It is a consulting committee.

Q. This executive committee, this 16 man executive committee, does it have anything to say about the prices at which products oranges should be sold to processors, independent processors?

A. No, it does not.

Q. It has nothing whatever to do with a determination of the price, then, at which product oranges shall be made available to processors?

A. No, sir.

Q. Isn't that part of the marketing of the product oranges of the association? Or isn't it?

A. Yes, but that decision is left to the one who is actually in charge of that operation. In the case

(Testimony of Paul S. Armstrong.)

of product oranges and grapefruit that was sold by the Citrus Distributing Plant under Mr. Kelly.

Q. This 16-member committee, then, is not concerned with the price at which the product oranges are sold at all, is that correct?

A. Well, the word "concerned" has a double meaning. They are always concerned with the price at which they sell, I can assure you. But they have no official direction of their selling. That is left to the employee staff.

Q. Who authorizes the employee staff to fix the prices at which the product oranges shall be [229] sold?

A. The manager of the department that is selling it.

Q. Is there any place from which his authority stems, specifically, to fix the prices at which the product oranges shall be made available to processors?

A. No, not officially. Of course, we talk about these things together, naturally.

Q. Does this 16-member executive committee have anything to do with determining the price at which the products—by "products" I mean the citrus juices and other products that are processed from oranges—are sold?

A. No, they do not. They are a policy committee, and they leave the determination of prices to the manager of the department, Mr. Thompson.

Q. Can you tell the jury just what this 16-member policy committee is supposed to do?

(Testimony of Paul S. Armstrong.)

A. They are like Congress, they make the appropriations, which is a very important function, and they hire the personnel, and they decide upon the broad policies of the organization. If any construction is necessary, for instance we have an office building which came in later than this case, that would be under their jurisdiction.

Q. But it does not concern itself directly with the marketing of any of the products of the association?

A. No. It hears the reports from the operating staff, just like a board of directors would, but they do not set the [230] prices themselves.

Q. Mr. Armstrong, I believe some place in Plaintiff's Exhibit 1 there is a reference to by-product or plan for pooling of by-product and juice-grade oranges; is that term in any way familiar to you?

A. Yes, sir.

Q. Can you state to the jury what is meant by plan for pooling of by-product and juice-grade oranges?

A. The purpose of the plan, Mr. Dixon, is to establish the equities between those who contribute fruit for processing purposes, whether it is processed in the plants owned by the growers themselves, or whether it is sold to anyone else. To do that you must have some standards which all growers can be aware of and can rely upon. So the board of directors at Sunkist Growers approved a plan drafted by management.

Q. By management you mean who?

(Testimony of Paul S. Armstrong.)

A. Of Sunkist Growers. (Continuing): for the pooling of by-product and juice-grade oranges.

That plan is subject to review every year. There is a provision in the contract, in Plaintiff's Exhibit No. 1, known as 14(b), which establishes the voting power in setting up such a pool. It requires a 75 per cent concurrence of the variety under consideration. [231]

Q. (By Mr. Dixon): Now, who formulates this pool plan within the Sunkist organization?

A. Well, the management team, department head, manager, assistant manager, secretary.

Q. In other words, it is formulated——

A. Strictly a management function.

Q. And then submitted to the board of directors of Sunkist, where it is approved?

A. For their approval or amendment or modification, as they may see fit, like any other management recommendation.

Now, this pool provides for the length of time that it covers the standards under which the product fruit is received into it. We use an assay method, you might say, for oranges based upon the number of pounds of solids per ton, and par on Valencia oranges is about 110 pounds of solids per ton. The fruit delivered is assayed from sample to determine the equity of the association making the delivery.

Q. May I interrupt you there, Mr. Armstrong?

A. Surely.

Q. I am not sure I understand, maybe the jury

(Testimony of Paul S. Armstrong.)
does, what you mean by determine the equity of the association.

The Court: Well, give a sample of fruit coming coming from one area where it was sub par, and coming from another area, where it was over par, and how you handle that.

The Witness: Well, this products fruit is developed [232] every day in the 160 or odd packing houses that operate in the Sunkist organization. It is a part of their crop that is currently handled that is not shipped to the fresh market. That fruit has to be taken away promptly, sometimes several times a day from some of the larger houses, and delivered to either independent processors, who may have acquired it, or to the Exchange Orange Products Company plant at Ontario.

Now, when it comes into the plant, there has to be given a credit to the delivering organization and that credit is dependent upon the weight in tons, and then the credit from a quality standpoint depends upon the assay in terms or soluble solids per ton, which is made in the plant.

Then once it is received into the plant it is commingled with fruit from other sources, which may have different assays and different weights, but that original credit or equity, as I term it, to the delivering association is carried right through the accounting system and the proceeds of sale after the expenses are met are disbursed upon that formula. You might have from one district a load of fruit that showed an assay of 90 or 110 pounds of

(Testimony of Paul S. Armstrong.)

solids. In many years, as you know, because this is a dangerous business, we have frost, and if you have a frost, your assay of that fruit is way down.

Q. May I interrupt for just a moment? We may have occasion to use this term soluble solids, I believe it is, [233] during the course of this case?

A. Yes.

Q. Will you explain what is meant by that to the jury?

A. Well, that is the general term given to all of the constituents that are inside of the juice part of the orange, except the water. In other words, it includes citric acid, it includes sugars of various types, and other dissolved solids that constitute the real substance of the orange juice.

The Court: Let me see if I can state this in simple language here so the jury will understand what the situation is. In these pooling agreements where this fruit comes into this central place at Ontario from 126 different associations or exchanges, once the fruit gets there, it is all mixed together, and so the question is what credit, what amount has each one of these association earned for the by-product fruit that they have sent in. Now, if the product was all alike, all you would have to do is take the tonnage of it and that would be easy to find out. One group forwarded 10 tons and another 100 tons. But fruit varies. Based on this question of analysis of what the soluble solids are, some fruit will be up and some will be down, some above and some below par. Therefore, this fruit, as it comes into the Ontario plant has to be analyzed by sample to find out what the content of the fruit is, and after that is done, on the basis of the [234] analysis made, figured against the number of tons that were brought in, a certain figure is arrived at, and then the fruit is dumped together, and from that time on it doesn't make any difference whose fruit it is. Each association knows what it is going to get. Its fruit came in, and if it was a little above par, it gets a certain figure. If it had 10 tons, it would amount to something above 10 tons. The fruit that came in that was below par in solids would get a litle less than 10 tons, and that that was over 10 tons would get a little over 10 tons as a practical matter.

Do you understand what they mean now by this pool?

Mr. Dixon: Thank you, your Honor.

The Witness: If I might interpolate a statement here?

Q. (By Mr. Dixon): Certainly, go ahead.

A. The fresh fruit is handled in much the same manner. It doesn't grow all the same on the tree. When it comes into the packing house, the individual grower has to get credit for the size product he brings in and credit for the grade of it. Otherwise, it would be all reduced to a common level, and there would be no incentive to be an excellent grower. Great care is taken with this, we are meticulous about it, to see that the rewards for superior performance go to the people who deserve it for the quality product they deliver.

The Court: That's right, because the fresh fruit is [235] also mixed.

The Witness: Yes. As soon as it gets to the carload, you don't know what grower it came from.

Q. (By Mr. Dixon): Mr. Armstrong, I was about to ask you something about soluble solids. Is it a fair statement that the average ton of Valencia oranges would produce about 120 pounds of soluble solids?

A. Well, that would be my recollection, although I am not a technical man and I wouldn't want to be held to that type of definition.

Q. I understand it may vary? A. Yes.

Q. A ton of oranges may vary from 60 pounds, or even lower than that, up to 140 pounds of soluble solids per ton?

A. That's right. That varies with the different seasons and with the different varities, so that one year you might average 110 pounds of solids, and another year 120. Some will rise above it and some will fall below.

Q. But you strike an average, that would be a fair statement? A. Approximately so.

Q. Now, directing your attention to Plaintiff's Exhibit No. 3, paragraph 15-A, under this pooling agreement, it is contemplated, is it not, that some of this product fruit that is pooled in the manner that you have described [236] shall be made available to independent processors?

(Testimony of Paul S. Armstrong.)

A. That section entitled 15-A relates to that purpose, yes.

Q. And I think, with consent of counsel, we will read paragraph 15-A to the jury so that they may know what we are talking about.

The Court: Now, that Exhibit 3 is an agreement between whom? I don't have a copy.

Mr. Dixon: I will see if I have a copy for you, your Honor.

The Witness: It is a pooling plan established by the board of directors I refer to in my testimony.

The Court: Can we take that as a fair statement? It is the pooling plan that was established by the the board of directors of Sunkist?

The Witness: Yes, sir.

Q. (By Mr. Dixon): And in effect for the year 1951, that is during the year 1951?

A. I would have to see the date, please. This is entitled plan for pooling of by-product and juice grade oranges effective beginning 1951-52 pools. So that would be the season following the shipments of 1951, because our fiscal year commences on November 1, and this would be pertinent to the season running from November 1, 1951, to October 31, 1952, but it is substantially the same. I [237] wouldn't think there is much difference.

The Court: You mean it is substantially the same as the period just before?

The Witness: Yes.

The Court: All right.

Mr. Dixon: We are—at least I am referring to

7

(Testimony of Paul S. Armstrong.)

the pooling plan that was in effect during the year 1951.

The Court: The witness has said that this was in effect beginning November 1, 1951, and that the plan prior to November 1, 1951, was substantially the same.

Mr. Dixon: Counsel are in agreement that paragraph 15 is the same in substance as in—well, this is the one I thought I was talking about. With the permission of the court, let's withdraw——

The Court: Let's leave 3 here and mark the other one 3-A.

Mr. Dixon: All right.

The Court: It will be marked A.

Mr. Dixon: Plaintiff's Exhibit 3-A is offered in evidence.

Mr. Fisher: I do have a copy of that for the court.

The Court: 3-A in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 3-A and received in evidence.)

The Court: Now, 3-A was for the period from November 1, [238] 1950, to November 1, 1951?

The Witness: That is correct, your Honor.

Q. (By Mr. Dixon): Now, referring to paragraph 15-A of Plaintiff's Exhibit 3-A, my previous question now applies to Plaintiff's Exhibit 3-A. Did that contemplate the sale of any product oranges to independent processors during the year

1951? A. Yes, it does.

* * *

Q. State, if you can, whether the Valencia oranges within the product orange group we have just described constituted [239] the greater part or percentage of the product fruit available to processors under that provision? A. Yes.

Q. It is a fact, is it not, that about 70 per cent—is that a fair percentage—of the total amount of product oranges available for processing purposes are Valencia oranges?

A. I would say so, approximately, although that will vary from season to season.

Q. Now, directing your attention to paragraph B, subsection (1), that section refers to establishing a schedule of prices at which this product fruit referred to in A shall be sold, is that correct?

A. Yes. That is designed to set forth the difference in the analytical characteristics of the juice, as we referred to before, of solids per ton.

Q. I am not sure that I recall what committee or group it was that was to deal with the establishment of the schedule of prices for this product fruit.

A. There isn't any committee that deals with it. It is handled by the sales department selling products oranges to outside processors.

Q. Is there a price list that is established by Sunkist under this provision during the processing season that is circulated among the independent

(Testimony of Paul S. Armstrong.)

processors, indicating the [240] prices at which Valencia oranges will be available for processing?

A. I personally do not recall the exact form in which they make these prevailing prices known to the customer. They are on the telephone with him. It may be that they get out a list that is not under my immediate supervision.

Q. Do you have anything to do with the determination of the selling price for product fruit under this provision? A. No. [241]

Q. Are the price lists that are established by someone in Sunkist under paragraph 15-B ever submitted to you before they are sent out to the independent processor?

A. Well, Mr. Dixon, I don't recall that I have ever seen such a price list. But of course I become familiar, by telephone or other contact, with the prevailing price. And it is not a fixed price for the season: it fluctuates with supply and demand. Mr. Kelly was charged with the responsibility of getting as much as he could get for the fruit from outside processors.

The Court: Who is Mr. Kelly?

The Witness: He is the manager, division manager, of the Los Angeles District under whose jurisdiction that falls.

The Court: I don't get that.
Read that.

(Answer read by reporter.)

The Court: Of Sunkist?

(Testimony of Paul S. Armstrong.)

The Witness: Of Sunkist. Because Sunkist sells its fruit to outside processors; not the Exchange Orange.

Q. (By Mr. Dixon): I take it, then, that you would not be able to indicate whether you saw or didn't see the price sechedule which might be established under paragraph 15-B during the year 1951?

A. I couldn't recall. I am not unfamiliar with the prevailing prices, but we are selling fresh fruit and doing [242] many other things, and I don't attempt to pass upon those prices, even thought I might have the authority if I chose to exercise it.

Q. Do you have the authority?

A. I don't know. I never used it.

Q. How did Mr. Kelly get his authority?

A. By being appointed Division Manager in charge of that operation. But it is our policy not to interfere with managers very much in carrying out their function, because they know more about it than we do.

Q. Mr. Kelly is with Exchange Products Company, is that correct?

A. No, sir, he is with Sunkist Growers. He is now retired, but he held that position in 1951.

Q. Mr. Kelly, then, in 1951 was the one who was determining the price under this Section 15-B?

A. Yes, in general. He consulted with some of his associates, no doubt.

Q. Was this another committee function, or was it one which was vested in Mr. Kelly?

A. Strictly a management function.

(Testimony of Paul S. Armstrong.)

Q. Well, I am not sure——

A. It was not a committee function.

Q. It was not a committee function?

A. No, sir. [243]

Q. Was Mr. Kelly the one who decided what the price was in the event there was a view by others in the Sunkist organization different from his concerning the price? A. Yes, sir.

Q. In other words, Mr. Kelly had the last and final word? A. Yes, sir.

Q. That was true all during 1951?

A. Yes, sir.

Q. So that any oranges that were sold to independent processors by Sunkist in 1951 would have to be sold under prices that were determined and fixed by Mr. Kelly, is that correct?

A. Yes, it could be stated that way. Of course, Mr. Kelly sought advice from the buyers and from everybody else. But when he made up his mind, that was it.

Q. My point, what I am trying to determine, Mr. Armstrong, is if somebody else in the organization of Sunkist decided that some oranges were to be sold at a price different from one that Mr. Kelly had established under this 15-B, that he couldn't do it?

A. He couldn't do it, unless he could sell Mr. Kelly on the change. Mr. Kelly had to make the decision. [244]

* * *

(Testimony of Paul S. Armstrong.)

Mr. Dixon: The plaintiff offers Plaintiff's Exhibit 4 in evidence.

Mr. Williams: We object, your Honor, to that part of the exhibit which relates to navels on the ground it is immaterial and irrelevant to any issue in this case.

The Court: Overruled. Exhibit 4 is received in evidence.

(The exhibit previously marked Plaintiff's Exhibit 4, was received in evidence.)

The Court: I take it the facts in Exhibit 4 are stipulated to and the objection is only on the ground of immateriality.

Mr. Williams: That's right, your Honor.

Mr. Dixon: May it be stipulated, counsel, that the dollar return per ton on Valencias and miscellaneous is 27.01, and navels 28.09, subject to your check?

Mr. Williams: We checked it and I have 27.02, but I will stipulate and disregard the penny.

The Court: 27.02 and what?

Mr. Dixon: 28.09.

Q. We also discussed this morning the purchase of the trade-mark Sunkist. It was shortly after that purchase was made, was it not, Mr. Armstrong, that you embarked upon an advertising program for the name Sunkist as applied to shelf products, so-called, as well as to the fresh fruit products?

A. Yes, that is correct. I might add in that connection [247] that our primary motive for buying

(Testimony of Paul S. Armstrong.)

the trade-mark was to protect our very large investment in Sunkist as applied to fresh fruit. It was defensive, but we had a secondary motive, and that was to use the well known trade-mark in promoting the sale of our process products as well. [248]

Q. At one of the meetings of the 16 member executive committee that you told us about this morning in the early part of January, 1951, appropriations were made, were they not, for an extensive advertising campaign for the Sunkist products, both fresh fruit and canned?

A. I couldn't be sure as to the dates, Mr. Dixon, but certainly an advertising campaign was arranged for.

Q. Do you recall the amount that was appropriated by the 16 member executive committee early in January of '51, for the campaign?

A. No, sir, I cannot. The records will readily show.

Mr. Dixon: It has been stipulated by and between counsel for plaintiff and the defendants that the third paragraph of the minutes of the joint executive committee of Exchange Orange and Exchange Lemon, held at Los Angeles, January 2, 1951, at the Jonathan Club--paragraph 3 of page 3—may be read into the record.

I am reading from those minutes as follows:

"The proposed appropriation for this advertising campaign is $1,250,000, Mr. Eller said, to be used principally for billboards, newspapers, radio and

(Testimony of Paul S. Armstrong.)

television, and that it is recommended that Sunkist frozen concentrate for lemonade should receive the entire appropriation. The outline of this campaign was presented in considerable [249] detail by Mr. Eller, following which Mr. Jameson said that the Lemon Board was in agreement with the plan in principle."

Q. (By Mr. Dixon): Do you recall, Mr. Armstrong, whether all of this appropriation was to be used and was used for advertising just lemonade or lemon products, frozen concentrate lemonade?

A. I can't recall that far back.

Q. You do recall, do you not, that in the year '51 an extended campaign was instituted by Sunkist to promote the Sunkist, that is, the products produced by Exchange Orange and Exchange Lemon under the Sunkist label?

A. Yes, as reflected in those minutes. [250]

Q. And this is part of that program when it got under way, is that correct? A. Yes.

Q. Now, at the meetings of the joint executive committee, I believe you testified this morning, Mr. Armstrong, Mr. Wilcox was present at those meetings usually, was he?

A. When available, yes.

Q. And Mr. Wilcox was the——

A. Assistant general manager of Sunkist.

Q. Is that your assistant, I mean a kind of assistant to you? A. Associate, yes.

Q. Did Mr. Wilcox have anything to do with reporting to the joint executive committee concerning

(Testimony of Paul S. Armstrong.)

the amount of product fruit that might be available for processing by Exchange Orange, Exchange Lemon, and for sale to independent processors in the year 1951?

A. Both Mr. Wilcox and I attend the joint executive committee when we are in town and can arrange to be there, more as observers and listeners, and not to make reports to anybody.

Q. Would it refresh your recollection any as to whether Mr. Wilcox made any estimate or report to such a meeting if the minutes showing such meeting and a report were shown to you?

A. Oh, surely. I might add Mr. Wilcox, among his other [251] duties, is treasurer of Sunkist, and in the treasurer's department is lodged our statistical office, so that he is looked upon as the best source of information for the crop condition and volumes, and so forth, obtained from the Government and other sources.

Q. Can you state to the jury whether as one of the duties which Mr. Wilcox performed for the 16-member executive committee, he did submit such reports to the committee?

A. Not to my recollection, not as a regular thing. It might be an occasional happening, but usually the plant managers might bring that up in connection with their reports. They would not look to Mr. Wilcox officially for it.

Mr. Dixon: It has been stipulated by and between counsel that the following portion of the minutes of a meeting of the joint executive commit-

(Testimony of Paul S. Armstrong.)

A. That is correct, f.o.b. shipping point.

Q. Now, getting back to your statement of a few moments ago that Sunkist lost money on this 18 per cent of its total volume dollar of business—was that your statement?

A. No, I didn't say Sunkist. I said the growers. Sunkist neither makes nor loses money. It operates at cost.

Q. Then I am referring to Sunkist as being the grower. Someone has to have this money.

A. No one ever has received a return for oranges from products channels that would justify planting an orange grove to grow oranges for that destination. That is because it is a salvage operation where the raw materials cost is less than the cost of producing it, and we, of course, have been very anxious to improve the distribution and sale and acceptance of these products so that the grower could get back what it cost to grow the oranges that went into them, feeling that if it didn't, it wouldn't be long until the industry itself would collapse as far as products is concerned, because you cannot long operate a business of these proportions where the cost of the basic raw material is not returned.

Q. Just how do you determine the cost of the basic raw material, Mr. Armstrong, so that you can state to this [258] jury that based upon that cost money is lost on the products end of your business?

(Testimony of Paul S. Armstrong.)

A. We take the average cost of producing oranges, which is developed by the county agricultural commissioners, who are state employees, and from that average cost there can be added the cost of picking and hauling the fruit to the packing house and the packing house expense of washing such fruit and grading it, so that you come up with a figure which represents the average for all growers in the organization as to their cost of providing product goods at the packing house ready for delivery to the cannery.

Q. I understand how you can perhaps compute a cost to the grower of all of the oranges that are grown on a particular acreage or number of acres, but I must confess, I am a little dense, I guess, at finding out how, when you once determine that total cost based upon the production cost per acre, that you can say that the grower makes money on the fresh fruit that comes from that particular acreage and loses money on the same fruit when it goes for products fruit, for process products. Can you explain that to the jury?

A. Well, I can to my satisfaction. We must start with an average cost of producing anything, and if a portion of that production can be sold at a market that pays a higher price, that represents a return over and above the average cost of production, If a portion of the crop has to be sold [259] in a market that returns less than the average cost of production, it would be my concept that that represented a

* * *

Q. At these joint executive committee meetings, were the members ever advised when you were present concerning the proposed opening prices for these products that are being processed by Exchange Lemon and Exchange Orange?

A. As a part of the report of the manager of the [262] products department, I recall that the prices of some of the products that were under consideration were mentioned by such manager to the joint executive committee. [263]

Q. By the way, do you recall what products were being put out or going to be put out under the Sunkist label in 1951 in connection with this campaign?

A. My list may not be complete from memory, but I would say single strength orange juice, frozen concentrate for lemonade, frozen orange juice concentrate, and I think canned single strength lemon juice, were among the first items that were entitled to use the Sunkist trade-mark. That list has been gradually added to as the specifications were refined.

Q. But single strength orange juice, Valencia juice, was among those products, was it?

A. Yes, sir.

Q. These products which were processed by Exchange Orange and Exchange Lemon, and sold by Sunkist, were they sold in the various states of the United States? A. Yes.

(Testimony of Paul S. Armstrong.)

Q. And they were processed here in the State of California, at the various plants of Exchange Orange and Exchange Lemon? A. Yes.

Q. Now, getting back to this other question that I asked you a moment ago about the opening prices for these products, were they presented to the 16 member executive committee either for approval or as merely information to [264] them?

A. For information, along with the prevailing prices for comparable products from Florida or elsewhere.

Q. Was it necessary for this 16 member executive committee to approve these proposed opening prices for these products?

A. No, it was not.

Q. In other words, the information was just passed on to the committee for their further information, shall we say—is that correct?

A. That is correct.

Q. Who determined those prices, do you know, Mr. Armstrong?

A. Do you mean the prices of the finished products, such as you have mentioned?

Q. Yes, the opening prices that I just referred to.

A. Well, they are determined by the manager of the products department, with the approval of the plant managers respectively of Exchange Orange and Exchange Lemon, as to the products originating from those respective plants.

(Testimony of Paul S. Armstrong.)

Q. Is there any particular part of the bylaws of Sunkist, or any other committee or organization of Sunkist, which authorizes them to make their sole determination as to the opening price for such products?

A. Not that I am aware of. [265]

Q. In other words, they have entire authority to determine that price, is that correct?

A. That is correct. Although if management for long does not please the board of directors whom they serve, they don't last very long.

Q. How do you determine whether they please or displease the 16 member executive committee?

A. By your continuation in office.

Q. Was there ever any discussion, to your recollection, of the amount of Valencias that were being processed or were available for processing, at any of these meetings during the processing season?

A. I cannot specifically recall the details, but certainly it would be a most appropriate subject to be reported for information by those who had it.

Q. Mr. Finley was the manager, was he, of Exchange Orange Products? A. Yes.

Q. Or Exchange Orange? A. Yes, sir.

Q. And he attended these meetings of the 16 member executive committee, didn't he?

A. Whenever he was in the city, yes. [266]

* * *

Mr. Dixon: It is stiplated by and between counsel for the plaintiff and the defendants that the fol-

(Testimony of Paul S. Armstrong.)

lowing protion of the minutes of the meeting of the joint executive committee of the Exchange Lemon and Exchange Orange, held at the Jonathan Club in Los Angeles on July 31st, may be read into the record——

The Court: What year?

Mr. Dixon: 1951.

"Mr. Finley reported that Valencias were being received at the rate of 2,500 tons daily, with frozen concentrate facilities working at full capacity utilizing 1,850 tons per day. Stating, further, that the third vacuum pan at Ontario would be in operation during the coming week, and adding that the quality of fruit presently being received is such that that sugar must be added when used for frozen concentrated orange juice, although it is expected that unsweetened juice can be produced in the near future."

Q. (By Mr. Dixon): Do you know whether that quantity of Valencias would, be a normal amount as being available for [267] processing each day during that time of the year, Mr. Armstrong?

A. It sounds reasonable in a good crop year.

Q. Well, it is a fact, is it not, that in 1951 the amount of Valencias available for processing into these by-products was in excess of what it had been in the previous year?

A. Yes, sir, we had a bad freeze in 1950, and it was a normal or above normal crop, I would say, in '51.

tee held on November 7, 1950, at the Jonathan Club in Los Angeles, California, may be read into the record.

"With deference to a production program, Mr. Wilcox said that estimates had been made of tons of oranges, lemons and grapefruit that would be available for processing during the coming year, production capacity of all exchange facilities for the various products under consideration, and the proportion of the pack of each product that would be available to private label buyers," [252] end of the stipulation and insert into the record.

Q. Does that refresh your recollection any, Mr. Armstrong, as to the discussion of what amount of fruit would be available during the year 1951 as Mr. Wilcox estimated it at that time?

A. Does the record show I likewise attended the same meeting?

Q. Yes. It shows that Mr. P. S. Armstrong, Mr. F. R. Wilcox, Mr. J. A. Finley, and several others were present.

A. Well, I would accept that statement, but I don't remember it specifically. [253]

Q. Do you recall whether at this meeting there was any discussion, in which you either participated or instituted, with reference to the use of the trademark Sunkist on processed juices?

A. I do not specifically recall, but it would be a very proper subject of discussion, because the right to use Sunkist is lodged with Sunkist Growers, and I would have a very active interest in what

(Testimony of Paul S. Armstrong.)

products were under contemplation and what their specifications were.

Q. Do you recall whether there was any discussion at this meeting concerning the sales program with reference to frozen products sold or to be sold under the Sunkist label in 1951?

A. I can't recall anything, I don't think, that happened in 1951, specifically.

Q. I realize that this is putting you under some handicap, Mr. Armstrong.

A. I have what is considered to be a fairly good memory for some things, but I can't remember that much.

Q. I thought because they had just purchased——

A. It is within the realm of possibility.

Q. ——the name and were embarking on this program, that some of these things might be rather clear in your mind.

A. We certainly intended to sell products under that trade-mark, and to be sure that the products were top quality. [254] and we were going to advertise them and properly promote them, because you must remember that this business is a salvage business, this products end of the business, and we never yet have been able to get a price for the juice fruit sold to others or made by ourselves that paid the cost of production to the average grower. It is purely salvage.

Q. I am glad you brought that up. Will you tell the jury, if you can, approximately what dollar re-

(Testimony of Paul S. Armstrong.)

turn Sunkist got in 1951 from these products that we have kind of cast aside here as being unimportant?

A. I couldn't recall specifically as to dollars and cents. I thought you put that in the record this morning as to the amount per ton. I can tell you——

Q. We haven't yet.

A. ——that the cost of production per ton——

Q. No. I mean what it meant in dollars, what was the income to Sunkist, approximately. I don't expect you to remember the exact amount, but approximately, from these by-products or products of by-product fruit.

Mr. Williams: I object. On Valencias and navels, it is already in the record. It is on Exhibit 4.

Mr. Dixon: I don't think the entire amount is involved.

The Court: Overruled.

Mr. Dixon: If you recall.

The Witness: I can't recall. It is a substantial amount [255] in dollars. At times it amounts to as much as 20 per cent of our total dollar volume of business. But it is conducted at a loss so far as the grower is concerned.

Mr. Dixon: Would you read back the question and answer, Mr. Reporter?

(The record was read by the reporter.)

Q. (By Mr. Dixon): I want to go into that loss question in a moment, but first let us establish,

(Testimony of Paul S. Armstrong.)

if we can, the approximate amount of this business in dollars for the year 1951.

The Court: Have you shown that to counsel?

Mr. Dixon: This is the '51 report.

Mr. Williams: I will be glad to stipulate to what the report says.

Mr. Dixon: I was going to use it to refresh——

Mr. Williams: As long as the figures are in the report we will be glad to stipulate to them.

I take it you are talking about the second paragraph on page 5?

Mr. Dixon: That is correct.

Mr. Williams: You may read it into the record if you wish.

Mr. Dixon: This, by stipulation of counsel, may be read into the record, and it is contained in the 1951 annual report of Defendant Sunkist, and is taken from page 5: [256]

"The sales value of all fresh fruit and products sold by the Exchange was slightly in excess of $150,000,000 f.o.b. shipping point, an increase of about seven million over last year. Product sales accounted for 18 per cent of the total dollar volume as compared with 19 per cent last year."

Q. (By Mr. Dixon): In other words, this would be about 18 per cent of the total business? I am talking about all of your products.

A. Yes. That is my report. [257]

Q. And it would comprise about between 18 per cent, then, of the total dollar income to Sunkist during the year 1951?

(Testimony of Paul S. Armstrong.)

loss as related to the average cost of the product. Whether the grower on his whole operation combined makes a profit or not in a particular year depends on the proportion of his product ~~that goes~~ to those respective channels and the relative prices received from each.

Q. Do you want this jury to believe that from your point of view, at least, the grower would be better off if Sunkist got out of the products end of the business because it is a loss to him?

A. No, that doesn't always follow, for the same reason that the packers make by-products that they may not make a profit on, but they would make more loss if they didn't utilize it. It is a salvage as distinguished from a profitable operation, and that applies to any kind of business.

Q. I beg your pardon?

A. I believe that applies to any kind of business. We have it in our support prices for agriculture.

Q. But was are just talking about Sunkist now?

A. Yes.

Q. And its operations, and particularly the processing operation, which I understood you had stated was conducted at a loss to the grower. But assuming that it has been conducted at a loss to the grower, you have continued to do [260] so for a good many years, have you not?

A. Yes, sir.

Q. That is the primary and principal function of Exchange Products Company? A. Yes.

Q. So that as far as Exchange Products is concerned—I am sorry, as far as Exchange Orange is concerned, that is a loss and a losing operation to the grower?

A. It is as far as determining his average cost of production. Of course, they are striving all the time to develop more products, develop greater consumer acceptance of that, learn the chemistry of by-products better, so that they can get a higher return for the fruit used for that purpose.

The Court: Does the jury follow this now? Do you understand this?

Juror Johnstone: I think I understand it better than the attorney does.

Juror Weiner: It brings up the cost of the other returns, the higher quality.

The Court: It comes down to this. If all that the growers grew was products oranges, they would lose money.

The Witness: They couldn't operate.

The Court: If all they grew was fresh fruit that went to the markets, they would make more money?

The Witness: Yes. [261]

The Court: But averaged together, what they get from products and from fresh fruit, they make an X amount of money, which probably means that most of them make a little money.

The Witness: Yes, or they wouldn't stay in business.

(Testimony of Paul S. Armstrong.)

Q. I mentioned the opening prices for these products a short time ago as being submitted to the committee; do you know whether regular price lists for the products processed and sold by Sunkist in interstate commerce and in the sate of California was thereafter submitted to the 16 member joint executive committee that we have been talking about?

A. I can't recall them being submitted as a regular thing. Perhaps in connection with Mr. Thompson's report he would reflect any changes in price that had occurred that were of significant interest.

Q. It is a fact, is it not, that this committee was kept pretty well informed, at least by the four-member committee, of what was going on, was it not, in the Exchange Orange processing plants?

A. They were kept well informed, yes.

Q. So the members of the committee, including yourself, [268] would know what the prices were and when changes in prices were made for the products that were being sold by—I mean that were being processed by Exchange Orange is concerned, is that correct?

A. I am not a member of the committee.

Q. But you did attend practically all the meetings.

A. I attended all the meetings I could when I was here, and I heard those incidentally reported. But that was all.

Q. Did you ever evince any interest in the price the products were selling for?

(Testimony of Paul S. Armstrong.)

A. Surely. I was trying to get more money for the farmer every time that I could possibly do it.

Q. I am sure you were.

Now, with that interest, can you tell us what the prices generally—whether the executive committee was informed by this four-man executive committee of changes in the price of the products sold?

A. I do not know to whom you refer when you say four-man executive committee.

Q. I am referring to this other committee we talked about this morning. Yourself—it is this informal committee—I believe Mr. Finley was a member, and there were two others.

A. McMillan, Thompson, and myself, and Mr. Wilcox. [269]

The Court: Let's call that, if we can, the committee of managers. That is the name the witness gave to it.

The Witness: That committee had no official status with the joint executive committee of 16, and such reports as were made to the joint executive committee were made by the individual managers on their own behalf in their own fields. No report was made by this committee of managers to the joint executive committee on prices.

Mr. Dixon: It is stipulated by and between counsel for the plaintiff and the defendants that paragraph 13 of the minutes of the meeting of the joint executive committee of Exchange Orange and Exchange Lemon held at the Jonathan Club on September 24, 1951, paragraph 13 thereof, may be read into the record.

"Distribution of the first edition of a new printed price list for canned goods items to be distributed to our brokers every two weeks, or more frequently if necessary, in order that our brokers may be kept fully informed as to the availability and current prices of our various canned goods items. Following examination of these new price lists Mr. A. C. Hardeson suggested that a complete set be sent as they are issued to each member of the joint executive committee, to which all concurred." [270]

May it also be stipulated that Mr. Armstrong was present at that meeting?

Mr. Williams: We will stipulate he was present. [271]

Q. (By Mr. Dixon): Did you receive any of these price lists that are referred to in this paragraph that I have just read into the record?

A. I might have, but I didn't, to my recollection. They wouldn't mean much to me. There are a whole host of different products, different sized cans, and I don't understand the language much.

Q. I believe you testified you didn't know anything about the cost of processing a ton of oranges into, say, single strength juice? A. I did.

Q. And you have never made it your business to determine that or to inquire into that phase of the business?

A. No, not except as general information. That is in Mr. Finley's bailiwick.

(Testimony of Paul S. Armstrong.)

Q. I take it that you also don't know anything about any of the contracts that Exchange Orange may have entered into with any processors in 1951?

A. No. I am not familiar with the contracts. They were never submitted to me. They were not under my jurisdiction.

Q. To your knowledge or recollection, were any such contracts ever discussed at any of the meetings of the 16 member executive committee?

A. No. I do not recollect any such discussion, because [272] contracts relating to oranges would be discussed with their own executive committee or board of directors, and with lemons, also, with their respective boards and committees, and not at the joint executive committee.

Q. Was any report ever made to the 16-member committee by the management committee or by the manager of Exchange Orange as to the return that Exchange Orange received from any processing contract entered into with independent processors?

A. Not that I can recollect.

Q. Would that be a matter of any concern to the 16-member executive committee of Exchange Orange and Exchange Lemon?

A. If you use the word concern from the standpoint of jurisdiction, I would say no.

Q. Well, aren't you interested as the general manager of Sunkist in what some of these contracts return, whether they are profitable or what they are?

(Testimony of Paul S. Armstrong.)

A. The management of Exchange Orange Products Company is not under my jurisdiction. It is a separate management reporting to the board of directors. I am interested, of course, but I do not have jurisdiction.

Q. Well, then, none of the processing contracts, if any, that were entered into by Exchange Orange with independent processors would ever be presented to the 16-member executive [273] committee for consideration or for any other reason?

A. No. That committee was concerned with sales and not production.

Q. Were you concerned with the sales of product oranges sold by Exchange Orange and the price that you, Exchange Orange, were getting for such sale?

A. Exchange Orange did not make such sales. Such sales were made by Sunkist growers, as I explained this morning, and those I was familiar with in that respect, but they were concerned, Mr. Dixon, with the sale of finished products, I should have said, rather than the raw material.

Q. If Exchange Orange, for example, ever sold any oranges, that would be outside of their jurisdiction, I take it, is that correct?

A. Unless they arranged with somebody to handle some for their account or something like that, because during 1951 all sales of oranges to other processors were made by Sunkist growers through Mr. Kelley's office.

Q. In any event, these contracts, if any, that

(Testimony of Paul S. Armstrong.)

were made with processors, independent processors, by Exchange Orange would not be matters to be submitted or discussed with the 16-member executive committee? A. That is correct.

Q. Were they discussed with anyone else in Sunkist by anyone from Exchange Orange? [274]

A. They might be as a matter of consultation, but not officially.

Q. Do you know of any occasion when any of them ever were discussed, officially or unofficially?

A. Not with me. I presume they were submitted to Exchange counsel.

Q. I take it your answer is as far as you are concerned, no?

A. They were not as far as I am concerned. I can't speak for anyone else with certainty.

Q. I presume you are at least familiar with the name of Winckler & Smith Corporation?

A. Yes.

Q. Do you know whether it processed any citrus juice products at any time while it was in operation? A. Oh, yes. I understand they did.

Q. Where did you get that information from, Mr. Armstrong?

A. Well, we knew in a general way who the companies were who were in the processing field throughout the state. There were probably a score of them, different sizes, and some came and some went, but Winckler & Smith was one of the processing companies, and I knew that to be so, located in Anaheim.

(Testimony of Paul S. Armstrong.)

Q. And I presume TreeSweet was another [275] one? A. Yes.

Q. Silzle?

A. Silzle. General Foods Corporation, MCP, Hyland Stanford, Mission—there were a great many of them.

Q. Some of these companies you have mentioned do not make single strength juice, do they?

A. That is true. Some do not.

Q. The ones that make single strength juices are —will you tell the jury which ones they are?

A. I wouldn't want to be responsible for the completeness of the list of that sort.

Q. I understand.

A. Because that is not in my field.

Q. To the best of your recollection.

A. I have an impression TreeSweet was the principle one, Case & Swayne, Winckler & Smith—this is single juice only?

Q. Single juice only.

A. That's all that I recall offhand.

Q. By the way, do you know whether there are any other organizations of orange or lemon or grapefruit growers in California that might come within the same classification of organization as Sunkist? A. Yes.

Q. Can you tell the jury what the names of those [276] companies are?

A. There is another co-operative in the service of the growers known as the Mutual Orange Dis-

(Testimony of Paul S. Armstrong.)

tributors, which was organized in 1905. I remember that date because they just published their 50th anniversary brochure. They now have changed their name to Pure Gold, as we have changed ours from California Fruit Growers Exchange to Sunkist. They have adopted their trade name in their corporate name.

American National Foods is now a co-operative. It used to be a private corporation for profit under the name of American Fruit Growers.

Q. When did they organize as a so-called co-op?

A. I think subsequent to 1951. Maybe two years ago, something like that.

Q. To the best of your knowledge——

A. And then there are some small individual local associations who do their own marketing and are co-operative. Such a one is Gold Banner Association at Redlands and there are others.

Q. Their operations are purely local in nature in the sense that they dispose of their products in the immediate area?

A. No, no, no. They do a national marketing.

Q. Do they do processing, also, to your knowledge?

A. Well, Mutual Orange Distributors in 1951 had a [277] procesing plant of their own at Anaheim similar, though not as large as our plant at Ontario. American Fruit Growers had arrangements with other processors to handle fruit of that character from their organization.

(Testimony of Paul S. Armstrong.)

Q. To your knowledge, Mr. Armstrong, do you know whether any individual growers as such sell their products as individuals to either buyers of fresh fruit or to independent processors?

A. An individual grower, were they large enough, would be able to sell fruit of their own production to the fresh fruit market. I am not aware of any who are large enough to have their own processing plant. The average grower in citrus has only 16 acres, so he is rather ineffectual in operating by himself.

Q. Is it a fair statement, then, that most of the oranges, shall we say, that are sold either as fresh fruit or as products fruit are handled by or through organizations comparable to the Sunkist organization?

A. Yes, that is a fair statement, although, of course, some of those organizations would not be co-operative in character, but practically all fruit would have to be delivered to a packing house to be prepared for market, because it could not be shipped from the grove direct.

Q. I think you have mentioned one, the MOD, or Pure Gold, and another one, American National Foods, that was in [278] the category of the Sunkist organization, although the latter one wasn't in that category in 1951? A. Yes.

Q. Do you recall any others?

A. The Gold Banner Association, which is a local co-operative at Redlands that engages in national marketing.

(Testimony of Paul S. Armstrong.)

Q. Do you know anything about their product, the quantity of their product?

A. About a thousand cars a year, I would venture.

Q. In tons, approximately?

A. Well, there are 15 tons in a car. Most of their fruit would be sold on the fresh market and most of their fruit happens to be navels.

Q. And they aren't particularly good for processing purposes, are they, so far as single strength orange juice is concerned?

A. The navel orange has the peculiar property of turning bitter after canning for some reason that hasn't been fully explained, and for that reason it cannot be used for single strength juice canning except very late in the season, where that bitter principle tends to disappear. There is a theory that in seeded variety that bitter principle is lodged in the seed, whereas in the seedless variety, such as the navel, there is no place to lodge except in the tissues of the fruit, and when that is cut and extracted, you get an [279] infusion of the bitter principle in the juice.

As far as the juice is concerned, if you make it fresh at home, it is just as good juice as the Valencia juice.

Q. I think this morning we agreed that a ton of oranges, that is Valencia oranges, would produce about a hundred gallons of single strength juice, and that a soluble ton of oranges, 120 soluble content,

(Testimony of Paul S. Armstrong.)

would produce about that quantity in gallons.

The Court: I thought it was pounds.

Mr. Dixon: Pounds of soluble content, Judge, yes. It is 120 to a ton, as I understand it. Is that correct?

The Court: Your question was gallons.

Mr. Dixon: No. How many gallons a ton of fruit, that is Valencia oranges, with 120 pounds soluble content, if that is the correct term, would produce, and it is my understanding it was 100 gallons at the 120 pound soluble content, if that is the correct way of putting it.

Q. Is that correct, Mr. Armstrong?

A. As far as I recollect, that is approximately correct, although there again that is not in my field.

Q. I understand.

A. But it is true that there is about 100 gallons of juice yield from a tone of Valencia oranges that are mature. Now, as to the soluble solid content of that ton and in that 100 gallons of juice, that will vary with the maturity of [280] the fruit, the district it comes from, and many other factors. It does not affect the gallonage at all. It is like having coffee that is weak and coffee that is strong. It is no more gallons. It is the flavor.

Q. As I understood your answer this morning, the average would be about 120 pounds per ton?

A. That is correct, in the average year.

Q. For the purpose of my question, Mr. Armstrong, let's assume that a ton of Valencia oranges

(Testimony of Paul S. Armstrong.)

with 120 pounds soluble content would cost $40 and would produce 100 gallons of single strength orange juice. That would, I believe, be about 40 cents a gallon, would it not, for the cost of the juice as such without any manufacturing costs?

Mr. Williams: We will stipulate that.

Mr. Dixon: All right.

The Witness: I am glad you stipulated it. I was trying to figure it out. [281]

* * *

Q. (By Mr. Dixon): That would be about 40 cents a gallon, it has been so stipulated. Now, do you know how many gallons of single strength orange juice are in a case of 12 46-ounce cans of Valencia orange juice?

A. I do not recall. That is a technical term I do not recall.

Mr. Dixon: May it be stipulated it is four gallons point three plus?

Mr. Williams: It is 4.3125 gallons per case.

The Court: What size cans?

Mr. Dixon: Twelve 46's.

Mr. Williams: Twelve cans of 46 ounces. [282]

* * *

F. R. WILCOX

called as a witness by and on behalf of the plaintiff, under Rule 43(b) of the Federal Rules of Civil Procedure, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: F. R. Wilcox, W-i-l-c-o-x.

Direct Examination

By Mr. Dixon:

Q. Where do you reside, Mr. Wilcox?

A. San Bernardino, 1395 Waverly Road.

Q. You are associated with Sunkist, are you?

A. Yes, sir.

Q. In what office or capacity do you serve that company at the present time?

A. I am assistant general manager and treasurer.

Q. How long have you been assistant manager and treasurer? A. Approximately 16 years.

Q. Now, Mr. Wilcox, are you familiar with the 16-member executive committee of Exchange Orange and Exchange Lemon? [286]

A. Yes, generally.

Q. As treasurer, as assistant general manager of Sunkist, have you attended or do you have occasion to attend the meetings of this committee?

A. Generally when I am in town, yes, sir.

Q. Directing your attention to the year 1951—I realize that is a long time back. A. Yes.

Q. During that year do you recall whether there was any discussion at any of the meetings of the

(Testimony of F. R. Wilcox.)

committee that you attended concerning any proposed contracts entered into by Exchange Orange and any independent processor?

A. I do not recall whether there were or not.

Q. Do you recall whether the amount of Valencia oranges that would be available for processing into citrus juice products was ever discussed at any of the meetings you attended that year?

A. Yes, I think that was discussed generally.

Q. And what would be the occasion for that matter to be discused?

A. It is necessary at the beginning of each season for Sunkist to make estimates, just as it is the other organizations, of the probable supplies of fruits by the varieties that they have. That is done for various reasons. For the purposes of determining cost, the general advertising and sales programs which will be carried on. [287]

Q. Directing your attention again to the year 1951, can you state of your knowledge, or based upon anything that was discussed at meetings of the 16-member executive committee, as to whether the amount of Valencia oranges which were available for processing purposes was greater in 1951 than in the year 1950?

A. I do not recall the specific occasions when it was discussed. It was generally felt, however, that the quantity was greater that year than in 1950.

Q. Are you familiar in any way with the operations of Exchange Orange?

(Testimony of F. R. Wilcox.)

A. I have a general knowledge of some of their general operations, yes, sir.

Q. Are you familiar with any of the operations of Exchange Lemon?

A. In a general way, yes, sir.

Q. Can you state to this jury whether or not Exchange Orange ever processes any lemons for Exchange Lemon at the Exchange Orange plant?

A. Yes, they have.

Q. Does Exchange Lemon process oranges for Exchange Orange at various times of the year during the processing season, at the Exchange Lemon plant?

A. I think they have processed some, yes, sir, but I could not recall the specific instances in the case of the [288] Exchange Lemon Company. [289]

* * *

Q. Are you familiar with or acquainted with the TreeSweet Products Company in any way?

A. I know of the TreeSweet Products Company. generally, yes, sir.

Q. Can you tell the jury what products they produce, if you know?

A. As far as I know their main product is single strength juices, citrus juices, both orange, lemon, and I think some grapefruit juice.

Q. Are you familiar with the name of the Silzle Company, so-called? A. Yes, sir.

Q. And what is their business, if you know?

A. They are in the citrus processing business.

(Testimony of F. R. Wilcox.)

Their activities, as far as I know, are confined to California, and they make citrus juices from the various varieties of citrus fruits. It is possible they are in other lines. I am not sure of that. [290]

Q. Do you have any knowledge, Mr. Wilcox, of any processing arrangements of any kind that were entered into, if they were, in 1951 between Exchange Orange and either TreeSweet or Silzle?

A. Yes. I knew of the fact that there were agreements with those organizations.

Q. And from whom did you secure that information?

A. From discussions with Mr. Finley primarily.

Q. Approximately when did you first learn about any such arrangements in 1951?

A. It is a long time ago.

Q. Approximately. I am not trying to pin you down to any particular time. A. I know that.

Q. Just was it the summer or the spring or the fall?

A. Well, I would say sometime in the spring or early summer months.

Q. Can you state to the jury what Mr. Finley said, if anything, to you about TreeSweet or Silzle?

A. No. I am afraid I can't recall the conversations.

Q. What was it about? Can you tell the jury what it was about?

A. General discussions as to the supply of fruit that would be available for processing during that season, both here and in Florida, the general supplies of products [291] that would be available in both of the areas during the season.

Q. And in that course of that discussion did it develop that Sunkist or Exchange Orange was going to have or did have more Valencias than they could process into juice?

A. For processing during the 1951 season?

Q. Yes. A. Yes.

Q. Did Mr. Finley explain to you or discuss with you any of the details of this arrangement, if there was one, between Silzle and Exchange Orange and between TreeSweet and Exchange Orange——

A. No. Excuse me.

Q. ——concerning processing of oranges?

A. No. I would say the details were not discussed. We did discuss the general matters of the contracts, however.

Q. Can you tell the jury what that discussion was, if you recall, I mean now about the details of the contract or the arrangements that Mr. Finley discussed with you?

A. No. As I say, there was little discussion, if any, about the details of the contracts. The discussions I had generally related to the overall supplies of fruit, which logically comes under the statistical department, which is a part of the treasurer's office, the supplies generally of fruit both in California and in Arizona and the [292] Florida districts.

Q. It is a fact, is it not, that in 1951 Sunkist or Exchange Orange had more Valencias than they could process through their own facilities or through the facilities of Exchange Lemon?

A. Yes, that was the situation. Of course, you have to estimate these supplies, as I am sure you are familiar with, because of two factors. First, the individual packing house or shipper has the determination as to which part of his fruit might go into the fresh market and which might go in the products market, and that is a variable depending upon the price factors and other determinations which he makes.

Secondly, of course, there can be changes in the crop during the season because of the growth of the crop or the loss of the crop that might occur through various circumstances of nature.

So these are estimates at the beginning of the season. But it was generally felt that there would be more fruit than Exchange Orange could process in 1951.

Q. Were you ever contacted by any independent processors in 1951 for the purpose of securing or entering into, either through Sunkist or Exchange Orange, any processing or other arrangements under which oranges might be secured or made available to an independent processor? [293]

A. Yes. I was contacted by a number of processors with whom we had done business and others on general matters. We discussed supplies of fruit, such things as that. Not as to the contracts.

Q. In other words, these other discussions that you had did not relate to any request for contracts or the making available to those with whom you were talking of any oranges for processing?

A. Making available of oranges in some form, but it is my recollection not as to contracts.

Q. How are oranges made available to independent processors other than by buying them?

A. As Mr. Armstrong has indicated, by the actual purchase of oranges through the Sunkist organization, and then through contracts made by the Exchange Orange Company.

Q. By that you mean that the idenpendent processor may enter into a processing arrangement with Exchange Orange whereby it actually processes for Exchange Orange citrus juices to be sold by Sunkist as the marketing agent for Exchange Orange, is that correct?

Do you understand my question? It is quite a long one. I will be fair about it.

A. Well, let me answer it this way. If Exchange Orange entered into a contract where they had products processed for them, then those products would be sold by Sunkist [294] through the products department, yes, sir.

Q. So that is, then, one way in which the independent processor might have oranges made available to him, is that correct?

A. Yes, sir. [295]

Q. Of course, they could also buy the oranges from Sunkist, or anyone else that had them for sale, and process them themselves, could they?

A. Yes.

(Testimony of F. R. Wilcox.)

Q. I presume you have at least heard of the name Winckler & Smith, plaintiff in this action?

A. Yes, sir.

Q. Were you contacted by anyone from that organization in 1951 concerning the making available to that organization of oranges for processing into citrus juices, to your recollection?

A. Yes, Mr. Winckler contacted me, I don't recall whether just with respect to the purchase of fruit, but generally discussed the processing situation, yes, sir.

Q. Can you tell the jury what was said in substance? I don't expect you to remember the exact words.

A. No. I would say that we had general discussions, as you have frequently——

Q. May I interrupt for a moment? Can you fix the time about when those discussions took place?

A. No, I could not, sir.

Q. Go ahead. I am sorry to have interrupted.

A. That is all right.

I would say we had general discussions about the overall supply of fruit, the prospective markets, prospective [296] supplies that were being manufactured and being held over in the Florida market during that particular season, as we did on some other occasions.

Q. Did you ever have any conversation with anyone from Winckler & Smith concerning the making of oranges available to that company under

(Testimony of F. R. Wilcox.)

any kind of arrangement, either purchasing, or processing for the account of Sunkist?

A. My only contacts with anyone from that concern were with Mr. Winckler, and it is along the lines that I have indicated, sir.

Q. I take it, Mr. Wilcox, that you are not familiar with the manner or method whereby the selling price of the product oranges are determined by Sunkist? Or are you?

A. No, I am not, in detail. I know generally the mechanism.

Q. It has been testified by Mr. Armstrong, I am not sure whether you were here when he so testified—— A. Yes, sir, I was.

Q. ——that Mr. Kelly, I believe, had, shall we say, the only final say on the matter?

A. That is correct, yes, sir.

Q. Have you ever had any occasion to discuss the price at which Valencia oranges would be sold to independent processors, or anyone else——

A. Yes. [297]

Q. ——in the year 1951? A. Yes.

Q. Can you state to the jury what the circumstances were under which such discussion took place?

A. Generally the discussion took place in connection with the overall supply situation, the prospective outlook for citrus juices, citrus products, as it relates to the Florida inventories, the products, the general business conditions of the country, and more particularly the statistical position of our own crop.

Q. In any of these discussions that you had with Mr. Kelly, was the actual price at which the oranges, that is the Valencia oranges, were to be sold in 1951, discussed, as distinguished from this general discusion that you have just referred to that you had with Mr. Kelly about prices generally?

A. Yes, sir, I would say that on occasions we discussed specific prices, yes, sir.

Q. Do you know how Mr. Kelly arrived at—strike that.

Did Mr. Kelly ever discuss the price, the actual selling price ultimately determined to be the selling price at which Sunkist offered Valencia oranges to anyone in 1951? A. Yes.

Q. When did those discussions take place?

A. I would have no recollection as to the exact dates, but I would say on various occasions during the spring and [298] summer period as crop conditions developed and supplies became available and more definitely known from time to time. And as the fresh market changed in its price structure.

Q. I am sorry if I have misled you. I am referring only to product oranges, Mr. Wilcox; not fresh fruit oranges.

A. My point was that the fresh market, you see, has a direct bearing on the product fruit available. If the fresh price tends to improve, then oranges that would not normally go into the fresh market might go into the fresh market, and that automatically lessens the supply of fruit going into products. If the converse situation is true, then the other

(Testimony of F. R. Wilcox.)

situation is true, because each individual shipper has the right of determination as to what fruit he will put into products.

Those kind of things change quite constantly during the course of a marketing season with a perishable products such as this.

The Court: Have you identified Mr. Kelly?

Who is Mr. Kelly?

The Witness: Mr. Kelly in 1951, sir, was in charge of the sales office in Los Angeles and had supervision of the sales of fruit, all fresh fruit, and that part of the orange and grapefruit crop which was not handled by the Exchange Orange Company. Mr. Kelly is now retired, your Honor.

The Court: In charge of sales of fresh fruit, but not [299] products oranges?

The Witness: Oranges which were sold to processors for processing, other than the EOP Company, yes, sir.

Q. (By Mr. Dixon): Now, you are familiar with the fact, I presume, Mr. Wilcox, that a price list is circulated to potential buyers of product oranges by Sunkist, are you not?

A. On occasions price lists were circulated, yes.

Q. It is a fact, is it not, that Sunkist have a price list at which product oranges were offered for sale and sold in 1951?

A. That was true at least a part of the time. Whether it was true all the time, or not, I cannot testify. [300]

(Testimony of F. R. Wilcox.)

Q. Well, if there were any changes made in the price lists, would you know about them?

A. Not necessarily, no, sir.

Q. Well, then, as far as you know, the price lists that were circulated by Sunkist in 1951 to potential purchasers of Valencia oranges indicated the actual selling price by Sunkist for those oranges during that year, is that correct?

A. I would say whenever there was a price list that was in effect and had not been substituted, either by word of mouth or another price list, that that was the price of the fruit, yes, sir.

Q. In other words, if there was a price list that Sunkist had just circulated or was available to purchasers of Valencia oranges during 1951, that would be the price, would it not, at which oranges would in fact be sold? A. Yes.

Mr. Williams: Your Honor, I object to this question on the ground no foundation has been laid to show the witness' knowledge.

Mr. Dixon: He has already answered the question.

The Court: Objection overruled. The question is answered. If it is repeated as a motion to strike, it is denied.

Q. (By Mr. Dixon): Now, directing your attention to Mr. Winckler of the Winckler & Smith Company in 1951, do you recall any conversation with him at that time concerning [301] the price at which oranges would be sold or made available to Winckler & Smith?

(Testimony of F. R. Wilcox.)

A. No. I had conversations with him, but, as I recall, nothing on price. I do not recall one way or the other.

Q. Mr. Wilcox, I believe you are also treasurer of Sunkist, are you? A. Yes, sir.

Q. And you were in 1951? A. Yes, sir.

Q. The figure of $7,947,218.13 is in the record in the case as being the pool return for Valencia and miscellaneous oranges to Sunkist by Exchange Orange in 1951. Are you familiar at all with that amount or figure?

A. No, I can't remember for each year that specific amount, but it sounds somewhere in the neighborhood of being correct, yes, sir.

Q. Do you know or can you tell this jury as to whether or not that figure represented the pool return to Sunkist after deducting all operation costs of Exchange Orange?

A. I would have to look at the record for that. There is such a figure, however, available. We would be glad to furnish it. May I say this? That a figure is made to Sunkist under the pool after the costs of selling and manufacturing. That does not, however, take into consideration the other costs of the packing house, that is the local [302] growers associations, and the picking costs, all of which are deducted before the farmers get their returns.

Q. Well, I appreciate that fact. What I am trying to get at, Mr. Wilcox, is, does this amount represent the net return to Sunkist by Exchange Orange for the 294,133.825 tons of Valencia Oranges that

(Testimony of F. R. Wilcox.)

were handled by Exchange Orange for Sunkist during the year 1951?

A. I can't answer whether that is the right figure or not.

Q. Well, let's assume that it is for the moment. Do you know how that figure is determined, Mr. Wilcox, and what items of manufacturing cost or depreciation of plant, if any, are taken into consideration?

The Court: What are you trying to find out? Whether this is a gross or net figure?

Mr. Dixon: Correct.

The Court: That Orange reports to Sunkist?

Mr. Dixon: Correct.

The Court: Can you tell us that?

The Witness: I cannot tell you what costs are taken out. If this amount is as here, it is the amount, sir, that is paid to Sunkist by Exchange Orange for purposes of distribution to the packing houses, less certain costs of handling and marketing and financing that must be deducted from this figure. [303]

The Court: Well, now, wait. Let's forget about the deductions after it gets into Sunkist's hands. Is this a bookkeeping transaction, or is this money actually transfered from Orange to Sunkist?

The Witness: No. Assuming this figure to be correct, sir, and I haven't checked it, if I may do that, this amount is actually paid to Sukist for distribution to the local associations.

The Court: Let's stop right there, please, now.

(Testimony of F. R. Wilcox.)

My first question is, is this money transferred from Orange to Sunkist, or is it a bookkeeping entry?

The Witness: No.

The Court: I understand they actually transferred the money. I am not inquiring what Sunkist does about it. I understand before Sunkist distributes it there are other expenses of packing house that must come out of it before the grower gets his share.

The Witness: That is correct.

The Court: Let's still look at the thing from Orange to Sunkist. Do you know whether this figure that has been reported here in Exhibit 4 is a gross or a net figure? This must be a net figure, then, that Orange transfers to Sunkist after Orange has taken out its expenses.

The Witness: That is correct.

Q. (By Mr. Dixon): In making that return, Mr. Wilcox, [304] do you know whether the deductions were made for depreciation of plant, machinery and equipment as an operating cost for processing these 294,000 tons?

A. No, I am not familiar with that.

Q. You don't know whether that was done or not? A. No, sir. [305]

* * *

SAM H. KELLY

called as a witness on behalf of the plaintiff under Rule 43(b) of the Federal Rules of Civil Procedure, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Sam H. Kelly, K-e-l-l-y.

Direct Examination

By Mr. Dixon: [312]

* * *

Q. Did you have charge of the sales of products fruit in this area, that is the Los Angeles area?

A. Yes, sir.

Q. During the period that you have mentioned, 1944, up until the time you retired in 1953?

A. That is correct.

Q. So that the sales of any product Valencia oranges that were made by Sunkist during that period of time would have been under your supervision in the area of Los Angeles that you have referred to? A. That is correct.

Q. Did Sunkist put out any price list to its customers for purchases of Valencia product oranges during the years that you were supervising or in charge of the sales of product oranges in this area?

A. For a period, and I can't remember the starting and stopping dates; we did for a while but I don't remember the dates.

Q. Maybe I can shorten it. Directing your attention to the years 1950 and 1951, did Sunkist put out a price list to the trade, so to speak, on products oranges during those [316] years?

A. I am not sure whether that was the case in those years or not, Mr. Dixon. Most of it was done by telephone, and I don't remember in those particular years whether we mailed a price list or whether it was a simple so much a tone. I am not sure as to that for those years. [317]

* * *

Mr. Dixon: Exhibit 5 offered in evidence.

Mr. Hurd: No objection.

The Court: Exhibit 5 received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 5, was received in evidence.)

Q. (By Mr. Dixon): Mr. Kelly, I will hand you what has been marked Plaintiff's Exhibit 5 and ask you to state, if you can, what that is?

A. It is very evidently a price list mailed out by my office over my name.

Q. Can you tell what year that price list bears or what date it bears? A. April 12, 1951.

Q. Will you refer please to the second sheet of Plaintiff's Exhibit 5, and what date does that bear?

A. April 4, 1951.

Q. Now, does that refresh your recollection as to what that exhibit is?

A. This is a price list worked out on solids basis.

The Court: Keep your voice up, please, so that counsel [318] and the jury can hear you.

The Witness: This is a price list on products Valencias, one dated April 4, 1951.

(Testimony of Sam H. Kelly.)

Mr. Dixon: Can you hear back there?

Juror Daiker: Yes.

Q. (By Mr. Dixon): Mr. Kelly, if you can, speak up just a little louder so that the juror at the far end of the jury box can hear your testimony.

A. Yes.

Q. I am sure it will be appreciated.

Were any other price lists put out by Sunkist for Valencia product oranges during the year 1951, to your knowledge, Mr. Kelly, other than Plaintiff's Exhibit 5? A. I think we only put out one.

Q. Plaintiff's Exhibit 5, then, is the price list under which Valencia oranges were offered to the processors or other buyers of by-product Valencia oranges during that 1951 season?

A. Yes, that is correct.

Q. I take it from your testimony and what I have heard from the other witnesses, that you were in charge of the sales of all the product oranges, that is Valencia oranges, in particular, in the Los Angeles area; that is true, isn't it?

A. That is correct.

Q. Did you determine the price list, I mean the prices [319] set forth in Plaintiff's Exhibit 5, before they were put into printed form, Plaintiff's Exhibit 5?

A. Yes, sir, that was my responsibility.

Q. I am sorry?

A. That was my responsibility. [320]

Q. In other words, that was your job, was it?

A. Yes, one of them.

(Testimony of Sam H. Kelly.)

Q. I know you had many of them, but this was one of them that required some time. Can you state to the jury how you arrived at the prices set forth in Plaintiff's Exhibit 5, or how those prices were determined by you? A. Yes, sir.

Q. Refer, if you will, Mr. Kelly, to Plaintiff's Exhibit 5. A. Yes, sir.

Q. I direct your attention to an item under the heading of pounds of soluble solids per ton, the figure 120. Can you state to the jury what that 120 figure means?

A. Yes. That would then translate into $40 a ton for that many soluble solids.

Q. And then under the other column, price per ton f.o.b. packing house, appears on the same line as you have indicated the figure 40, with a dollar sign in front of it. A. That is correct, sir.

Q. That indicates, does it, that the price for a ton of Valencia oranges with a soluble solids content of 120 would be $40 f.o.b. the packing house?

A. That is correct, sir.

Q. And these other figures and prices respectively represent the price per ton for oranges with various soluble [321] solids content contained in those columns, do they? A. That is correct.

Q. And Plaintiff's Exhibit 5 was the price list of Sunkist for those products, that is, Valencia oranges, during the season for 1951?

A. That is correct.

Q. Getting back to the manner of determining

(Testimony of Sam H. Kelly.)

this price and still referring to the $40 that I mentioned in the price list, can you tell the jury how you arrived at the price of $40?

A. Yes, sir. There were many factors to be considered in arriving at a price, and a certain degree or weight given to each factor, and then, also, I asked the opinion of some of the processors, some customers, as to their ideas of what prices should be.

Q. What customers do you usually contact to get that information?

A. Well, there were three major uses made of Valencia juice. One was so-called hot concentrate, which is a beverage base for an orange drink. Then there are single strength canners and frozen concentrate processors. So I would ask some of each of those different classes of processors.

In the case of hot concentrate, I would ask the customers we then had, which were Hyland Stanford, Mission Dry, and Bireley's, as well as Mr. Finley at the Exchange [322] Orange.

On single strength, I would ask the then customers, and as I remember them, they were Case & Swayne and Silzle and Mr. Finley. I think those are the only customers I had. [323]

Q. Did you ever ask anyone at TreeSweet?

A. And TreeSweet. I am sorry I overlooked that.

Q. Did you ever ask anyone at Winckler & Smith?

A. No. In 1951 I didn't consider Winckler & Smith a customer.

Q. Well, they were a potential customer, were

(Testimony of Sam H. Kelly.)

they not, of Valencia oranges, and one of the four processors, that is, the large processors so-called, of single strength Valencia juice in this area?

A. They were potential customers inasmuch as they were still in business, but that didn't necessarily mean that they would come to me for supplies, or look to me for a source of supply.

Q. I take it from your answer that the only ones, then, that you contacted that were primarily processors of single strength Valencia juice were TreeSweet, Silzle, and Case-Swayne?

A. That is correct.

Q. That you didn't contact anyone at Winckler & Smith before you made this determination——

A. No, sir.

Q. ——in 1951? A. No, I did not.

Q. Coming back to this $40 price and 120 soluble solids that we have referred to, if anyone called up and asked you what product Valencias could be purchased for, is it customary [324] in the trade to quote the price on the basis of the 120 soluble solids per ton price?

A. Yes, that is customarily done. You take that price, that is, that number of soluble solids, as being as near the average, and that would be the base price.

Q. Now, this price list, Plaintiff's Exhibit 5, do you know whether, after you had determined those prices set forth in Plaintiff's Exhibit 5, a copy of it was sent to Winckler & Smith?

A. No, sir, I really don't know.

(Testimony of Sam H. Kelly.)

Q. Well, in the ordinary course of operations of your department, and as a potential customer and a processor, and therefore a large user of Valencia product oranges, would one be sent to it?

A. It probably was. I don't know that it was or was not.

Q. Mr. Kelly, are you familiar with the 16-member executive committee of Sunkist and Exchange Lemon Products? A. No, sir.

Q. I take it from your answer that you never attended any of the meetings of that committee?

A. No, sir.

Q. And you were never called upon by any member of that committee to give any of your views concerning the price situation as it might affect processors, independent processors [325] in this market? A. No, sir.

Q. Are you a member of any other, or any committee of Sunkist? I don't mean are you, but were you? A. No, sir, I never was.

Q. Were you ever a member of any committee of Exchange Orange—— A. No, sir.

Q. ——the processing company for Sunkist?

A. No, sir.

Q. Did you ever attend any of the meetings of the executive committee of Exchange Orange?

A. I recollect one, but that was some years ago. I would guess seven, eight years ago.

Q. I assume from your answer it wasn't in 1950 or '51, in any event? A. No.

(Testimony of Sam H. Kelly.)

Q. Did you ever attend any meeting of the board of directors of Exchange Orange?

A. I think I did attend in that I sat down and listened to some of the proceedings once or twice over the years, but I don't remember the [326] years.

Q. Well, there weren't, then, I take it, probably in either 1950 or 1951?

A. Well, the only reason I would attend is if I happened to be in the building at 707 West Fifth Street and a meeting was there, why, someone might say they were having a meeting.

Q. I am sorry.

A. And then I would go in and listen for awhile.

Q. Did anyone in Exchange Orange and the executive committee or board of directors ever call you in and ask you your opinion concerning the price situation as it applied to Valencia product oranges in 1951?

A. I don't remember that any did.

Q. Did you in 1951 discuss at any time to your best recollection the price of Valencia oranges with anyone at Exchange Orange as that price might affect independent processors of single strength orange Valencia juice?

A. I probably did with Mr. Finley, but I am not sure.

Q. You say you probably did?

A. Yes. I don't remember. I talked to him frequently, so I don't remember the specific point.

Q. I am directing my attention, Mr. Kelly, solely

(Testimony of Sam H. Kelly.)

to any discussions that you might have had with Mr. Finley of Exchange Orange or anyone else at Exchange Orange concerning the price of Valencia product oranges in 1951. [327]

A. Oh, yes. I talked to Mr. Finley frequently.

Q. Can you state to the jury what the occasion would be for Mr. Finley to consult you or you to consult Mr. Finley with reference to the price of Valencia oranges sold to independent processors in 1951?

A. Well, I would ask him his opinion as to whether or not a certain price would give the processor a chance to operate at a profit.

Q. And did you have a conversation with Mr. Finley about the independent processors being able to operate at a profit under the price schedule that is Plaintiff's Exhibit 5 in 1951?

A. Oh, I am sure that I did.

Q. Can you tell the jury what that discussion was in substance? A. Well——

Q. First, may I interrupt to ask you about when the discussion took place?

A. I can't give you any dates, Mr. Dixon. I wouldn't have the slightest idea as to the dates.

Q. I can appreciate that that may be quite a few years back, but can you tell the jury whether it was, shall we say, after Plaintiff's Exhibit 5, the price list was fixed or before?

A. It would be prior to my having issued a price that [328] I would ask his opinion.

(Testimony of Sam H. Kelly.)

Q. Then these conversations were before Plaintiff's Exhibit 5 was made up by you and circulated.

A. That is correct.

Q. And after it was done, were there any discussions, to your best recollection?

A. I don't remember any specific ones.

Q. I take it, Mr. Kelly, you are not particularly familiar with the amount of product oranges, Valencia oranges, that were processed by Exchange Orange into single strength juice in 1951, are you?

A. No, I don't know how much they put up that year, but my recollection is that it was small. I may be wrong.

Q. Do you remember or can you tell this jury whether a greater amount of Valencia oranges were available for processing into citrus juice products in 1951 than in the year, say, 1950?

A. I think there was more fruit in 1951 than there was in 1950.

Q. In other words——

A. I don't remember the tonnage, Mr. Dixon.

Q. I don't expect you to do that.

A. But my recollection is that there was more, and to what degree I don't even remember that, but I am quite sure there was more in that one [329] year.

Q. Now, directing your attention to TreeSweet—you know what I mean by the name, do you, Mr. Kelly? A. Yes, sir.

Q. Do you recall whether your department, that

(Testimony of Sam H. Kelly.)

is Sunkist, sold any oranges, Valencia oranges, to TreeSweet in 1951?

A. No, sir, I didn't sell them any.

Q. In other words, no Valencia oranges were sold by your department to TreeSweet in 1951?

A. No. I am sure I didn't sell them.

Q. They were one of the big customers, were they not, of Sunkist by-product Valencia oranges?

A. They would be.

Q. And they were one of the companies that you consulted with with reference to this $40 price that we discussed a few minutes ago, were they not?

A. I probably talked to them.

Q. But you are certain that no Valencia product oranges were sold to TreeSweet by Sunkist in 1951.

A. I don't remember, no.

Q. Now, directing your attention to Silzle, you know what company I am referring to, do you, Mr. Kelly? A. Yes, sir.

Q. Do you know whether any product Valencia oranges were sold by Sunkist to Silzle in [330] 1951? A. Yes, I sold them some.

Q. Do you remember the approximate amounts?

A. No. I think it was a small amount, Mr. Dixon.

Q. And were those purchases made, to the best of your recollection, early in the canning season?

A. Yes.

Q. And do you recall whether after the canning season really got under way in volume and the Valencia crop was in, whether you made any further sales of Valencia product oranges to Silzle?

(Testimony of Sam H. Kelly.)

A. I don't think we made any.

Q. Well, Silzle was also one of these companies to which you went for help in determining this $40 price, was it? A. That is correct. [331]

Q. Do you know of your own knowledge whether they did process or produce and sell any single strength Valencia orange juice in 1951?

A. Oh, yes, yes.

Q. Do you know where they got the oranges to process?

A. Yes, sir. I know where they got some of them.

Q. Can you tell us?

A. Through Mr. Finley.

Q. Of Exchange Orange Products?

A. Correct.

Q. Do you know whether TreeSweet processed any single strength orange juice and sold it in 1951?

A. Yes, they did.

Q. And do you know where they got the oranges?

A. From the same source.

* * *

Q. (By Mr. Dixon): Mr. Kelly, would you tell the jury, please, what the procedure was that was followed by your division or office when a purchase of oranges was made by anyone, whether it was a processor or someone who wanted to buy it to squeeze into orange juice to sell, just the general procedure. [332]

A. The routine of how an order was handled?

Q. Yes.

(Testimony of Sam H. Kelly.)

A. Well, the processors usually did not purchase a single lot of fruit. they would buy or indicate the latter part of one week or the first part of the succeeding week how many tons they wanted for the week, and that divided into so many tons per day. So when the order would come in to the man in my office who handled it, then he, in turn, would contact a group of men we had in the country, that is in producing areas, who would then tell him, the man in my office, at what packing house the fruit would be available. Then, in turn, either this man in the country would contact the customer's trucker who did the hauling, or my office in Los Angeles would contact the trucker and tell them where the fruit would be available and at what time of day.

Q. Can you tell the jury how that delivery or order would be billed, that is to say, would it be based upon the price list, Plaintiff's Exhibit No. 5 that we have talked about?

A. Well, a sample was taken by the customer as he ran the fruit, and then we had a truck that each day called on each processor to pick up these samples, representing about 25 pounds of fruit. which was hauled to Ontario. And there was a laboratory at Ontario who analyzed the fruit, and from that analysis then the billing was done at my office.

Q. In other words, if the analysis showed 120 soluble [333] solids per ton. then the customer would be billed at $40? A. Yes.

Q. F.o.b. the place of shipment?

A. That is correct.

(Testimony of Sam H. Kelly.)

Q. In other words, in addition to the $40 price the buyer would pay the trucking charge to the plant, or wherever the oranges were to be delivered, is that correct? A. Yes, sir, that is correct.

The Court: By the same token, if the sample showed 150 pounds of soluble material, then the customer was billed upon the price list?

The Witness: Yes.

The Court: Or if it showed a low count of solubles, then he paid a lower price?

The Witness: That is correct.

The Court: With the forty being sort of the base?

The Witness: Yes, sir.

Well, the reason for the base, your Honor, was that that was about the average, it was 120. A lot of it would be much under that, and some of it would be considerably higher. [334]

* * *

Q. (By Mr. Dixon): Now, directing your attention, Mr. Kelly, to what has been marked as Plaintiff's Exhibit 7, can you state to the jury what that is or what those three papers attached thereto are?

A. Well, this seems to list—this one seems to list a pick-up of——

Q. By "this" you mean the top one?

A. Yes.

Q. Dated June 15, 1951?

A. Yes. It has a load number and variety and

(Testimony of Sam H. Kelly.)

weight, and a weight certificate number, driver's name, and an OAC date and where it was picked up, and then the amount of soluble solids, and that is extended out into dollars and also gallons.

By the way, I never saw one of these forms. That is apparently one of mine, but I never saw one before.

Q. Directing your attention, Mr. Kelly, to the column in Plaintiff's Exhibit 7 for identification, a rate per ton, I notice that the solids is 123 in the preceding column, but [335] I find two figures. 1,268 gallons and $342.36. Can you explain that to the jury?

A. I don't know the reason for that.

Q. Directing your attention, also, to the second sheet of Plaintiff's Exhibit 7, dated June 14, we find the same thing, 2,136 gallons and $576.72. Can you explain the reason for the gallonage there?

A. I don't know whether that figure was placed in there at the same time this dollars extension was made or whether it was made afterwards.

Q. I see. A. I don't really know.

Q. And the same question with reference to the one dated June 12, 1951, in Plaintiff's Exhibit 7 for identification.

A. They all seem to be the same.

The Court: What does OAC mean? You have OAC date and OAC number.

The Witness: That was the Orange Administrative Committee number, the committee that dealt with setting prorates for the fresh fruit market.

(Testimony of Sam H. Kelly.)

Q. (By Mr. Dixon): Mr. Kelly, from your knowledge of the manner and method in which these deliveries made to buyers were handled, do you have any explanation for the gallonage figures appearing upon these three documents? [336]

A. Well, we billed to the Silzle Corporation a certain number of gallons—I mean it was reduced to gallons, on a price per gallon. I think the number of tons involved was about 72, as I remember it.

Q. You mean that you sell oranges, Valencia oranges, to the trade and bill them on a gallonage basis? A. No.

Mr. Hurd: If the Court please, I should perhaps——

Mr. Dixon: I am just asking——

The Court: Just a minute, Mr. Dixon.

Mr. Dixon: I am sorry.

Mr. Hurd: ——make an objection to this line of inquiry. If I understand what this particular exhibit is, it is a sort of flyspeck and not worth much time, but if I am correct, this is an incident when a small tonnage was apparently sold on a gallonage rather than an tonnage basis. I don't know what the purpose is of the inquiry regarding it. If it is for the purpose of showing any discrimination as against the plaintiff, I will object to it. It is beyond the scope of the plaintiff's complaint. If it is just a matter of general history, I don't care. It is a very minor incident, in any event. Depending on the purpose, I would make an objection.

The Court: The objection is overruled. Counsel's

(Testimony of Sam H. Kelly.)

statements in objection are not evidence. I don't know and you don't know whether this is a minor matter or not. That will [337] be a question for the jury to decide under the proper instructions of the Court. —

* * *

Q. (By Mr. Dixon): Mr. Kelly, I am going to hand you what has been marked Plaintiff's Exhibit 6 for identification, the same purporting to refer to the E. A. Silzle Corporation, Anaheim, California, and direct your attention in particular to some documents contained in said exhibit dated commencing June 27, 1951, and running through to August 4, 1951. I just ask you to look at that, Mr. Kelly.

A. Yes.

Q. I ask you to refer particularly to a document that is part of that exhibit dated June 27, 1951, and direct your attention to the column Solids, which contains a figure 123 and a column headed Rate Per Ton, which has the price $41.15 in it, apparently in lead pencil, which has apparently been crossed out, and then a $35 figure in blue pencil in the margin of the document dated June 27, 1951.

Can you explain to the jury why this figure $41.15 is—strike that.

Do you know what the figure $41.15, which has been taken out in pencil or marked out in pencil is?

A. Well, that is apparently the price for 123 pounds of soluble solids, if you refer to that schedule.

Q. Yes. A. I think that is about right.

Q. The jury still has it, I think, but I think that is correct. A. Yes. [339]

Q. Do you have any explanation for the 35, apparently dollar figure in blue pencil that is in the margin of that document, June 27, 1951?

A. I am sorry I can't, Mr. Dixon. I don't know whose figures or what it represents. This gallons, if this will be helpful to you, I think it was 72 tons that were sold to Silzle and billed on a gallons basis, for the reason that at that time they were quite concerned over competition on single strength juice from Case-Swayne, and this was a small amount billed at that gallons price.

Q. Was Case-Swayne also buying oranges from Sunkist at the same time, namely June 15, 1951?

A. No, sir.

Q. Had they bought any oranges from Sunkist, to your recollection, prior to that date in 1951?

A. In that particular year?

Q. In 1951, yes.

A. I don't think so. I don't remember any.

Q. Now, coming back to Plaintiff's Exhibit 6 again, I will ask you to look at the various documents numbered therein, commencing June 27th, '51, and running to August 6th, '51. I notice that the ones up to and including the one dated August 4, '51, contains the rate per ton which has been crossed out in many of the exhibits or documents, and in some instances different prices apparently placed on the margin of [340] the particular exhibits in which that appears. Do you have any explanation or the

(Testimony of Sam H. Kelly.)

reason for marking out in pencil the items the rate per ton in those exhibits?

A. Only this: That this is apparently the work of some clerk in the office, and these apparently were listed and extended as routine, and from that an invoice would be made, and if no invoice was made, then it was merely a record of where the fruit went.

Q. Do you mean that no invoice was sent for these deliveries where the price had been taken out or marked out by pencil?

A. I assume so. I don't know the routine in my office as to making out invoices, but I would assume that is true, that up to some point it was extended and recorded, and then was not invoiced. I would assume that to be true. As I said before, I have personally never seen these forms until recently.

Q. Well, if any changes were made on the prices or arrangements under which these oranges were delivered to Silzle, would you be advised of that, Mr. Kelly? A. Yes.

Q. And were you ever advised by anyone of any change of arrangements that would explain why these rate per ton figures have been taken off of these exhibits?

A. Yes, I am sure that was at the time Mr. Finley made [341] a contract with——

Q. At what time?

A. At the time of these, I assume, if they were never invoiced, then the fruit would have been delivered to the Silzle Corporation, and in our rec-

(Testimony of Sam H. Kelly.)

ords it would have been charged to Exchange Orange, that is, delivered to or made available to Silzle Corporation for the account of Exchange Orange, just so we recorded where all the fruit went.

Q. I notice that the balance of these exhibits, commencing August 6th, '51, and running through to November 7, '51, do not contain any items in the column Rate Per Ton. Is it your recollection that you were advised by Mr. Finley on or about the date at which these changes commenced, namely August 6th, that there was some other arrangement with Silzle? A. I am sure that is true.

Q. And that someone, or Mr. Finley, advised you to apply that arrangement back to these other invoices dated, commencing June 27th, '51, and ending August 5th, '51?

A. I am sure that is so.

Q. Is that your recollection of the explanation for this, Mr. Kelly?

A. Mr. Finley asked me to make available to the Silzle Corporation a given number of tons of fruit.

Mr. Dixon: Just a minute. Plaintiff will offer in evidence Exhibits 6 and 7. [342]

Mr. Hurd: I don't object on the ground of authenticity, but for the record, if the Court please, I would like to record an objection as to materiality, as being outside of the claims, or basing any claim on it as being barred by the statute.

The Court: These forms, Exhibits 6 and 7, are your forms, that is Sunkist forms?

The Witness: That is correct.

The Court: They are not Orange Products forms?

The Witness: No. They were from my office. As I have said, your Honor, I didn't follow the routine of the bookkeeping and records in the office, and I personally had never seen that particular form.

The Court: You probably had more to do than that.

The Witness: But I am sure they came from my office.

Mr. Dixon: Your Honor, maybe I forgot to further identify those.

Q. (By Mr. Dixon): Those are the delivery forms, are they not?

A. Yes, sir. They would show where the fruit was picked up and the dates, and quantities.

The Court: They are the type of form from which ordinarily your invoices would be made up?

The Witness: Would be made up. That would be probably the first recording in my office as to the transaction, that [343] is the fruit itself, where it was picked up, and the quantity, and so forth.

The Court: In this particular case, as to at least certain of them, invoices were not made up, but because of this arrangement you had with Finley it was taken care of in some other way?

The Witness: That is correct.

The Court: In reference to the objection, you

(Testimony of Sam H. Kelly.)

are not relying on these specifically under the Robinson-Patman?

Mr. Dixon: No.

The Court: The objection is then overruled. They are clearly admissible as part of the plaintiff's general case. They certainly bear on intent. Exhibits 6 and 7 will be received in evidence.

(The exhibits referred to, marked Plaintiff's Exhibits 6 and 7 were received in evidence.)

Q. (By Mr. Dixon): I have one further question concerning those exhibits, Mr. Kelly. They also show the delivery, do they not, of the tonnage specified therein to Silzle? A. Yes, sir.

The Court: Well, it's time for a recess. As this case goes along, I am going to try from time to time to give you some oral instructions, which I think is proper.

I want to talk to you a minute now on objections and the Court's rulings. You are the sole judges of the facts. It is not my job to decide any facts in this case. It is my job to give you the law eventually for your decision. So during the course of the trial, counsel will object, as they have a right to do and as they should do in duty to their clients, either to preserve some theory that they have in the case, or to present to the Court some legal question about the matter, and the Court rules on those objections.

When I rule on an objection concerning the admission of evidence, all my ruling means is that the

(Testimony of Sam H. Kelly.)

matter is then available to you for consideration. By ruling on the admission of the evidence, I don't indicate that I believe the witness or disbelieve the witness. I don't indicate how this particular bit of evidence fits into the picture. I don't indicate what you are going to find from it or not find from it. In other words, the judge's function in ruling on evidence is to sort out that material which you are entitled to [345] consider and that material which you are not entitled to consider. That is the extent of my function. Once it is admitted in evidence, then it is available to you for consideration and for fitting it in, if possible, with the other evidence in the case, because you must go over all the evidence, and for the purpose of drawing your final conclusions, for the purpose of drawing those inferences you are entitled to draw from evidence received.

But I put no stamp of approval on evidence when I admit it. It just like when the witness is asked a question and there is some objection made to the question and I overrule the objection. That doesn't mean I believe the witness or disbelieve him. It merely means that you are entitled to consider the evidence.

Do you follow me on that?

We will have this come up time and time again, and I think you are entitled to have a general instruction as to the function of the Court in ruling on objections to evidence.

Any objection to that?

Mr. Hurd: It was excellent, Judge.

(Testimony of Sam H. Kelly.)

The Court: Mr. Dixon?

Mr. Dixon: No, your Honor.

The Court: We will take a short recess. Remember the admonition of the Court. [346]

* * *

Q. (By Mr. Dixon): Mr. Kelly, apart from the conversation that you had with Mr. Finley of Exchange Products concerning some arrangement with Silzle, do you have any knowledge of any arrangement with Silzle for the securing of fruit from Sunkist for processing into single strength juice in 1951?

A. I don't think I understand your question. Mr. Dixon.

Q. I will try to simplify it. I realize it is a little long. [347]

Do you have any knowledge concerning the arrangement, if any, whereby Silzle was to secure oranges from Sunkist for processing into single strength juice in 1951?

A. No, sir, I didn't know the basis.

Q. Do you have any knowledge concerning any arrangement with TreeSweet whereby TreeSweet secured product Valencia oranges from Sunkist for processing into single strength orange juice in 1951?

A. No, sir.

Q. I believe you mentioned that Sunkist did sell Valencia oranges from time to time to Winckler & Smith. that is the plaintiff in this action, is that a fact? A. Yes, sir. [348]

* * *

Q. (By Mr. Dixon): Now, directing your attention to 1951, did you have any conversation, to your recollection, with Mr. Winckler of Winckler & Smith concerning the securing of oranges, Valencia oranges, for the purpose of processing those oranges into single strength Valencia orange juice?

A. No. I don't think Mr. Winckler contacted us to buy fruit in 1951. He did call up to ask prices, but he didn't evidence any desire to purchase.

Q. Did you have any conversation at all with Mr. Winckler in 1951 to your recollection concerning the securing of some arrangement, if possible, with Sunkist, whereby Valencia oranges might be secured for the purpose of processing them into single strength Valencia orange juice?

A. I don't remember that I did, Mr. Dixon. I may or may not. But if he did ask me, I would be obliged to refer him to Mr. Finley.

The Court: By-products fruit?

The Witness: No. I thought his question was that he was to get fruit other than on a purchase basis. [349]

The Court: Oh.

The Witness: Is that correct, Mr. Dixon?

Mr. Dixon: That is correct, yes.

Q. Did you ever have any conversation with Mr. Finley of Exchange Orange concerning the prices

(Testimony of Sam H. Kelly.)

at which Winckler & Smith sold their Valencia orange juice?

A. No, sir. I don't remember any.

Q. Did you ever have any conversation of any kind with Mr. Finley of Exchange Orange Products concerning the underselling of Sunkist by Winckler & Smith as to price in the Valencia orange juice market?

A. I probably did, Mr. Dixon. From time to time other processors would complain to me or state to me that Mr. Winckler was selling at a price less than they were quoting. I don't recall whether that was 1951 or not.

Q. Was TreeSweet one of those who complained to you?

A. I don't remember whether they were or not.

Q. Was Silzle one that complained to you?

A. I don't remember, Mr. Dixon.

Q. Well, Mr. Kelly——

A. I don't remember the years.

Q. I understand that.

A. That was over a period of years.

Q. All you remember is that some sellers or processors of single strength Valencia orange juice complained to you [350] about Winckler & Smith selling below their price, is that correct?

A. Yes. From time to time processors did complain that one or the other was selling for less.

Q. Was there ever any question in your mind concerning the ability of Winckler & Smith to pay for any oranges, Valencia oranges, that they pur-

(Testimony of Sam H. Kelly.)

chased from you at any time? A. Yes, sir.

Q. When was that question raised in your mind?

A. I think it was late in 1947.

Q. That was during a period when Winckler & Smith were in reorganization, so-called, under Chapter 11? A. No. That preceded that.

Q. That was preceding that? A. Yes, sir.

Q. Let me ask you this question, Mr. Kelly: Did Sunkist ever lose a dime on any Valencia product fruit that it sold to Winckler & Smith at any time?

A. No, sir.

Q. To your knowledge?

A. No, sir, it did not.

Mr. Dixon: That is all. Thank you.

Mr. Hurd: If the Court please, I have a few questions that I would like to ask.

Cross-Examination

By Mr. Hurd:

Q. Mr. Kelly, I believe you testified that in setting the opening price for the products fruit that you expected to sell in 1951 you gave consideration to a number of factors. [352] I don't believe you stated what those factors were. I wonder if you would tell us what the factors were that you took into consideration in reaching this price of $40 a ton for 120 soluble solids?

A. Well, the factors were the inventories in Florida of canned juice and the rate of its sale, and the potential crop in California and an estimate

(Testimony of Sam H. Kelly.)

of the crop oncoming in Florida, and what the fresh fruit market would be as to what quantity it would absorb, meaning that products would get more or less according to whether the fresh fruit took more or less.

In crop estimates, they were really guesses. I think they were fairly accurate as to the number of fruits on the tree, but the estimates were made in boxes, and that allowed for a rate of growth. And if the rate of growth was less than anticipated, that meant an out-turn of less boxes or less gallons, or less tons. If the rate of growth exceeded this estimate, then the out-turn was no more fruits, individually, but was a gerater number of boxes and a greater number by any yardstick, either gallons or tons.

So these estimates, the out-turn, you never knew whether it wouid be close to it or not. And merchantability of fruit was not known. That is, during the growing season it was never known how prevalent crystalization would develop, or withered ends and splits, and other defects would develop. [353] So you would start with a given estimated number, but you never knew whether it would turn out to be that or not. [354]

* * *

Q. (By Mr. Hurd): What bearing, Mr. Kelly, did the Florida inventory have upon the price that you would set for your products?

A. Well, Florida was the dominating factor in both single strength juice and frozen concentrate.

(Testimony of Sam H. Kelly.)

They produced far more than did California. Now, the California pack would have been over, most of it, by the time Valencias in Southern California were available. But the oncoming crop of Florida would have an impact, depending on the size of the crop and the quality, the size, and it may or may not be affected by weather conditions intervening, hurricanes, or anything bearing on the quality of the fruit that would affect—well, the time of maturity, too, as to when it would be available.

Q. Is there any relationship between the price of Florida product and the price of California product?

Mr. Dixon: I object to that question, your Honor. I think it obviously calls for a conclusion of this witness.

Mr. Hurd: Well, I should say what, if any, relationship was there? I don't expect a conclusion, but I would like you to explain if there is any. [355]

The Court: Talking about price of fresh fruit or products fruit?

Mr. Hurd: Talking about products fruit. The price Florida is charging for their inventory as bearing upon the price that California might expect from the product it put up.

Mr. Dixon: If the Court please, as I understand the question, it is directed to the determination of price of product fruit, Valencia oranges sold here by Sunkist in California. I can see no connection between the price of product fruit sold here in California and the price of product fruit in Florida. They are not in competition with each other.

The Court: Overruled. We will find out. Was there a relationship?

The Witness: Well, the price of products fruit in Florida partly determined the price of the finished product. Hence it would be competitive with the finished product as put up in California.

The Court: Let me ask you this. Product fruit from Florida, was that ever shipped out here to these processors in California?

The Witness: Oh, no.

The Court: They couldn't ship it?

The Witness: No. [356]

The Court: So processors here in California, like the ones you have mentioned, TreeSweet and Silzle, were dependent upon products fruit in California?

The Witness: That is correct.

Q. (By Mr. Hurd): Now, what, if anything, was the relationship between the price being charged for the finished product of Florida fruit in this area and the price that would be charged for the finished product of California fruit that you would pack?

A. One was directly competitive with the other, that is, California juice would have to sell in some relationship to that of Florida. Now, I think California juice usually sold for slightly more than Florida juice, but then you get into the question of freight rates. If the California juice—the farther you would go east, the more it would cost because of the freight differentials, and coming west, the same would be true of Florida. But one had an effect on the other. One was influenced, each was influenced by the other.

Q. Do you know approximately what percentage of the single strength juice as sold in this area in 1951 was from Florida and what percentage from California?

A. No, sir, I don't know.

Q. Do you recall whether or not you gave any consideration to what was being charged for the products, single strength and frozen concentrate, made out of Florida oranges [357] when you set your $40 price in 1951?

A. Yes. It is my recollection that in 1951 the price of Florida single strength juice advanced over a series of months, January, February, March, and I think April—I am not sure about April, but it did advance in January and February and March, I am quite sure. Now, I don't know the conversion tables, I can't tell you, I don't even remember the selling price of California juice or Florida juice at that time as to dozens or cases, but what Florida was selling at would determine the price that I would arrive at to permit a processor in California to sell, make the product and sell it.

Q. You have referred to there being the three types of orange juice products, the hot concentrate, single strength and frozen concentrate. Are those customarily made in this are at the same time?

(Testimony of Sam H. Kelly.)

A. No. The first processors buying fruit each year were the hot concentarte people, and some years some single strength canners would put up some juice sweetened.

The Court: You mean they would have to add sugar?

The Witness: Add sugar. Then other processors of single strength would wait until the fruit, they thought, had reached a better standard of maturity.

And then about that same time frozen concentrate operators would start. That was customarily the case some time in July. [358]

Q. (By Mr. Hurd): Do you recall whether there was any difference in the normal return to the processor for these various three products?

A. Yes; hot concentrate would be the lowest, and single strength would be next higher, and frozen the highest of the three.

Q. I notice that Plaintiff's Exhibit 5 is dated sometime in April, 1951. Was that before or after the beginning of the hot concentrate season?

A. Well, April, there was no Valencia oranges available for processing in April except from Central California.

Q. Prior to the beginning of the hot concentrate season, then? A. Yes, that is correct.

Q. Did you have any custom or general rule regarding changing your prices throughout the year? I notice in the testimony you said that you did not change the price in 1951. Was that a customary situation?

(Testimony of Sam H. Kelly.)

A. No, it was not. Most years, in fact all of them that I can remember, we started at a minimum price, and then as it was jutified raised the price. There would not be very many price changes during an entire season.

Q. Did you also reduce prices throughout the year? A. That is correct.

Q. Is that a customary thing? [359]

A. Late in the season we did make some sales in '51 of small amounts, but we did not reduce prices once they were established, and for this reason: that I would financially cripple processors if I reduced a price. Once they had built up an inventory, these inventories were sold, some currently, and some carried as stock and sold over a period of months, and if I reduced the price, then I would cause them to suffer a loss on all of the inventory they had on hand, and in some cases I understand they guaranteed prices against their own decline in the warehouses of wholesalers.

Q. I believe you testified that before you set this $40 price in 1951 you consulted Mr. Finley of Exchange Orange, among others; am I correct in that? A. That is correct.

Q. Do you recall whether or not Mr. Finley approved of your $40 price?

A. My recollection is that he felt that price was too high.

Q. Had Winckler & Smith been a substantial customer of yours for products oranges in 1950?

A. I don't think so.

(Testimony of Sam H. Kelly.)

Q. What about '49?

A. I don't think in '49 either.

Q. You said you didn't consult him regarding the $40 price. Did you have any reason in your own mind for not [360] consulting him in 1951?

A. I didn't consider him a customer in that year.

Q. You consult only customers, customarily?

A. That's right.

* * *

Q. (By Mr. Hurd): With reference to your questioning Winckler's ability to pay, when did that occur?

A. As I remember, late in 1947, they were slow in meeting their payments.

Q. What, if anything, did you do about it? [361]

A. So we asked them why. And their answer was that they didn't have the money at the time.

Mr. Dixon: If the Court please, I object to the general statements here. The witness has referred to Winckler, the plaintiff here as Winckler & Smith. If he is referring to conversations with the president of Winckler & Smith, I think it ought to be specified. I object on the grounds of generality of the question.

Mr. Hurd: I will try to clear that up, if I may, your Honor.

The Court: All right.

Q. (By Mr. Hurd): You said they didn't have the money. To whom are you referring?

A. Mr. Winckler.

(Testimony of Sam H. Kelly.)

Q. And where and when was this?

Mr. Dixon: If the Court please, may I have the answer?

(The record was read by the reporter.)

The Court: That doesn't clear it up.

Who were you talking to?

The Witness: Well, it would come about this way, your Honor: The man in my office who was responsible for collections, when he couldn't make collection on terms agreed upon, then he would call it to my attention that such and such a customer could not and did not meet their agreed upon terms. [362] Then is when I would take some action.

The Court: Are you referring now to what your man in the office told you, or did you speak to Mr. Winckler?

The Witness: I talked to Mr. Winckler on a number of occasions.

Q. (By Mr. Hurd): Is this during 1947?

A. I am sure it was in 1947.

Q. Where did these conversations take place? Were they in person or over the telephone?

A. Both. Some of them were in my office and some were over the telephone.

Q. Was anyone present besides the two of you?

A. I don't remember whether there was or was not.

Q. Do you recall any specific conversation?

A. No, I can't pinpoint it as to a date.

(Testimony of Sam H. Kelly.)

Q. Do you recall the general substance of the conversation?

A. Yes. We told Mr. Winckler, or I told Mr. Winckler that our terms of sale were cash five days after date of invoice, and if he couldn't meet those terms I would have to work out some other arrangement with him. And the first arrangement was that he would pay for each day's purchases the day following. [363]

Q. The day following what?

A. The pick-up of the fruit.

Q. About when would that be?

A. Like if I sold him on a Monday, we got a check from him on Tuesday.

Q. And when did that arrangement go into operation?

A. I think that was late in 1947 or in 1948.

Q. Was that before or after his Chapter 11 bankruptcy proceeding?

A. I think this was before.

Q. You said the first arrangement. Was there another one?

A. Yes, there was one following that, where we asked Mr. Winckler——

Q. Who do you mean by "we"?

A. That is I did, ask Mr. Winckler to make a deposit with us and buy against the deposit.

Q. About when was that done?

A. I think that was in 1948.

Q. Was that before or after the Chapter 11 proceeding? A. That was before.

(Testimony of Sam H. Kelly.)

Q. Thereafter did you ever sell Mr. Winckler on open account? A. No, sir.

Mr. Hurd: That's all. [364]

Redirect Examination

By Mr. Dixon:

Q. Mr. Kelly, thereafter did you ever make any inquiry into the credit status of the plaintiff, Winckler & Smith? A. Yes, sir.

Q. When? A. Well, from 1947 on.

Q. I said thereafter? A. Yes.

Q. When thereafter?

A. Well, as a matter of fact, when he first started in business, but we asked him, or I asked him to furnish us with a financial statement.

Q. When did you ask Winckler & Smith to furnish Sunkist with a financial statement?

A. I did it on several occasions. I don't know just——

Q. Can you specifically state when?

A. No, I don't remember just what years, but he did furnish us with a financial statement on occasions. I don't know how many or what years. We also asked Dun & Bradstreet for a credit report on Winckler & Smith.

Q. Was this after the 1947 situation you have referred to? A. That is correct.

Q. How do you fix the time as being after that period [365] of time?

A. Well, I just remember the date as to the year in which he became slow in meeting his obligations.

(Testimony of Sam H. Kelly.)

Mr. Dixon: Now, if the Court please, I wish the witness would be instructed to use the term Winckler & Smith here. He has several times—I know he is a layman and doesn't understand this, perhaps, but he uses the term "he was slow," and "he didn't pay."

Q. You were doing business with Winckler & Smith, a corporation, were you not?

A. That is correct, sir.

Q. And the personal credit of Mr. Winckler was not involved in any of these sales or transactions, was it?

A. No, sir. I am sorry if I used the wrong word. I was referring to Winckler & Smith as a corporation.

Q. I just wanted to clear it up.

A. I'm sorry.

Q. Because we are talking about Winckler & Smith, Mr. Kelly. A. I know.

Q. And not Mr. Winckler, who is a stockholder of this company. A. Of course not.

Q. After 1947, did you request any credit report of Dun & Bradstreet on Winckler & Smith, the plaintiff in this [366] action? A. Yes, sir.

Q. Do you have such a report in your files at the present time? Do you know whether there is such a report? A. I think there is.

Q. Can you tell this jury about when you requested such a report? Was it in 1948, after this proceeding you have talked about?

(Testimony of Sam H. Kelly.)

A. To the best of my recollection, it would have been late in 1947 or in 1948.

Q. Did you make that request on your own of Dun & Bradstreet?

A. Those requests were made by my office to the cashier's office of Sunkist.

Q. In other words, you made the request?

A. That's right. I did not make it directly to Dun & Bradstreet.

Q. So that there would be such a report, then, in the files of Sunkist, would there not, or should there be such a report?

A. I assume there is, sir.

Q. For the year 1948? A. I assume so.

Q. Did you make any request other than the one request that you mentioned of Dun & Bradstreet for a credit report on [367] Winckler & Smith?

A. We probably did—I probably did from time to time, but I don't remember dates when I asked for them. I don't remember that. We tried to keep up currently with a current position on Winckler & Smith.

Q. Winckler & Smith did buy some Valencia oranges from Sunkist all through the years 1948, 1949, 1950, and 1951, did they not?

A. In some years—I think one year they only bought one ton.

Q. The record would show.

A. And then I think another season they only bought 20 tons. That is my recollection. But the rec-

(Testimony of Sam H. Kelly.)

ord will show. I am sure it was almost nothing in two years.

Q. But whatever was bought they paid for, did they not? A. Yes, sir.

Q. It was not a sale on a credit basis, then, is that correct?

A. No, it was not on open account.

Q. So that Sunkist never sold Winckler & Smith anything after 1947 except on a cash basis, is that correct, or by pre-payment for the purchase?

A. Well, there was a period where it was—invoices were paid the day following the pick-up of the fruit. How [368] long that continued until it was put on a purchase basis against the deposit, I don't remember those dates.

Q. So that no fruit was ever delivered to Winckler & Smith without assured payment, is that correct, while you were with Sunkist?

A. As I have stated.

Q. After 1947. Did you ever make any inquiry into the financial condition of Silzle?

A. I don't remember that I did.

Q. Did you ever make any request for a credit report concerning Silzle's financial condition?

A. I didn't make any.

Q. Did you sell them on cash or credit, do you recall? A. Open account.

Q. On open account? A. Yes.

Q. Did you ever sell any oranges to Hart's? You know what company I am referring to.

A. Yes.

(Testimony of Sam H. Kelly.)

Q. Did you sell them on open account?

A. I think so.

Q. Did you ever make any inquiry into the financial condition of Hart's? A. Yes.

Q. When did you make such an inquiry? [369]

A. I don't remember the years.

Q. Do you know whether Hart's is still in business? A. No, I do not.

Q. I take it you don't know whether they are or aren't in business? A. No, I do not.

Q. Were they in business, to the best of your recollection, when you retired in 1954—was it 1954?

The Court: 1953.

The Witness: 1953.

Q. (By Mr. Dixon): 1953?

A. Yes, I think they were.

* * *

Mr. Dixon: Plaintiff's Exhibit 8 is offered in evidence, the same being the delivery sheets, the records showing deliveries of fruit, Valencia orange products, to TreeSweet commencing July 30, 1951, and ending November 8, 1951.

Mr. Hurd: No objection.

The Court: Exhibit 8 received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 8.)

Q. (By Mr. Dixon): Handing you, Mr. Kelly, Plaintiff's [370] Exhibit 8, I ask you to examine the same and indicate to the jury, if you will, what

(Testimony of Sam H. Kelly.)

documents are contained in that exhibit. They are all the same.

A. Is it necessary for me to go through them?

Q. Well, you suit yourself.

A. These documents show loads of fruit picked up by TreeSweet, Valencia oranges, in 1951, show the point of origin, that is the packing house, and the quantity, and the soluble solids. No extension made as to rates per ton. [371]

Q. On any of the delivery sheet records in Plaintiff's Exhibit 8? A. That is correct.

The Court: Well, that means they were not invoiced, then, at any rate per ton?

The Witness: That is correct, sir.

The Court: And were, instead, handled under some contract between Orange and——

The Witness: And TreeSweet.

That was merely my record to account for all the fruit.

Q. (By Mr. Dixon): Those records, Plaintiff's Exhibit 8, Mr. Kelly, are from your office, are they?

A. That is correct.

Q. Showing the deliveries referred to therein of the fruit mentioned therein to TreeSweet?

A. Yes, sir. I was responsible for all the fruit, so my records had to show where it went.

The Court: These are Sunkist records?

The Witness: Yes, sir.

The Court: The same as Exhibits 6 and 7?

The Witness: That is correct. [372]

* * *

(Testimony of Sam H. Kelly.)

Recross-Examination

By Mr. Hurd:

Q. Mr. Kelly, did you have any trouble collecting from Silzle at any time? A. No, sir.

Q. Did you have any trouble collecting from Hart's at any time? A. No, sir.

Q. Once you put Winckler on a cash basis did you ever take him off? A. No, sir.

Q. From your studies of the information you received regarding the financial situation of Winckler & Smith, did you ever conclude that it justified putting him back on a credit basis, or putting the company back on a credit basis?

A. No, sir. [373]

* * *

JAMES A. FINLEY

called as a witness by the plaintiff under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: James A. Finley, F-i-n-l-e-y.

Direct Examination

By Mr. Dixon:

Q. Where do you reside, Mr. Finley?

A. 413 West Sixth Street, Ontario.

Q. And what is your present occupation?

(Testimony of James A. Finley.)

A. Manager of Exchange Orange Products Company.

Q. Are you also secretary and treasurer of that company? A. I am.

Q. And were you serving in that capacity in 1951? A. I was . [375]

Q. Are you a member of any executive committee of Exchange Orange?

A. Not a member of the executive committee. Just the manager reporting to them.

Q. Are you one of the four members of this so-called four-man management committee of Sunkist and Exchange Orange? A. Yes.

Q. Do you know what I refer to?

A. I think so.

Q. Just state to the jury, Mr. Finley, what your duties consist of. Withdraw that.

How long have you been with Exchange Orange?

A. Since 1926.

Q. And how long have you been general manager and an officer of Exchange Orange?

A. Since about October, 1946.

Q. And Exchange Orange is a 100 per cent owned or controlled subsidiary of Sunkist, is it?

A. It is 100 per cent owned by Sunkist.

Q. And what kind of business is Exchange Orange engaged in?

A. It is engaged in making products from the surplus fruit from the fresh fruit market, juices primarily, although we do make oil, dried meal,

(Testimony of James A. Finley.)

pharmaceuticals, and the full line. Anything we can make out of oranges or grapefruit. [376]

Q. And Exchange Orange operates the plant, does it, at which the citrus fruit is processed into these juices and other products?

A. It operates three plants, one at Ontario, one at Tempe, Arizona, primarily on grapefruit, and then one at Lindsay, California.

Q. The two plants here in California, are they engaged primarily in processing orange products and lemon products?

A. The plant at Ontario processes orange products and grapefruit products, very seldom lemon products, and that plant does the full line, juice and all.

The plant at Lindsay, California, is a drier and oil plant only. [377]

Q. It doesn't process any juice products?

A. No juice products.

Q. Is that what you call a No. 2 plant?

A. No. We have two plants in Ontario; we call one of them No. 1, and one No. 2. It is all on the same piece of property.

Q. And the plant at Tempe, Arizona, that processes both grapefruit and oranges, does it not?

A. Primarily grapefruit. Recently they have some oranges.

Q. Some of the grapefruit that are grown in Arizona, are they occasionally shipped in to your plant here in California for processing into grapefruit products?

A. I would say not as a rule. There is one occasion or two occasions where that will happen. One is your grapefruit from Arizona comes in the winter months. Your summer grapefruit, the grapefruit around this area, comes in the summertime. If we have a particular order in the wintertime and have not the stock for it, we will go ahead and bring in some fruit, a very few tons, from Arizona for that one product.

The only other time was one year when we had a major freeze in the Phoenix area—Tempe is about 15 miles out of Phoenix—and the plant there was run over capacity, so we brought the surplus up here. But that was because [378] they did not have facilities.

Q. At your plants here, you process single-strength Valencia orange juice, do you?

A. Yes; we do.

Q. And so-called concentrated orange juice?

A. Concentrate, both what is termed here hot concentrate, a pasteurized concentrate, and the frozen.

Q. And the frozen concentrated orange juice?

A. Frozen concentrate orange juice.

Q. You do process some grapefruit into comparable grapefruit products, do you, at the plant here?

A. In the Ontario plant we process the grapefruit into concentrate. We have never gone into putting up that type of grapefruit into single strength.

(Testimony of James A. Finley.)

Q. You do process some lemons into lemon juice products, do you not?

A. The only time that we process lemons is when there is a particular product that the Exchange Lemon wants for their sales, but they do not have the equipment for it. And if the Exchange Orange has it, we will make those facilities available. If that particular product, the volume increases enough, they will put it in over there. But it is a temporary thing to do.

Q. These citrus juice products that you process at the plants that you have mentioned, particularly those here [379] in California, those are sold by Sunkist, are they?

A. Sunkist Growers products department.

Q. And you ship from your plants here such products as are sold by Sunkist to various states of the United States, do you? A. Yes; we do.

Q. And the same is true, is it, of the citrus juices that are processed at the Tempe, Arizona, plant?

A. That's right.

Q. So that Sunkist, then, is the marketing facility or agency through which the products that are processed under your supervision and control of the plant here are disposed of or sold in interstate commerce; is that correct? A. That's right.

Q. Do you get your fruit that you process at your plants here in California from someone in Sunkist or from Sunkist?

A. 100 per cent of our fruit comes from packing houses of Sunkist.

(Testimony of James A. Finley.)

Q. How do you determine how much fruit your plant can handle and will handle on a given occasion?

A. Of course I know our plant capacity, and——

Q. Let me ask you a few questions about that. It might be of some help to the jury to get a little picture of the processing operation here of these products. [380]

How many employees do you carry on your payroll during the processing season at your California plants?

A. Well, in the winter months during the navel season we have about 200. In the Valencia season, which is really our juice season, we will run up to 500, 550 employees, depending on the products which we are making. [381]

Q. And do you run around the clock, so to speak, during the canning season, that is, three shifts a day?

A. We have some operations which we run 24 hours a day, seven days a week. That doesn't mean that the entire plant is running that length of time, but some operation is going 24 hours a day.

Q. Can you process and can single-strength juice and frozen concentrate juices in your plant at the same time?

A. Yes. We can do that although one may affect the total production of the other, but we can do it.

Q. Then I take it the usual practice is to utilize the facilities of the plant to its capacity for a particular product at a particular time; is that correct?

(Testimony of James A. Finley.)

A. It depends upon what we have to sell in the going market or the request of the sales department as to what products they want to sell.

Q. How many other employees do you have on a year-around basis in your plants?

A. Well, there is probably on the salaried roll, accounting, chemists, and all, 100, 125.

Q. So that the ratio would be about one to four or five insofar as permanent personnel of an operating plant is concerned?

A. Yes; the difference between salary and hourly payroll, is the way we break it. [382]

Q. How do you determine the amount of oranges and grapefruit, lemons, that your plants herein California are going to process during a given year, or do you determine that in advance?

A. We have no control over the number of oranges ahead of time, what we are going to process. That depends upon the fresh fruit market and sizes and other factors. We are the home of that fruit which is not shipped in the fresh form, and it is literally—it is just dumped over to us and they say, "Here, handle it," and it is our responsibility to see to it that that fruit is handled and the growers get the highest possible return.

Q. In connection with that operation, does anyone in your organization estimate, say, at the beginning of the processing season or in advance of the processing season about how many tons of oranges, say, will be available to your plant for processing purposes?

(Testimony of James A. Finley.)

A. There is no one in our plant that does that.

Q. Who makes such a study, if any such is made?

A. Well, there is a government estimate that comes out usually for the Valencia season about in October. Here about a month ago there was one for this next year. That estimate is based on the growing conditions and just the estimated crop, and then as the season progresses further estimates are made. They go so far as to take the size of the oranges and [383] the growth rate each month to see how they compare with previous years. In that way, they extend it and make a guess as to the size of the oranges, as well as the number of boxes.

Q. Do you get this information yourself or do you get it from someone in your organization?

A. I get that from Mr. Wilcox of Sunkist Growers.

Q. You say you get that estimate early in the season?

A. Very early in the season.

Q. Does that also contain an estimate of the amount of fruit, that is, let us say, oranges, that will be available for outside processors during the processing season?

A. No. About all that gives is the total crop and then subtracted from that is the amount of fruit which they figure that they can sell on the fresh fruit market, and by this that is the amount that goes to products, all processors.

(Testimony of James A. Finley.)

Q. In connection with that estimate and the operation of your plant or plants, do you take into consideration that some of this fruit, so-called product fruit, again calling it oranges for our purposes, will be available to outside processors during the processing season?

A. At that time of the year, I will know just about how many tons of oranges the outside processors purchased or used the previous year, and then I will deduct that from the estimate of the tons available, and then I figure that, everything being normal, I will be responsible for that [384] amount of fruit.

Q. Do you do that or does Mr. Wilcox do it?

A. Well, I don't think it is done by any formal method. At the time he is giving me the estimate, he may say, "Well, we sold about so many tons to outside processors last year. Let's just take that off for a rough estimate." So early in the season, you can't pinpoint it.

Q. Directing your attention to the year 1951 in particular, do you recall whether there was an excess of product fruit that was available for processing purposes that exceeded the capacity of the Exchange Orange plants, processing plants here in California?

A. Yes. It was very early in the season when we realized that the amount of fruit would be greater than what Exchange Orange could handle.

Q. Do you know as a fact whether Exchange

(Testimony of James A. Finley.)

Orange processed during the year 1951 more single-strength orange juice than it did in the previous year?

A. I don't know whether it processed more than the previous year, but it was not our largest year by any means. There have been a number of years larger than '51.

Q. But you don't know whether it was larger in amount, that is tonnage or cases, than it was in the previous year, 1950?

A. No; I don't remember. It was a relatively small [385] pack compared to the last three or four or five years, I know that.

Q. Do you know whether the tonnage that was handled by your plant in 1951 for processing into single-strength orange juice was greater than it was in 1950?

A. That would be the same answer. [386]

Q. What was the answer?

A. I don't know whether it was more than it was in 1950, but the tonnage was not as great as it was in some previous years. We were primarily working with frozen concentrate.

Mr. Dixon: It has been stipulated to by counsel for the plaintiff and the defendants that the tonnage of oranges processed in single-strength orange juice in the year 1950—that is the season year—was 32,007 tons, and in the year 1951—that is the season year—it was 37,016 tons.

The Court: This is processed by Exchange Orange?

(Testimony of James A. Finley.)

Mr. Dixon: Yes.

Mr. Hurd: If the court please, perhaps I should point out this includes navels, as well as Valencias.

Mr. Dixon: Yes; it includes all oranges, because it wasn't broken down in that answer.

Q. (By Mr. Dixon): Can you state to the jury whether, to your recollection, you processed proportionately more navels in 1951 than you did in 1950? A. Greater on Valencias.

Q. They would be larger on Valencias in 1951?

A. Yes.

Q. In other words, there were more Valencia oranges available in the year 1951 for processing into orange juice products than in the previous year; is that a fair statement? [387]

A. That is correct.

Q. So that more Valencia oranges as product oranges went into orange products in '51 than in the previous year; is that a fair statement?

A. Yes; there was.

Mr. Dixon: It has been stipulated by and between counsel for the plaintiff and the defendants that the Government report records covering the production of fresh single-strength orange juice in 1951—I use that term to cover the processing season of 1951—was 2,397,000 gallons.

The Court: Is that figure for '50 or '51?

Mr. Dixon: That is for '51.

It is stipulated by and between counsel for the plaintiff and the defendants that during the year 1951 California and Arizona packed approximately

1,600,000 cases of 24 2's of single-strength orange juice.

The Court: What is a 2?

Mr. Dixon: I was just going to come to that. It is a very good question. You are way ahead of me.

I presume it may be stipulated by and between counsel that a No. 2 can will include 3.375 gallons of orange juice. I mean that is in a case, I didn't mean a can.

The Witness: 24 18 ounces.

The Court: The witness said 24 18-ounce cans. What was your figure? [388]

Mr. Dixon: 3.375 gallons per case.

Is that right, counsel?

The Witness: That is approximately correct.

The Court: These stipulations are being stated by Mr. Dixon, without any concurrence in the record by the defendants. The court will assume that you agree, unless something is said to the contrary.

Mr. Hurd: That is correct. We advised him privately.

The Court: Unless I hear something to the contrary, his statement will be the stipulation.

Mr. Hurd: Yes. [389]

* * *

The Court: Received in evidence, Exhibit 9. [390]

* * *

The Court: But shouldn't this reference to tables be stricken out of this exhibit?

(Testimony of James A. Finley.)

Mr. Dixon: It is agreeable with the plaintiff that it be stricken.

Mr. Hurd: That's all right with the defense.

The Court: Or in the alternative to indicate that the tables 21 and 24 that are referred to in Exhibit 9 are in substance the stipulation just entered into on the production and packing of juice in 1951.

Mr. Hurd: That is also agreeable.

Mr. Dixon: That will cover it.

The Court: Then we will leave it as it is.

Mr. Dixon: I think we should also further add that the case figures reported there include any production for Exchange Orange by Exchange Lemon.

Mr. Hurd: That is correct. [391]

* * *

The Court: No. 10 received in evidence.

* * *

The Court: I am only in doubt about one sentence, that is the first sentence in the first paragraph. I take it that means there was no production shown here for Sunkist.

Mr. Williams: None for Sunkist. It was all for EOP.

Mr. Hurd: I think the subpoena asked for production either for EOP or for Sunkist.

The Court: Then it is a confusing sentence.

Mr. Hurd: It ought to be stricken.

The Court: May it go out, Mr. Dixon?

(Testimony of James A. Finley.)

Mr. Dixon: Yes. You mean take it all out?

The Court: That last sentence in the first paragraph.

Mr. Dixon: There was no production for Sunkist, yes, so that may go out. [392]

* * *

The Clerk: I have marked Plaintiff's Exhibit 11 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 11 for identification.)

Mr. Dixon: Plaintiff's Exhibit 11 offered in evidence.

Mr. Hurd: If the court please, I object only to the portion of it relating to the Silzle situation.

In order to avoid interrupting on this, I wonder if it might be understood that I might have a continuing objection with respect to that Silzle contract. Your Honor ruled [393] on it, but just for the purpose of the record.

The Court: That will be the ruling of the court. You are objecting to the materiality and the relevancy of the Silzle references.

Mr. Hurd: Yes, on the ground of the statute of limitations.

The Court: Yes. And the objection is overruled, and you may have a continuing objection.

Exhibit 11 is received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 11, was received in evidence.)

* * *

(Testimony of James A. Finley.)

The Court: I don't know that this exhibit is clear. [394] All these figures are based upon the contracts referred to under Subdivision (a)?

Mr. Dixon: That is my understanding, your Honor, yes.

Mr. Hurd: I believe that is correct. [395]

* * *

The Court: 12 received in evidence.

* * *

The Court: Well, I suppose there is going to be no dispute later on in talking about these documents, but the abbreviated way in which they are prepared would leave a lot to be desired. This says net tons processed. I take it that means the tonnage of resulting products obtained.

The Witness: Oh, no.

Mr. Dixon: No. I think, your Honor, it means the tonnage of juice product oranges that are handled by Exchange Orange during the year in question. In other words, there was also a figure here of product oranges, and there is the [396] item of 49 tons there. That figure merely indicates, as I understand it, that about 49 tons were not usable for juice purposes, is that correct?

Mr. Hurd: Something happened to [397] them.

* * *

Q. (By Mr. Dixon): Now, coming back to you again, Mr. Finley, I believe when we started to put in this statistical information you had testified that in 1951 more Valencia oranges were available for

(Testimony of James A. Finley.)

processing into juice in the industry than in previous years, is that correct?

A. That is correct.

Q. Of those that Sunkist had available to it, some of those were processed into citrus juice orange juice, were they not, by Exchange [398] Lemon?

A. In the year 1951 Exchange Lemon processed some for the account of the Exchange Orange Products.

* * *

Mr. Dixon: Plaintiff's Exhibit 13 offered in evidence.

Mr. Hurd: No objection.

The Court: Received in evidence.

(The exhibit referred to, and marked Plaintiff's Exhibit 13, was received in evidence.)

Mr. Dixon: This exhibit, ladies and gentlemen, I think this is about all we are going to put in for a little while, shows that Exchange Lemon received from Exchange Orange 9371 tons of oranges during the year 1951 to be processed into orange juice at the order of Exchange Orange; that of [399] this amount, 2587 tons were rejected as unfit for juice, and the total processed to juice was 6784 tons; and that Exchange Lemon received the sum of $96,108.98 from Exchange Orange for processing the 6784 tons.

The Court: All right.

Sometime hereafter, counsel will make the exhibit indicate what year and what it refers to. It doesn't on its face. It just refers to paragraph 3, which doesn't mean anything. That could be stricken out and the other information added.

You can do that later.

Mr. Dixon: All right, your Honor.

Q. (By Mr. Dixon): I believe Exchange Lemon and Exchange Orange had some arrangement between themselves whereby they processed oranges and lemons for each other into citrus juices at cost? A. We will help out each other.

Q. Do you know how these costs were determined, and what was involved in arriving at the cost per ton of processing the fruit by each company for the other?

A. Well, the two companies each have their own cost departments, and those figures are arrived at by good accounting practices, subject to the approval of auditors at the end of the year.

Q. Do you happen to know of your own knowledge, for example, when Exchange Orange would process some lemons for [400] Exchange Lemon, what elements were taken into consideration by Exchange Orange in arriving at the charge that was made to Exchange Lemon for that processing?

A. We would charge actual costs.

Q. That is what I am trying to find out. How did you arrive at the cost? Did you just include the labor involved in processing those?

A. Cost is labor, steam, electricity, depreciation, supervision, proper share of administration, and

(Testimony of James A. Finley.)

all costs up to the time that the material is turned over to Exchange Lemon, the freight involved is at Corona, if we sent it over there with our trucks they are charged for that. But it is actual [401] costs.

Q. And did it include the cost of cans used by Exchange Lemon, do you know, Mr. Finley?

A. That is worked differently. Are you talking about that one particular year? Or any year?

* * *

Mr. Dixon: Plaintiff's Exhibit No. 14 is offered in evidence.

Mr. Hurd: No objection.

The Court: Exhibit 14 is received in evidence.

* * *

Q. (By Mr. Dixon): Mr. Finley, I will hand you Plaintiff's Exhibit 14 and ask you if that exhibit constitutes the billing received by Exchange Orange for the processing of oranges during the year 1951 by Exchange Lemon?

A. As far as I know, that is.

Q. Do the many marks or notes on those bills or invoices indicate anything to you particularly?

A. Nothing in particular. It is done in the accounting department. This is the first I have seen of them. [402]

Q. I take it, then, that you are yourself not personally familiar with the items or the manner or method in which the amounts set forth in Plaintiff's Exhibit 14 were arrived at, is that correct?

(Testimony of James A. Finley.)

A. I know they are arrived at on a cost basis. I am not an accountant.

Q. Can you tell this jury of your own knowledge what cost factors were considered by either Exchange Orange or Exchange Lemon in arriving at the charge made in Exhibit 14 to Exchange Orange by Exchange Lemon?

A. Those are the actual costs, supposed to be, as represented to me, the actual costs of producing that material for the account of Exchange Orange Products Company by their accounting procedures.

Q. Now, Mr. Finley, can you tell the jury who determines the prices that are to be charged by Sunkist for the citrus juice products that are processed by Exchange Orange and turned over to Sunkist for sale?

A. The Sunkist Growers Products Department, which is a sales organization for the Exchange Orange Products and Exchange Lemon Products, recommends in the case of oranges and in the case of grapefruit to the manager, which is me, and in the case of lemons to the manager of Exchange Lemon Products, what they think they can get for certain products. It is up to the managers of the two respective plants individually, [403] depending upon variety, to set the final price, either concur in it or change it, or tell them what we want for it.

Q. By the management committee——

A. Not the management committee, no. The managers.

(Testimony of James A. Finley.)

Q. In other words, you are the manager, are you, of Exchange Orange?

A. I am the manager of Exchange Orange Products Company.

Q. To what extent would you confer with the manager of Exchange Lemon on Exchange Orange products? By that I mean, say, Valencia single-strength orange juice.

A. I wouldn't confer with the manager of Exchange Lemon Products at all on oranges or grapefruit, and the same thing in reverse.

Q. Then you in fact determine the price, do you not, at which single-strength Valencia orange juice shall be sold, is that right?

A. I am the final word.

Q. And no one else has anything to say about that price?

A. They can argue with me, but it is my final decision.

Q. Have you ever had any arguments with anybody about the price at which you determine single-strength orange juice, for example, shall be sold?

A. They may say it is a little bit too high or they may [404] say it is a little bit too low and recommend a change, because they are closer to the market, they are talking to the trade, the brokers and all that, and that is one of my sources of information to help me make up my mind. I depend upon it.

Q. In any event, you determine the price at

(Testimony of James A. Finley.)

which the product shall be sold to Sunkist, is that correct? A. Yes, that is correct.

Q. Now, coming back to this question of the quantity of products fruit that was available for processing in 1951 by outside processors, did you handle any of that fruit?

A. The fruit that is handled by the outside processors?

Q. Yes.

A. I do not handle the fruit sold by Sunkist Growers in outright sale, but all other fruit turned over to the EOP Company was handled by me. [405]

Q. So that unless a buyer paid cash for the fruit or paid for the fruit in cash, you handled all other fruit, that is, oranges, for Sunkist that went into any processed product; is that correct?

A. That is correct.

Q. Now, did you have occasion to look around for outside processors in 1951 to take care of any of the oranges that you couldn't process in Exchange Orange plants? A. I did.

Q. Whom did you contact—withdraw that.

First, when did you first determine that there was a greater amount of Valencia oranges that were going to be available to Sunkist that the Exchange Orange plant couldn't process on its own?

A. Well, I probably knew that in November, December, late in the fall, if the fruit grew as estimated, if there wasn't any cold weather and the elements changing it, I knew there would be a bumper crop.

(Testimony of James A. Finley.)

Q. In other words, you knew as early as late fall of 1950 that the product Valencia orange crop—rather, the product Valencia oranges that were going to be available for processing purposes in 1951, was going to be larger in amount than Exchange Orange could handle at its own plant, is that correct?

A. Taking the weather into consideration and all that, [406] the fruit that was on the tree at that time.

Q. Did you make that estimate yourself?

A. No. That is the Government estimate I spoke about.

Q. How did you get that information on which you based your determination of that fact?

A. As I said, it was from Mr. Wilcox and the Sunkist Growers.

Q. Did Mr. Wilcox give you that information on which you made this determination, or was it made by Mr. Wilcox?

A. Well, first, to get an estimate, you get an estimate of the total crop among all marketing organizations in California, and then 100 per cent of them do not belong to Sunkist, so if there is 70 per cent. 72 per cent, that is taken into consideration, the number of cars shipped, and the balance will go to products. That is made in the winter months.

Q. In other words, there is some, of course, Valencia oranges that Sunkist doesn't handle that are available for processing purposes?

A. That is correct.

(Testimony of James A. Finley.)

Q. Do you know what organizations have that type of fruit available for independent processing?

A. The Mutual Orange Distributors, which is a co-op., at that time had their own plant at Anaheim.

Q. In other words, they did the processing?

A. 100 per cent of their grower-members. [407]

Q. To the same extent that Exchange Orange does it for Sunkist, I take it?

A. They had facilities at that time, it has since closed up, but at that time they had facilities, to handle all the product grapefruit from their members.

Q. Product oranges we are talking about.

A. They had both.

Q. Do you know of your own knowledge that MOD, so-called—is that what it is called?

A. Commonly called MOD.

Q. (Continuing): ——had any surplus Valencias available to independent processors that came into the market in competition with whatever product Valencia oranges Sunkist had to sell to independent processors in 1951?

A. Not to my knowledge.

Q. What other source, to your knowledge, would an independent processor have for Valencia juice oranges in 1951?

A. Well, there is the American Fruit Growers, which is another organization, and they had their own—they just built it in 1949 or '50, they built a new plant for the production of frozen concentrate —frozen concentrate just started in about 1946, so when the volume increased they put in their own

(Testimony of James A. Finley.)

plant, and before that they sold to independent processors. At that time they had their own plant and they handled all their own fruit. [408]

Q. That was in 1950 or '51?

A. They started in '50, I know they were in full swing in '51, they may have started in '49. They were in full swing in '51.

Q. Do you know any other source of supply of Valencia oranges to an independent processor in 1951, other than those that you have mentioned?

A. Most of the balance of it, outside of those three organizations, the packing houses that are not affiliated with them, they sold through an individual by the name of Morgan Ward, I don't think he had 100 per cent of the balance, but practically all of it, and he sold to independent processors whenever he could, and at the best price, I suppose, that he could get for it. One year selling to one, and one year to the other, wherever he got the best deal. But outside of those four, that was the available supplies of fruit. Anything above that would be so small it wouldn't count.

Q. It wouldn't be of any consequence. Is this a fair statement, Mr. Finley, that Sunkist had approximately two-thirds of all of the Valencia juice oranges that were available for processing by anyone in 1951, and that the other third were available through the companies that you have mentioned?

A. I think it is around 70 per cent, a little more than two-thirds. [409]

Q. All right, 70 per cent, and the balance of 30

(Testimony of James A. Finley.)

per cent, then, was available only from the three companies that you have mentioned, is that correct?

A. That is correct.

The Court: The three companies; Morgan Ward —is that a company or an individual?

The Witness: I think he is an individual.

The Court: By three, then, you mean Mutual Orange, American Fruit, and Morgan Ward?

The Witness: And Morgan Ward, yes. And a very small percentage outside of that.

The Court: Let me ask another question.

In '51 American Fruit were not selling any of their product oranges, they were using them all in their new plant?

The Witness: They had plant facilities to handle all of it, and to the best of my knowledge they did. I don't think they sold any. They may have sold some. [410]

* * *

Q. (By Mr. Dixon): Mr. Finley, are you familiar or do you know what the selling price of Valencia oranges was by Sunkist in 1951 during the processing season?

A. I knew the price that they set after it was set.

Q. Were you here this morning when that matter was discussed? A. Yes, I was.

Q. Was the $40, 120-pound solids price the one that was prevailing during the processing season in 1951? A. Yes, it was.

Q. Now, I am wondering if you could tell the

(Testimony of James A. Finley.)

jury just a little bit more about how you got the fruit that you processed. As I understand it, Mr. Kelly was in charge of all of the sales of product Valencia oranges that were actually sold to anyone who wanted to buy them, including independent processors or bottlers, or anyone that wanted to buy product Valencia oranges for use other than consumption, is that correct?

A. That is correct.

Q. Then how was it determined how much you got? I mean how many tons Exchange Orange got that were made available to it? Did Exchange Orange get what Mr. Kelly of Sunkist didn't sell? Is that the way you got it, what was left? [411]

A. Well, you want to go back a little. The packing house is the one that makes the determination as to how much goes into their cull bin, as they call it, and how much is packed fresh fruit. Then the distributing plant, which is Kelly's department, has representatives in the citrus area. They call up the packing houses once or twice a day. Each evening they have an estimate of the number of boxes of fruit which each packing house has for products. They in turn call up the citrus distributing plant located in Los Angeles, each one of these salesmen calls up and tells them how many boxes by individual houses they have. That is done late in the afternoon, probably around 3:30 or 4:00.

The Court: This citrus distributing plant is Sunkist?

The Witness: Is Sunkist, under Sam Kelly. He

(Testimony of James A. Finley.)

then, or his men allocate or tell the independent processors where they can pick up their fruit if they want to buy.

So after he gets through that, he has some more fruit. So about 4:30 he will call our plant, our truck dispatcher, as we call him, and tell him there are so many boxes at this house and so many boxes at the other house, and that fruit is to be gotten out of those houses before noon the next day.

So we take what is left over after sales.

Q. (By Mr. Dixon): And you then have the disposition of those product oranges from that point on, is that correct? [412]

A. Yes. If there is more fruit, if he culls out more fruit than we have got capacity to handle, that is still our responsibility to see to it that it is taken care of.

Q. I believe Exchange Orange entered into some so-called purchasing and processing contracts in 1951, did it not? A. Yes, we did.

Q. What companies, if you recall, did you make any kind of arrangements with in 1951 for processing, or were able to process Valencia oranges into juice products?

A. Well, first, it was early in March, or in March anyway, I approached Mission, Hyland-Stanford, and a little later, a month or so later, Bireley's, which is a division of General Foods, which is also Bird's-eye. The reason I approached them first is they turn out this pasteurized or hot concentrate. They have got plant facilities for more

(Testimony of James A. Finley.)

than what they actually want to buy, because they are franchise bottlers, and they turn out and receive just the number of oranges to make their product, so they may be through before the season is half over. I know they have facilities available, so they are the first ones I approach, because I know I can have them.

Q. Do any of those companies, Mission Dry, General Foods, or Hyland-Stanford, process single strength Valencia orange juice for sale in the markets of the country, to your [413] knowledge?

A. General Foods did, but not in 1951. They did back in 1945 and 1946.

Q. Is that one of the companies that you mentioned were processors of single strength Valencia orange juice, is that correct?

A. They were all hot concentrate with the exception of Bireley, and he was also a frozen concentrator.

Q. And the concentrate that was processed by any other company that you have mentioned was in fact sold under the Sunkist label, was it not, through your department?

A. The concentrate?

Q. Yes. A. Ask that question again.

Mr. Dixon: Read the question, Mr. Reporter.

(Question read.)

The Witness: The concentrate that was produced for the account of Exchange Orange Products was sold to Sunkist.

(Testimony of James A. Finley.)

Q. (By Mr. Dixon): I am trying to determine, Mr. Finley, whether all of the oranges, the concentrate that may have been processed under any arrangement that you may have made with Mission Dry or General Foods or Hyland-Stanford, was in fact processed for the account of Exchange Orange and sold by Sunkist as a Sunkist product under the Sunkist label.

A. The three firms produce concentrate for themselves, [414] and then any under these arrangements you talk about were produced for the account of Exchange Orange Products Company.

The Court: Go ahead.

The Witness: The two of them producing hot concentrate, it was not sold under the Sunkist label, it does not carry the Sunkist label but is sold through the Sunkist Growers.

In the case of Bireleys, General Foods, we had them produce frozen concentrate for us, and that was sold under the Sunkist label.

The Court: You apparently have skipped a gap. At least I don't follow it. You asked whether arrangements were made with these companies. He said he approached them.

Were arrangements made with them?

The Witness: They were.

Mr. Dixon: Thank you, your Honor. I was about to come to that point.—

The Court: Under these arrangements Bireleys made frozen concentrate for Sunkist, which was sold under the Sunkist name?

(Testimony of James A. Finley.)

The Witness: Sunkist label, and sold by Sunkist.

The Court: And Mission Pak and Hyland-Stanford made a hot concentrate for Sunkist, which was sold by Sunkist but not under the Sunkist label?

The Witness: Yes.

The Court: It was sold under some other label by Sunkist?

The Witness: Exchange label. And then they also produced [416] some for their own account.

The Court: I understand. All three of them were producing for their own account, as well?

The Witness: Yes.

The Court: You weren't concerned with what they produced for their own account?

The Witness: No.

The Court: That was their own business, their own materials?

The Witness: Yes. Mission Pak sold under the Mission label; Hyland-Stanford sold under the Tru-Ade label; and Bireleys under the Bireleys label.

* * *

Mr. Dixon: Offered in evidence, your Honor, by the plaintiff.

The Court: Exhibits 15, 16, 17 and 18——

Mr. Hurd: As I understand it, Mr. Dixon is offering these for general background purposes, and not on the basis of themselves being a cause of action. [417]

(Testimony of James A. Finley.)

With that understanding I have no objection.

The Court: Sometime along the line I want to tell the jury about what this case is about. Isn't this a good time?

Mr. Hurd: Yes.

The Court: Exhibits 15 to 18 are received in evidence. [418]

* * *

Q. (By Mr. Dixon): Do I understand your testimony, Mr. Finley, to the effect that Exchange Orange Products did not sell any oranges?

A. It does not sell oranges. [434]

Q. In other words, that function was performed by Mr. Kelly?

A. Mr. Kelly. The Exchange Orange Products does not sell, even, products. Sunkist Growers products department sells the products.

Q. Now, directing your attention to Plaintiff's Exhibits 15 and 16, which are contracts between Exchange Orange and Hyland-Stanford Company, will you tell the jury what kind of business Hyland-Stanford is engaged in?

A. Hyland-Stanford makes concentrated orange juice, and they market it under the trade label Tru-Ade. It is a beverage put up in a six or eight-ounce bottle containing orange juice, and it is sold—the common name for a carbonated beverage is soda pop, such as Mission. It so happens that Tru-Ade is a non-carbonated orange beverage.

Q. Does Exchange Orange make any product comparable to that made by Hyland-Stanford?

(Testimony of James A. Finley.)

A. Yes, it does.

Q. And it is sold in competition with the products of Hyland-Stanford in the interstate markets of the conutry?

A. It is sold to similar customers as Hyland-Stanford.

Q. Directing your attention now to Plaintiff's Exhibit 17, the same being a contract between Exchange Orange and Mission Dry Corporation, will you state to the jury what Mission Dry Corporation makes, what products it makes? [435]

A. Mission Dry makes a carbonated beverage, orange beverage, in the case of these contracts. First they put up, they form a concentrated juice, and then during their off season they will take that out and make a syrup, and then that is shipped to the bottlers scattered throughout the country. Mission happens tc be a franchise bottler as we call it. That is, bottlers have a certain contract with Mission to distribute in that area, and that is what we call a franchise bottler. So they send them the concentrate. The bottler then takes this concentrate, adds, sugar, water, or any other ingredients that Mission specifies to add, such as color, and it is put up in a 10 or a 12-ounce bottle by the bottler and distributed by them.

Mission also makes what we term a full line of carbonated beverages. That is, they will make root beer, lemon-flavored drinks, or raspberry, but a full line of carbonated beverages.

In the case of Tru-Ade, they make just the orange, as far as I know. I think Tru-Ade makes some grape, too, pardon me. [436]

The Court: Both these companies just make the concentrate, is that right?

The Witness: They make the concentrate into a syrup form and ship to the bottlers for them to dilute with water and distribute on.

Q. (By Mr. Dixon): I was under the impression, Mr. Finley, that neither Hyland-Stanford nor Mission Dry made products for sale in interstate commerce that were made by Sunkist out of oranges.

A. We sell the concentrate.

Q. Sunkist does not sell carbonated beverages, does it, like Mission Dry and Hyland?

A. We sell the concentrate just like they do for the carbonated beverages. [437]

* * *

Now, coming back to the question I asked you a moment ago, Mr. Finley, will you tell the jury what products General Foods makes out of oranges?

A. Bireley's, which is a division of General Foods, early in the season, or they can make it throughout the season, but normally early in the season they make a concentrate very similar to the Hyland-Stanford type concentrate, that is, they make up a concentrate, add the citric acid, oils, any flavors, color, to it, and ship that on to their distribution points, and then the additional sugar and water is added.

(Testimony of James A. Finley.)

In addition to that—well, they also have other flavors. Exactly what they are, I don't know, except what are in the market, and you probably know more about that than I do. I think they have grape —I know they tried a grapefruit at one time.

Q. Do they also make orange products that are sold in interstate commerce in competition, shall we say, with those made by Sunkist?

A. Yes, they do.

Q. What are those products?

A. Well, we make a product, too, that goes in the same field. It is what we call a dairy field, it is a dairy orange. It is a still drink. [438]

Q. But most of the products made by these three companies that we have just mentioned are in the beverage field, are they not? I mean carbonated beverage field?

A. Up to this point. There is also General Foods. Bireley's have a frozen concentrate. General Foods owns Bireley's. They also have Bird's-Eye. Bird's-Eye have most of their concentrate made in Florida, but they have plaint facilities out here and they will make frozen concentrate in the little six-ounce can, and they make that in addition to these beverages like Hyland-Stanford. Hyland Stanford and Mission do not have frozen concentrate equipment to make a satisfactory product.

The Court: I am in doubt now and I would like to ask some questions to clear this up in my own mind. What is the product that Exchange Orange

(Testimony of James A. Finley.)

puts out in the way of concentrate? What does it call it?

The Witness: We have 200 of them. I can go on and explain just what this is.

The Court: Well, here is what I am getting at, and maybe we can shorten this down, if you have 200 products.

The Witness: No. I will take just one.

The Court: Is the product that Exchange Orange puts out in the way of concentrate then ready for mixing to make drinks with? And the same question as to Mission Dry, Bireley's and Hyland-Stanford? I understood you to say Bireley's took the concentrate and added syrup and sugar, so I take it when Bireley's gets through with it, the thing that they put out is the kind of thing a drug store would have, similar to the syrup a drug store would have.

The Witness: No. These contracts all refer to the manufacture of a 65 Brix concentrate.

The Court: That is per cent?

The Witness: Brix means per cent soluble solids, so that 65 Brix is 65 per cent soluble solids. It is all, of course, orange.

Q. (By Mr. Dixon): I am not sure, Mr. Finley, that the jury understands. That is a new term we haven't had occasion to use yet. What is meant by a 65, what do you call it, degree Brix?

A. Degree Brix.

Q. Will you tell the jury just what a 65 degree Brix orange concentrate is?

(Testimony of James A. Finley.)

The Court: That is B-r-i-x.

The Witness: B-r-i-x.

The Court: Named after some man, I suppose.

The Witness: I don't know.

The Court: Who invented the test, I guess.

The Witness: I don't know. 65 Brix is the per cent soluble solids. You go to straight sugar solution, for instance, and if you had 65 Brix, that means 65 per cent sugar [440] and 35 per cent water. In the case of orange juice, 65 Brix means soluble solids. It is anything that goes in solution, that is, it is the sugar and acid or any other minor elements, mostly sugar and acid. So ordinary orange juice will run from, oh, 11 to 13 per cent solids, which is Brix.

We take that and concentrate it in a vacuum pan 100 degrees Fahrenheit in the case of so-called hot concentrate, and around 55 to 60 degrees Fahrenheit in the frozen concentrate. We concentrate that down to any level. In the case of frozen concentrate, it is 42 Brix per cent solids.

These contracts call for concentrating down to 65 degrees Brix.

The Court: They were making this material for you, for Exchange Orange?

The Witness: Yes.

The Court: Turning it over to you after it was made?

The Witness: They turn it over to us after it is made. There is one interesting thing, if you keep in mind that the soluble solids for orange juice is

(Testimony of James A. Finley.)

about 12 to 14 soluble solids, and 12 per cent means the orange is 88 per cent water. Orange peel is also about 88 per cent water. That means it has just as much water in it as your orange juice, except the one is soluble and the other is not. Just like sugar is soluble and sand isn't.

So the Brix means what goes into solution, not what [441] does not go into solution.

Does that cover it? [442]

* * *

December 16, 1955—10:00 A.M.

* * *

Q. I believe when we adjourned yesterday, Mr. Finley, we were discussing some contracts that were entered into by Exchange Orange in 1951 with Hyland-Stanford Company, Mission Dry, and General Foods. We also talked about concentrates, orange concentrate and products which these companies made.

Did any of these three companies make single-strength orange juice, do you know?

A. General Foods made single-strength orange juice, but I am sure it was back in the 1946-1947 period, not in 1951. [446]

Q. Not in 1951. And these three companies, then, were engaged primarily in processing oranges into concentrate, that is pasteurized concentrate—is that what you call it?

A. Pasteurized concentrate, except for general

(Testimony of James A. Finley.)

Foods, and they operate on frozen concentrate for the use of Bird's-Eye.

Q. Now, I am not sure that the jury understands just what is meant by pasteurized concentrate. Can you explain what that product is to the jury and how it is secured?

A. The pasteurized concentrate is a concentrate that has been made way back since 1945 that I know of. The juice is extracted from the oranges by a number of different types of juice machines. Back before 1930, it was done by hand, just like you would in the kitchen, but in the thirties juice machines were developed and they have different types of machines. There is one type that squeezes out the orange juice just like you would with a Sunkist reamer at the rate of about 280 oranges a minute. There are other pressing types.

The juice is screened and then what we call flash pasteurized. It is processed at a temperature of 190 to 195 degrees Fahrenheit for 30 seconds or 45 seconds, and then immediately cooled, run into a vacuum pan, where the water is evaporated off in the form of steam at a temperature of about 105 to 110 degrees Fahrenheit. At that point it [447] makes a very good concentrate.

If you start with orange juice, for instance, the single-strength orange juice, concentrated down to about six or seven to one, depending upon how much sugar you have in the original oranges, why if you concentrate it six to one, you come out ap-

(Testimony of James A. Finley.)

proximately 65 Brix as I spoke about yesterday. That product is a product that is used in what we call beverage base. Probably 90 per cent, 95 per cent of what is produced goes into beverage base or orangeades, the soda pop type of drink, or up into the higher juice contents of 15 to 20 per cent, even 30 per cent juice in the finished drink. It is strictly a beverage.

The contracts call for—— [448]

Q. May I stop there? When this pasteurized concentrate is made, is it then frozen sometimes into brick, is that what is known as frozen orange concentrate?

A. We are talking about the hot concentrate. It is pasteurized so that it kills all the bacteria or yeast that are naturally in the orange juice, so it is sterile, it should be, and it can then be stored. If it is about 65 Brix or above it can be stored at 35 degrees Fahrenheit in cold storage, and held in that form for a year or two, depending on the temperature of storage.

Q. Is that what is known as the frozen orange concentrate?

A. No. That is what is known as the pasteurized or hot concentrate for beverage bases.

Q. And that is the product primarily that these companies, with the exception of General Foods, were making, is that correct?

A. Yes. General Foods also makes that for their beverages.

Q. I understand they do, too, but in addition to

(Testimony of James A. Finley.)

that, General Foods also made a frozen orange concentrate, did they not? A. Yes.

The Court: Let me ask a question. I am not getting at what I want to know. Maybe I will do worse than you. We [449] will see.

This hot concentrate which Exchange Orange makes itself is in liquid form, isn't it?

The Witness: It is 65 per cent solids, 35 per cent water; it is a very viscous liquid.

The Court: A heavy syrup?

The Witness: Yes, heavy syrup.

The Court: Exchange Orange, when it makes this, sells it under what label?

The Witness: I think we all make it. And then it goes in storage as 65 Brix concentrate. We will sell that as 65 Brix concentrate to some customers. To others we will what we call compound it, that is, take so many gallons of the concentrate, add citric acid, oil, and the other ingredients, so when the consumer gets it they just have to add the sugar to carry it on.

In the straight concentrate, 65 Brix concentrate that we sell as such under the Exchange label, we sell that to supply houses who add their own acids, sugars, and put it up in the same type of package that we do.

The Court: Then you sell it two ways, as the 65 per cent Brix under the Exchange label, and then you sell it after you have done certain further compounding?

The Witness: Yes.

(Testimony of James A: Finley.)

The Court: Do you sell that under the Exchange label? [450]

The Witness: Under the Exchange label.

The Court: Do you have a name for that when you have done this further work to it?

The Witness: There is what we call a bottler's base. That goes to the bottlers of carbonated beverages. They use carbonated water before it gets to the ultimate consumer. Then we have another one that we call a dairy base, which goes and is distributed through the dairy routes, which does not have carbonated water. That is what we call a still drink.

The Court: When you had these contratcs with these three companies, Hyland, Mission, and General Foods that we referred to, under the contracts they made for Exchange Orange this 65 Brix?

The Witness: That's right.

The Court: I suppose it was kept in large containers?

The Witness: 50-gallon barrels.

The Court: And turned over to your company?

The Witness: Yes.

The Court: Did Hyland—just take Hyland—did Hyland also make for itself a 65 per cent Brix syrup or concentrate?

The Witness: Yes, they do the same thing, they make it in 65 Brix first; it could vary between 65 and 67, that is immaterial, depending upon their finished formula; but they will concentrate it down to approximaetly 65, put it in storage themselves,

(Testimony of James A. Finley.)

during the Valencia season, and then they [451] will pull it out of storage and compound it, February, March, April, and then can it.

The Court: They sell it compounded?

The Witness: Yes.

The Court: Do they sell it in 65 per cent Brix?

The Witness: No, they do not sell the straight 65 Brix concentrate.

The Court: Does Mission Dry sell the 65 per cent Brix that it makes for itself, or does it only sell it compounded?

The Witness: They just sell it compounded. I think in some cases on government orders or British orders they have done some of it, but that is not their primary business.

The Court: What about General Foods, does it sell the 65 Brix, or just the compound that results from further work?

The Witness: I think they have sold some 65 Brix. In case they would maybe miss their estimate on the amount of concentrate they would put up, and have some excess, they would sell it off before the next season. But that was not their primary business.

The Court: Ordinarily they sold the compounded product?

The Witness: The compounded product, yes.

The Court: All right.

Q. (By Mr. Dixon): Now, can you tell the jury, Mr. Finley, what is meant by frozen orange concentrate?

(Testimony of James A. Finley.)

A. The frozen orange concentrate is the concentrate [452] that is put up in the small 6-ounce cans that is so popular now in the grocery stores in the deep freeze. That is made by taking the single-strength juice, concentrating it down to about 58 Brix, that is about a 5½ to 1 concentration, under a low temperature evaporator, and that evaporator concentrates the juice down, evaporates the water off at a temperature of around 55 degrees, and at the rate of about 1200 gallons an hour. So we start in with about a 5, 5½ to 1 concentrate, and then single-strength juice because during the concentration you take off some of your volatile flavors, we add back single strength juice to this 58 Brix concentrate to 42 Brix. That, then——

Q. Do you mean 42 degree Brix?

A. 42 degree Brix, which is 42 per cent solids, which is an even 4 to 1 concentrate. That is, you take one can of that and then add three cans of water and you get four cans of single-strength orange juice. And when it is mixed, it is cooled down immediately to about 18, 19 degrees, which is as low as you can go without freezing, put in the cans, 6-ounce cans, at the rate of about 400 a minute, and sealed, run through a cold tunnel at 40 degrees below zero, it takes about 40 minutes to go through, and it comes out frozen solid and it remains at temperatures of zero or below during all storage until it gets to the retail store, and then the houswife. [453]

Mr. Dixon: One of the jurors has a question. I don't know whether your Honor cares to hear it.

The Court: Yes.

Juror Colby: May I ask a question? I would like to know whether the quality is as good in a concentrated juice as it is in a single strength?

The Witness: The quality of the juice?

Juror Colby: Yes.

The Witness: Well, the quality of the juice——

Juror Colby: Or the vitamins.

The Witness: The vitamin content, I would say in all three about 95 to 98 per cent of the vitamins are retained, so the health value would be the same.

The Court: There is a housewife who is going to benefit from this trial and she wants to find out about it.

The Witness: The vitamin contents are down at elevated temperatures and long storage, but as far as the juice going in the three products is concerned, your Valencia season starts in the early part of May and, as you know, they are a little more tart than they are later in the season. So early in the season the fruit is used for these so-called hot concentrates to go into beverages, because it is tart and there is more citric acid to be added. It is also used late in the season, but we have more citric acid to add depending upon the processor. Ourselves, we do not figure [454] we can start on a single strength or frozen concentrate until just about the middle of July when the flavor, acid, and all that, is correct. Early in the season, it is still a little bit immature, so we use the best fruit for

(Testimony of James A. Finley.)

single and frozen, although for those two we will use the same fruit.

The Court: All right. Go ahead.

Q. (By Mr. Dixon): Now, the pasteurized concentrate, that is the orange pasteurized concentrate, I think you testified has been made since about 1925 as a commercial product?

A. To my knowledge.

Q. The frozen concentrate citrus juices were relatively new, were they not, in the commercial market around about 1947 to 1948, 1950?

A. It started shortly after the war, probably 1946. The first year or so was more or less experimental, so it is a question of what year it started commercially.

Q. Sunkist in any event didn't really start into the frozen concentrate product market until about 1951, did they, Mr. Finley?

A. Started in the frozen concentrate market in 1950.

Q. On a large commercial scale?

A. On a large commercial scale in 1950, but not under the Sunkist label.

Q. They were operating then under the Exchange label? A. No. [455]

Q. What was it?

A. In 1950 we processed for Minute Maid under their label and Bird's-Eye.

Q. I am talking only about Sunkist, what Sun-

(Testimony of James A. Finley.)

kist was doing in 1950 in the frozen concentrate product, Mr. Finley.

A. We started the Sunkist label in 1951 or the the fall of 1950, the winter.

Q. Well, can you tell the jury when Sunkist commenced on a large commercial scale to develop a frozen concentrate, I mean a market for frozen concentrate citrus juices?

A. When we developed the process for doing it—in the winter of 1948, we had our plans and specifications all up to make this product. In January, there was a major freeze. We knew we could not make a quality product out of that.

The Court: I think counsel's question was not when the process was developed.

Mr. Dixon: That's right.

Q. When did Sunkist start on a large commercial basis to promote the sale of frozen concentrated citrus juice?

A. Sunkist Growers, the sales department, sold in large scale in 1950 to Minute Maid and Bird's-Eye. In 1951, under the Sunkist label.

Q. Pardon me. I am sorry, Mr. Finley.

The Court: Well, he has answered the question now, [456] hasn't he?

Mr. Dixon: Yes.

Q. Sunkist was merely producing for the Minute Maid label, were they not? That was not sold by Sunkist under any Sunkist label, was it?

A. Exchange Orange Products produced it, all the product, and it was sold by Sunkist Growers

(Testimony of James A. Finley.)

products department. They sold it to Minute Maid, who distributed it.

Q. Will you tell the jury what Minute Maid means, what that means in your answer?

A. Minute Maid is a processing company, a Florida company.

Q. Is it connected in any way with Sunkist?

A. It is not.

Q. That is what I wanted to clear up. In other words, Exchange Orange was making a frozen product and selling that product in what the industry calls, perhaps, shiners, that is, in unlabeled cans?

A. No.

Q. And then put the Minute Maid label on the can?

A. The cans are lithographed. We get the cans with the label already on. It is a label product, private label.

Q. Minute Maid buys that product from Sunkist and sells it in the open market to wholesalers and retailers? A. That's right. [457]

Q. Under its label Minute Maid?

A. That's right.

Q. But the product itself is made by Exchange Orange? A. That's right.

Q. Is that correct? A. That's right.

Q. I understand you to say that in 1950 you were making frozen concentrate which was sold to Minute Maid. My question is, Mr. Finley, again, when was it that Sunkist commenced to sell frozen concentrate citrus juices under its own label in the

(Testimony of James A. Finley.)

United States market, shall we say? Was it 1951?

A. It was the winter of 1950, right at the end of that year, a very small pack, and then in major proportions in 1951 after August.

Q. That is what I was trying to determine. Now, before we get back to these contracts, I would like to ask one or two other questions that may be helpful to the jury. What is the capacity of Exchange Orange plants to produce citrus products on an eight-hour shift per day, shall we say, just approximately, in tonnage?

A. In 1951, I think the capacity was right around 1200 tons in 24 hours.

Q. For what product?

A. For all products. [458]

Q. By "all products," you mean what?

A. Hot concentrate, single-strength juice, frozen.

Q. Can you do all three at the same time in the same plant?

A. You can do part of all three of them at the same time, but we may not have enough juicing equipment, for instance, to keep everything going. We would have to slow down maybe one department to keep going, but over all it is 1200 tons.

Q. Using the same basis for answering the question, do you know what the capacity of the plant of Hyland-Stanford was in 1951?

A. Oh, around 250 to 300 tons.

Q. And do you know what the plant capacity of General Foods was—or Mission Dry, first?

(Testimony of James A. Finley.)

A. Mission Dry was about 300.

Q. And General Foods?

A. Between 300 and 350.

Q. Directing your attention to Plaintiff's Exhibit 15, the contract entitled an orange concentrate processing contract dated June 19, 1951, between Hyland-Stanford Company and Exchange Orange Products Company, had Exchange Orange had any concentrate processing contract with Hyland-Stanford of the type of Exhibit 15 prior to the execution of this contract, Mr. Finley? [459]

A. I think we had—well, I know we had one before 1951. It may have started in 1949 or 1950, but it was started before 1951.

Q. It dealt with the same product, did it, the orange concentrate?

A. Yes, pasteurized concentrate.

Q. Now, directing your attention to paragraph 2 of Exhibit 15, will you state to the jury for their information the basis under which Hyland-Stanford was to be paid for any services performed under this contract—by the way, will you first tell the jury just what services, if any, were to be performed by Hyland-Stanford under this [460] contract?

* * *

A. Paragraph 2 says the processor is to be paid 60 cents per gallon for producing 65 Brix orange concentrate. That rate of 60 cents——

Q. I am sorry. Oh, had you finished your answer?

(Testimony of James A. Finley.)

A. No. I was just reading from the contract.

Q. That is what we are trying to avoid.

A. I will tell you why.

Q. All right, go ahead.

A. That 60 cents was by negotiation with Hyland-Standard as their cost of producing this 65 Brix concentrate. I sat down with them and they went over in general what their costs were. I was familiar enough with it from our own operations and knew it was reasonable and gave them a small amount, I think it was five per cent, for what I call an operating profit, because there was no profit in that figure.

The Court: Wait a minute. You mean the 60 cents—— [461]

The Witness: Included five per cent.

The Court: Included the five per cent?

The Witness: Yes. This was cost plus five per cent.

Q. (By Mr. Dixon): By the way, I presume you negotiated all the contracts, Plaintiff's Exhibits 15 through 18, did you, Mr. Finley?

A. Yes, I did.

Q. You said that this contract provided for overhead expenses of the processor, a reasonable profit on the complete operation for the account of the processor, is that correct?

A. The overhead of the processing, not the overhead on their product which they might have for sale.

(Testimony of James A. Finley.)

Q. The basis under which the 60 cents per gallon made to Hyland-Stanford was determined took into consideration the general overhead, did it not, costs and expenses of Hyland-Stanford in doing this processing for Exchange Orange, and provided for a reasonable profit in addition thereto to Hyland-Stanford on the operation?

A. It was a negotiated price which they and we were satisfied with. [462]

Q. In other words, did you have any discussion with them in negotiating this contract as to whether this was to be one by which they were to not only secure their overhead costs, but in addition thereto were to be paid or to have within the amount paid to them a reasonable profit on the entire operation?

A. I don't quite understand your question.

Mr. Dixon: Read it, please.

The Court: I think he has already answered that.

From his discussion with them he was attempting to allow them a 5 per cent profit on the processing work. Is that right?

The Witness: That's right. Because there was no price for the fruit in it. Just operating cost.

The Court: You supplied the fruit, and you got back the concentrate?

The Witness: Yes, we got back the concentrate, oil, and peel.

The Court: You got back everything?

The Witness: Yes.

(Testimony of James A. Finley.)

The Court: Except what might be waste?

The Witness: That is right.

The Court: For that you gave them 60 cents a gallon, which was their cost, their overhead, and a 5 per cent profit?

The Witness: That's right. [463]

The Court: The way you computed it?

The Witness: Yes.

The Court: Maybe the way they were computing it they were getting a higher profit?

The Witness: Of course if we didn't give them this contract, their overhead would have been going on anyhow, so in their own mind they figured they were making more profit than this. But figuring costs properly, you have to figure overhead as in.

Q. (By Mr. Dixon): Directing your attention to paragraph 12, the amounts due Hyland-Stanford for processing were to be paid weekly, as I understand that provision; is that correct?

A. According to the contract: "Supplier will make payment to processor not earlier than 10 days after the close of a week and no later than two weeks." And we made that when necessary.

Q. So the payments, then, for this processing operation were made to Hyland-Stanford shortly after Exchange Orange received the weekly billing therefor, is that correct?

A. I don't know whether it was actually paid at the end of the week or month, but if they needed the money they would have gotten it at the end of the week.

(Testimony of James A. Finley.)

Q. Directing your attention to paragraph 11, will you state what that paragraph relates to? [464]

A. Well, that is processor performance.

"The processor agrees to operate its plant as efficiently when working under this contract as it ordinarily operates on its own production. The processor further agrees to allow supplier to make necessary inspections of product, production, and records as pertain to this contract, and to obtain necessary samples other than those supplied by processor."

The purpose of that clause is that in these juice machines you can get different yields in gallons per ton. We wanted them to run their plant and get as many gallons per ton when they were running for our account as they would have been if they would have been running for their own account. We didn't want them to go ahead and just because they had a processing contract be inefficient and save some money on the contract. And that is the purpose of that clause.

Q. Well, the purpose of this clause was, also, was it not, to permit you to make inspections of the product as it was being processed under this contract, so that Exchange Orange could be assured that the product that they were processing was all right? A. That's right.

Q. Directing your attention to paragraph 15, will you state to the jury what that deals with?

A. Paragraph 15 is just the contract [465] period.

(Testimony of James A. Finley.)

"This contract is to run from June 1, 1951, to May 31, 1952, and thereafter from June 1 to May 31 of each year, unless either party gives notice of termination at least 90 days prior to May 31 of each year."

The purpose of that clause, the Valencia season starts about the 1st of June, so this covers the full Valencia season over the winter, and it saves the job of writing a new contract every year, to put a clause like that in. It is a continuing contract, if both sides are satisfied.

If either side is dissatisfied, they could cancel it.

Q. Can you state to the jury whether that contract continues in effect at the present time under this provision? A. Yes, it does.

Q. I believe this contract was signed by Exchange Orange Products on June 19, 1951.

A. Yes.

Q. Directing your attention to Exhibit 16, the only date that would indicate when that contract was signed appears to me under the contract as June 29, 1951; do you find any other date on the contract, Exhibit 16?

A. It says June 29, 1951.

Q. This contract is entitled a Fruit Purchasing Contract, Mr. Finley. Directing your attention to paragraph 1 thereof, will you state to the court what that deals with?

A. Paragraph 1 is on fruit supplies. [466]

"The Exchange Orange Products is to be the

(Testimony of James A. Finley.)

only supplier of oranges to Hyland-Stanford Corporation unless otherwise mutually agreed upon because of inability of seller to supply requirements of purchaser.

"It is further agreed in the event of short fruit supplies purchaser will receive his proper pro rata share of fruit along with other purchasers of seller's fruit."

This contract covers the concentrate which Hyland-Stanford made for their own account, and they kept the merchandise, and this was assurance that we would furnish them the fruit if at all possible.

Q. Then this is a little different kind of contract than Exhibit 15? A. Yes.

Q. Under this arrangement or contract, Exhibit 16, Hyland-Stanford is purchasing or making some arrangements, are they not, with Exchange Orange, to acquire oranges from Exchange Orange, or Sunkist?

A. To acquire the oranges and concentrate, you might say.

Q. Is Sunkist or Exchange Orange selling any concentrate that it processes under this contract to Hyland-Stanford? A. This contract——

Q. Can you answer that, if you can, yes or no, Mr. [467] Finley?

A. The Exchange Orange under this contract sells them the concentrate.

Q. Sells the concentrate? A. Yes.

Q. Do you mean they sell concentrate that Exchange Orange itself manufactured and processed?

(Testimony of James A. Finley.)

A. Hyland-Stanford manufactures this——

The Court: You mean it sells them fruit to make concentrate for themselves, is that right?

The Witness: We sell them concentrate, not the fruit.

Q. (By Mr. Dixon): I must confess that I am somewhat confused, Mr. Finley.

Directing your attention, in particular, to paragraph 2 of this contract, I find the language, "In the event purchaser finds it necessary to stop the purchase of fruit, then Section 10 is to apply to the situation," end quote.

Is it your understanding that this particular language does not appear to mean what it says, namely, that Hyland-Stanford is not purchasing fruit under this contract?

A. Let me see. It isn't very complicated.

The way this contract works is that Hyland-Stanford purchases the fruit from Sunkist Growers.

Q. It is a purchase of fruit from Sunkist?

A. A purchase of fruit, but not paid for. [468]

Q. But not paid for?

A. This is what I call a deferred payment plan contract. The merchandise which they make, the concentrate which they make, then goes into Lawrence Warehouse, and the only way that they can get that out is for them to pay the Exchange Orange Products Company for the concentrate as they take it out. So the concentrate is security for the fruit

(Testimony of James A. Finley.)

that goes into the product. They pay the current market price.

Q. Well, directing your attention to paragraph 11 of this contract, will you state to the jury what that refers to or indicates?

The Court: Before you go to that one, I didn't understand this last question.

I think we can state to the jury that Lawrence Warehouse is a nationwide organization that has warehouse facilities whereby products may be placed there, and Lawrence Warehouse holds them, so that, in this case a company that has supplied certain materials may get their money out.

Can counsel explain Lawrence Warehouse any better? They probably can.

Mr. Hurd: I have wondered about it myself. I will accept your version.

The Court: Actually I tried a case involving them, and they have little compartments in these warehouses closed in with chicken wire, and they will take certain goods and put [469] them in here and lock them up and hold them until they can be pulled out, and by that warehousing they see to it that somebody that has some interest in it gets their money out. It is sort of a security arrangement. They operate all over the country.

But now my question is this: You said this concentrate that they make, which they are making now for their own account, is put in Lawrence Warehouse, and then as it is released from Lawrence Warehouse and sold they pay you for the

(Testimony of James A. Finley.)

concentrate. Do they pay you so much per gallon of concentrate, or do they pay you at that time for the oranges which were used to make the concentrate?

The Witness: They pay for the concentrate, the price of the concentrate based upon the price of fruit which went into that concentrate, yield, and so forth. It comes out just like they bought the fruit, but they actually pay us, and it is warehoused there, as so much per gallon for concentrate, which reflects the price of the fruit. They have their own manufacturing costs in there, so we do not recover any of that, of course.

Q. (By Mr. Dixon): Reference has been made by the court to this Lawrence Warehouse; can you state to the jury whether or not there was a Lawrence Warehouse immediately adjacent to the Hyland-Stanford plant, and this arrangement under which Hyland-Stanford provides for the storing of this product in [470] the Lawrence Warehouse?

A. The Lawrence Warehouse is a national organization, it is bonded, and as was said, they put chicken wire up. So Lawrence Warehouse can be in a person's own plant. In this case it was at the Hyland-Stanford plant. A certain portion of the warehouse was blocked off with chicken wire.

Q. In the plant of Hyland-Stanford?

A. In the plant of Hyland-Stanford. A lock was put on the door, and an employee of Hyland-

(Testimony of James A. Finley.)

Stanford was bonded, and was the only man with that key. For them to get anything out of there, or for us, they had to give us a check, along with a Lawrence Warehouse release.

And those Lawrence Warehouses can be located any place you want to, as long as they will bond it.

Q. Directing your attention back to paragraph 11, will you perhaps read——

Mr. Hurd: Pardon me. One of the jurors had a question.

Mr. Dixon: I am sorry. I didn't see.

Juror Johnstone: Do they pay for the concentrate before they make it, I would like to know?

The Witness: No, they do not pay. It is a deferred payment plan, a credit plan for the purchase of fruit, technically. They get the fruit and make the concentrate, and as it comes out of the warehouse that is the time they pay for it. They pay for their own manufacture. [471]

Mr. Dixon: I think the answer to her question will be if you will answer my question, Mr. Finley?

The Witness: That is on Section 11?

Mr. Dixon: That is right, paragraph 11.

The Witness: "Seller's function.

"Seller's prime function is to supply fruit at current prices but to await payment until purchaser withdraws products from Lawrence Warhouse."

Q. (By Mr. Dixon): In other words, under this contract, Exhibit 16, Sunkist made oranges available to Hyland-Stanford, which were then processed by Hyland-Stanford into whatever products it wanted to make under this contract from the oranges, the products made were then put in the Hyland-Stanford plant and locked up, so to speak, but no payment was made for any of the oranges that had thus been made available to Hyland-Stanford until Hyland-Stanford sold the products that it had made and which were locked up under this so-called Lawrence Warehouse arrangement?

Now, that is a long question, but does that fairly state the arrangement here, Mr. Finley?

A. Right at the end of that question, did you say when Hyland-Stanford sold it it came out and we got our money? [472]

Q. Well, I thought I indicated that. In other words, Hyland-Stanford did not pay anything to Sunkist under this contract even though the oranges had been delivered to it, shall we say, months, before, until the product that Hyland-Stanford had processed from those oranges was withdrawn from the warehouse, this Lawrence warehouse?

A. When they took the concentrate out of the Lawrence warehouse, it was paid for.

Q. And not before? A. And not before.

Q. That is what I wanted to determine.

The Court: Does the jury understand this? Does anybody not understand it?

This concentrate, as I understand, belonged to Hyland, but there was a claim for the money due for the material supplied, so it was warehoused in this

(Testimony of James A. Finley.)

chicken wire business with the Lawrence Warehouse man on guard—a Hyland man, but bonded by Warehouse, who was the person who would release it. The product at all times belonged to Hyland, did it not?

The Witness: Yes.

Q. (By Mr. Dixon): Now, directing your attention, Mr. Finley, to paragraph 10, will you state what that relates to?

A. Paragraph 10 is entitled Production Facilities.

"Purchaser agrees that in the event it stops buying fruit because of price, or because of [473] excess capacities over its own needs, its production facility shall be made available to seller upon its request. The seller agrees that in the event purchaser stops buying fruit when the average price of fruit purchased under this contract goes above $40 per ton for fruit yielding 120 pounds solids per ton, as described in Section 2, purchaser is permitted to buy fruit of sufficient quantities on the open market to produce requirements of Tru-Ade products. Any production capacities above these requirements shall be available to seller at its request. Details covering the use of purchaser's production facilities or seller's use are set forth in a separate contract called 'Orange Concentrate Processing Contract.' "

That is in the contract.

Q. That is Exhibit 15?

A. The orange concentrate processing contract is Exhibit 15. The purpose of that paragraph is that with a contract calling for a purchaser to buy all their requirements from you, you could just about price them out of the market, you could raise the price any place you wanted to, so the price was put in there at $40 so they could buy from others.

Also, the purpose of the clause is that they use their own facilities for their own accounts first, and if they [474] have any excess facilities, then we would have a call on them. That is the purpose of the balancing, giving them credit on the fruit. We would have first call on their plant and that would save us putting in that additional capital investment in Ontario.

Q. These two contracts, then, were really tied in together, were they not?

A. Exhibit 16 is the one that they operated on and we assured them of a sufficient supply of fruit to carry on their normal business. If we had more fruit than what we could handle at Ontario, then we would go over to Exhibit 15. Some years we used it and some years we didn't.

Q. But the processing contract was dated, if I understand it, was dated June 19th, and the fruit purchase contract was dated June 29th?

A. Both these contracts were in effect in previous years. There is the same clause in both of them. They are continuing contracts. Neither party reopened them.

Q. This arrangement has been in effect some time?

(Testimony of James A. Finley.)

A. It went into effect probably about 1949.

Q. Under paragraph 13 of Exhibit 16, that provision indicates that the contract is to run on unless it is cancelled by either party?

A. This contract is to be effective June 1, 1951, to May 31, 1952, and thereafter is to run from June 1 to May 31 [475] of each year, unless either party gives notice of termination at least 90 days prior to May 31 of each year.

We put the 90-day clause in there because we wanted to know 90 days before the Valencia season started, so in case they didn't want to continue on we could make other arrangements.

Q. Is that contract still in effect, as you indicated Exhibit 15 was in effect?

Mr. Hurd: If your Honor please, I suppose this is immaterial, whether it is still in effect. I don't know the purpose of the inquiry. I don't know as we should get in the habit of going into periods since the complaint.

The Court: What materiality would its continuance have on the date of the filing of this suit have? The suit was filed in 1952.

Mr. Dixon: Yes, your Honor, but one of the charges is monopolizing the industry, the citrus juice products. I want to know if the contract period still continues in effect. That is tied in to show—in other words, under this contract, one of them, certainly, Hyland-Stanford, is required to continue to purchase all of its requirements of oranges from Sunkist. If there is any other seller, they have no chance to break into this market under this contract.

The Court: But the suit speaks as of the date of the filing of the complaint in this action. [476]

Mr. Dixon: Correct.

The Court: Which was February 1, 1952.

Mr. Dixon: Yes, sir. I also direct the attention of the court to the fact that the original, I believe the complaint indicated at that time that injunctive relief was also asked for. The plaintiff is still technically in existence.

The Court: Well, of course, we have a different rule on injunctive relief. The relief is as of the date of the decree. Objection overruled.

Q. (By Mr. Dixon): Directing your attention to——

The Court: Was the question answered?

Mr. Dixon: I am sorry.

The Court: Is the contract still in effect, Mr. Finley?

The Witness: It was in effect in 1955.

Q. (By Mr. Dixon): Now, directing your attention to Plaintiff's Exhibit 17, Mr. Finley, the same being entitled Orange Concentrate Processing Contract, dated August 9, 1951, between Mission Dry Corporation and Exchange Orange, and specifically directing your attention to paragraph 2 thereof, will you state what that paragraph relates to?

A. "The processor is to be paid 55 cents per gallon for processing 65 Brix orange concentrate. The volume of production is to be determined by the

(Testimony of James A. Finley.)

nominal content of filled containers. This rate includes all costs from the [477] time of receiving fruit until the moment the juice is ready to be placed in cans or barrels. It also includes a first month storage charge. The principal costs generally are fruit receiving, juice extraction, concentration, pasteurization, refuse disposal, etc., overhead expenses of the processor, and a reasonable profit on the complete operation. The first month's storage, as is included in the 55 per gallon rate, includes the handling in and out of storage, and cooling the product for a period of one month where the processor has such facilities.

"The 65 Brix concentrate shall meet the following specifications:

"Product must be sterile.

"Product must be free from specks.

"Product must have cloud stability.

"The raw juice before being concentrated must have been passed over a 40 or 50 mesh screen as specified by the supplier.

"The Brix of the finished concentrate shall be in a minimum of 65 degrees not corrected for acid." [478]

Q. This contract, Plaintiff's Exhibit 17, is comparable in substantially all respects, is it not, to Plaintiff's Exhibit 15? A. Yes, it is.

Q. And paragraph 2 that you have just read is omparable to paragraph 2 of Exhibit 15?

A. They are comparable contracts.

Q. And under paragraph 2 that you have just referred to Mission Dry was paid under the price agreed to in this paragraph for the processing costs incurred by Mission Dry in processing the oranges, and in addition thereto, it was assured the reasonable profit in addition to overhead expenses is that correct? A. That is what it says.

Q. It is a fact, isn't it?

A. Yes, it is a fact. It is a comparable paragraph to the other and includes profit. [479]

* * *

Mr. Hurd: I have one question on another subject I would like to ask while the jury is away. This matter of going into matters since the filing of the complaint, I assume that that is going to come up time and time again, and rather than interrupting each time, I wonder if I might have a continuing objection on any question dealing with matters since the filing of the complaint?

The Court: I haven't ever considered this proposition, but actually this is a complaint which asks equitable relief, and I suppose when the case is over with, if the jury returns a verdict for the plaintiff on damages, this court might have authority to issue an injunction if it was so minded. I understand the difference between an action at law and one at equity is that the action at law speaks of the date of the filing of the complaint. The action in equity speaks up to the time of the entry of a decree. Is that right? [484]

Mr. Hurd: That is correct.

(Testimony of James A. Finley.)

The Court: And there is nothing so far to remove the equitable propositions from this case.

Now, is there any prejudice——

Mr. Hurd: I can't tell, but it seems to me that there could well be, and that is why I do feel I should object. It is just a question whether I object each time, or whether I just have a continuing objection.

The Court: You may have a continuing objection. I have already told the jury as far as they are concerned this matter speaks as of the date of the filing of the complaint and gave them a date.

Mr. Hurd: If it will just be understood that I can have a continuing objection to any question dealing with the period after the date of the complaint, then I will not interrupt Mr. Dixon any more.

* * *

Q. (By Mr. Dixon): Directing your attention to Plaintiff's Exhibit 17, paragraph 12 thereof, which reads as follows:

"The processor"—and that is Mission Dry Corporation—"shall invoice supplier"—that is Exchange Orange— [485] "as soon as possible after the close of Sunday to Saturday week."

And then follows something further, and then:

"The supplier will make"—the supplier being Exchange Orange or Sunkist—"will make payment to processor"—that is Mission Dry Corporation—"not earlier than 10 days after the close of a week, and not later than two weeks."

(Testimony of James A. Finley.)

Now, under the provision I have just made reference to, Mr. Finley, Sunkist or Exchange Orange did make payments to Mission Dry for the oranges that were delivered to it and processed under this contract in 1951, did they not?

A. The Exchange Orange Products made the payments.

Q. And not Sunkist? A. And not Sunkist.

Q. But the oranges were delivered by Sunkist?

A. The oranges were delivered by Citrus Distributing Plant of Sunkist.

The Court: This contract 17 is another contract wherein Orange was having Mission Dry make concentrate, 65 Brix concentrate, for Orange, is that right?

The Witness: Right.

The Court: The same as the first contract with Hyland?

The Witness: The same as Exhibit 15.

Q. (By Mr. Dixon): Directing your attention back now to Exhibit 15, the Hyland-Stanford Company contract, the payments [486] to be made to Hyland-Stanford by Orange Exchange, under the provisions of paragraph 12, were made to Hyland-Stanford by Exchange Orange, were they not?

A. They were also made by Exchange Orange Products Company.

Q. Directing your attention to Exhibit 16, the fruit purchasing contract, oranges were delivered to Hyland-Stanford under this contract and paid for to Sunkist by Hyland-Stanford, were they?

(Testimony of James A. Finley.)

The Court: Paid to Orange?

The Witness: Paid to Exchange Orange by Hyland-Stanford.

Q. (By Mr. Dixon): Exchange Orange and not Sunkist?

A. Exchange Orange and not Sunkist.

Q. Now, directing your attention to Exhibit 18, the same being an Orange Products processing contract bearing the dates of June 22, 1951, and July 2, 1951, the June 22nd date being the one at which it was apparently signed by Mr. Ingalls of General Foods, and the latter date being the date on which it was signed by Mr. Smith for Exchange Orange, this contract deals with the processing of frozen orange concentrate by General Foods for Exchange Orange, does it not? Or am I in error in that respect?

A. It has been a long time since I have seen it, but paragraph 2, that refers to 65 Brix pasteurized concentrate.

The Court: That would be hot concentrate? [487]

The Witness: Hot concentrate. Similar to the Hyland-Stanford and Mission.

Q. (By Mr. Dixon): Directing your attention to page 2 of that contract, I find the language, "Frozen concentrated orange juice"; what does that refer to with reference to this contract?

A. Bireley's being able to produce either the hot concentrate or the frozen, both were covered in the same contract, so on page 2 is frozen concentrated

(Testimony of James A. Finley.)

orange juice, and we pay them so much per gallon for producing that. When I say "we," I mean Exchange Orange Products Company.

Q. Was any frozen concentrate processed for Exchange Orange by General Foods under this contract, to your knowledge?

A. In 1951 there was.

Q. Do you know whether General Foods had any cold storage facilities at its plant for storing this frozen concentrate?

A. They had a small amount of frozen storage space available. Whether they owned it themselves or whether they are located right next to a storage place, I don't remember, but they had it available. But it was a limited quantity.

Q. All of the frozen concentrate processed by General Foods under this contract, Exhibit 18, was stored at places other than the storage warehouse of General Foods, was it not? [488]

A. I think they had enough storage space there for about one or two or three days' operation, and then we agreed to take it away and put it in outside storage, some of it going as far as Long Beach and clear to Claremont.

Q. And payments were made to General Foods under this contract in the same manner and time duration as in the previous contracts we have discussed for the services rendered by General Foods in processing the frozen concentrate for Exchange Orange? A. Yes, it was.

Q. And this contract provided for payment to

(Testimony of James A. Finley.)

General Foods of overhead expenses and a reasonable profit, did it not, to General Foods?

A. That was a negotiated price, which frozen concentrate being a very new item, and there was to be paid 33 cents per dozen for producing it, that price was developed by negotiations with General Foods, and that is the same price which they were paying other places that they were buying concentrate from. We hadn't produced enough of it to get it that accurate. But it was a negotiated price, and it includes a reasonable profit. [489]

* * *

Mr. Dixon: Plaintiff offers in evidence Exhibit 19, the same being a contract or document entitled Frozen Orange Concentrate Processing Contract between Hart's Fruit Products Company and Exchange Orange Products Company, bearing the date July 23, 1951.

Mr. Hurd: If the court please, may I inquire? This is offered for general background purposes, and not on the basis of itself being a cause of action?

Mr. Dixon: Surely.

Mr. Hurd: No objection.

The Court: Received in evidence, Exhibit 19.

* * *

Q. (By Mr. Dixon): Will you state to the jury, Mr. Finley, what Hart's Fruit Products Company is?

A. Hart's Fruit Products Company was a——

Q. You say "was"; may I interrupt you. Do you mean it isn't in existence now?

(Testimony of James A. Finley.)

A. It is in existence now under the name of Brea Valley. It has changed names since then. But in 1951 it was going under the name of Hart's Fruit Products Company. It is located at Brea. It started in originally as a single-strength processor on orange and grapefruit, possibly some [490] lemon. In about 1950 they bought a low temp evaporator to go into frozen. They were having financial difficulties about '50, the end of that year, after they put it in, and approached me, and for the year 1951 I think all they ran was frozen concentrate. [491]

Q. They were not a processor of single-strength juice? A. Not in 1951, to my knowledge.

Q. This is a contract that is like the Mission Dry, Hyland-Stanford and General Foods contracts, whereby those companies processed oranges into pasteurized concentrates for Exchange Orange?

A. More similar to the General Foods contract for producing frozen orange concentrate.

Q. I am sorry. I left that one out.

The Court: For——

The Witness: Frozen orange concentrate.

The Court: For Exchange Orange?

The Witness: For Exchange Orange. Not hot concentrate.

Q. (By Mr. Dixon): And this contract also provided that Hart's should have a profit on this operation, did it not?

A. I will have to glance at it. I haven't seen it since 1951.

(Testimony of James A. Finley.)

Mr. Dixon: Perhaps I can read into the record then from paragraph 3 the following:

"33 cent rate per dozen does not include sugar, if necessary, cans or cartons, as these items are to be supplied by supplier; it does, however, cover all cost to the processor from the time the fruit arrives at the plant until the product is in sharp freezer, plus a profit for [492] processing."

Q. In other words, Mr. Finley, under this arrangement the 33 cent rate was the processing—withdraw that.

The 33 cent rate per dozen cans of frozen concentrate was the amount paid to Harts for processing the fruit, that is the oranges which Exchange Orange or Sunkist delivered to it under this contract, is that right?

A. That's right, 33 cents a dozen.

Q. And Harts were paid on a weekly basis for such processing services, the same as payments were made under the Hyland-Stanford, Mission Dry and General Foods contracts?

A. Yes. It was paid on a weekly basis, and they even went so far as to drive to Ontario to pick up the checks.

Q. So, that to summarize these contracts, Exchange Orange had so-called orange concentrate processing contracts with Hyland-Stanford, Mission Dry, General Foods and Harts Food Products Company; that Harts Food Products Company and General Foods processed frozen concentrate, orange concentrate, for Exchange Orange, and the other two

(Testimony of James A. Finley.)

companies, Mission Dry and Hyland-Stanford, processed this pasteurized orange concentrate that you have heretofore described.

Is that a fair summary?

A. That is correct.

Mr. Hurd: Pardon me. I think there should be added to that Bireleys also processed the hot concentrate. I believe that was omitted. [493]

The Court: Well, that's General Foods.

Mr. Hurd: General Foods, yes.

Mr. Dixon: I thought I said that.

Mr. Hurd: I think that was omitted.

The Court: If it was, it is now supplied. I thought General Foods was mentioned.

The one contract, 16, was a different kind of a contract. That was a contract whereby Orange supplied lemons——

The Witness: Supplied oranges.

The Court: ——supplied oranges to Hyland so that Hyland might make a hot concentrate for their own use.

The Witness: That is correct.

* * *

Mr. Dixon: Plaintiff's 20 is offered in evidence.

Mr. Hurd: No objection.

The Court: Exhibit 20 received in evidence.

* * *

Q. (By Mr. Dixon): Now, among the types of orange citrus juice products that Exchange Orange was processing was single-strength [494] Valencia orange juice, was it not?

(Testimony of James A. Finley.)

A. Will you repeat the question?

(Question read.)

A. That is correct.

Q. The single-strength orange juice which Exchange Orange processes it cans, of course, and that product then is sold in interstate commerce, is it, by Sunkist? A. Yes, it is.

Q. In the various states of the United States?

A. That's right.

Q. During 1951, Exchange Orange processed some single-strength orange juice that was sold under the Exchange label and also under the Sunkist label, did it not? A. That is correct.

Q. Now, was there any difference in the actual product that went out under the two labels, or was it a difference in name or label?

A. We packed the Exchange label a little earlier in the season. We waited for full maturity of the fruit, full flavor, and the acid going down to a minimum, before we packed Sunkist. I would say the Sunkist was slightly higher quality than—the fruit was the same quality, but the Exchange product was just a little higher acid content than Sunkist.

Q. Would that be anything that the average consumer [495] or drinker of this orange juice would recognize as a factor?

A. Frankly, I am not a consumer.

Q. I assume you probably drink a lot of orange juice out at Exchange Orange?

A. To one who is trained and critical, there is a difference, but to the untrained, I would say there would be very little difference.

Q. If I were to go into a grocery store and see on the shelf some orange juice with a Sunkist label on it and some with the Exchange label on it and did not know the difference, would there be in fact any difference between the juice I would get out of either can if I bought one of each?

A. Exchange label in the year 1951, you would have had juice that was produced in June. In Sunkist the fruit matured at a point—I don't think we started up until the latter part of July. It is a little better flavor.

Q. I know you are a connoisseur, probably, of orange juice. I am talking about a housewife or just myself or someone who bought a can. Would I be able to tell any difference between the two?

A. I can't taste for you

Q. Well, you are an expert in the field. Did your marketing department ever run any surveys on that point? A. No.

Q. Now, you also put out some of this orange juice, [496] single-strength Valencia juice, that is sold to other marketers of single-strength orange juice, do you not? A. Yes, we do.

Q. That is what is called a private label product, but it is one that is manufactured or processed by Sunkist and sold to the buyer who has his label put on that can which bears the orange juice processed by Exchange Orange, shall we say?

A. That was our type of business up to 1951.

(Testimony of James A. Finley.)

But I don't remember whether we did any of that type of business in 1951 or not. If it was, it was very small.

Q. You did offer, did you not——

A. We offered it, but how much business we did, I don't know.

Q. That type of orange juice processing by you is what is called shiny or unlabeled?

A. Bright stock.

Q. Yes, bright stock. The buyer then would tell you, Exchange Orange, to put "my label" on. Let's assume, maybe it is Ana-Gold he wants on that particular can. You would sell the bright stock and put the label on the can as the label of the purchaser, the Ana-Gold label on the can to the purchaser, would you not?

A. We would put the purchaser's label on.

Q. And the juice then would be the same juice as that [497] that went out under the Sunkist label, would it, or the Exchange label?

A. Some buyers would ask for samples first. We would block off 2,000 or 5,000 cases, take a sample of it, and send them a sample, and they would say to put their label on it. Others would send the label in and tell you to put it on anything.

Q. In processing this orange juice, do you have vats, or wherever it is stored, in which you pour the orange juice that is supposed to be available under the Exchange label, and then that under which the Sunkist product goes, and another one for the bright stock buyer? A. No.

(Testimony of James A. Finley.)

Q. Or is it all put into one container?

A. We run one type of product at a time.

Q. So that any one time if anyone wanted to buy Exchange orange juice, single-strength Valencia juice, or if they wanted to buy the unlabeled or bright stock, as you call it, that orange juice would come from the—might well come from the same vat, might it not, or storage tank?

A. It might, yes.

Q. It might also come from the same one in which Sunkist orange juice was being labeled, might it not? A. It could.

Q. Now, directing your attention to TreeSweet Products [498] Company, have you ever heard of that company?

A. Yes. That is the concern down in Santa Ana, TreeSweet Products Company. They have got a very good reputation.

Q. Well, I don't doubt that, Mr. Finley. They are located in the same town or city in which the Exchange Orange plant is located?

A. Exchange Orange plant is located in Ontario and TreeSweet Products plant is at Santa Ana.

Q. I don't suppose it makes much difference. They are close together.

A. It is just about a triangle from Los Angeles, about 35 miles.

Q. As a matter of fact, most of the processing plants, whether they are Exchange Orange or TreeSweet or any other independent processor, are all located in the Anaheim-Ontario——

(Testimony of James A. Finley.)

A. Los Angeles

Q. ——Orange County area, are they not?

A. And Los Angeles and Hollywood. There is a lemon plant that is up in Ventura, and an orange plant in San Fernando.

Q. But most of the facilities for processing oranges into orange juice products are in the Santa Ana-Ontario-Orange County area, are they not?

A. That's right.

Q. And TreeSweet is located there, too?

A. They are located in Santa Ana in the Orange County area. [499]

Q. Do you know whether Winckler & Smith Company had a plant in that area, too?

A. Winckler & Smith had a plant at Anaheim.

Q. TreeSweet produces primarily single-strength Valencia orange juice, does it not, at its plant in the Santa Ana area?

A. It produces the Valencia orange juice and a quantity of single-strength lemon juice.

Q. And those are the two products that it processes at its plant?

A. Those are the only two products that I know of.

Q. Its principal product, however, is single-strength Valencia orange juice, is it not? If you don't know, you may state so.

A. It is either orange or lemon.

Q. Do you know what label it puts on its single-strength Valencia juice when it puts it out for sale to the consumer in various states of the United States?

A. I think most of it goes under the TreeSweet label.

Q. Exchange Orange has no interest—by that I mean doesn't have any financial interest—does it, in TreeSweet Products Company?

A. It does not.

Q. Does Sunkist have any financial interest in TreeSweet Products Company? [500]

A. I am sure it does not.

Q. Is it fair to refer to TreeSweet Products Company as an independent processor, in the sense that it doesn't have any access to orange groves that it owns or controls as a source of supply for oranges that it processes? A. That is correct.

Q. So that it would depend upon the supplier or whatever source it could get oranges from, I presume, for processing its single-strength Valencia juice at its Santa Ana plant? A. That is correct.

Q. The single-strength Valencia orange juice that TreeSweet sells, is that sold in competition with the Exchange and Sunkist labeled single-strength Valencia orange juice?

A. It is sold in the same markets and in competition.

Q. That is in the various states of the United States, as well as the state of California?

A. Yes.

Q. So that if a buyer of single-strength Valencia orange juice went into a store in, shall we say, Chicago, they might find there on the shelves of a grocer

(Testimony of James A. Finley.)

both Sunkist Valencia orange juice and TreeSweet Valencia orange juice?

A. That is possible. [501]

Q. Mr. Finley, I believe we have heard from Mr. Kelly in this case testimony to the effect that a ton of Valencia oranges costing $40 a ton would produce an average of 100 gallons of single-strength Valencia orange juice, that ton purchased at $40 being 120 solids soluble content, I believe is the term he used. Now, the oranges that you process at the Exchange Orange plant with a 120 pound soluble content, if you had to pay for it, would produce about 100 gallons of single-strength orange juice, would it not?

I realize it might vary a gallon or so.

A. Your solids per ton depends probably more upon the Brix of the orange juice than it does on the number of gallons per ton, but for rough figuring I would say your statement is right.

Q. So that if anybody who didn't have to pay for the oranges got them under some arrangement, they would get 100 gallons, approximately, of single-strength orange juice from a ton of oranges that cost $40, is that correct?

A. That is approximately correct.

Q. Now, are you familiar with the costs—by "costs" I mean the manufacturing costs and overhead costs—included in that item for processing a ton of 120 solids Valencia oranges into the 100 gallons of single-strength Valencia juice?

A. I never heard of anyone keeping costs by

(Testimony of James A. Finley.)

tons. [502] Costs are usually kept on a case basis, so much per case, not a per ton basis. At least we never have, and I never heard of anybody else. We can multiply it out easily if you have your figures that way.

Q. I don't know much about this business, Mr. Finley, so I am just trying to see whether it can be dealt with on a tonnage basis, rather than on some of these case bases. By the way, do you have a good many sized cases of orange juice?

A. There are two sizes, primarily. The 46 ounce family size, and the No. 2, which is the 18 ounce size. And then there is a smaller percentage put up in 12 ounce, and some put up in 6 ounce, single strength. A very small percentage.

The Court: Can you compute it out on the ton basis? Not now, because we are almost at noon time.

The Witness: Permit me to bring my slide rule. All you have to do is multiply the per case cost by approximately 23, and that gives the per ton cost.

The Court: Well, that is a certain sized case, I take it?

The Witness: That is a 46 ounce case, which is 80 per cent of the pack.

Q. (By Mr. Dixon): My figures are 4 gallons and approximately a third. The figure I have is 4.312 gallons in each case of 12/46 ounce cans of single-strength Valencia orange juice. [503]

A. Twelve 46 ounce cans?

The Court: Is that correct, the figure of 4.312 gallons?

(Testimony of James A. Finley.)

The Witness: That is correct. I think there is a five on it. 4.3 is the figure I use.

Q. (By Mr. Dixon): Is it a fair statement, Mr. Finley, to say, based upon your knowledge and experience, that in processing oranges into single-strength juice, that the average cost of processing a ton of single-strength Valencia juice would be about from $30 to $35 a ton?

A. May I have a piece of paper, please?

The Court: Here is a pad.

The Witness: It is between $30 and $35 a ton.

* * *

Q. May it please the court. If I recall, Mr. Finley, when we adjourned for lunch we were talking something about manufacturing costs, discussing the various number of gallons, and so forth, of orange juice that were produced from the average ton of Valencia oranges. I believe you mentioned something about 12/46s as being the standard can. I am not sure the jury understands what that is. Will you tell them, please?

A. 12 46-ounce cans or 4.3 gallons is probably 80 per cent of the pack of oranges and grapefruit. That is the family size can. The Government figures—well, 10 or 15 years ago, the popular size used to be the 18 ounce, 24 No. 2s, so all cans were converted into that one size for comparative purposes, and even now the 12/46s are converted No. 2s. So it is about 80 per cent of the pack, 75 to 80 per cent of the pack is in the larger size can. [505]

(Testimony of James A. Finley.)

Q. If I understand correctly, then, 23 cases of 12/46s would be the usual number of cases that would be produced from the average ton of Valencia oranges?

A. If we call the average for Valencia oranges 100 gallons to the ton, and you divide it 4.31, it comes out approximately 23 cases per ton.

Q. I think you indicated you could more easily express the manufacturing costs per ton of single-strength Valencia orange juice if you computed it from the 12/46 ounce can cost. Now, if that is any easier for you, can you indicate to the jury what the manufacturing cost for processing a ton of Valencia oranges in single-strength juice under the case method would be?

A. To take the average price would depend on the size of the pack, but around $1.35 per case of 12/46 ounce cans.

The Court: $1.35?

The Witness: Yes. [506]

Q. (By Mr. Dixon) Is that the Exchange Orange manufacturing cost? I mean according to the best of your recollection.

A. Depending upon the size of the pack, that is about the cost.

The Court: Size of the pack, by that you mean the number of cases that you are making?

The Witness: Yes, per year.

If you making 500,000 cases, your cost would be one figure; if you are making 200,000 cases a year, it would be another figure.

(Testimony of James A. Finley.)

The Court: Go ahead.

Q. (By Mr. Dixon): Is that difference in cost explained, if there is a difference, because of the fact that overhead is a constant factor in the processing business?

A. Your overhead figure, taxes, insurance, depreciation, are constant factors.

Q. Of course, if you didn't run any single-strength juice and had an overhead—if you ran one case, let's say, of 12/46s, the manufacturing cost of that one case would be astronomical, relatively speaking, would it not?

A. It would be all your overheads, plus the cost of the cans and the case on that one case. It would be a pretty high figure.

Q. So when we are referring to this figure that you [507] mention of $1.35 for manufacturing cost per case, you are assuming of course that there is at least an average, shall we say, use made of the processing facilities that are available to you for that purpose?

A. Yes, sir, that is an average figure.

Q. Mr. Finley, I am not sure whether I have asked you this question, but if I didn't, I intended to: As I recall it, most of the processing facilities of Exchange Orange in 1951 were being utilized for frozen juice products, is that correct?

A. Well, both frozen and single strength take juicing equipment. You have one room—after it leaves that juice room it goes to the room where we

(Testimony of James A. Finley.)

can out single strength. If we are making frozen, it goes to another room where we are making frozen. So we can make both at the same time, although we cannot and didn't have in '51 enough juicing capacity to run both rooms to full capacity.

The Court: Well, the question was, I take it, what proportion of your production in '51 was frozen concentrate and what proportion was single strength.

Was that the question?

Mr. Dixon: Yes.

The Witness: It was predominantly frozen concentrate.

Q. (By Mr. Dixon): Was Exchange Orange in 1951 on the look-out for, shall we say, plant capacity for processing [508] single-strength Valencia orange juice because of this situation that you have mentioned?

A. Yes, sir, we looked for single-strength operators, as well.

Q. Who were the processing companies that were in 1951 primarily processing, to your knowledge, single-strength Valencia orange juice?

A. Case-Swayne, TreeSweet, Silzle, Winckler-Smith had equipment for——

Q. I didn't get the last name.

A. Winckler-Smith, and then ourselves, Exchange Orange. And the Exchange Lemon was putting in equipment for frozen lemon—not frozen lemon, but single-strength lemon, and the same equipment is used.

(Testimony of James A. Finley.)

Q. Mr. Finley, you mentioned the Silzle Company; was the Silzle Company selling single-strength orange juice in interstate markets, that is, in the various states of the United States, to your knowledge, in 1951? A. Yes.

Q. And was that product being sold by Silzle in competition with the product of Exchange Orange, either under the Exchange label or the Sunkist label?

A. It sold in the same markets and competitive.

Q. Directing your attention to the TreeSweet Company and the year 1951, did your company, that is Exchange Orange, [509] have any contract or arrangement of any kind with that company pursuant to which either Sunkist or Exchange Orange made oranges available to TreeSweet for processing into single-strength Valencia orange juice?

A. Had arrangements with TreeSweet from late in the season 1947 up to and through 1951. [510]

Q. You mean there had been an arrangement with TreeSweet for several years prior to 1951?

A. Yes.

Q. And that arrangement was in contractual form, was it, written form? A. Yes.

Q. During all that period of time? A. Yes.

Q. Before any written contract was entered into between Exchange Orange and TreeSweet in 1951, with whom did you discuss such a contract within the Exchange Orange Company?

A. Within Exchange Orange or Sunkist?

Q. Yes. A. Or just Exchange Orange?

(Testimony of James A. Finley.)

Q. You can include Sunkist, too, yes.

A. That contract, the first I heard of it was a discussion that originated, I think, with Sam Kelly. It was a suggestion to get around a problem.

Q. You mean that Mr. Kelly of Sunkist suggested to you that Exchange Orange enter into some kind of an arrangement with TreeSweet in 1951?

A. No.

Q. Under which TreeSweet could secure oranges?

A. No. 1947.

Q. I am sorry. I am now talking about 1951. Did you [511] have any discussion with him?

A. No.

Q. Did you discuss the arrangement, if any, that you made in 1951 with TreeSweet with anyone outside—I mean anyone in Exchange Orange before that arrangement was made?

A. No. The size of the crop was such that we decided——

Q. I am sorry. My question is, did you discuss any arrangement with anyone before you made it in Exchange Orange?

A. Not in Exchange Orange.

Q. All right. Did you discuss it with anyone in Sunkist? A. Yes.

Q. With whom?

A. Discussed the advisability of having a contract with Sam Kelly and with Fran Wilcox.

Q. When, if you recall, did those discussions take place?

A. I don't remember the exact dates on it, but

(Testimony of James A. Finley.)

they occurred very early in that year, because at that time we knew the size of the crop and knew that we would have to have all facilities operating. As to any dates, I don't know.

Q. What, if anything, did Mr. Wilcox and Mr. Kelly say to you with reference to entering into an arrangement with TreeSweet in 1951?

A. They thought it advisable to make arrangements to, you know, process all the fruit available and to do that I [512] figured I would need some single-strength juice operators.

Q. In these discussions, was there anything said by Mr. Kelly concerning the price at which any oranges would be made available to TreeSweet under any arrangement in 1951? A. No.

Q. You mean price wasn't even discussed?

A. Price wasn't discussed with Kelly and myself.

Q. Did you discuss price with Mr. Wilcox?

A. Regarding the price to TreeSweet?

Q. Yes. A. No.

Q. Was there any discussion concerning the terms of any arrangement that should be entered into with TreeSweet in 1951 and Exchange Orange which would enable TreeSweet to secure Valencia oranges for processing into single-strength juice in 1951?

A. Terms were not discussed and wouldn't have been discussed because we had previous arrangements, and it was assumed that the same arrange-

(Testimony of James A. Finley.)

ments would be carried on, so there would be no need of discussing, you know, figures.

Q. Then I take it, Mr. Finley, that you were given carte blanche by Mr. Kelly and Mr. Wilcox to enter into the same type of arrangement, shall we say, with TreeSweet in 1951 as you had had in previous years? A. Well, I—— [513]

Q. Do you understand what I mean by carte blanche? A. No.

Q. Unrestricted discretion.

A. The authority to make a contract like that would not come from Kelly and Wilcox. It would come from members of my board. So they might agree with it and back it up, but I would still have to get approval from somebody else. It would be their suggestion or advice.

Q. Did you ever present a proposed contract between Exchange Orange and TreeSweet for the approval of the board of directors of Exchange Orange in 1951?

A. Not the contract, no. That is an administrative matter.

Mr. Dixon: Counsel, may it be stipulated that a request was made for the production of any minutes of Exchange Orange of the board of directors or of the executive committee of that company which would indicate any action or discussion ever having been taken by the board of directors or the executive committee of Exchange Orange on any arrangement between Exchange Orange and TreeSweet in 1951 pursuant to which TreeSweet would acquire oranges

(Testimony of James A. Finley.)

for processing into single-strength orange juice or any other citrus juice product?

Mr. Hurd: That is correct, and there were not minutes dealing with the particular contract to which you are referring. [514]

Q. (By Mr. Dixon): But Exchange Orange did enter into a contract with TreeSweet in 1951, did it not, Mr. Finley, pursuant to which TreeSweet did secure Valencia oranges for processing into single-strength Valencia juice? A. We did.

Q. Directing your attention, Mr. Finley, to Plaintiff's Exhibit 20, did Exchange Orange make any Valencia oranges available to TreeSweet for processing into single-strength Valencia juice under that contract in 1951? A. Yes, it did.

Q. It is a fact, is it not, that in excess of 24,000 tons of Valencia oranges were made available to TreeSweet by Exchange Orange or Sunkist under that contract?

A. I don't know the exact figure, but it was approximately that figure, over 20,000 tons as I remember it.

Mr. Dixon: Just so the record may show at this time, I think counsel will agree that it is already in evidence that the amount, Mr. Finley, was in excess of 24,000 tons.

Is that correct, counsel?

Mr. Williams: 24,148.

Q. (By Mr. Dixon): Will you state to the jury, if you can, from this contract how TreeSweet paid,

(Testimony of James A. Finley.)

if it did, for any oranges delivered to it under that contract for processing into single-strength juice?

A. This contract covers TreeSweet producing for the [515] Exchange Orange Products Company a single-strength juice at their represented cost with the Exchange Orange Products Company furnishing the fruit to make the juice, Exchange Orange Products Company taking, also, the oil and peel for dried meal. After it was produced, then the TreeSweet Company bought the finished product cased from Sunkist for the then going price of our products.

So we hired them to make it for our account and then sold it back to them at our regular price, less discounts of brokerage, allowances which are common in the trade, which we would have to give in the case of our own sales, plus an operating profit. And we got paid, really, for the oranges on the difference between those two prices.

Q. I don't presume that you have figured, Mr. Finley, the actual amount that Exchange Orange received per ton after all of these various transactions had been made between Exchange Orange and TreeSweet, while this contract was in effect, have you?

A. No, I havn't. It is the addition of the juice, oil and meal that is sold over a period of time.

Q. Would you say that it was around about 12 to 15 or 16 dollars a ton? Is that a fair estimate? I am not asking you now to be specific. I am just asking you to approximate it if you can.

A. Some lots may have been sold that low, but I

(Testimony of James A. Finley.)

would [516] venture to guess that the total contract was somewhat higher than that, but as to how much——

Q. Approximately, can you indicate? Or if you can't, don't hesitate to say so.

A. Well, I can't.

Q. I am sorry?

A. I can't. It would be higher than that, but I don't know how much.

Q. So that under this contract with TreeSweet, Exhibit 20, TreeSweet was paid, was it not, on a weekly basis according to the manufacturing costs, plus a manufacturing profit, for the processing of the oranges it received thereunder as this contract went into effect?

I direct your attention, Mr. Finley, if you are having difficulty finding it, to paragraph 3. It will be the third page of the exhibit as it is presented to you.

A. The reason that I was looking for that particular paragraph, it is in the contract that we pay for it on a weekly basis. That was the agreement. But we did not do it that way. [517]

Q. Yes, I understand. A. All right.

Q. After TreeSweet got processing under this contract, it sold the juice it canned and processed, did it not, on its own account under its own label?

A. Yes.

Q. None of this juice that was processed under this contract was ever sold by Sunkist or Exchange

(Testimony of James A. Finley.)

Orange under a Sunkist or Exchange Orange label, was it, Mr. Finley?

A. Practically all of it was sold, if not all, sold under a TreeSweet label, although the contract is about a four-year contract, and I remember one or two years that we did get some and it was packaged on the Exchange label, but in 1951, I don't remember.

Q. It is a fact, then, is it not, that the entire production under the TreeSweet 1951 contract, Plaintiff's Exhibit 20, was sold under the TreeSweet label?

A. I would say as nearly as I can remember practically all of it was sold under that label.

The Court: Sold under that label and sold by TreeSweet?

The Witness: And sold by TreeSweet.

Q. (By Mr. Dixon): And as TreeSweet sold the oranges processed by it under this contract, it remitted or paid Sunkist or Exchange Orange for the juice so processed by TreeSweet on the basis of the then prevailing Sunkist selling [518] price for Sunkist Valencia orange juice less certain specified discounts, did it not? A. That's right.

Q. So that if TreeSweet would process, let us say, a thousand tons of Valencia oranges during the week, more or less, taking that as a figure, and process that 1,000 tons into single-strength Valencia juice, in cans furnished by TreeSweet, and sold that juice under the TreeSweet label, they would then remit to Exchange Orange the price for that product

(Testimony of James A. Finley.)
based upon the method that I have just suggested which appears in the contract, and at the same time, if TreeSweet had any money coming to it from Sunkist during that week in which the sale was made for processing those oranges, the actual amount which TreeSweet would then remit, if any, to Sunkist would be the difference between the amount due that week to TreeSweet for processing the oranges under the contract on a certain basis provided for in the contract, and the amount that TreeSweet owed Exchange Orange for the canned juice which it had sold during that week, the price being paid by TreeSweet being determined under the contract with the selling price of Sunkist less the discount mentioned?

I realize that is a long and involved question, Mr. Finley. Do you understand the question?

A. Yes.

Q. Well, is that a fact? [519]

A. That is the way it was worked.

The Court: Well, I saw one juror shaking his head.

Mr. Dixon: I could put it in simpler language, but I don't know how I can without putting words in the witness' mouth.

The Court: Can I explain the contract? I will try it and see if I do any better.

Under this contract, Exhibit 20, between TreeSweet and Orange, Exchange Orange, Exchange Orange made available to TreeSweet oranges to be made into juice, and the contract provided that this

(Testimony of James A. Finley.)

juice should remain the property of Exchange Orange until such time as TreeSweet purchased it. So to start with the oranges went from Exchange Orange to TreeSweet. TreeSweet made them into juice. But the contract provided that was Exchange Orange's juice so far.

In the meanwhile, TreeSweet was paid by Exchange Orange or was to be paid—I am not talking about when the money passed—was to be paid a certain amount for processing oranges into juice. TreeSweet had a right to buy this canned juice from Exchange Orange, and so it bought the canned juice in case lots from Exchange Orange at the Sunkist price—or I guess you would call it the Sunkist price less certain discounts which we have only heard generally about, and was to pay Exchange Orange then for the number of cases that it bought. [520]

The evidence shows that substantially the entire 1951 production made by TreeSweet under this contract was bought by TreeSweet on that basis. [521]

As a result of these two parts of the contract there would be credits going each way. TreeSweet would have money coming to it from Exchange Orange for doing the processing, but when it sold the cases it would owe Exchange Orange for the cases.

I don't know. I assume that there were bookkeeping entries.

Mr. Hurd: I think that is true. I think as TreeSweet sold, it paid Exchange Orange for the juice, less what it had coming for doing the processing.

The Court: All right.

(Testimony of James A. Finley.)

Now, do you think you understand this transaction?

All right.

Q. (By Mr. Dixon): So that oranges were then made available to TreeSweet under this contract, Exhibit 20, pursuant to which it did not pay anything for any of the oranges, it paid only for the juice processed thereunder, and then only when sold; is that correct?

A. That is correct, just the juice portion.

Q. Now, directing your attention to Schedule 1 of Exhibit 20, Mr. Finley, and particularly the column 12/46 ounce heading——

A. What page is that?

Q. This is Schedule No. 1.

A. I see it. [522]

Q. That schedule deals with the costs, that is the manufacturing costs, to be paid to TreeSweet by Exchange Orange under the per case system that you mentioned a few minutes ago: is that correct?

A. That's right.

Q. Now, by referring to the column under the 12/46 ounce schedule, I notice there is a line drawn through or under the sixth figure.

I am sorry, ladies and gentlemen of the jury, that I have to be this specific. You will have the contract with you, but at this time this is the only way that I can identify what I am talking about.

Will you indicate to the jury what that line means, if anything?

A. I don't think that line means anything. It

(Testimony of James A. Finley.)

could have been put at any other place and meant just as much. I don't know the meaning of it.

Q. I don't, either, and I was just curious as to whether it had any particular meaning.

Mr. Hurd: I will say for the record we don't, either, Judge.

The Witness: It is sort of the mid point or a guess, and it is put in there.

The Court: The line that they are talking about here is on a very detailed set of figures. There is a line between [523] certain columns, and that is what they are talking about.

Q. (By Mr. Dixon): I venture this suggested explanation, Mr. Finley. I am not much of a mathematician, but by taking the figure 1.41, which is just above that line, and multiplying it by 23 cases, I get a figure of approximately 32 or 33 dollars. Is that in your judgment a fair cost, manufacturing cost, with profit, for manufacturing a ton—the average ton, rather—of Valencia oranges into 23 cases of size 12/46 ounces?

A. If the pack as drawn by that line carries out to 1.41, the cost would be about a dollar forty-one cents, but that does not include profit.

Q. You mean that under this contract there wasn't any manufacturing profit included in this item of cost?

A. There is no manufacturing profit.

Q. But the overhead of operating the plant, of course, was figured in that item, was it not?

A. The manufacturing overheads.

(Testimony of James A. Finley.)

Q. Was included? A. Yes.

Q. But no manufacturing profit?

A. You are right. [524]

* * *

Q. (By Mr. Dixon): Now, Mr. Finley, let's assume for the purpose of my question that the Sunkist selling price to any other buyer of orange juice, that is Valencia single-strength juice, was $2.20 a case for a case of 12/46 ounce cans—and I might say to the jury this figure 12 means 12 cans of 46-ounce size. Can you tell the jury under this contract what TreeSweet would pay Exchange Orange for any juice, that is, for a can of 12/46s that it purchased or otherwise acquired from Exchange Orange under this contract?

The Court: You mean a can or a case?

Mr. Dixon: I am sorry. I mean a case, yes, Judge.

The Witness: Following the contract, that could be figured.

Q. (By Mr. Dixon): First you take off 15 per cent, do you not?

A. That's right. That is 33 cents.

Q. Which, I am a poor mathematician, but I understand is about 30 cents? A. 33 cents.

Q. 33 cents, I am told. Then to that we add the 6½ cents label allowance.

A. You don't add to it. It is less 6½ cents.

The Court: It depends on what you are talking about. Are you adding discounts together? [526]

Mr. Dixon: That is the purpose, your Honor.

The Court: That is what he means, so you get the total discount.

The Witness: You add it to the discount, yes.

The Court: What was that figure?

Mr. Dixon: Six and a half cents.

Q. Then we add another 7 cents to this, do we not, under the provision which says less 7 cents per case regardless of size as advertising allowance?

A. That's right.

Q. That makes a total of 46½ cents, if I compute the figures correctly, to be deducted from $2.20, or an actual amount of $1.73½, which is paid for the case of 12/46s.

The Court: Is that correct?

The Witness: That's right.

The Court: Speak up. Let me inquire, where do we get the $2.20? You say assume that.

Mr. Dixon: Your Honor, we are prepared to place in evidence at a later date the actual price list of Sunkist which entered into this.

The Court: This is a hypothetical question now, assuming $2.20?

Mr. Dixon: It is a hypothetical question, yes.

The Court: All right.

Mr. Dixon: The price varied during the season from [527] $2.20, I believe, up to $2.50 on the type of thing we are talking about here, and also on an-

(Testimony of James A. Finley.)

other price system from $2.50 to $2.80. So I am starting at the $2.20 price.

The Court: All right.

Q. (By Mr. Dixon): Now, if any other brokerage allowances or anything were given any other customer, they would be added to this price, would they, Mr. Finley, under the contract?

A. That is according to the contract.

The Court: Do you mean what you said?

Mr. Dixon: Would be deducted. I am sorry. Would be deducted from this $2.20 price.

Q. Your answer is yes, is that correct?

A. Yes.

Q. Now, I notice, Mr. Finley, that this allowance of 7 cents is made for advertising purposes. Did TreeSweet ever advertise any of the Sunkist products under this contract?

A. No. They advertised their own TreeSweet label.

Q. What is meant by advertised allowance? Will you explain that to the jury?

A. We had allocated that year 7 cents per case for advertising Sunkist. We felt that if we sold this to another concern, they should be permitted to use that same 7 cents advertising their own brand, if they wanted to. If they [528] didn't want to, that was all right, but that is how much it cost us to advertise our own brand. TreeSweet was an advertised brand and whether they used it or not I will never know.

Q. Do you know whether your price lists that

(Testimony of James A. Finley.)

were circulated to the trade provided for a 7 cents per case advertising allowance to any purchaser that might buy your juice?

A. Could be on private label, but if you are selling Sunkist, the Sunkist organization is the one that spends the 7 cents, and you don't allow anyone money for it because you spend it yourself.

Q. That is the thing I don't understand, Mr. Finley, as to why TreeSweet was given this 7 cents per case advertising allowance unless they were advertising something for Sunkist.

A. It cost about 7 cents a case to advertise your own brand. We were advertising Sunkist and it permitted him to advertise TreeSweet. He would have to get his money from some place, and we spent that much on advertising, or it was allocated for it.

Q. My question is again, Mr. Finley, when you circulated a price list of Sunkist to the trade, when anyone else would be buying unlabeled juice, did you give that purchaser a 7 cents per case advertising allowance? [529]

A. The Exchange brand is a non-advertised brand, and the price is 7 cents less.

Q. Will you answer my question? Did you or did you not, if you know?

The Court: Wait a minute. The question is on unlabeled use?

Mr. Dixon: Correct.

The Court: Which you call bright, is that it?

(Testimony of James A. Finley.)

Mr. Dixon: Correct.

The Court: Now, that is the question. When you sold bright juice or unlabeled juice.

The Witness: I don't know what our price list was at that time.

Q. (By Mr. Dixon): Are you familiar with the price structure or, generally speaking, the composition of your pricing system in 1951 as set forth in your price schedule circulated to the trade?

A. I am familiar with them at the time, but my memory isn't that good.

Q. Maybe my question isn't a fair one then. Let me ask you this. When you sell unlabeled product, single-strength juice, in a case of 12/46 to a purchaser who puts his own label on that juice and then sells it to a consumer or to a retailer or wholesaler, as the case may be, do you give that person or buyer a 7 cents per case advertising allowance? [530]

A. I don't remember whether we sold any of what you call bright stock in that year.

Q. Isn't it a fact, Mr. Finley, that the general purpose of giving an advertising allowance to a buyer is to enable that buyer to go out and set up the particular trade-marked product that he is selling and advertise it in the local store and in the fly sheets in the area in which the product is sold? Do you know what I mean by fly sheet? An advertising sheet circulated to the housewife containing a list of products that are being offered for sale at a certain price? Isn't that what is meant by an advertising allowance in the trade?

A. Well, I think an advertising allowance in the trade might be considered an allowance to the store operators to advertise in the newspapers, and they pick up the advertising bill, while this 7 cents advertising allowance here was for the purpose of Sunkist doing their own advertising in their own way. It can be spent, that 7 cents, if Sunkist wanted to, they could pass it on to the customer with the agreement that they go ahead and spend the 7 cents in their ads, co-operative advertising.

Q. I understand, but it is only given, is it not, to someone who is advertising the Sunkist label product?

A. When the Sunkist product is being sold, that's right. [531]

Q. And this wasn't being sold under the Sunkist label, was it? A. No.

Q. It was being sold to the trade under a Tree-Sweet label? A. As far as I know.

Q. Well, then, was Sunkist in fact subsidizing or paying TreeSweet to advertise and promote the TreeSweet label by giving it this allowance under the contract?

A. We weren't paying them for it. They could use that 7 cents for that purpose if they wanted to.

Q. I understand. I think you have answered my question. There was no obligation, however, for them to use this 7 cents per case to advertise Sunkist label products, was there? A. Why, no. [532]

* * *

Juror Johnstone: Didn't I hear Mr. Finley say that Exchange brand products sold for 7 cents a case less because it wasn't advertised, because they weren't spending that advertising?

The Court: Yes. In other words, Sunkist had two brands, one the Sunkist brand and one the Exchange brand. I understood him to say that—you sold your Exchange brand for 7 cents less?

The Witness: Than the Sunkist brand, yes.

The Court: You advertised both brands, though?

The Witness: No, we don't advertise the Exchange brand.

The Court: You don't advertise it at all?

The Witness: No. And since have discontinued it.

Mr. Dixon: Plaintiff's Exhibits 21 and 22 are offered in evidence.

Mr. Hurd: No objection.

The Court: Exhibits 21 and 22 received in evidence.

* * *

Q. (By Mr. Dixon): I will ask you to refer to Plaintiff's Exhibit 21, the same being a series of written documents dated July 27, August 3, August 16, 1949, and ask you, Mr. Finley, if those documents and that exhibit represent [533] the arrangement in effect between TreeSweet and Exchange Orange during the processing year 1949.

(Testimony of James A. Finley.)

A. Yes, it does.

The Court: That is Exhibit 21?

The Witness: 21.

Q. (By Mr. Dixon): And is the arrangement substantially the same under that contract as it was in Exhibit 20?

A. Substantially, the contract Exhibit 21 is the same as the 1951 contract, except that it does not allow for an advertising allowance, some of the prices are a little different, and it also allows for the addition of sugar.

* * *

Q. (By Mr. Dixon): I notice there wasn't any advertising allowance of 7 cents a case allowed in this contract, Mr. [534] Finley, and that there was one in the '51 contract. Can you explain to the jury why it appeared in the '51 contract and didn't in the '49 contract?

A. Well, the '51 contract was negotiated from those that started in in the season '47, the first contract, and we thought we made refinements or improvements as we went along. We did not advertise the Exchange brand to any degree. And in '51, coming out with the Sunkist brand figuring on advertising it, and backing it up with advertising, we budgeted 7 cents per case for advertising, and felt if we were willing to back up our Sunkist name with 7 cents allowance for advertising, why, he should be entitled to the same thing, so it was put in the '51 contract.

Q. Was this to be kind of a joint advertising

(Testimony of James A. Finley.)

effort for Sunkist and TreeSweet Valencia single-strength orange juice throughout the country?

A. No. It was to be, you might say, a competitive advertising program. He was going to advertise TreeSweet and we were going to advertise Sunkist.

Q. I don't believe there was any advertising allowance provided for in Exhibit 22, that is the 1950 arrangement; is that correct?

A. That is correct. [535]

* * *

Q. (By Mr. Dixon): Exchange Orange or Sunkist did make oranges available to TreeSweet in both the years '49 and '50 under these two contracts, Exhibits 21 and 22, did they not, Mr. Finley? A. It did.

Q. And TreeSweet did purchase from Sunkist all of their requirements and all of the juice which it processed from oranges delivered to it by Sunkist under those contracts in the years 1949 and '50, did it not?

A. It purchased all of the fruit—rather, all of the juice packed by it from Exchange fruit in the years '49 and '50. As to whether he ran additional fruit or not, I don't know.

I don't know whether that was in your question. [536]

Q. I don't know, either, Mr. Finley, whether they did or didn't.

Then, these three contracts, Exhibits 20, 21, and

(Testimony of James A. Finley.)

22, represent the working arrangement between Sunkist and Exchange Orange—I mean Sunkist and TreeSweet—during the years '49, '50 and '51, do they?

A. Those contracts cover the sale of juice to the TreeSweet Products Company under these contracts. [537]

* * *

Mr. Dixon: Plaintiff's Exhibits 23 and 24 offered in evidence.

Mr. Hurd: No objection.

The Court: Exhibits 23 and 24 received in evidence. [538]

* * *

Q. Now, under the 1950 contract, Mr. Finley, all of the juice that was on hand on February 1, 1951, was to be purchased by TreeSweet at the Sunkist selling price for the particular inventory then on hand, was it not? A. That's right.

Q. By selling price I mean the circulated or published selling price of Sunkist for those products to any other purchaser who might be buying them to sell or resell to other retail buyers.

A. Sale to wholesalers and the like for retail consumption. [540]

Q. Now, the discounts I refer to in Exhibit 24, they are those we have previously discussed, is that correct? A. Yes. [541]

Q. And the reference to processing for Exchange Orange at cost refers to the amounts that were to be paid TreeSweet for processing the fruit made available to it under the price schedule for

(Testimony of James A. Finley.)

costs attached to the 1950 agreement, is that correct? A. That is correct.

Q. And were those increased in 1951, do you know?

A. The prices increased in 1951——

Q. The cost that TreeSweet was paying.

A. Over 1950?

Q. Yes. If you know. If you don't know, why——

A. In negotiating a contract we start with the previous contract, the previous year, and then starting at that point will take into consideration the increased cost of cans—they have gone up practically every year since '47—increased cost of labor, or increased cost of labels, or any increase in cost, that has been taken into consideration. So the 1951 contract allowance is probably a little higher, that is, their cost would be a little higher in '51 than it would be in '50, due to labor and can costs going up.

Q. Now, Mr. Finley, you have referred to the E. A. Silzle Corporation, I believe, during the course of your testimony. A. Yes, I have.

Q. They are, I believe, a processor of single-strength [542] Valencia orange juice.

A. Single-strength Valencia orange juice, and they processed some navel orange juice, grapefruit juice, a blend of orange and grapefruit, and they may have processed some lemons, I don't know.

Q. They sell their product, do they, in competition with single-strength Valencia juice that is proc-

(Testimony of James A. Finley.)

essed or was processed and sold by Sunkist in 1951, in interstate commerce?

A. Yes, it is sold in the same class of trade.

Q. Did Exchange Orange have any working arrangement, shall we call it, with Silzle in 1951 pursuant to which that company was furnished Valencia oranges by either Exchange or Sunkist for processing into single-strength Valencia juice?

A. Yes, we had arrangements with them about the same as with TreeSweet.

Q. Mr. Finley, did you have any discussion with anyone in Sunkist concerning the making of oranges, Valencia oranges, available to Silzle for processing into single-strength juice in 1951?

A. We had discussions for making oranges available to reputable single-strength canners in the year 1951. They left it up to me to go ahead and make those contracts.

Q. In other words, they were only to be made available to reputable canners, is that right?

A. That is the way I specified it in my recommendation [543] to the board.

Q. Reputable may mean a lot of things and different things to different people. Was it used in any particular manner when you just referred to reputable canners?

A. It was left to my discretion by the [544] board.

Q. And they gave you no yardstick or norm by which you would determine who or what canner was reputable? A. No, they didn't.

(Testimony of James A. Finley.)

Q. That was left up to your determination?

A. That was left up to me.

Q. Well, now, do you know whether any product Valencia oranges were sold to Silzle in 1951? Maybe that is an unfair question. I realize that is not in your department, but I thought you might know. If you don't know, just say so, Mr. Finley.

The Court: You are speaking of outright sales?

The Witness: Outright sales on a per ton basis, I did not know.

Q. (By Mr. Dixon): I am sorry. I didn't get your answer.

A. Per ton basis, I just don't remember.

Q. Did you have any discussion at any time with Mr. Kelly or anyone in his department concerning oranges that had been made available to TreeSweet in the early part of the processing season of 1951 which should be handled on any basis other than a direct payment for those oranges at the circulated Sunkist price list for Valencia product oranges?

A. Read the first part of that question over again, and I think you said TreeSweet.

Q. I eliminated TreeSweet. I am referring only to [545] Silzle in this question.

A. But if you read it, I think you said TreeSweet.

The Court: You said TreeSweet.

Mr. Dixon: Thank you, your Honor, for the correction. I meant Silzle.

Q. Do you now understand the question?

A. Yes, sir. The first I heard of it, of any

(Testimony of James A. Finley.)

oranges being made available to Silzle in the early part of 1951, early part of the Valencia season, was they wanted to know whether they could sell some juice to Silzle——

Q. They wanted to know what?

A. If they could sell some juice to Silzle.

Q. Who wanted to know whether they could sell some juice?

A. Well, Sam Kelly called me and said they had a few tons of fruit which they had sent to Silzle and wondered if they could sell it to them, and if 27 cents a gallon was a fair figure on the basis of the canned orange juice price which Case-Swayne was then selling for, as their supplies of fruit were coming from outside sources, and a price of 27 cents was proposed to Sam Kelly, I think by Silzle, and Kelly called me to see if that was a reasonable figure, because he did not know what 27 cents a gallon meant. He gave me what the price was that Case-Swayne was selling for, the canned goods, and by my own little formula, I figured out and said [546] it was probably worth about 27 cents, and there was a very few tons, as I remember it.

I heard Kelly yesterday, and I think he said it was 72 tons, and they wanted to meet the competition which was started by Case-Swayne, and the 27 cents a gallon.

Q. Who wanted to meet the competition?

A. Silzle had a pack, and they had to, or felt they had to meet the Case-Swayne competition, and

(Testimony of James A. Finley.)

Sam Kelly let them have 72 tons of fruit to meet that competition.

Q. You mean this price formula per gallon was what was figured out between you and Mr. Kelly, was it?

A. No. As I remember it, I think he worked it out more or less with Silzle in conversation with them, and the details, of course, I wouldn't know, and he called me just to confirm that price, to see whether it was a reasonable price, and I did a little figuring and said, well, yes, it was.

Q. I must confess, Mr. Finley, I haven't the slightest idea what this 27 cents per gallon figure is and what it means in connection with the selling price of a ton of Valencia oranges, which I believe several tons had been sold to Silzle which they had not apparently paid for. Is that correct?

A. Well, 72 tons wouldn't be over a day's operation for them, and how they got it and why they called me after they received it, I will never [547] know.

Q. How did you arrive at this figure of 27 cents a gallon? Can you tell the jury?

A. You can take 27 cents a gallon, add on or multiply that by your 4.3, which is the gallons per case, that gives you the juice cost per case, add on to that your manufacturing cost of around $1.35 or $1.40, whatever their cost would be, and then add onto that their brokerage, cash discount, label allowance, labels, or anything else they have, and you can come up with a price as to what you should sell

(Testimony of James A. Finley.)

for. Of course, you can start the other way around and start with the selling price and make those deductions come out with 27 cents, too. How he approached it, I don't know. [548]

Q. I would like to have you, if you can, Mr. Finley, transform—I don't care how you do it—that 27 cents a gallon figure into a selling price per ton, as compared to what Sunkist was then selling or making oranges available to independent processors for under their published price list.

A. Maybe I misunderstood your last question. You want it converted to price per ton.

There is roughly 100 gallons of juice per ton. 27 cents a gallon times 100 equals $27.00.

Q. In other words, whatever tonnage was involved in these transactions would run to about $27 a ton, is that correct?

A. Yes; 72 tons would run just about that figure.

Q. Mr. Finley, I will hand you Plaintiff's Exhibit 5, which is the Sunkist selling price of Valencia oranges for the processing season 1951. I will also hand you Plaintiff's Exhibit 7, which purports to be three delivery sheets showing the delivery of oranges by Sunkist to Silale, under dates of June 12, 14, and 15, and which contain these gallonage figures that we have referred to before. I notice that the delivery sheet dated June 15 has the figure 123 solids. Is that the same solid as appears on Plaintiff's Exhibit 5 as selling for $41.15 a ton?

A. Yes, it is.

(Testimony of James A. Finley.)

Q. And the one dated 6/14/51 bearing the solid figure [549] 131. Will you tell the jury what a ton would sell for with those solids per ton?

A. According to the chart and Exhibit 5, 131 pounds of solids per ton would be $44.22.

Q. And referring to the one on June 12, '51, the solids purport to be 136 and 124; will you tell the jury what those were selling for per ton?

A. 136 pounds of solids per ton would be $46.13; and 124 pounds of solids per ton would be $41.53.

Q. And what was the price that we had figured out that was charged to Silzle under this juice arrangement? Or did we figure it out?

A. You told me it was 27 cents per gallon, or $27 per ton.

Q. Well, do you know of any reason, Mr. Finley, why Silzle was delivered the oranges referred to in that exhibit at a price of $27 a ton, when the same oranges were selling to any other idependent processor, or buyer of those oranges, at a price in excess of $40 a ton?

A. That was not in my department. He called me up for verification of the 27 cent figure, and as to what he had in the back of his mind I don't know.

Q. I take it your answer is that you don't know the reason for it? A. I don't know. [550]

Q. Did you inquire of Mr. Kelly as to his reason for making that change in the delivery sheet and price at which they were sold to Silzle?

A. As I remember it, we were starting negotia-

(Testimony of James A. Finley.)

tions with Silzle for a custom packing contract similar to the TreeSweet contract. and it was just during that period of time, and they wanted a few tons for a special order to meet Case-Swayne competition——

Q. Do you mean in single-strength juice?

A. In single-strength orange juice. And it amounted to so few tons, and it was in their records, I told them, I said, "Well, you go ahead and run them through your records, and in the custom packing contract I will run it through mine," which is the EOP contract.

It didn't amount to enough to throw it back and forth.

Q. But as far as Exchange Orange was concerned, your department had no contract or arrangement with Silzle at that time, did they?

A. No, we did not.

Q. So this arrangement, whatever it was, that existed at that time was one between Mr. Kelly and Silzle? A. Yes.

Q. Do you know whether oranges were thereafter made available to them at a price of $22.50 a ton?

A. Exchange Orange Products [551] Company——

Q. By Exchange Orange Products.

A. By Exchange Orange Products Company. I contacted Mrs. Silzle, who is the operating head of the Silzle Corporation, and asked her to come up and we would make a custom packing arrangement,

(Testimony of James A. Finley.)

selling her juice, and on the telephone I went over just the general terms to see if she was interested. I did not go over the detail, because she did not signify she wanted to do it. But she later signified she would be interested in it, and she wanted to go away, so I said, "Well, let's go ahead and we will send you 500 tons of fruit and you can go ahead, but we won't send you any more until we work out the details." And she saw me when she got back, and she got a few over the 500, because you can't guess at these truckloads of fruit that run 20 tons. They may ran 21, 22.

Q. I take it from your testimony that you contacted Mrs. Silzle at the E. A. Silzle Corporation for this arrangement?

A. As I remember it, I tried to contact her earlier, she was at—she was the operating head——

Q. What office does she have, if any, to your knowledge in this corporation?

A. Well——

Q. Is she the president of it?

A. From the start of it up to '50 I think she was president [552] of it. In '51 I am not so sure that they didn't change presidents, but as far as I was concerned she was the operating head of the Silzle Corporation.

Q. And you contacted her as you have indicated?

A. I tried to contact her. That summer she was, if I remember, down in the Imperial Valley quite a bit on her grapefruit grove, and whether I got

(Testimony of James A. Finley.)

ahold of her myself or told someone down at Silzle. her secretary or one of the fellows that I knew down there that I was trying to get her, I don't remember. But I finally reached her.

Q. In any event, you finally reached her?

A. Yes.

Q. Did you do this at Mr. Kelly's suggestion, to make these oranges available to Silzle?

A. No, because that was decided earlier in the spring, that we would make oranges available to the single-strength processors. [553]

Q. All on the same basis, I presume?

A. Yes. That is what we wanted to do, was treat them all on the same basis.

Q. In other words, you didn't want to discriminate between any of these independent processors, did you? A. No.

Q. In making the oranges available?

A. No.

Q. Now, you went ahead under this arrangement, then, without any written contract or understanding of any kind, and made over 500 more tons available to the Silzle Corporation, did you?

A. As far as Exchange Orange Products Company is concerned, we made the 500 tons available to her on a verbal contract.

Q. Was the price left open that Silzle was to pay for these 500 tons, or was it decided at the time or before you made the delivery of 527 tons?

A. I think the price was on a per case basis, we to take the oil and peel——

(Testimony of James A. Finley.)

Q. May I interrupt you, Mr. Finley?

A. Yes.

Q. I asked you whether you had agreed with Mrs. Silzle, or anyone at that corporation, with reference to the price at which you would make any of these 527 tons [554] available to them before you actually made them available to Silzle?

Do you understand my question?

A. I don't.

Q. All right.

The Court: Did Silzle know before they got the 527 tons what the price was going to be?

The Witness: They knew what the billing price would be at that time, would be on the basis of the price of canned juice, in our telephone conversation, when I talked to her.

Q. (By Mr. Dixon): Are you sure of that, Mr. Finley? A. At that time, yes.

Q. At what time are we talking about?

A. Well, we are talking about that 500 tons.

Q. Yes.

A. And before she received any of the 500 tons, I told her on what kind of terms we would make the canned juice available to her. She would custom pack and then buy back the canned juice. That was a verbal understanding which we had. I told her about the discount, and when she came back to town, she was going to or she might even come in from the——

Q. She wasn't very much interested in the deal, I take it, from your conversation, to start with?

(Testimony of James A. Finley.)

A. I didn't know it at the time, but that year she was [555] sort of dropping out of the business and turning the business over to somebody else, which I did not know until later in the season, but up to that time she was very, very active.

* * *

Q. (By Mr. Dixon): Was the E. A. Silzle Corporation to pay either Sunkist or Exchange Orange for any of the oranges that Exchange Orange or Sunkist delivered to it in 1951 under any arrangement except the—I mean were they to be paid for on a cash basis per ton?

A. The 500 tons was to be paid for at the time that we made the price on a per case basis, but the net result of the transaction, it was so confused because of other circumstances, that it was easier to convert it back to a per ton basis and wipe out the transaction, so we put that in the contract, because the contract was not written until after that period of time, and we had a chance to sit down [556] and go over details of their particular operation. No two plants operate the same and I had made some wrong assumptions on the way they operated.

Q. The arrangement that you ultimately reduced to writing was not signed until September 10, 1951, was it, Mr. Finley? A. That's right.

Q. You operated under this oral confused arrangement that you mentioned, whereby you continued to supply Silzle with oranges during that period?

(Testimony of James A. Finley.)

A. It was on the first 500 tons, and then that was straightened out, and then we started in on a definite basis, but the contract was not signed until September 10th.

Q. In other words, if I understand your testimony correctly, up until September 10, 1951, Exchange Orange or Sunkist made Valencia oranges available to Silzle for processing into single-strength juice under an arrangement not reduced to writing?

A. It was reduced to writing, but not signed.

Q. You mean it laid around on somebody's desk a long time before it was signed after it was reduced to writing?

A. No. The agreement as to price, and so forth, can be written very easily, and then as you write it up to a formal contract, you put in some extra words and protective clauses, and it was not signed until September 10, but it [557] was a verbal contract during that period of time.

Q. But during this period of time Sunkist continued to make oranges available to Silzle under this oral arrangement?

A. Exchange Orange Products Company made them available.

Q. Now, I will show you Plaintiff's Exhibit 6 and ask you to refer to the delivery sheets contained therein, commencing June 27, 1951, and ending August 4, 1951, and ask you to explain, if you can, how the price per ton or rate per ton figure computed on

(Testimony of James A. Finley.)

that is taken out in pencil in each one of the invoices or delivery sheets up to that date.

A. I am looking to see whose form this is. This is the first time I have ever seen it.

Q. Were you here yesterday? A. Yes.

Q. When Mr. Kelly was testifying?

A. Yes.

Q. Mr. Kelly didn't seem to know much about this form either. Is this the first time you have ever seen this form?

A. Yes. Here it is. CDP—that stands for Citrus Distributing Plant—form No. M-9. The Citrus Distributing Plant is in Los Angeles. That is Sunkist.

Q. Maybe the jury doesn't understand, and I may be a little uncertain about what Citrus Distributing Plant is. Is that one office of Sunkist or—— [558]

A. That is a department of Sunkist.

Q. Just a minute. Is that an office of Sunkist that handles the product oranges that are sold to processors?

A. Yes. It handles the product oranges sold to processors. Over and above what is sold to processors is turned over to Exchange Orange Products. Sam Kelly is the manager of CDP.

Q. Would you say from examining that exhibit that Sunkist or this department, whatever you call it, turned over all those oranges referred to in those delivery sheets to Silzle on the date specified? Is that a fair assumption? A. I would assume that.

Q. But you don't know who changed or took

(Testimony of James A. Finley.)

off the price per ton figure on each one of those invoices? A. No.

Q. Did you give instructions to anyone to do so?

A. I told Kelly to send for the account of EOP 500 tons to Silzles.

Q. At what price or under what arrangement? Just to deliver them?

A. For the account of Exchange Orange Products Company.

Q. But at what price, if any, were they to be delivered to Silzle?

A. There would be no necessity of naming a price, because they are under the control of Exchange Orange Products [559] Company.

Q. You mean these oranges, then, were under your control even though they were distributed or made available by this distributing office of Sunkist?

A. No. I think I—well, let me ask a question. Is this the 527 tons we are talking about?

Q. I don't know. I am just asking you for information.

A. If you total them up, it would be a clue. I told Sam Kelly around the June 27th figure to make 500 tons available to Silzle for the account of Exchange Orange Products Company. From looking at this, I can see where the accounting department and all, they ran it through as a normal operation, and then sometime during that period of time somebody, maybe Sam waited a week before he told

(Testimony of James A. Finley.)

A. Yes, it is.

Q. And is it sold in competition with the product of Exchange Orange?

A. The Mission Dry Corporation in making their 65 Brix concentrate, they further process that into a beverage base before shipment under their label. The Exchange Orange Products Company sells through the Sunkist Growers a 65 [584] Brix concentrate to go to bottler supply houses, who do the same thing that Mission will do from that stage on.

Q. Was the fruit which was delivered to Mission Dry under this contract paid for by Mission Dry at the time it was delivered, Mr. Finley?

A. Mission Dry bought the concentrate. The concentrate——

The Court: Just a minute. Let's answer the question, then give your explanation.

Read the question, Mr. Reporter.

(Question read by the reporter.)

The Witness: It was not.

The Court: Now you may explain it.

The Witness: The concentrate went into the Lawrence Bonded Warehouse, and then it was paid for at the time it was taken out.

Q. (By Mr. Dixon): In other words, if I understand your answer correctly, the oranges were delivered to Mission Dry under this contract, but were paid for as oranges only when the product taken or processed therefrom was sold by Mission

(Testimony of James A. Finley.)

Dry or taken out of the Lawrance warehouse; is that correct? A. Yes.

Q. And can you state to the jury how long under this contract might elapse—how long a period of time might elapse from the delivery of the oranges to Mission Dry before they were taken out of the Lawrence warehouse and paid for [585] in the manner that you have indicated?

A. The Valencia oranges delivered from June to November, that was taken out before March 31st of the following year.

Q. How was the cost of the fruit that was delivered to Mission Dry under this contract determined, Mr. Finley?

A. We had a record of their yields, that is, gallons per ton recovery, and took the going price of the fruit at the time which they operated, and by division set a value on the juice portion of the concentrate.

Q. I am not sure that I understand just how that works. Can you explain that to the jury? Let's assume, for example, that you have a ton of oranges of 120 pound soluble content, which under you 1951 price list would be selling for $40 per ton; would that be the price that Mission Dry would pay for a ton of oranges when they took the concentrate out of the warehouse?

A. Take the $40 a ton, divide—that product runs roughly 15 gallons to the ton——

The Court: 15 gallons of concentrate?

(Testimony of James A. Finley.)

Q. When did you make such an inspection, approximately?

A. The early part of June. I went down originally to look over their peel situation, because we were going to have them run on peel for orange peel first, and I was down there at that time.

Q. Was that the time at which you discussed with someone at Silzle the making of an arrangement to make oranges available to them during the processing season?

A. No, I don't think so. [589]

Q. There was no discussion at that time?

A. No. It was a peel arrangement.

Q. Were you investigating the plant just for the purpose of looking over their facilities for handling peel?

A. In going through it, I looked over other things, kept my eyes open.

Q. Who was accompanying you on that inspection tour, if you recall, for Silzle?

A. I don't recall.

Q. Was it Mrs. Silzle?

A. I just don't remember who it was.

Q. From the point of availability of product fruit, Mr. Finely, would you say that '51 was comparable to '49, that is the year 1951 comparable to the year 1949?

A. I think there would be more fruit in '51 than '49 generally.

Q. I take it neither Exchange Orange nor Sunkist has any financial interest in Silzle?

(Testimony of James A. Finley.)

A. It does not.

Q. Did you ever get a credit report in 1951 from Dun & Bradstreet concerning the financial condition of Silzle?

A. No. Exchange Orange Products did not, I know.

Q. Did you ask them for a financial statement before you made any arrangement with them in 1951? [590] A. No, we did not.

Q. Now, you stated you made an inspection of the Silzle plant in June of 1951. Was that the only inspection you made?

A. I think it was about the only one I made that year.

Q. By the way, Silzle, I believe, in case you haven't mentioned it, produced single strength orange juice.

A. Single strength orange juice, single strength grapefruit juice, and single strength blend.

Q. And all of those products are the kind that Exchange Orange also makes and sells in interstate commerce? A. They are.

Q. Through Sunkist? A. Yes.

Q. And they are in competition with the products of Sunkist, are they not?

A. They are. [591]

Q. Now, getting back to this inspection tour, did you notice when you made this survey whether Silzle had any canning line for the 12-ounce size of single strength juice?

A. No, I didn't notice.

them, and they went back and corrected it to my original statement.

Q. But if you or someone from Exchange Orange had not advised the distributing department or Sunkist about that oral arrangement with Silzle, the oranges that were delivered under those delivery sheets to Silzle would have been delivered at the price specified in the tonnage place, would they not?

A. Without checking the figures, I assume they are correct.

Q. I don't know who put the figures there, but I assume they are correct. That would have been the price [560] Silzle would have paid, would they not, for those oranges delivered to them under that arrangement?

A. If they hadn't made arrangements with the EOP company in the meantime. [561]

* * *

Mr. Dixon: Plaintiff's Exhibit 25 offered in evidence.

Mr. Hurd: I believe I have a continuing objection that applies to this, for the record.

The Court: Just a minute.

Your objection is overruled, on the views I have heretofore stated.

I assume that you are going to show performance extending into '52?

Mr. Dixon: Yes, your Honor.

The Court: Which would make it admissible on another ground.

(Testimony of James A. Finley.)

So without discussing it, you know my views.

Mr. Hurd: Yes, your Honor. I am just doing it for the record.

The Court: Exhibit 25 received in [562] evidence.

* * *

The Court: The record will show the jury absent.

As to Exhibit 25, this objection that you make is not based upon lack of foundation, but entirely on the question of the statute of limitations?

Mr. Hurd: That is correct.

The Court: All right. That is so we understand each other.

To enlarge upon what I had to say, it has an amendment to it dated into February of '52, which would of course be within the statute of limitations if we considered it as starting with the filing of the amended complaint.

In addition, counsel has indicated that he is going to show performance of it in '52.

However, I am of the view that it is admissible under the original complaint, in the sense that the amended complaint dates back to the filing of the original complaint.

So we understand each other, do we?

Mr. Hurd: Yes, I understood. I didn't mean to be reopening the matter. I was just making my objection for the record to be consistent on it. [564]

* * *

(Testimony of James A. Finley.)

Mr. Dixon: The plaintiff offers in evidence Exhibit 17-A, which I inadvertently omitted last week, the same being entitled——

The Court: No objection?

Mr. Williams: I assume that is being offered as background only, not as the basis for any cause of action, like the other contracts?

The Court: Not as the basis of some specific act or damage.

Mr. Williams: On the same basis as the other Mission [580] contracts?

The Court: That's right.

Mr. Williams: We have no objection.

The Court: Exhibit 17-A received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit 17-A.)

The Court: 17 was the Mission Dry contract, as I recall. I take it this is connected with Mission Dry?

Mr. Dixon: That's right, your Honor. [581]

* * *

Q. Now, Mr. Finley, this contract, I believe, is dated June 1, 1949. A. Yes, it is. [582]

Q. Are you familiar with the provisions of this contract? A. Yes, I am.

Q. Was it in full force and effect in 1951?

A. Yes, it was.

Q. Were oranges, Valencia oranges, delivered to Mission Dry by Exchange Orange during that year under this contract? A. Yes, they were.

(Testimony of James A. Finley.)

Q. Is the contract still in effect?

A. Yes, it was, in 1955.

* * *

Q. (By Mr. Dixon): Mr. Finley, directing your attention to Article 3 which I just read, will you state to the jury what the purpose of this provision is with reference, particularly, to permitting Mission Dry to convert the oranges supplied thereunder into 65 degree Brix orange concentrate?

A. The purpose of that article? Making beverage bases, [583] you start in basically with a 65 Brix concentrate, but in certain blends you may use what we call a pulpy type Juice or a juice made by some other method, so it takes so many gallons of 65 Brix and then so many gallons of a pulpy type juice. So that paragraph was put in there to permit them to make their finished product.

Q. Was there any limitation intended on the products which Mission Dry might make from the oranges purchased from Exchange Orange under this contract?

A. Knowing the type of equipment that they had, why, it was limited as to what products they could make.

Q. Now, this company, as I understand it, does not make single-strength Valencia orange juice?

A. It does not make single-strength. It does not have the equipment to do it.

Q. The orange Brix concentrate which they manufacture or process, is that the same kind of product that Exchange Orange also makes?

(Testimony of James A. Finley.)

The Witness: Of concentrate per ton. You take the $40, divide it by 15, and that would give the cost of the juice portion. If for any reason the fruit was a different grade and you just got 14, you take the $40 and divide it by 14. [586]

Q. How did this formula work out? Did it work out so that Mission Dry would only pay, say, $38 for a ton of $40 fruit, or would they pay $42 for a $40 ton of fruit?

A. They would pay the $40, the going price.

Q. You mean that regardless of this formula, then, they would pay the $40 per ton specified in the price list of Sunkist for those oranges?

A. Yes.

Q. Well, then, if they would pay the price of $40 per ton in any event, what was the purpose of this formula that you have just mentioned as the means of determining the price to be paid would be $40 a ton?

A. The purpose, Mission wanted a dependable source of supply of fruit, and this is a deferred payment plan of paying for their requirements. To do it, we put the concentrate in Lawrence Warehouse and set up the value on the juice portion of the concentrate, they furnishing the cost of manufacture. That gave us our security.

Q. Well, I take it from your answer that they still paid $40 per ton regardless of this arrangement, is that correct?

A. $40 on the basis of 120 pounds of solids.

The Court: Well, I don't know whether it is clear to the jury. Let's see if I can state it. Since this material was coming out of the warehouse from time to time you had to know [587] how much to allocate to the particular concentrate coming out of the warehouse.

The Witness: Yes.

The Court: By using the formula you could reduce the oranges from $40 a ton to so much per gallon of concentrate. Therefore, when 100 gallons of concentrate came out, you knew how much money Mission Dry had to pay you?

The Witness: Yes.

The Court: Otherwise, if you just used $40 a ton for oranges, without the formula, you wouldn't know how much to collect off Mission Dry when they took out 100 gallons of concentrate.

The Witness: That's right. [588]

• • •

Q. So that Exhibit 17 and Exhibit 17-A are tied in together, are they, Mr. Finley?

A. Yes, they are. They go along together.

Q. Now, coming back, Mr. Finley, to the Silzle Company, the Silzle plant at Anaheim was located right next to the plant of Winckler & Smith in 1951, was it not?

A. Yes, in the same neighborhood.

Q. Before Plaintiff's Exhibit 25 was entered into, Mr. Finley, did you inspect the Silzle plant?

A. Yes, I was down there.

(Testimony of James A. Finley.)

Q. Do you know as a fact whether they did have a 12-ounce canning line size?

A. Those machines, many of them, they will be converted. So if I saw it for a No. 2 can I wouldn't know whether they could convert it over to a 12-ounce by a simple adjustment. I didn't notice what size they had their machines set for at that time.

Q. Then I take it, you don't know, and didn't know in 1951, whether they had such a canning line, or not, insofar as the Silzle facilities for canning were concerned?

A. I did not know they had a 12-ounce line.

Q. That size is processed, isn't it?

A. To a minor degree.

Q. I direct your attention, Mr. Finley, to paragraph 5 of Plaintiff's Exhibit 25, which for the jury—— [592]

* * *

Q. (By Mr. Dixon): Mr. Finley, can you tell the jury who this Hart's Fruit Products Company is that is referred to?

A. The Hart's Fruit Products Company is a concern located in Brea that were equipped to make frozen concentrate, but were not equipped to make oil. As we furnished the fruit and we took the oil and peel, we made arrangements in that area to take the oil out of the peel before it went to the driers.

Q. You did have an arrangement with Hart's. I believe, in Plaintiff's Exhibit 19, I believe it was, whereby that [593] company, as you may have suggested, processed oranges for the account of Ex-

(Testimony of James A. Finley.)

change Orange into frozen orange concentrate in '51; is that correct? A. That is correct.

Q. Before you made Plaintiff's Exhibit 19, Mr. Finley, that contract, with Hart's Fruit Products Company that I just referred to, and which is referred to in paragraph 5, did you get any financial statement from that company?

A. No, because we didn't need one, because we would be owing them money instead of them owing us money.

Q. You mean under the processing arrangement?

A. Yes, under the processing contract they were doing it for us.

Q. Which was carried out under Plaintiff's Exhibit 19?

A. Yes, if Exhibit 19 is the Hart contract.

Mr. Dixon: I just want to be sure that it is.

The Court: All right.

Q. (By Mr. Dixon): I take it, therefore, that you didn't get any Dun & Bradstreet report on Hart's before you made that contract with them?

A. No, I did not.

Q. Well, it is a fact, is it not, Mr. Finley, that Hart's shortly after the contract was entered into, and during the year 1951, entered into an assignment for the benefit of creditors? [594]

A. Well, as to just exactly when, from the legal standpoint, they went into assignment, the Hart Company was in difficulty even in the winter of 1950 and another concern was taking them over.

(Testimony of James A. Finley.)

They were going to do business under the name of Hart's, but I made all my contacts with this other concern that were taking them over. And the fellow didn't think it was still a good deal, so he dropped out of it, and then I think it went into some kind of an assignment basis, but we were out of it by that time.

Q. Well, in other words, you were aware of the fact that Hart's were allegedly in financial difficulties even in the latter part of 1950?

A. Yes.

Q. And the contract, Plaintiff's Exhibit 19, was entered into between Exchange Orange and Hart's before there was any assignment for creditors by that company; that is so, is it not, Mr. Finley?

A. That's right. [595]

* * *

Q. (By Mr. Dixon): Now, Mr. Finley, directing your attention to that paragraph, it is a fact, is it not, that any orange juice that was processed by Silzle under Plaintiff's Exhibit 25 into single strength Valencia orange juice was sold solely under Silzle's label or someone who purchased that product from Silzle and wanted their particular label placed thereon? A. That is correct.

Q. In other words, none of the single strength Valencia orange juice processed by Silzle under this agreement was [596] ever sold under the Sunkist label? A. It was not.

Q. Or under the Exchange label?

(Testimony of James A. Finley.)

A. That is correct.

* * *

Q. (By Mr. Dixon): Now, directing your attention to that provision in this contract, Mr. Finley, are those 527.95 tons referred to therein any part of the tonnage that we have heretofore talked about and which were indicated as having been delivered to Silzle under Plaintiff's Exhibits 6 and 7?

A. Exhibits 6 and 7 are reports from the citrus distributing plant and the Exchange Orange Products Company has nothing to do with them. I don't know.

Q. I take it your answer is then you can't answer the question? A. No.

Q. Can you state to the jury, then, of your own knowledge when these 527.95 tons were delivered to Silzle at $22.50 a ton?

A. The latter part of June and July. [597]

Q. Do you have any records in your office or company that would indicate when those tons were in fact delivered to Silzle?

A. I imagine so, although I couldn't swear to it, because I don't do that type of work.

Q. Handing you Plaintiff's Exhibit 11 and directing your attention to the last sheet contained in that exhibit, it specifies in detail the time or, rather, just the delivery numbers, apparently, and the weights of the 527.95 tons of oranges. Will you refer to that, Mr. Finley, and state whether you

(Testimony of James A. Finley.)

now have your memory refreshed as to whether Exchange Orange made those deliveries?

A. These deliveries were made to Silzle for the account of the Exchange Orange Products Company. CDP actually arranged the delivery of this fruit.

The Court: CDP is the——

The Witness: Is the sales organization, and they have salesmen out in the country who know where the fruit is and they are the ones that call us and tell us where the fruit is available. [598]

The Court: What does CDP mean?

The Witness: Citrus Distributing Plant.

The Court: Department of Sunkist?

The Witness: That is a department of Sunkist under Sam Kelly.

Q. (By Mr. Dixon): I am not sure whether I asked you this question before, Mr. Finley, but did you have any discussion with Mr. Kelly or anyone in Exchange Orange at any time about the price of $22.50 per ton to be paid for 527.95 tons of oranges delivered to Silzle?

A. I had no discussion with anyone at CDP, or anyone in the organization, on the $22.50 a ton.

Q Well, was this contract prepared by you and under your supervision as the manager of Exchange Orange?

A. It was prepared under my supervision.

Q. When was it prepared? A. It was——

Q. Approximately.

(Testimony of James A. Finley.)

A. Started preparations on it the latter part of June before this 527 tons was delivered to them.

Q. What do you mean you started preparations?

A. Started verbally to go ahead and make a contract.

Q. I see I have not made my question clear, Mr. Finley. Did you dictate this contract or have it reduced to writing? [599] A. No, I did not.

Q. To your knowledge who did, if you know?

A. Arville Smith.

Q. Did you discuss it with Mr. Smith before he had it done? A. Yes.

Q. When did that discussion take place? I am referring now to the time immediately preceding the reduction of this contract to writing, Plaintiff's Exhibit 25.

A. Immediately preceding the September 10th date?

Q. Yes.

A. Mr. Smith came to me and said that the Silzle contract, which was verbal, was just an impossible thing to work out, unless they went down there and went through all their records, because they had mixed their peel in with other purchase peel, their oil was mixed, and it was going to be an impossible task, practically. And I told him, well, let's go ahead and figure up what the thing figures out and block it in there and put it in in one paragraph and save all that trouble.

Q. This discussion that you had with Mr. Smith occurred September——

(Testimony of James A. Finley.)

A. Previous to September 10th.

Q. Of 1951? A. Yes, 1951. [600]

Q. And prior to that time you had been working under this oral arrangement, whatever it was, is that correct? A. That is correct.

Q. Well, now, did you tell Mr. Smith to cover these 527.95 tons at $22.50 a ton when he wrote up the contract?

A. No. We took the price of juice that we sold to them, what the price of that juice was, and then by the formula converted it back to see what it would come out, and it came out roughly $22.50 a ton.

Q. And those were the oranges which had theretofore been billed at the prices set forth in the exhibits, is that correct, Plaintiff's Exhibits 6 and 7, I believe it is?

A. By having some of these Silzles' in Exhibits 6 and 7 wiped out during that period of time, I assume that Sam Kelly did not pass the information on to the clerical department of CDP, and at the end of the month as some time probably told them to correct their records.

Q. But you were the one, were you, Mr. Finley, who determined this $22.50 per ton price to Silzle?

A. That was done, I think, jointly with——

Q. Would you please answer that directly, Mr. Finley? Do you understand the question?

A. I approved that price, yes.

Q. Well, did you establish the price at $22.50 a ton, or did somebody else establish it? [601]

(Testimony of James A. Finley.)

A. Mr. Smith calculated it for me and I okayed it.

Q. So this $22.50 price was one that was worked out by you and Mr. Smith, is that correct?

A. That is correct.

Q. And who was Mr. Smith?

A. He is our comptroller in charge of accounting.

Q. Of Exchange Orange?

A. Of Exchange Orange Products.

Q. This price, then, of $22.50 was computed at the time the contract was reduced to written form on September 10, 1951, is that correct?

A. Previously to September 10th.

Mr. Dixon: Now, ladies and gentlemen, I am now going to read to you sub-paragraph (B) under the heading of "Price."

* * *

Q. (By Mr. Dixon): I believe, Mr. Finley, that the figures 24 mean two dozen, do they not?

A. 24 is two dozen. [602]

Q. (By Mr. Dixon): So that the actual price per case would be twice the 1.98, would it not, or is that the price per case?

A. That is the price per case.

The Court: A case of those sizes consists of 24 cans?

The Witness: Yes.

The Court: And a case of the big ones consists of 12 cans?

(Testimony of James A. Finley.)

The Witness: Yes.

The Court: All right.

Q. (By Mr. Dixon): Is this price, Mr. Finley, a price per dozen?

A. No. It is a sales price per case.

Q. All right. I just wanted to be sure that was correct. A. Yes. [603]

* * *

Q. (By Mr. Dixon): Now, directing your attention to this contract, Mr. Finley, do you find any provision in there dealing with the inspection of this product, the single strength orange juice processed by Silzle under this contract?

A. We have the right to. [608]

Q. What provision is that?

A. I would put it under the other conditions. "It is agreed that seller may examine and audit purchaser's records at any time * * *."

Q. That deals only with the records, does it not?

A. Laboratory records or any records.

Q. Well, did you ever resort to that provision, Mr. Finley? A. No, we didn't.

Q. With reference to examining the product processed by Silzle under this agreement?

A. No, we never did.

Q. Did you have any inspectors from Exchange Orange in the plant of Silzle while Silzle was processing oranges delivered to it under this contract into single strength Valencia juice?

A. Not to my knowledge.

Q. If there were, would you have known about it?

(Testimony of James A. Finley.)

A. I would have known about it. I don't think we did.

Q. I direct your attention to supplement No. 1 attached to Plaintiff's Exhibit 25, which bears the same date, namely September 10, 1951. [609]

* * *

Q. By Mr. Dixon): Now, Mr. Finley, all of the oranges delivered by either Sunkist or Exchange Orange to Silzle Corporation, or Silzle, under this oral and subsequently written agreement, Plaintiff's Exhibit 25, were processed by Silzle, were they not, into single strength Valencia orange juice?

A. Yes, they were.

Q. And Silzle paid for the oranges that were thus processed—strike that.

The only payment made by Silzle to Exchange Orange for any oranges that were delivered to it under this contract were the amounts paid by Silzle to Exchange Orange for the juices as they were sold under this contract, is that correct?

A. Except for that "A" which is referring to 527 tons, that was sold—because of the mixture of the oil and peel that was sold with the fruit, because it could not be divided.

The balance, the juice was sold to Silzle and then we kept the oil and peel. [613]

Q. Mr. Finley, you are thoroughly familiar with the processing costs and arrangements whereby oranges are processed by your company into single-strength Valencia juice, are you not?

(Testimony of James A. Finley.)

A. Yes, I am.

Q. Rather elaborate records are maintained by Exchange Orange in connection with all of these various phases and segments of the citrus juice processing business of Exchange Orange?

A. Yes, sir, there are lots of records kept.

* * *

Mr. Dixon: Plaintiff's Exhibit 26 offered in evidence.

The Court: Exhibit 26 received.

* * *

Q. (By Mr. Dixon): Mr. Finley, I hand you Plaintiff's Exhibit 26 and ask you if you will state to the jury, if you [614] can, what that is?

A. This page 6 of Exhibit 26 has to do with the fruit tonnage data as received by the Exchange Orange Products Company, and the distribution of that fruit.

Q. For what year?

A. For the month October, 1951.

Q. Is this only the monthly report, or is this the season report?

A. The report is for the month of October, 1951, and the 1950-51 season.

Q. Your 1950-51 season ends October 31, 1951, does it not, Mr. Finley? A. Yes, it does.

Q. So that these figures, whatever they are, on Plaintiff's Exhibit 26, cover the season?

A. It covers the month and season to date. I see it.

(Testimony of James A. Finley.)

Q. I notice at the bottom of Plaintiff's Exhibit 26 an item Fruit tonnage to outside processors, then follow the names of certain companies; will you state who those companies are?

A. Bireley's for EOP——

Q. Just a moment. And the tonnage. Is there a tonnage figure?

A. For the season, season tonnage is 20,643.94.

Q. Does that represent the tonnage that was delivered [615] to Bireley's under Plaintiff's Exhibit 18?

Shall we explain to the jury, or will you explain to the jury, Mr. Finley, whether Bireley's referred to there is the same company or division of the General Foods Corporation referred to in Plaintiff's Exhibit 18?

A. Bireley's is a division of General Foods.

Q. So that the Bireley's that you just referred to is General Foods that is referred to in Plaintiff's Exhibit 18? A. That is correct.

Q. And next what name or company is referred to or found on this exhibit, Plaintiff's Exhibit 26?

A. The next item is Hyland-Stanford for EOP. Season 14,855.89 tons.

Q. And the Hyland-Stanford referred to, is that the Hyland-Stanford with whom Exchange Orange had the contracts, Plaintiff's Exhibits 15 and 16?

A. Yes, it is.

Q. What is the next company that you find there? A. Mission Dry for EOP.

Q. And is the Mission Dry referred to therein

(Testimony of James A. Finley.)

the same Mission Dry that is referred to and is part of Plaintiff's Exhibit 17?

A. That is correct.

The Clerk: There is 17-A, also, counsel. I don't know whether you want that one. [616]

Q. (By Mr. Dixon): And 17-A?

A. That is correct.

Q. The next one is Damerel-Allison for EOP. Will you tell the jury who Damerel-Allison is or what it is?

A. Damerel-Allison is a company in Covina, California, for the production of citrus products, and that company was bought by the Exchange Lemon Products Company——

Q. When?

A. In 1950, I think it was. [617]

Q. What is the business of Damerel-Allison?

A. Damerel-Allison made frozen concentrate and a fresh juice put up in quart paper containers.

Q. Did it make any single strength juice, to your knowledge?

A. No, except that which went in a paper container.

Q. The next one is "Corona for EOP." Does that refer to the Corona plant of ELP?

A. Yes, it does.

Q. The next item is "Hart's for EOP." Is that Hart's referred to in Plaintiff's Exhibit 19?

A. Yes, it is.

Q. All of those companies that we have mentioned, under them the words "for EOP" appear, is that correct? A. Yes.

(Testimony of James A. Finley.)

Q. Now, will you tell the jury what the next company referred to is? A. TreeSweet.

Q. Do you find or is there contained on said exhibits any words "for EOP" following the name TreeSweet? A. No, there is not.

Q. I also notice the words Cold Gold. Do you find anything there? A. No, I don't.

Q. "For EOP"? [618] A. No.

Q. Does the name E. A. Silzle Corporation or Silzle appear anywhere on this Plaintiff's Exhibit 26? A. It does not.

* * *

Q. (By Mr. Dixon): Now, that Plaintiff's Exhibit 26, Mr. Finley, purports to represent the tonnage delivered to processors who are actually in fact processing the tonnage referred to therein for the account of Exchange Orange, does it not, where the symbols "for EOP" are placed after the name of such company? A. Yes, it does.

Q. Do you have any explanation or can you tell the jury whether TreeSweet and any oranges that were delivered to it under Plaintiff's Exhibit 25 was omitted from any computation or reference in that exhibit? A. What is the question again?

Q. I will withdraw it. It may not have been quite clear.

The tonnage referred to under TreeSweet is the tonnage, [619] is it not, that was delivered to TreeSweet by Exchange Orange or Sunkist pursuant to the provisions of Plaintiff's Exhibit 20, Mr. Finley,

(Testimony of James A. Finley.)

that is the contract between TreeSweet and Exchange Orange for the year 1951?

A. Yes, it is.

The Court: Well, I don't understand. Let me ask a question.

Mr. Dixon: Yes, your Honor.

The Court: Is the 22,000 tons that is shown—I think it is 22,000 and some odd tons—shown after TreeSweet, is that fruit that was processed by TreeSweet for EOP's account?

The Witness: Yes, it was.

The Court: That does not include the fruit which was processed by TreeSweet which went into canned juice, which cans TreeSweet bought for its own account?

The Witness: That was the fruit which EOP delivered to TreeSweet for them to can under the contract, and then TreeSweet bought the canned juice from us. That is the figure.

The Court: I don't recall. Was there any fruit processed by TreeSweet for Exchange Orange and then the cans turned over to Orange that year?

The Witness: I don't think so. If it was, it wouldn't be over——

The Court: Then this is the total figure?

The Witness: This is the total figure. [620]

The Court: All right.

Q. (By Mr. Dixon): Will you state to the jury, Mr. Finley, why the words "for EOP" are not contained on the exhibit you are referring to?

A. I don't know of any particular reason. I no-

(Testimony of James A. Finley.)

tice that Hart's is "for EOP." Cold Gold was exactly the same type of organization, that is, they made frozen concentrate, and it has not got "for EOP." The "for EOP" started by a report which CDP turns out on their distribution of fruit, that when they would send Mission fruit it would be on there, "for Mission," or just left blank, so if there was any chance of it being for EOP, it was put on there afterwards as in the case here, "for EOP." In the case of TreeSweet and Cold Gold, I take it that there was no—well, nothing came up to put that on there. There is no purpose of it.

Q. In other words, General Foods, Hyland-Stanford, Mission, and those other contracts where that appears, "for EOP," in those cases it is a fact, is it not, Mr. Finley, that all of the juice or concentrate that was processed under those arrangements was actually processed for the account of Exchange Orange, is that not so?

A. All the concentrate produced by them from EOP fruit. They could have purchased some other fruit which we know nothing about.

Q. Any of the concentrate or products so processed [621] under those contracts if sold by Sunkist would be sold under the Sunkist label or private label brand, would it not?

A. Yes, it could be.

Q. Well, do you know whether any of the juice that was processed, pasteurized orange juice, under those contracts where the words "for EOP" appear was sold by any of the companies for the account of those companies and as their product?

A. No. They did not sell that. They made their own requirements under the other contracts.

Q. Well, they may have processed some for their own account, but the citrus juice products processed that are referred to in that exhibit here, as it indicates, were processed for the account of EOP in its entirety, were they not, Mr. Finley?

A. That is correct. [622]

* * *

Q. May it please the Court, and ladies and gentlemen of the jury. I believe when we adjourned we were discussing Exhibit 26, Mr. Finley. Will you state again to the jury what that exhibit is contained in or taken from?

A. The book is our cost department records of the different costs in the different departments and operations throughout the plant. This one particular page, which has been put in evidence, is the fruit tonnage that was processed at the EOP plant, and the distribution of that fruit going to the different departments, just for our cost department records only, and not for keeping track right to the ton of fruit.

Q. But all of the companies that were mentioned in that exhibit or that are mentioned in that exhibit, with the exception of TreeSweet, and I believe one other, had the [623] language, "for the account of EOP," after them, did they not, Mr. Finley?

(Testimony of James A. Finley.)

A. They all have, except TreeSweet and Cold Gold.

Q. And those two companies have nothing after them, such as, "for the account of EOP," or any other description? A. That is correct.

Q. State, if you will, whether you find the name Silzle on that exhibit?

A. Silzle is not on this exhibit.

Q. That does include the entire processing or production records, does it, of Exchange Orange, during the period represented?

A. No, Silzle is not on it, Hyland-Stanford for Hyland-Stanford is not on it; Mission Dry for Mission is not on it; ELP is on it.

Q. Just what is that record supposed to represent, then, Mr. Finley? Anything in particular?

A. No, I can't see why that record is in there, because this is a cost department record of what is going through our plant. It is just a memo record of some kind that is put in there, because the tonnage figures are not in the tonnage figures up above, so it is a memo record, and I don't know why it is there. [624]

Q. (By Mr. Dixon): Now, Mr. Finley, who determines the selling price for Sunkist for, shall we say, single strength Valencia orange juice and other citrus juice products?

A. The canned juices?

Q. Yes. A. Or citrus product?

Q. Yes. A. I do.

Q. You do? A. Yes.

Q. You determine that price in consultation with anyone else, or do you determine it on your own account?

A. Well, I run my little own survey, you might say, just what I can hear, and then the sales department, who has charge of the sales, they will come down and tell me what they hear, because they are the ones who talk to brokers and the trade. I am the one that talks more to the producers to know how much will be packed in Florida and California each year. So we get together, and after that consultation, I will go ahead and set a price.

Q. But you are the one, are you, who has the final determination concerning the prices at which the product processed by Exchange Orange are made available to the trade by Sunkist?

A. That is correct. [625]

Q. Do you determine those prices in consultation in any way with Mr. Kelly?

A. Not on the canned juices, no.

Q. Or with anyone else in Sunkist?

A. No.

Q. Mr. Wilcox, for example?

A. No, not with Mr. Wilcox.

Q. Mr. Armstrong? A. No.

* * *

Mr. Dixon: Plaintiff's Exhibits 27 and 28 offered in evidence.

The Court: 27 and 28 received in evidence.

* * *

(Testimony of James A. Finley.)

Q. (By Mr. Dixon): Directing your attention to Plaintiff's Exhibit 27, will you state to the jury what that is, [626] Mr. Finley?

A. These are the price lists sent out to the brokers and trade by the Sunkist Growers.

The Court: For what year?

The Witness: For the year——

Q. (By Mr. Dixon): Well, it does contain, does it not, the price lists circulated to prospective buyers of Sunkist citrus juice products for the years 1951 and through the 1952 processing or sales season for those products?

A. Let's see. It starts at August 27, 1951, to June 9, 1952.

Q. And that exhibit contains, does it not, the Sunkist selling price, for single strength Valencia orange juice, the so-called 260 numbered item?

A. Yes, it does.

Q. And the comparable numbered item sold under Exchange label—is it 53? A. 53.

Q. And all of the prices so circulated and contained in said exhibit for the year 1951 were determined by you, I take it, is that correct?

A. That is correct. [627]

Q. Please refer to Plaintiff's Exhibit 27—28, and tell the jury what that is.

The Court: You said "27—28"; which one are you talking about?

Mr. Dixon: I meant 28, the smaller one.

The Witness: 28 is a circular letter turned out by Howard Thompson, the sales manager of the

(Testimony of James A. Finley.)

Consumer Division. It is a letter to the brokers giving them the prices of Valencia orange juice for the year on August 3, 1951.

Q. (By Mr. Dixon): It also contains, does it not, any price changes made by Sunkist in Valencia orange juice after that date, and during the season in which single strength Valencia orange juice was sold during the year 1951 and '52?

A. From August 3, 1951, to November 30th, 1951.

Q. And it contains various bulletins, as you have described, namely, one commencing August 3rd, followed by one dated August 20th, September 4th, September 19th, October 8th, October 17th, and November 30, 1951? I am talking, Mr. Finley, about Exhibit 28.

A. I didn't check those dates with you, but there are a number of them here.

Q. Directing your attention particularly to the August 3, 1951, bulletin, No. 1, I notice that it refers to our opening prices on fancy California Valencia orange juice. Will you explain to the jury what is meant by your opening [628] price or the Sunkist opening price for California Valencia grade juice?

A. We hadn't canned any quantity to come out with a price to the trade up to this time, and this is August 3rd that we offered juice for sale.

Q. In other words, there was sufficient packed, shall we say, at that time for Sunkist to come out

(Testimony of James A. Finley.)

with an official opening price for its product, is that correct?

A. Yes, we had some in stock so we could make delivery.

The Court: You don't have any extra copy of 28?

Mr. Fisher: I am sorry I do not have. We will supply it.

Q. (By Mr. Dixon): Now, at the time Sunkist was selling single strength Valencia orange juice under the Sunkist label, the Exchange label, and was also offering it for sale to private buyers to be labeled under the private label of the buyer, was it not? A. Yes.

Q. Will you state to the jury what the opening prices were as circulated to the trade by Sunkist for 12/46's on August 3, 1951?

A. Price for Sunkist on August 3 for the 12/46 ounce size was two twenty per dozen in all states except California and Arizona, and two fifty a dozen for California and Arizona. The No. 53, the Exchange brand on 12/46 ounce was $2.13 a dozen except in California and Arizona, and $2.43 in [629] California and Arizona.

The Court: 12 is a case of this size, 12/46's?

The Witness: 12/46's, yes.

Q. (By Mr. Dixon): At that time the price of the Exchange or private label was the same, was it not?

The Court: The same as which?

(Testimony of James A. Finley.)

Mr. Dixon: That is $2.13 for the 12/46's outside California and Arizona, for that size.

Do you understand my question?

The Witness: The same as the price for the fifty-three Exchange was $2.13, and the price on the two-sixty, which is Sunkist, was $2.20.

Q. (By Mr. Dixon): I am sorry, I guess I didn't make my question clear.

Supposing someone wanted to buy private labeled pack from Sunkist, that is they would buy what we call brights or shiners, is that correct?

A. Yes.

Q. And have their particular label, let's say Ana-Gold, put on it. What would they pay under this price list if they made such a purchase?

A. If they made a purchase of the Sunkist, they would pay the $2.20 a dozen, less advertising allowance, less label allowance, and brokerage—not brokerage, and then on the 53 Exchange they would pay the $2.13 less brokerage, swell [630] allowance.

The Court: By 53 Exchange you mean that is the type of goods canned ordinarily under the Exchange label?

The Witness: Yes, non-advertised label Exchange.

Q. (By Mr. Dixon): I am not sure that I am clear, Mr. Finley. There is a difference, then, between the Exchange price, which of course is a can with a label Exchange on it, and the Exchange—or private label—strike that—and one with the private label, and they both seem to have the same

(Testimony of James A. Finley.)

price. I don't find in this price bulletin of August 3rd any reference to any label allowance to such a purchaser who might want to buy shiners or brights and have its own label placed on them. Do you find any there?

A. Not in this bulletin, no. [631]

Q. Well, does this correctly represent the selling price at which Sunkist offered to sell private label Valencia orange juice to the trade August 3, 1951?

A. We may not have had any bright stock to sell, and this covered what we had in inventory.

Q. In any event, this is your offering price, is it not, to such a buyer?

A. This is the opening price August 3, 1951.

Q. It is the same, is it not, that is, the price for the private label buyer is the same as the price for an Exchange label buyer? A. That's right.

Q. Do you recall what the TreeSweet single-strength Valencia orange juice was selling for on August 3, 1951?

A. No. I never did know what TreeSweet sold their canned orange juice for.

Q. It is a fact, is it not, Mr. Finley, that you did have some discussion with Mr. McCracken of TreeSweet or someone in TreeSweet concerning the opening price of single-strength Valencia orange juice?

A. We set our price at Sunkist at $2.20 and that is the price which we sold to him for.

Q. I understand that, but I am talking now about the price at which TreeSweet sold what it

(Testimony of James A. Finley.)

bought from, shall we say, Exchange Orange under this contract to the trade. [632]

A. Well, it set the price to him what we would sell to him for and as I remember it, he got a head start on us that year, and came out with opening prices before we did, because we did not have the stock.

Q. Now, will you answer my question, if you can? Did you have any discussion with Mr. McCracken or anyone from TreeSweet concerning the opening price of California Valencia orange juice for the year 1951 before such prices were issued to the trade by Sunkist?

A. I think I called him and told him what our price to him would be for juice for a limited period of time, but as to discussion of the opening prices, I did not discuss that with him. I told him what the price would be.

Q. About how soon prior to the issuance of the opening prices on August 3, 1951, did you have such a discussion with Mr. McCracken?

A. It was probably before he came out with opening price. I don't remember when he came out with them.

Q. Are you familiar, Mr. Finley, with the prices generally at which TreeSweet sells its single-strength Valencia orange juice to the trade?

A. Just what we hear back from the brokers. I do not know directly what he sells for.

Q. But by the time this bulletin was issued, the August 3 bulletin, you had advised Mr. McCracken

(Testimony of James A. Finley.)

of TreeSweet as to what the Sunkist opening price was going to be for Sunkist [633] Valencia orange juice, that is a fact, is it not? A. I think so.

Q. It was a pretty fast market for Valencia orange juice when Sunkist came into the market in 1951, was it not? You know what I mean by a fast market?

A. There usually is what we call the first time around to the customers. They are all waiting for the new pack juice and the first time around it is a pretty fast market.

Q. And it went out pretty fast, did it not, the amount that Sunkist had itself processed?

A. Yes. We had sold out what we packed very shortly after we came out with the price.

The Court: What do you two mean by a fast market? You seem to understand each other, but I don't know what a fast market is.

The Witness: I would consider a fast market is when you come out with an opening price. You call your brokers and they call the trade, and the stores want to have your brand on the shelf, so you have a lot of orders come in in just a very few days. A slow market is when the repeat orders are coming along, and they come in as it is sold off the shelf, but with the bare shelves, it goes pretty fast at first.

Q. (By Mr. Dixon): Of course, Sunkist did not sell any of the juice that had been processed, I mean sell itself to the trade any of the juice that had been processed by TreeSweet [634] under this contract, Exhibit 20, did it, Mr. Finley?

(Testimony of James A. Finley.)

A. No, it did not.

Q. That was all sold by TreeSweet to the trade?

A. Yes, it was sold by TreeSweet to somebody.

Q. Will you look at the bulletin dated December 4? The price of 12/46's in that bulletin was $2.35 a dozen, was it not, for Sunkist?

A. That is correct.

Q. And the previous price had been had $2.20—or what was it? A. $2.20 a dozen.

Q. This juice that had been put on the market by Sunkist under the August 3 bulletin had moved so fast that Sunkist had in fact had to withdraw from the market for that product temporarily, had it not?

A. Yes. We withdrew from the market because we had sold out our limited pack. We were spending all of our time on frozen concentrate.

Q. This bulletin, September 4, reads as follows:

Mr. Dixon: Ladies and gentlemen of the jury, I am just going to read parts of it to you. This is Bulletin No. 5, dated September 4, 1951.

"To Our Brokers:

"We are pleased to advise that we are again entering the market on California unsweetened Valencia orange [635] juice. Fresh fruit receipts increased considerably during the period we were withdrawn and shipments of orange juice have now closely approximated prior sales."

Then the last sentence or paragraph of this bulletin says, "With Florida juice in somewhat short

(Testimony of James A. Finley.)

supply, you should find many buyers eager to submit orders for prompt delivery."

Q. That is a fact, is it not, Mr. Finley, that the Florida juice, Valencia orange juice, so-called, by this time was considerably in short supply in the market?

A. The indications were that they were, because the price of Florida juice hit a low spot and then started increasing in the fall of the year, which is indicative of shorter supply.

Q. Now, directing your attention to Bulletin No. 12 dated October 8, 1951, will you state what the price of 260, that is the California Sunkist Valencia orange juice, was for 12/46's in that bulletin?

A. The Bulletin No. 12, 12/46 ounce No. 260 Sunkist was $2.50 a dozen out of the state, out of California and Arizona, and $2.80 a dozen in California and Arizona. [636]

* * *

Q. Did you have any discussion of any kind with Mr. McCracken of TreeSweet before this price bulletin was issued raising the price from the previous price charged by Sunkist for single-strength Valencia orange juice?

A. As Mr. Thompson and I would decide, and I would give him authority to raise or lower prices, I would immediately call Mr. McCracken and tell him what I decided to do, and that would be the charge that we would charge him from then on.

Q. What is the fact, if you know, as to what the

(Testimony of James A. Finley.)

price was at which TreeSweet sold its TreeSweet Valencia orange juice that it processed under this contract, Plaintiff's Exhibit 20, to the trade, on October 8th?

A. I don't know what price he sold for. All I know is what price we sold to him for.

Q. Did you ever get any price bulletins from TreeSweet?

A. I would see price bulletins from some of t processors through some of the brokers, but I don't ever remember seeing a TreeSweet bulletin. I don't know whether they turn them out or not.

Juror Wells: May I ask why the juice should be higher in California?

The Court: I was about ready to ask that question and then didn't. I don't think it has anything to do with this case.

Juror Wells: That is what I thought, too. [638]

The Court: Is there any charge made by the plaintiff on that?

Mr. Dixon: No.

The Court: I don't think it has anything to do with the case, but I thought you people would be curious.

Mr. Williams: We have no objection to the question. We expect to have that explained later.

The Court: Tell us, Mr. Finley, why you discriminated against our good citizens of California for our very excellent product?

The Witness: 90 per cent of the juice is produced in Florida, and as they ship it out here they

(Testimony of James A. Finley.)

are paying a higher freight rate, so what we do, we set a price that is as high, if not a little higher, because of quality—we think we have a better quality—and we get a little better price, so in California we set that price accordingly. And then as we go east they have got the freight advantage, and if we do want to sell East we have to go down a little.

If we sold at the same price—and I am sympathetic to California—if we sold at a lower price than Florida, we would be sold out in a month or two or three months' time, and then our good customers couldn't get it the year around.

Juror Wells: Thank you.

Q. (By Mr. Dixon): Now, Mr. Finley, I am going to ask you to do some computing, mathematically speaking. Do you [639] have your slide rule with you? A. Yes.

The Court: Do you want to use a slide rule, or be like the rest of the people and use a yellow pad?

The Witness: I have paper, too.

Q. (By Mr. Dixon): Please refer to Plaintiff's Exhibit 11, Item A. TreeSweet processed under Plaintiff's Exhibit 20, 24,148 tons of Valencia oranges that were made available to it under that contract. Let us assume a selling price to the trade of $2.50 a case for the 12/46's, that being your opening price on August 3rd to the California and Arizona buyers. By referring to Plaintiff's Exhibit 20—do you have it before you? A. No.

Q. Here it is.

(Testimony of James A. Finley.)

What discount or allowances were given to Tree-Sweet from that price?

A. In Exhibit 20, on page 2, paragraph 9, is the method by which the price of juice is determined. You start in with $2.50 a dozen, the price at which we sell to them——

Q. And the first thing that you deduct from that $2.50 price is a 15 per cent allowance, is it not?

A. 15 per cent is calculated on the gross sales price, so 15 per cent is taken off of the $2.50. [640]

Q. And that amounts to 37½ cents a case?

A. 37½ cents a case, correct.

Q. In addition thereto, 7 cents a case is allowed for advertising allowance, is it not?

A. 7 cents a case advertising allowance.

Q. And a label allowance of 6½ cents per case is also allowed from that price, is it not?

A. 6½ cents on the 12/46 ounce size.

Q. So that the total amount to be deducted from this $2.50 price when TreeSweet buys a case of this orange juice under contract Exhibit 20 is 51 cents per case, is it not, for the 12/46's?

A. The amount deducted?

Q. Yes. A. 51 cents a case.

Q. Yes. So that the total price that would be paid by TreeSweet for a case of 12/46's that it had processed would be $1.99, if my mathematics are correct? A. That is correct.

Q. It is a fact, is it not, that generally 23 cases of 12/46's juice equal a ton?

A. Approximately 23.

(Testimony of James A. Finley.)

Q. If you will multiply the 23 by $1.99 we get a figure, if this is correct, of $46.16?

A. What figure did you use? [641]

The Court: 23 times $1.99.

Mr. Dixon: I am informed that my multiplication is apparently in error.

The Witness: It is 45.77.

Q. (By Mr. Dixon): Now, that would represent, would it not, Mr. Finley, the actual amount which would be paid by TreeSweet for the single-strength Valencia orange juice which would be processed from a ton of oranges under this contract? I mean that would be the juice in the cans ready for sale, is that correct?

Mr. Williams: We object to this question, your Honor, because it is based upon an assumed price of $2.50, and there is no evidence showing that that is the actual price.

The Court: Counsel indicated that he is taking the example of the $2.50 price, which was the opening price for California and Arizona, and he is running this example through on that basis.

Mr. Williams: The basis of our objection relates somewhat to the purpose of this calculation.

The Court: Make your objection.

Mr. Williams: We object if the purpose of this, or the use of this calculation is in any way to establish damages. And we object to it on other grounds as being immaterial and irrelevant.

The Court: Overruled. [642]

Mr. Dixon: Would you answer the question? Do you understand the question?

The Witness: Repeat it, please.

Mr. Dixon: Would you read it to him, please?

(The question was read by the reporter.)

The Witness: Yes, it would. [643]

Q. Now, under this——

The Court: Just a minute. Now, counsel has made the objection, which is very largely a general objection, that this is not to be considered on the question of damages. The jury will be instructed this is not plaintiff's demonstration to you to calculate damages, but he is making a demonstration to you involving a certain price on a certain date, and you may consider it for various purposes—intent, generally, as part of the case. If I understand counsel's objection, this is not some method by which you may calculate dollars and cents in damages should you find plaintiff entitled to recovery.

Does that satisfy you?

Mr. Williams: That is half of my objection, and the other is it is immaterial.

The Court: Well, I won't comment on that.

Q. (By Mr. Dixon): By referring to Plaintiff's Exhibit 20, Mr. Finley, paragraph 3, TreeSweet was to be paid all of the processing costs for processing the oranges made available to it under this contract by Exchange Orange, were they not?

A. That is correct.

Q. And by referring to Plaintiff's Exhibit 11,

(Testimony of James A. Finley.)

those amounts were reported to be by Exchange Orange $859,004.49. We will forget the 49 cents and deal with round numbers.

Would you divide the 24,184 tons into that figure and indicate to the jury what the result is? [644]

The Court: Will you read that question?

(Question read.)

Mr. Fisher: I think it should be 148 tons, Mr. Dixon.

The Court: 24,148.

Mr. Dixon: You are right. 24,148 tons.

The Witness: Approximately $36.60.

Q. (By Mr. Dixon): In other words, TreeSweet was paid by Exchange Orange approximately that amount for every ton of oranges delivered to TreeSweet under Plaintiff's Exhibit 20? Is that a fact, Mr. Finley? A. As far as I know.

Q. By subtracting that figure for the previous figure, 45.77, what result do you get?

The Court: What figure are you talking about?

Mr. Dixon: 36—what is the rest of it?

(Answer read.)

The Court: Mr. Williams?

Mr. Williams: We object, because the figure that is used, $859,000, is the total amount paid to TreeSweet for processing several different sizes of cans and is not the price paid for the 46 ounce can, while the calculation to date is being based solely on the

(Testimony of James A. Finley.)

46 ounce can. Therefore, the two figures are not comparable.

The Court: Objection overruled. Counsel's second computation is based upon tons and total cost, so that the [645] $35.60 figure has nothing to do with cases, that is true. That is a ton figure.

Mr. Williams: And it has nothing to do with $45.77, because it is based on all cases, not upon 46 ounce, and the other, the $45.77 price is based only on the 46 ounce case.

The Court: All right. I understand your objection, and if it is made as an objection, it is overruled, but I want the jury to understand this problem. Anything further?

Mr. Williams: No. May I have a continuing objection to this line of examination so I will not have to object to the questions?

The Court: You may have a continuing objection to this line of questions. I take it that will be based upon what your objections have been heretofore.

Mr. Williams: Yes, the previous objection and this one.

The Court: All right. Now, ladies and gentlemen of the jury, we don't want to make this any more complicated than we can. I want to understand as we go along and I want you to understand. All the TreeSweet juice which TreeSweet produced under this contract for itself with oranges supplied by Exchange was not in twelve 46 ounce cans. You understand that. And it was not all sold at $2.50 a

(Testimony of James A. Finley.)

case. You have got a lot of prices here. You have heard something a little bit ago on various ranges.

This $2.50 was the opening price in California and [646] Arizona. The U. S. price was $2.20 at that time. Then it ran up to $2.80 for California and Arizona. There are various figures involving various times and involving various size cases and involving California and Arizona as contrasted with other states.

Counsel, therefore, is trying to make a comparison for you, attempting to show you by an example from one price, one situation, what TreeSweet, as it were, was getting out of this, and consequently to make that comparison you would have to take one particular price and one particular size of cans.

Now, therefore, on the example he started out with, the 46/12 cans, assuming everything had been 46/12 cans, which it was not, and assuming everything had been $2.50 a case, which it was not, he reduced cases then into tons and arrived at this figure of $45.77 a ton for the oranges.

The other figure with which he is comparing it doesn't present that problem.

This first figure is certainly an arbitrary one limited to a particular example under certain suppositions. The second figure that he is using is arrived at a little differently. He took the total number of tons processed, and he took the total amount paid TreeSweet for processing. You heard the testimony. He arrived at a figure of $36.00 which TreeSweet got for processing this juice.

(Testimony of James A. Finley.)

Therefore, technically, Mr. Williams rightfully calls [647] attention to the fact that you have one figure arrived at in a certain way and a second figure arrived at in another way. They are both ton figures. Of the two, of course, the $36.60 figure, tons into total dollars, shows pretty well the figure of an average per ton. But the other figure is a comparative figure.

You could sit down and take another supposition. You could take a supposition juice was $2.20, and you could take another size can, and you could figure it out and make comparisons. That's all counsel is trying to do.

Or you could take a supposition that so much of one size can and so much of another, and so much was sold at this time and so much was sold at another time, and you would wind up with a lot of paper on your hands and you would get some varying results.

What I am trying to tell you is that this is being shown to you for the purpose of comparison, giving you an example, taking one size can and one price, which is fictitious. I want you to understand that, because they weren't all one size can and they weren't all one price.

Does that satisfy your thought, Mr. Williams?

Mr. Williams: Well, your Honor, frankly, I got lost. I am not sure whether I understood you.

The Court: You mean you got lost on what I was trying to tell the jury? [648]

(Testimony of James A. Finley.)

Did you understand me, ladies and gentlemen of the jury?

All right. Go ahead, Mr. Dixon.

Mr. Dixon: Thank you, your Honor.

* * *

Q. (By Mr. Dixon): Now, assuming, Mr. Finley, that we are dealing here only with 12/46's at the $2.50 price, by deducting the $36.60 from the $45.77, what figure do we get?

A. We get $9.17.

Q. Assuming then that all of the oranges, the 24,000 tons plus, were processed in 12/46's and sold to TreeSweet at the $2.50 price mentioned, it is a fact, is it not, that TreeSweet would have been paid for the oranges, without giving any credit to or adding to that whatever might be secured from the peel and the oil, oranges at $9.17 a ton? Is that the figure that you have? [649]

A. You say assuming these figures, the $859,000, and assuming that they are all 46's, if you assume they are all 46's why, that figure wouldn't come out 859 by any means. [650]

Q. It wouldn't come out what?

A. I say it wouldn't come out 859,000.

You are assuming that. But assuming your figures, it would come out $9.70 without oil and peel.

Q. Do I now understand——

The Court: Go ahead. First let me interrupt.

You understand what Mr. Finley is calling your attention to, that the total cost of $859,000 paid to

(Testimony of James A. Finley.)

TreeSweet was not a price based entirely on making cans in 12/46 size. They were paid for making canned juice in various sizes, and had the entire pack that TreeSweet made been in 12/46's, I take it you mean this figure would have been less?

The Witness: It would have been less.

The Court: The more variety of pack that you make the higher the cost, is that right?

The Witness: The smaller the can the higher the cost. And the No. 2 cans, 12-ounce cans, cost more.

Q. (By Mr. Dixon): So, assuming that TreeSweet just went in and bought these oranges from Exchange Orange or Sunkist, it would of course have the peel and it would have the orange oil, and any other by-product that might be recovered from the orange; is that a fact?

A. That is correct.

Q. And there is some recovery, is there not, to the processor for by-products when they process the orange into [651] single-strength juice?

A. Yes, there is income from the peel portion of the fruit.

Q. There is income, as I understand it, from the oil and the peel. Is that approximately the sole source?

A. Income from the peel. The oil is in the outer portion of the peel. And you have the income from the oil, and then the balance of it is what we call peel. But the oil is in the peel.

(Testimony of James A. Finley.)

Q. But that is recovered and sold as a by-product by the processor, is it not?

A. That's right.

Q. And in this case, that is, under the TreeSweet contract, TreeSweet was paid by Exchange Orange for that processing operation, were they not, and the oil was then turned over to Exchange Orange?

A. They were paid their cost of producing the orange oil, which is in paragraph 7 of Exhibit 20, at the rate of 22½ cents a pound.

Q. But the oil was turned over to——

A. To Exchange Orange.

Q. ——to Exchange Orange? A. Yes.

Q. And there was 152,097 pounds that Exchange Orange so secured from TreeSweet under this contract, did they not? [652] Refer to subdivision (e) of this exhibit and you will find the figure that I am talking about. A. That is correct.

Q. Will you state to the jury about what the value of that oil was per pound in 1951, approximately?

A. Well, the value of the oil in 1951—the sales price was $2.75 per pound.

Q. That was delivered in New York?

A. Delivered in New York. It is a national price.

Q. Is that the only place at which this oil is sold, New York?

A. Sold nationally at $2.75, even in Los Angeles. At one price.

Q. You mean that is one situation where they don't add the freight? A. Yes.

(Testimony of James A. Finley.)

Q. On the basis of that price can you tell the jury what should be added to this figure $9.17 for the oil?

A. The figure of $9.17, where do you get that?

Q. As I get it, that is 45.77 minus 36.60.

A. The $9.17 per ton?

Q. Yes.

A. The price of oil sells at $2.75 a pound, we have brokerage to pay on that, a container, and freight from here to New York, or freight from here to Chicago or any place [653] else.

Q. Would it run about $1.40 a pound recovered, per pound? A. A lot more than that.

The Court: Are you talking about the brokerage and freight, or the recovery?

Mr. Dixon: The amount recovered per pound from the oil processed and delivered to Exchange Orange under the TreeSweet contract.

The Court: Are you still talking about a net figure?

Mr. Dixon: Yes.

The Court: What does Exchange Orange get ultimately per pound of oil?

Mr. Dixon: That is correct.

The Court: After all expenses are paid out?

Mr. Dixon: Yes.

The Court: All right.

The Witness: $2.75, and——

Q. (By Mr. Dixon): You have expenses to pay on that, and costs, don't you?

(Testimony of James A. Finley.)

A. Yes. I am giving you the expenses now. 34 cents brokerage, and about 2½ cents container, and about 3 cents freight from here to New York. That is 59½ cents, call it 60 cents, off of the $2.75, or $2.15 net back to the growers. [654]

Mr. Fisher: Wouldn't that be 39, instead?

The Court: I get 39.

The Witness: I get 39, too.

$2.35.

Q. (By Mr. Dixon): I am sorry. I didn't get your figure.

A. It is $2.75, less 39½ cents, or call it 40 cents, which would bring it down to $2.35 per pound of oil back to the growers, as we term it.

Q. We have to also consider the peel, do we not, and its value? To whom did the peel go under this contract, Mr. Finley?

A. The peel under this contract went to a concern which specializes in just drying the peel——

Q. I am sorry. I mean who got the peel?

A. The Exchange Orange Products.

The Court: You still don't mean that. You mean who did the peel belong to?

Mr. Dixon: Yes, your Honor.

The Witness: The peel belonged to Exchange Orange Products Company.

Q. (By Mr. Dixon): And can you tell the jury approximately what the recovery net to Exchange Orange was on the peel, resulting from this contract?

A. The peel was sold at $2.08 a wet ton, there

(Testimony of James A. Finley.)

being [655] about two tons of fruit to make one ton of wet, so it would be about $1.04 per ton of fruit.

Q. So that if we add the recovery of $2.35 per ton for the oil and $1.04 per ton for the feed, to the $9.17 per ton figure that we previously referred to, we have a total of $12.56 per ton, is that correct?

A. You have got a figure of $2.35 per ton. It is $2.35 per pound of orange oil.

Q. I meant recovery per ton.

A. You haven't asked yet how many pounds of oil we have gotten per ton.

Q. I thought we had that figure, and that you had already figured it out. A. No.

Q. Do you have it before you, Mr. Finley, in this Plaintiff's Exhibit 11?

A. You have got 105,297 pounds, and 24.148 tons, and that is approximately 4.35 pounds per ton.

Q. Did you deduct the 22½ cents paid to Tree-Sweet for recovering the oil in making this computation?

A. No, I didn't. That should come off. It would be $2.35 less the 22½ cents. It brings it down to $2.12½.

The Court: A pound for the oil recovered?

The Witness: Per pound, yes.

Q. (By Mr. Dixon): Now, can you state to the jury, [656] with that figure what that recovery would have been per ton on the 24,184 tons processed by TreeSweet under this contract?

A. $9.25 per ton.

Q. For the oil?

(Testimony of James A. Finley.)

A. Which is $2.12½. Multiply that by the 4.35 pounds per ton.

The Court: That is 4.35?

The Witness: Yes, 4.35.

Q. (By Mr. Dixon): Is that the average recovery per ton for oil processed—I mean recovered when a ton of Valencia oranges is processed into juice, Mr. Finley?

A. It all depends upon the type of oil equipment or juice equipment that the juice is going through, and TreeSweet happened to have a machine which had very good oil yields.

Q. Will you state to the jury, if you can, what the recovery per ton is to Exchange Orange on its processing Valencia oranges, insofar as the recovery of oil is concerned?

A. On the same type of machine which TreeSweet used——

Q. Do you have the same type?

A. We had the same type in 1951—we would get approximately the same yields, four, four and half pounds per ton.

We had other machines which would just give us two pounds per ton. And we had other processes which we wouldn't get anything. [657]

Q. Do you mean you had three different types of machine, some that didn't recover any oil, some that recovered some, and some that recovered more?

A. Yes.

Juror Johnstone: What is a wet ton?

The Witness: Well, it is just a ton. I wanted to

(Testimony of James A. Finley.)
differentiate between a ton of peel and a ton of fruit. So it takes about—well, one ton of fruit makes about half a ton of wet, in a wet ton. It is about one-half peel, in other words, and we just call that a wet ton to differentiate it from a dry ton.

Juror Johnstone: That is why the wet ton is twice as much?

The Witness: Yes.

Juror Johnstone: Thank you.

The Court: So that I understand you, on certain machinery that you had that was the equivalent of the TreeSweet machinery, your recovery to Orange and, therefore, to the growers, was as much as $9.25 per ton for oil?

The Witness: Yes, if it sold at these prices, and on the same type of machine. [658]

The Court: So the $9.25 for this hypothetical example would have to be added to the $9.17?

Mr. Dixon: That's right.

The Witness: That's right.

The Court: Then the $1.04 for the peel, is that right?

The Witness: That's right.

Q. (By Mr. Dixon): The total amount is $19.46, is that correct, Mr. Finley? A. $19.46.

Q. So that, assuming the facts I have stated to you as the basis of my question before, if TreeSweet had bought the oranges processed here under this contract and had the benefit of the oil and the peel recovered therefrom, as well as the juice, on the

(Testimony of James A. Finley.)
basis of computations made, it would have paid $19.46 a ton for such oranges, is that correct?

A. With the assumption that this $9.17 figure is correct.

Q. Now, let me go back to this $1.99 case figure for the 12/46 ounce case, that being the price paid by TreeSweet to Sunkist for 12/46 case, selling at $2.50 a case, would that be on the basis of brights or shiners, Mr. Finley? In other words, you have already made a label allowance.

A. The label and advertising. The label allowance is in there so that would be on the basis of the bright stock.

Q. In selling this case of 12/46 to the trade, TreeSweet [659] would, of course, have to add to that price the cost of putting the TreeSweet label on each can in the case. A. That is correct.

Q. And your allowance under the contract generally is 6½ cents per case?

A. That is correct.

Q. And if TreeSweet advertised this product, it would add 7 cents a case for every case produced under this contract, would it not?

A. Advertising and promotional.

Q. In other words, this 7 cents per case was allowed by Sunkist to TreeSweet on every case processed under this contract regardless of the size, was it not? A. Yes, it was.

Q. So that those two figures would have to be added to the $1.99, which brings it up to $2.12½ per case, does it not? A. That is correct.

(Testimony of James A. Finley.)

Q. Now, of course, we have some selling expenses that have to be put on that. Perhaps brokerage, which may vary from 2 to 5 per cent, or is it fixed?

A. It varies with the different concerns, brokerage concerns.

The Court: Are you answering his question that it varies 2 to 5? [660]

The Witness: Yes. It varies—I don't know whether it varies within 2 and 5, but it varies, and approximately it would be 2 to 5.

Q. (By Mr. Dixon): We will add for selling cost, if that is a fair statement, 5 per cent, or 11 cents—5 per cent of $2.50 would be 12½.

A. 5 per cent is 12½ cents.

Q. So that brings the total cost to TreeSweet of this $2.50 a case to what figure?

A. You are calling that 5 per cent what? Sales or brokerage?

Q. Selling cost.

Mr. Williams: I object to this question as assuming that this figure states the cost to TreeSweet. There is no basis laid to show it does show the cost to TreeSweet.

The Court: This is again an arbitrary figure of $2.50. It is only an illustrative example.

Mr. Williams: May I have a continuing objection to the materiality of all this line of examination?

The Court: You may.

The Witness: It all depends upon what you have got included in this 5 per cent sales. You

(Testimony of James A. Finley.)

could have brokerage, which is a sales expense, cash discount, which is a sales expense, what we call swell allowance, and then the sales department's expense. All those should be added, and they would [661] add considerable as sales expenses.

Q. (By Mr. Dixon): I think that is correct.

A. So when you say 5 per cent for the sales expenses, I wondered if you meant that was sales expense or brokerage, or total.

Q. I don't know, Mr. Finley. I am asking you, is that a fair amount, do you think? What is the Sunkist percentage?

A. 5 per cent is not a fair amount for sales expense at all.

Q. What does the Sunkist Company allow for sales expense percentagewise?

A. What are our, or what are the expenses of sale?

Q. Per case, can you tell the jury, 12/46, if you can?

A. The total sales expense, 5 per cent brokerage, 1½ per cent cash discount, ¼ per cent swell allowance, and then 3 per cent is the figure we use for our own sales department, or 9¾ per cent, or about 24½ cents per case, with the case being priced at $2.50 per case.

Q. Let's assume that your figures are applicable. What do you get remaining as the figure, Mr. Finley?

A. $2.12½, add on the 24½ cents, and you come out with $2.47.

(Testimony of James A. Finley.)

The Court: That makes it 37.

The Witness: 37. Pardon me. $2.37.

Q. (By Mr. Dixon): Now, are there any items of expense [662] that haven't been considered in computing this figure, Mr. Finley?

A. There is still the storage and shipping. That is a cost to TreeSweet or any processor.

Q. This figure already represents, does it not, the processing cost and a profit on that operation which was assured to TreeSweet by the provisions of the 1951 contract?

A. The $1.35 per case was for manufacturing cost, and the 15 per cent—the $1.35 was presented to us as not including storage, so there is a clause in the contract to be able to store that without cost to us, assuming it would be within that 15 per cent. You can consider it in or out of it. It doesn't make any difference.

Q. In any event, TreeSweet was not going to lose on this deal, were they, if they sold the products that they bought from Sunkist at the same price as the Sunkist selling price?

A. No. They weren't going to lose on it. They were going to make a small profit.

Q. At least they were going to have a profit?

A. A profit.

Q. After all overhead and expenses were paid?

A. That is correct. [663]

• • •

Q. (By Mr. Dixon): Mr. Finley, referring to

(Testimony of James A. Finley.)

Plaintiff's Exhibit 11, Silzle processed a total of 163,326 cases of single-strength Valencia orange juice under its contract with Exchange Orange, Plaintiff's Exhibit 25. Of that amount 123,326 cases were 12/46's. By referring to Plaintiff's Exhibit 25 I find that the price paid by Silzle to TreeSweet for the——

The Court: Wait a minute. Silzle to TreeSweet?

Mr. Dixon: To Sunkist. Thank you, your Honor.

Mr. Williams: Exchange Orange, your Honor.

Q. (By Mr. Dixon): Yes, Exchange Orange, for the 12/46 ounce cases processed and purchased by it thereunder, vary from $2.20 a case to $2.80 a case, is it? Or do we stop at $2.50?

A. It varies from $2.20 a case to $2.65 a case under this contract.

Q. Taking the B price of $2.20 a case and the figure of .4036 cents per case, as being the amount paid by Silzle to Exchange Orange for any juice purchased under the B arrangement, can you state to the court what that would amount to per ton for juice on the basis of 23 cases to a ton of 12/46's?

A. $13.28 per ton, if it is with the figure of 23 cases per ton.

Wait a minute. Pardon me. It comes out [665] $9.28.

Q. So if Silzle had paid for the oranges on a dollar basis per ton for the juice processed therefrom, that would have been the price paid, plus whatever recovery there might have been for the orange and peel under the $2.20 per dozen charge,

(Testimony of James A. Finley.)

is that correct? A. That is correct. [666]

Q. Now, directing your attention to the $2.50 price under the 12/46 ounce size, the contract provides the rate per case to be paid Exchange Orange for the fruit is .6661 cents per case. Can you jury what that amounts to per ton?

Mr. Stark: That is 66 cents.

Mr. Dixon: .6661. I am using the decimal point to indicate the difference between dollars and cents figures, because this is easier for the reporter, I think.

The Court: That is 66 cents and 61/1000ths of an additional cent.

The Witness: $15.32.

Q. (By Mr. Dixon): Now, Silzle was paid at the rate of $1.35 per case by Exchange Orange for manufacturing cost incurred by it in processing the oranges under this contract, and this particular provision, the C provision thereof, was it not, Mr. Finley? A. Yes, it was.

Q. Can you tell the jury approximately what amount that would have been per ton paid to or allowed to Silzle by Exchange Orange for manufacturing cost?

At. At the rate of $1.35 per case, roughly 23 cases per ton, would come out $31.00 per ton. [667]

* * *

Q. (By Mr. Dixon): Referring to the C price in the Silzle contract, Plaintiff's Exhibit 25, and the selling price of a case of 12/46 ounce cans at

$2.50 per case, will you state to the jury what the deductions were, total deductions were that were provided for in said contract for sales expense, brokerage and profit, 12½ per cent, label allowance, manufacturing cost, and advertising allowance and trucking? [668]

A. You want the total figure?

Q. Yes, if you will take the——

A. I will just add them up.

Q. Take the $1.35 figure, the 5.4 cent figure, and the 7-cent figure, and the trucking figure only, including the .3125.

A. Excluding the sales expense?

Q. Yes.

A. That would be $1.52 and 14/1000ths, [669] 1.5214.

Q. And if you add to that the cost of the fruit of 66 cents plus per case, what total do you get?

A. $2.1875.

Q. So that excluding sales expense, brokerage and profit, so-called, on this item, there remains 31¼ cents per case to be allowed Silzle for those items under this contract, is that a fact?

A. That is correct.

* * *

Mr. Dixon: Plaintiff's Exhibit 29 offered in evidence.

Mr. Williams: No objection.

The Court: 29 received in evidence. [670]

* * *

(Testimony of James A. Finley.)

Mr. Dixon: * * * May it be stipulated by and between counsel that there is nothing contained in the minutes of the executive committee of Exchange Orange or of the Board of Directors of that company, which in any way refers to, deals with, or approves the [671] Plaintiff's Exhibit 25, the contract with the E. A. Silzle Corporation?

Mr. Williams: Is there any reference in those that we furnished you?

Mr. Dixon: None whatever.

Mr. Williams: There were none, then.

Q. (By Mr. Dixon): Directing your attention, Mr. Finley, to Winckler & Smith, I believe you testified that the processing plant of that company was adjoining to or adjacent to the Silzle plant in Anaheim? A. That is correct.

Q. Are you familiar in any way with the selling price at which Winckler & Smith sold its products, particularly Valencia single strength orange juice, prior to the year 1951?

A. Just what I heard through the sales department.

Q. And from whom did you get any information concerning it?

A. Usually through Howard Thompson who has charge of the consumer goods sales. He is the one that talks to the trade. [672]

Q. And what did he tell you with reference to the Winckler & Smith prices, if anything?

A. Well, he said they jumped around an awful lot. He couldn't pinpoint, he couldn't find out what

(Testimony of James A. Finley.)

their price was, but in general they were probably a little lower.

The Court: Lower than what?

The Witness: Lower than the Exchange or Sunkist price.

Q. (By Mr. Dixon): It is a fact, is it not, that the Ann-Gold brand, under which the Winckler & Smith Valencia orange juice was sold, was generally sold to the trade at a lower price than the Exchange Orange product?

A. Yes, it was generally expected that the Ann-Gold and Silzle and the Case-Swayne prices were lower. We just expected it, so we didn't think anything about it.

Q. Have you ever had occasion to have Exchange Orange check or analyze the single strength orange juice processed and sold by Winckler & Smith in interstate commerce from the years 1949 to 1950? A. I never did have.

Q. Did you ever have anyone in Exchange Products do it under your supervision and control?

A. I don't think anybody ever did it unless they did it as an individual, as a chemist who would be curious, but they never reported it to me.

Q. So that Exchange Orange had no records of any examination [673] having ever been made of the single strength Valencia orange juice processed by Winckler & Smith during the years 1949 and 1950? A. No, we didn't.

Q. Now, were you ever inside the Winckler &

Smith processing plant at Anaheim during the years 1949 and 1950?

A. I don't remember whether I was or not. I remember being in there the latter part of 1947. Whether I was in there after that, I don't remember.

Q. Was anyone from Exchange Orange, to your knowledge, ever requested by you to go in and take a look at the facilities or the plant of Winckler & Smith during the years 1949 and 1950?

A. No.

Q. Did anyone from Sunkist, to your knowledge, ever do so during those years?

A. Not that I know of.

Q. Now, directing your attention to the year 1951, Mr. Finley, did you have occasion during that year at any time prior to the commencement of the processing season for the Valencia crop to inquire into or determine what the facilities of Winckler & Smith were for processing single strength Valencia orange or any other product?

A. No, I didn't.

Q. Did you know that Winckler & Smith had added some [674] facilities to their plant in 1949 and 1950 for processing frozen citrus juice products?

A. Yes. I heard where he changed over his vacuum pan by his own design to a vacuum pan to make lowtemp, but I never heard much more about it.

(Testimony of James A. Finley.)

Q. Mr. Finley, I am talking about Winckler & Smith now, not about Mr. Winckler.

A. All right. Winckler-Smith Corporation then.

Q. You say you heard something about Winckler & Smith having put in some pan or something that you refer to for processing frozen citrus juices?

A. Yes. I heard it was a pan of his own design.

Q. When was lemonade first produced from citrus products, that is, lemons, made and sold? I am talking now just about lemonade, not a frozen concentrate? A. The frozen lemonade?

Q. Not the frozen kind. Just the regular lemonade. A. The shelf item lemonade?

Q. I beg your pardon?

A. What we call a shelf item.

Q. Yes, just a shelf item.

A. Non-frozen. Oh, I think there was some of it being produced by some companies even before, oh, 1940, and then during the war, with the sugar shortage, a lot of us went out of it and then it started in after sugar got plentiful again, so it would be 1945 and 1946 it started again. [675]

Q. Do you know whether Winckler & Smith was producing and selling any lemonade in interstate commerce in the years 1949 and '50?

A. I couldn't say one way or the other. I don't know.

Q. Did you at any time hear anything about Winckler & Smith in 1951 issuing any additional stock for the purposes of expanding its facilities?

(Testimony of James A. Finley.)

A. I don't remember whether I heard it during the year or after the lawsuit was started. It may have been during the year that I just heard it, but I didn't know the detail of it.

Q. Do you know from whom you might have heard it, Mr. Finley?

A. I don't remember whether I heard it or not. I heard it sometime around that period. It may have been after this lawsuit was started.

Q. These contracts that we have referred to with TreeSweet and Silzle, did you have any occasion to discuss the credit of either of those companies with Mr. Wilcox, before Exchange Orange entered into those contracts?

A. No, I don't remember of it.

Q. If I recall your answer, if I have asked this question, you did not inquire into the financial condition or credit condition, that is, as to whether Silzle was a credit risk, prior to the time you entered into the contract with [676] that company?

A. No, I did not.

Q. And you did not discuss that company with Mr. Wilcox? A. I did not.

Q. Or anyone else in Exchange Orange?

A. No.

Q. Did you during the year 1950 have any occasion to discuss—1951, instead of 1950—have any occasion to discuss the credit or financial condition of Winckler & Smith with Mr. Wilcox?

A. I didn't discuss it, but it was common knowledge——

(Testimony of James A. Finley.)

Q. No. You answer my question now.

A. I don't remember discussing it with anybody.

Q. Well, did you discuss it with Mr. Armstrong at any time in 1950?

A. No, not that I remember.

Q. Or Mr. Kelly?

The Court: Are you talking about 1950 or '51?

Mr. Dixon: I am sorry. 1951, Judge. I am sorry.

The Witness: It would be out of one of those departments that they would tell me as to the terms which they sold fruit on; but to specify which one told me, I couldn't do it.

Q. (By Mr. Dixon): I don't believe I have an answer to my question, Mr. Finley. My question is, did you have any occasion at all during the year 1951 to discuss the credit [677] or financial condition of Winckler & Smith with anybody in Exchange Orange or Sunkist?

A. I don't remember of it.

Q. Did Mr. Wilcox ever discuss with you in 1951 any conversation that he had had with Mr. Winckler of Winckler & Smith concerning the securing of oranges on some basis from Exchange Orange or Sunkist?

A. I don't remember him mentioning it to me.

Q. Did you have a conversation with Mr. Kelly of Sunkist concerning any conversation that he might have had with Mr. Winckler of Winckler & Smith concerning that company securing oranges under some arrangement with Sunkist?

A. I don't remember him mentioning it to me.

(Testimony of Wendell K. McCracken.)

Pack Canned Orange Juice sold by TreeSweet from April 11th through April 30, 1952.

It would show the number of units in inventory, the processing cost per case, the processing cost to be recovered from Exchange Orange Products Company, and the gallons involved.

Evidently there was due EOP Company a net of $3,400.37.

I do not understand that, I am sorry, about credit memo reducing account RC from EOP for processing.

This was prepared by our accounting department and it isn't very clear. But this shows the processing cost to be recovered from Exchange Orange Products.

Q. Do you know or can you tell from this exhibit [775] whether that amount was deducted from the total purchase price that might be due Exchange Orange for the Valencia juice purchased, or otherwise acquired, by TreeSweet under the contract with Exchange Orange in '51?

A. I would assume so, sir, because I notice here the check to EOP Company herewith with a net amount after a deduction.

The Court: Is it your testimony that generally the credit was offset, or did money come to TreeSweet from Exchange Orange for the processing, and then did money go back for the purchase of the goods? Or were they crossed off pro rata to the extent that they would cross of by credit memos?

The Witness: Your Honor, I believe that the

(Testimony of Wendell K. McCracken.)

latter is correct. I think our purchase of orange juice under the option agreement made us owe Sunkist or Exchange Orange Products Company more than they owed us for processing, so I think we were paying the net amount as shown by these figures that we are looking at, the difference between the amount they owed us and we owed them. I think there was just one check that changed hands.

The Court: You mentioned several checks. You mean one series of checks? The checks all went one way, is that what you mean?

I understand you already to have testified to several different checks here, not one check. [776]

The Witness: Frankly, I don't understand that myself. I believe the checks followed the purchase orders. These sheets here are our purchase orders when we brought juice from Sunkist.

Q. (By Mr. Dixon): Will you examine Plaintiff's Exhibit 35, Mr. McCracken, and indicate whether that represents the wind-up and settlement of the pack processed by TreeSweet under the 1951 contract with Exchange Orange?

A. It does, because Purchase Order No. 6739 states, Final purchase of 1951 Valencia single-strength orange juice packed for account of EOP Company by TreeSweet. And this, I would assume, represents the taking down or the exercising of our option to purchase the balance of our pack, which we were required to do, you remember under the agreement by June 1 of '52.

(Testimony of Wendell K. McCracken.)

Q. I would like to have you refer to that part of the exhibit being No. 6739, and part of Plaintiff's Exhibit 35, which reads as follows: All juice located in eastern warehouses unsold on 5/26/52 has been purchased at eastern prices. Only 48/6 ounce remained in California warehouses as of 5/26. We estimate that only 7 per cent of this will be sold at 55 cents per dozen, and the balance of 93 per cent will go at 60 cents. Settlement is, therefore, based on this estimate agreed upon with Arvel Smith by telephone today.

Can you state to the jury what is meant by this telephone conversation with Mr. Smith concerning the prices at [777] which the balance of the stock remaining in the TreeSweet warehouses on May 26th was to be sold?

A. Yes. You will recall that throughout the 1951 pack year and the sale of that pack into the 1952 calendar year, Sunkist and TreeSweet had two prices, one for eastern buyers and one for western buyers, which has been referred to previously. When it came to the final settlement date of June 1st, on which date we had to pay for and take delivery of the amounts still on hand which we had not previously purchased from Exchange Orange Products or Sunkist, then it became a matter of determining at which price, the eastern price or western price, we were going to pay for that merchandise. So this was finally agreed upon for that which was still on hand but not sold. We were trying to determine where it could be sold, whether it would be

(Testimony of Wendell K. McCracken.)

sold east or west. So evidently our Mr. Taylor, and Mr. Smith of EOP, decided that all of the juice located in our eastern warehouses of the 6 ounce size would be presumed to be sold at the eastern price, and the 48/6 ounce size that we have in California, 7 per cent of that was to be sold in the eastern market at 55 cents a dozen, and the other 93 per cent would be sold in California at the 60 cents or higher price. [778]

Q. In other words, these prices, 55 cents and 60 cents, were the prices at which TreeSweet expected to sell the merchandise or juice referred to therein, is that correct? A. That is correct.

Q. And those prices, 55 cents and 60 cents, are also the prices which TreeSweet paid, in fact, to Exchange Orange for the balance of this pack under this arrangement, is that correct?

A. Less the deductions, yes, sir.

The Court: You say after the deductions?

The Witness: Less the deductions. That was the gross price, the selling price.

The Court: Now, I am in doubt here. Does this refer to cases, these figures of 55 and 60 cents refer to cases?

Mr. Dixon: Dozens.

The Witness: Dozens, sir. It may be confusing. All juice is quoted by the dozen. This 48 cans to the case represents four dozen, so it is four times 55 or 60 cents mentioned.

(Testimony of Wendell K. McCracken.)

The Court: So these were small cans?

The Witness: That's right.

The Court: Which would retail for—what were the figures there—55 or 60 cents a dozen?

The Witness: Wholesale.

The Court: And it took four dozen of those to make a [779] can?

The Witness: Yes, sir.

The Court: So that the case price would be four times that for the small cans?

The Witness: That is correct.

The Court: All right.

Q. (By Mr. Dixon): In other words, the 55 cents per dozen would be $2.20 for a case of 48/6's?

A. That's right.

Q. And that price of 55 cents per dozen and 60 cents per dozen was not the price actually paid, was it? In other words, from the 55 cents and 60 cents per dozen were deducted the various allowances, such as 7 cents a case for advertising allowance, 15 per cent from the gross, and so forth, provided for in the contract, is that correct?

A. That is correct.

Mr. Dixon: May it be stipulated, counsel, that the oranges delivered to TreeSweet under the 1951 contract with Exchange Orange had an average soluble solids content of 131.6 pounds per ton?

Mr. Williams: Is that the figure in the TreeSweet answers to interrogatories?

Mr. Dixon: That is the figure, counsel.

Mr. Williams: Then we so stipulate.

(Testimony of Wendell K. McCracken.)

The Court: All right. Stipulation. [780] accepted.

* * *

Q. * * * Did TreeSweet purchase and pay for with cash any Valencia oranges from Sunkist at any time during the year 1951? A. No, sir.

Q. Did TreeSweet purchase any oranges from any other source, Valencia oranges, during the year 1951? A. We did.

Q. Can you state to the jury the approximate tonnage so purchased and the approximate time of said purchases?

A. During the 1951 season, we purchased for cash from other than Sunkist 1,114.105 tons of oranges from other people, growers, direct from growers and from other packing [781] houses not affiliated with Sunkist.

Q. Can you state to the jury approximately when those purchases were made, Mr. McCracken?

A. Those purchases were made in the latter part of October or the first few days of November at the time we were finishing up our pack.

Q. And what was the occasion for making those purchases?

A. At the beginning of each season we budget our pack, and we were short of our budget on one size, the same six-ounce individual serving can that we mentioned before, and we wanted to finish out our budget and, as I recall it, the Sunkist supply of fruit got down to a point where they could handle it or wanted to handle it all in their own

(Testimony of Wendell K. McCracken.)

plant, and we wanted to keep running long enough, our plant running long enough to pack the balance of our budget on that particular size.

Q. So that these purchases were made after you had in fact finished the pack for Sunkist, is that correct?

Mr. Stark: Your Honor, I object to the form of this question as leading.

The Court: Overruled.

The Witness: Shall I answer the question?

The Court: Yes, sir.

The Witness: I believe these purchases were made at the same time we were finishing up our pack for Exchange Orange [782] Products Company, because my notation from our accounting department states that the agreement with Sunkist lasted until November 8th, the last day of our pack, so I think the 1,114 tons supplemented the supply of fruit we were getting in a smaller way from Sunkist.

Q. Can you state to the jury what price, approximately what price you paid per ton for those oranges that you acquired at that time?

A. We paid an average price, according to our records, of $32.97 per ton for the 1,114 tons we purchased at that time, and as far as I know, that was the price delivered at our plant.

Q. That is to say, that was the delivered price?

A. Yes, sir.

Q. To your plant? A. Yes, sir.

(Testimony of Wendell K. McCracken.)

Q. Now, Mr. McCracken, are you familiar with the costs of operation and—strike that.

Are you familiar with the manufacturing costs for processing a ton of Valencia oranges into single-strength juice as they were in effect and applied to your plant in the processing season of 1951?

A. Yes.

Q. Can you state to the jury approximately what those costs were per ton? [783]

A. I am sorry, sir, but we do not figure our costs on a ton basis. We know 23 cases, approximately, make a ton, but we figure all our costs on a gallon basis. I have them on a gallon basis.

Q. That's fine. I think maybe by this time we can understand that. The average ton will produce about 100 gallons?

A. Approximately, yes, sir.

Q. And 100 gallons will make about 23 cases of 24/2's? A. That's right.

Q. Is that correct?

A. No. 23 cases of 12/46's.

Q. 12/46's? A. That's right.

Q. On that basis, can you indicate what the manufacturing cost would be per case of 12/46's?

A. Depending on the volume run in the plant, the volume run in the plant materially affects your cost, because your overhead costs the same no matter whether you run large or small volume.

Q. In other words, your overhead goes on whether you are processing or not?

A. Right.

(Testimony of Wendell K. McCracken:)

Q. Is that an important factor in determining the cost of operations? [784]

A. Most important.

Q. Can you proceed from there now?

A. The cost—I am looking at one of your exhibits, which is our agreement with EOP in 1951, which has attached to it the list of charges, processing charges, we were to be paid, based upon the volume of fruit furnished to us by EOP. I believe that shows that the processing cost of packing a case of 46 ounce is $1.37 based upon the volume we ran that year, 2,400,000 gallons, and over on the right-hand side called for processing fees to be paid to us by Sunkist, EOP, of $1.37531 per case.

Q. Can you tell the jury what the cost of the juice would be per ton on the basis of the $33 fruit that you purchased?

A. About 33 cents, and there are 4.31 gallons of juice in a case of 46 ounce.

Q. Approximately what does that total? I don't have the figures.

* * *

Q. (By Mr. Dixon): By 33 cents, Mr. McCracken, you mean 33 cents a gallon?

A. Yes, sir.

Q. And there are four and approximately three-tenths gallons in a case of 12/46's, is that correct?

A. Yes, sir.

Q. So that the juice cost on the basis of $33 a ton, per case, would be 33 cents times 4.3 and some fraction, which is approximately $1.42 a case, I believe?

A. That is correct, $1.42 according to my figures.

Q. And that, added to the $1.37 per case gives us about $2.79 a case? A. Correct.

The Court: I am lost again. You must not be talking about the thousand tons, then.

Mr. Dixon: No. I left the thousand tons, Judge. I am now talking——

The Court: About the cost of the juice that went from Exchange Orange to TreeSweet?

Mr. Dixon: I am talking about the juice that came from the thousand tons plus that TreeSweet bought—I mean the oranges, thousand tons of oranges that they bought and paid $33 a ton for, which would mean that the juice per gallon—per ton, would cost about 33 cents a gallon.

The Court: Which figured $1.42 a case? [788]

Mr. Dixon: That is right.

The Court: Now you are adding to that——

Mr. Dixon: The manufacturing cost of $1.37.

Q. (By Mr. Dixon): That was the cost provided for in the TreeSweet-Exchange Orange contract in 1951, was it? A. That is correct, yes.

Q. Can you state to the jury whether that price, or cost, provided for any manufacturing profit to TreeSweet from the processing operation?

A. It did not, no, sir. The $1.37 cent processing charge made to EOP by TreeSweet did not include a profit. It was an estimated actual cost.

Q. So before we get to the selling cost, if any,

(Testimony of Wendell K. McCracken.)

for what you produced from this thousand tons that you paid $33 a ton for, we are already, are we not, in excess of any selling price at which TreeSweet sold any of the Valencia juice that it processed under the TreeSweet-Exchange Orange Products contract in 1951?

Mr. Stark: I object to the form of the question as being leading and argumentative.

The Court: Overruled.

Mr. Dixon: You may answer, if you can.

The Witness: Sir, you have my only price bulletin that I have for 1951, and I haven't got it in front of me or in my mind. [789]

We started out with a price of $2.50 and $2.99, East and West, and I haven't got it before me. Exhibit 36, I think it was, the yellow sheets.

Q. (By Mr. Dixon): By referring to Plaintiff's Exhibit 36, I believe, the highest price at which TreeSweet offered any single-strength juice to the trade in 1951 and 1952, the end of that pack, was $2.80 a case for the 12/46's.

* * *

The Witness: As far as I can see, that is correct.

The Court: If I don't understand, I suppose the jury doesn't, and I don't understand.

On the first page of this Exhibit, Exhibit 36, it shows price per dozen 12/46's ex-warehouse distributing points $2.99. Can you explain? Because the witness says the highest price was—what did you say?

(Testimony of Wendell K. McCracken.)

The Witness: May I explain that, your Honor?

The Court: Yes. [790]

Mr. Dixon: Would you explain that? It appears from the price list——

Mr. Stark: If I may interrupt there, your Honor. I think the confusion arises from the fact that the $2.20 price is f.o.b. plant. The other price is the price ex-warehouse in the East, which naturally includes the freight from the plant to the warehouse.

Is that correct?

The Witness: That is correct. The ex-warehouse —we sell orange juice on two different plans; one of which we sell it f.o.b. our plant in Santa Ana, and it is shipped out and we charge the buyer the f.o.b. plant price, and it goes out freight collect and he pays the freight on it, the buyer does. Then we have another method of selling, which is customary in the canned goods business. We carry a warehouse stock of our citrus juices in Chicago or New York, and we pay the freight on that car that goes out. All of our shipments are made in carloads or pool car lots. So that the merchandise in the warehouse in New York or Chicago, we put what we call an ex-warehouse Chicago or New York price on that, which includes the freight, which is added to our f.o.b. plant price, and which also includes the warehouse's cost.

The Court: So that those prices, then, ex-warehouse, are both the price you are charging for the fruit plus freight? [791]

The Witness: That is right.

The Court: I take it you all know what f.o.b. means, free on board. Is that right?

The Witness: Free on board.

The Court: That clears it up in my mind. I am sorry.

Mr. Dixon: I am not sure whether we had a question pending, Mr. Reporter.

> (The following portion of the record was read by the reporter: "Q. By referring to Plaintiff's Exhibit 36, I believe, the highest price at which TreeSweet offered any single-strength juice to the trade in 1951 and 1952, the end of that pack, was $2.80 a case for the 12/46's.")

Q. (By Mr. Dixon): Was that the highest price, according to the TreeSweet price lists, at which TreeSweet offered for sale any single-strength Valencia juice from the '51 pack processed under the Exchange Orange-TreeSweet '51 contract? A. Yes, sir.

Q. If my computations are correct, Mr. McCracken, TreeSweet must have lost money, if it sold any of the juice processed from the thousand tons that you purchased at $33 a ton, and processed into single-strength juice during the 1951 processing season; is that a fact?

A. That is not a fact. [792]

Mr. Stark: I object. I move to strike the answer for the purpose of an objection.

(Testimony of Wendell K. McCracken.)

The Court: It may go out. What is your objection?

Mr. Dixon: Well——

The Court: Just a minute.

Mr. Stark: I object, first, to the form of the question as leading and argumentative. But, secondly, to the fact that it assumes facts contrary to the evidence. The witness testified that this thousand tons was purchased for $33 to make 48/6's, and the rest of the hypothetical question has gone on the costs of processing 12/46's, which is a different can size, and we have no evidence in the record that the costs are the same.

The Court: Maybe that is just what the witness was going to explain. He has already answered that he hadn't lost any money, and he started to explain when you objected.

I will overrule the objection and let the witness answer.

You may explain.

The Witness: That is exactly right, sir, that was my point. I had previously testified that we bought 1100 some odd tons, because we were short on our budgeted pack of 48/6 ounce cans. In the 6 ounce size your cost of juice per gallon is a lot less—your can cost on a gallon basis of the little cans is a lot higher per gallon than the can cost of the large 46 ounce, which we call the family size. So that [793] you have lesser proportionate costs in the 6 ounce size of juice and heavier costs on cans, cartons, and even labor.

(Testimony of Wendell K. McCracken.)

Q. (By Mr. Dixon): Mr. McCracken, of course what I am trying to determine is, so that the jury may understand your operations under this contract, could you have paid $33 a ton for the 24,000 tons of oranges that you processed under the TreeSweet-Exchange Orange contract in '51, and sold that at a profit, based upon the selling prices at which TreeSweet did sell its juice packed under that contract in 1951? A. No.

* * *

The Court: All right. We will take a recess now.

Before you go, when I instruct you, one of my form instructions is that when I ask questions, that doesn't indicate that I have any view whatsoever about the facts. I am just trying to understand the matter as I go along. So don't draw any assumptions from questions that I ask as to any view that I might have as to the facts. That is not my business, for me to decide the facts. I think it is my business to try to understand that.

And I also apologize for being so dumb. Just because [794] you sit on the bench as a judge, that doesn't mean you know everything by any [795] means.

* * *

(Testimony of Wendell K. McCracken.)

Cross-Examination

By Mr. Stark:

Q. Mr. McCracken, this morning you testified that the majority of your product was sold under the TreeSweet label. Does that apply to the Florida, as well as your California pack? A. It does.

Q. Does the Florida pack carry any additional trade-mark identification on it, or is it indistinguishable from the California pack?

A. It is distinguishable. The difference is by a different color label, and very much identified by large letters on the can that it is Florida pack. Some people prefer our Florida pack, some our California pack.

Q. In answer to one of Mr. Dixon's questions regarding your principal supplier of Valencia oranges, you stated that Sunkist Growers and Exchange Orange was your supplier. In making that answer, did you have in mind your Florida operation?

A. I was not considering the Florida operation. Probably that answer was in error, without giving consideration to the Florida operation.

Q. You have a separate local Florida source for that [796] operation? A. We do.

Q. Comparatively, is your Florida pack or your California pack of single-strength juice, or was it in 1951, the larger? Which?

A. In 1951, I think our California pack was slightly larger, but today our Florida pack is larger.

(Testimony of Wendell K. McCracken.)

Q. Now, you indicated this morning that you had had prior contracts between TreeSweet and Exchange Orange in substantially the same form as the 1951 contract which is in evidence. When, if you recall, did those contracts first start?

A. In 1947.

Q. 1947 was the first contract between yourself and Exchange Orange? A. It was.

Q. Calling your attention to the season 1947, did you pack all of your single-strength juice under this predecessor contract, or did you buy some of the fruit?

Mr. Dixon: If the court please, I have no objection to the question, but I think the direct examination did not go back to 1947. It seems to me it is wholly irrelevant, unless counsel has some preliminary reason for his question. I object to any cross-examination as to anything in 1947 which was not gone into on direct examination with this [797] witness.

Mr. Stark: Your Honor, as I understand it, these contracts and the background purpose for entering them were a very definite part of Mr. Dixon's case. He started with the last contract and led us back a little ways, and then left us on the edge of the cliff, and I am simply trying to go back to the time they started.

The Court: Well, you understand his objection. You are a pretty good lawyer.

Mr. Stark: Yes.

The Court: You objected, to start with, and made him call this man as his witness. Now he is saying in substance that you should call this man your witness if you want to go into this matter.

Mr. Stark: No. He has testified there were prior agreements and they were in substantially the same form. He has now testified the first of those prior agreements was 1947.

The Court: I will sustain the objection, but you are privileged to go into the matter. All you have to do is make this man your witness, just like you made Mr. Dixon make him his witness when the matter first arose.

Mr. Stark: We will, of course, take our witnesses in the normal course of the trial.

Q. Mr. McCracken, you gave a pack figure for 1951, total pack of some 2,400,000 gallons. Did that figure include your Florida operation? [798]

A. It did not. All of my testimony had to do with only California operations.

Q. You recall on Exhibit 35, as to which you were examined, there was contained the statement, "Settlement is therefore based upon this estimate" —that is the 55 cents or 60 cents sales price on the final inventory—"agreed upon with Arville Smith by telephone today."

I believe you testified that the price that was agreed upon was the price which was to be the basis of your payment to Exchange Orange, is that correct? A. That is correct.

Q. And it did not relate or purport to be an agreement by Arville Smith of Exchange Orange as

(Testimony of Wendell K. McCracken.)

to the price that you were or were not in fact to sell the product for? A. No, sir.

Q. As a matter of fact, do you know whether those products were in fact sold for 55 cents or 60 cents in the proportion which you stipulated?

A. I do not. That was an estimate. [799]

Q. Simply for the purpose of closing out the contract year? A. Final accounting.

Q. Mr. McCracken, you testified that in 1951 you purchased 1100 some odd tons of fruit from sources other than Sunkist or Exchange Orange. Did you have any difficulty in obtaining this fruit?

A. I do not recall, but I do not think we did.

Q. In Mr. Dixon's computation he asked you what the cost per gallon of juice was from the $33 fruit, and you answered 33 cents a gallon. In giving that answer did you include any credit for peel or oil?

A. I did not have a chance to do that. I thought about that later. It was not included at all.

The way we carry our cost, if the fruit cost $33 a ton, and we get back 4½ pounds of oil per ton, we get back a dollar or two dollars or three dollars for cow feed, dried orange feed, per ton, we credit that against the cost of our fruit and reduce the cost of the fruit by that amount. And that credit towards that $33, which we would derive from the oil and the peel, was not included in that price.

Q. If you had considered the oil and peel credit, it would have reduced the 33 cents a gallon figure?

(Testimony of Wendell K. McCracken.)

A. I am glad to have a chance to correct it, yes.

Mr. Stark: I believe that is all. [800]

Redirect Examination

By Mr. Dixon:

Q. Just one question, Mr. McCracken.

The estimate of the selling price in Plaintiff's Exhibit 35 that counsel asked you about was, in fact, the price that TreeSweet expected to get for this product when they sold it, based upon the market and the selling price of the product at that time, was it not? A. That's right.

Mr. Dixon: That's all.

Mr. Stark: May I ask one further question?

The Court: Let me ask one question and maybe you won't have to ask yours.

The estimate that you referred to was an estimate of the 7 per cent and the 93 per cent, where you estimated—I am asking if this is true—where you estimated that 93 per cent of it would be sold—where was that, in California?

The Witness: Yes.

The Court: And 7 per cent would be outside of California. That was the estimate?

The Witness: Yes.

The Court: But there was no estimate as to the price that you would pay, was there?

The Witness: Your Honor, that is exactly right. I have no doubt we sold it at 55 and 60 cents per

(Testimony of Wendell K. McCracken.)

dozen. The estimate [801] was how much we sold in California and how much we sold in the eastern markets.

Knowing our treasurer, I am surprised he only estimated 7 per cent to be sold at the higher price.

The Court: I think it is the other way around. if you look. I think he estimated that the 93 per cent would be sold at the higher price. Maybe not.

The Witness: I got it the other way, your Honor.

The Court: "We estimate that only 7 per cent of this will be sold at 55 cents per dozen, and the balance of 93 per cent will go at 60 cents."

So he was estimating that you would sell the 93 per cent in California.

The Witness: That is my point. Knowing my treasurer, I am surprised that he estimated such a high amount for California, at the higher price.

The Court: All right. Mr. Stark.

Recross-Examination

By Mr. Stark:

Q. Mr. McCracken, in negotiating and executing the 1951 processing contract with Exchange Orange. did you have in mind any purposes or objectives other than those which motivated you to execute the 1950 contract or the 1949 contract? [802]

Mr. Dixon: I of course object to the question, your Honor. It calls for a conclusion of this witness, a statement of what was in his mind. That is for the jury to determine.

(Testimony of Wendell K. McCracken.)

The Court: Let me have the question read again.

(Question read by the reporter.)

The Court: The objection is overruled.

The Witness: No, sir, we did not. The objectives were the same in '51 as they were the prior years.

Mr. Stark: That is all.

Further Redirect Examination

By Mr. Dixon:

Q. If you hadn't had this contract, Mr. McCracken, you could not have produced, in fact, single-strength orange juice and sold it at your selling prices during the 1951 season, if you had bought the 23,600 tons from Sunkist at the selling price established by their price list; that is so, is it not? A. Yes, but——

Mr. Dixon: That is all.

Mr. Stark: Just one more. I think we will finish this exchange. [803]

Further Recross-Examination

By Mr. Stark:

Q. Mr. McCracken, you indicated that you pack your product for inventory, as well as for immediate sale, I believe? A. Yes, sir.

Q. In any given year, at the time you pack inventory of single-strength juice, do you know or can you tell whether or not you will make money or lose money on that particular inventory?

A. We have done both. You can do either one very successfully, lose or make. [804]

• • •

ROBERT VICTOR CLARK

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Robert Victor Clark.

Direct Examination

By Mr. Dixon:

Q. What is your residence address, Mr. Clark?

A. 221 Evelyn Drive, Anaheim, California.

Q. What is your business or occupation and your present business connection?

A. I am secretary-treasurer of the E. A. Silzle Corporation.

Q. How long have you been secretary and treasurer of that company? A. Five years.

Q. Who is the president of the company?

A. Thelma Silzle.

Q. Where is Mrs. Silzle at the present time, if you [805] know? A. She is in Florida.

• • •

Mr. Williams: I suggest we stipulate he has been unable to serve Mrs. Silzle on his statement, and we can move ahead.

(Testimony of Robert Victor Clark.)

The Court: Is that agreeable?

Mr. Dixon: That is agreeable.

The Court: Fine.

Q. (By Mr. Dixon): Mr. Clark, what products does your company make?

A. Single-strength orange juice, grapefruit juice, lemon juice, concentrates and citrus oils.

Q. Your company is primarily a processor, however, of single-strength orange juice, is it not?

A. Yes.

Q. And it was such in 1951?

A. It accounted for the bulk of our business.

Q. And the single-strength juice which you processed was sold in interstate commerce in the various states of the United States, was it?

A. It was.

Q. And that was true in 1950 as well as 1951?

A. Yes.

Q. You do make some other products you mentioned. Do you make any frozen concentrates?

A. Yes.

Q. Did you make any in 1951? [807]

A. No.

Q. When did you go into the frozen concentrate field? A. 1953.

Q. Now, are you familiar with the manner and method in which your company acquired Valencia oranges for processing purposes in 1951?

A. Yes.

Q. Did you handle any of the transactions which directly related to the acquisition of by-product fruit for processing purposes by your plant in 1951? A. Yes.

Q. Well, did you do the buying of the fruit, the oranges, for example, that were processed by your plant in 1951 into single-strength juice?

A. No, I didn't actually do the buying.

Q. Who did the buying, if you know?

A. Well, in our company, I might explain we have a purchasing company that acquires the fruit and further sells it to us. The Bauer Fruit Company at that time, I believe, was instrumental in acquiring product fruit and selling it to us.

Q. I am not sure I get your answer. You mean you have a company within your company that buys fruit and sells it to your company?

A. It is not a part of our company. It is a separate [808] company.

Q. Does Silzle have any financial interest in the Bauer Company?

A. No, the corporation does not.

The Court: Is there some connection between this company and the Silzle Corporation?

The Witness: Yes. The Bauer Fruit Company is composed of Mr. Bauer and Bill Silzle, who is the son of Earl and Thelma Silzle, who are stockholders of the E. A. Silzle Company. It is a separate partnership operating company that acquires fruit. At that time it was functioning as such.

Q. (By Mr. Dixon): Do you have anything to do in performing the duties of your office at Silzle

(Testimony of Robert Victor Clark.)

in producing or processing the oranges into citrus juice products?

A. Yes. My job is secretary-treasurer, and I am also the general manager, so I administer the affairs of the company in all phases.

Q. Do you manage the processing operation of the Silzle company, as well as the other operations of the company of the kind you described?

A. Yes.

Q. So you are in charge of the processing part of the operations of the Silzle company, is that correct? A. Yes.

Q. From whom did the E. A. Silzle Company get the [809] oranges that it processed into citrus juice products in 1951, if you know? Let's start with the early part of 1951.

A. Valencia oranges or all citrus?

Q. Let's start with Valencia oranges, let's deal with them.

A. Well, we purchased Valencia oranges from either independent sources or direct from groves or from the Sunkist organization.

Q. Did you purchase any oranges, Valencia oranges, from Sunkist prior to June 12, 1951?

A. Yes, I believe so.

* * *

The Court: Well, I didn't understand you. I thought you told me Bauer Fruit Company bought fruit and sold to Silzle?

The Witness: That's right.

(Testimony of Robert Victor Clark.)

The Court: Now you say Silzle purchased oranges from Sunkist, independents, or growers.

The Witness: Well, I meant that the Bauer Fruit Company bought them for the account of Silzle.

The Court: So all the buying is done by Bauer Fruit Company, who in turn turn it over to Silzle Corporation?

The Witness: That's right. [810]

* * *

Q. (By Mr. Dixon): Mr. Clark, did you conduct any of the negotiations with anyone at Sunkist in 1951 in which any discussion was had with reference to the acquisition of oranges by Silzle to be processed into single-strength juice during the processing season in 1951?

A. I don't understand your question.

Mr. Dixon: Read it, please.

The Court: Read it, Mr. Reporter.

(Question read by the reporter.)

The Witness: I probably talked to the Sunkist member at the Citrus Distributing Plant, in talking about fruit to be purchased in 1951.

Q. (By Mr. Dixon): When were those discussions had, if you recall, Mr. Clark?

A. I don't recall.

Q. When did you start buying fruit from Sunkist in 1951, do you recall that?

A. I don't recall the exact date.

Q. About when? [811]

A. Possibly in March, April.

Q. Do you know under what arrangement, if

(Testimony of Robert Victor Clark.)

any, you acquired oranges from Sunkist at that time? By "you" I mean the Silzle Company.

A. Purchased on a tonnage basis.

Q. In other words, Silzle paid for them on delivery, did they? A. Yes.

Q. How long did that arrangement continue, if you know?

A. Up till June, if I remember correctly.

Q. About what time in June did the Silzle Company cease to buy oranges and pay for them on delivery in 1951?

A. I can't recall the exact date.

Q. About when, do you recall that?

A. It could have been the middle of June.

Q. Well, the arrangement was changed about the middle of June, was it?

A. As I recall, we ceased processing because it is more or less between seasons, between the northern Valencias and when the southern Valencias come into maturity for processing.

Q. And the northern Valencias are used primarily for what kind of product?

A. A blend of orange and grapefruit, and they are at [812] times processed into Valencia juice, single strength.

Q. And a concentrated orange juice, too, is it not?

A. Currently they will be that way, but not in 1951 we didn't concentrate them.

Q. You said that this arrangement or the man-

(Testimony of Robert Victor Clark.)

ner of acquiring oranges changed about the middle of June; is that correct? A. Yes.

Q. How did it change, insofar as the change came to your attention was concerned?

A. Well, that is the natural time for lack of processing. The southern Valencias are not in maturity at that time, so there will not be any production. We would just naturally stop producing during that period.

Q. I don't believe you quite answered my question. Maybe I didn't make it clear, Mr. Clark.

You continued to purchase Valencia—or acquire, let us put it that way—Valencia oranges from Sunkist throughout the balance of the processing season in 1951, after about the middle of June, did you not? A. Yes.

Q. Did you continue to pay for those oranges as they were delivered to Silzle by Sunkist——

A. No.

Q. ——during the balance of the season? [813]

A. No.

Q. When did any change in the manner of paying for or otherwise accounting for the oranges so acquired come to your attention?

A. It would have been in July some time that the manner of paying for the oranges was changed.

Q. Did you at any time, Mr. Clark, have any discussion with anyone at Sunkist about making any arrangement or changing the manner or method of acquiring oranges, different from that in which you had been paying for them or acquiring them before that time?

A. I had no discussions with anyone.

Q. Who had those discussions, if you know, if anyone? A. Mrs. Silzle.

Q. Were you present at the time any of those discussions occurred between Sunkist and Mrs. Silzle? A. No.

Q. I take it, then, that you do not know of your own knowledge what the arrangement was, if any, that was made between Sunkist and Silzle Company, after you didn't pay for the oranges when they were delivered; is that true?

A. Only when the processing agreement was written up and furnished to us, then I became aware of it.

Q. When was that presented or when did that come to your attention? [814]

A. I don't recall the exact date.

The Court: You have been using the word "Sunkist"; I take it you are using that in a very broad sense to refer to Sunkist or their subsidiaries?

Mr. Dixon: That is right, your Honor.

Q. (By Mr. Dixon): I will hand you Exhibit 25, the same being a document which purports to deal with some arrangement between Silzle and Exchange Orange; will you please refer to that and indicate, if you can, when any change in the arrangement first came to your attention.

A. Well, July 15th—I signed this agreement as secretary of the organization on September 10th. It was effective——

Q. When did you first see this agreement? You say you signed it on September 10th, Mr. Clark. When did you first see this agreement that you signed on September 10th?

A. Some date near September 10th. Probably several days prior to this time. I don't recall exactly.

Q. That was the first time that you saw that agreement that you executed on September 10th?

A. This is a supplemental agreement that you showed me here.

Q. Just read it if there is any question about it.

The Court: There is actually a letter, an agreement, and a supplement to the agreement, although it is one exhibit. [815]

The Witness: Yes, sir, September 10th is the date that it was signed.

Q. (By Mr. Dixon): You had, however, signed another document, a part of Plaintiff's Exhibit 25, on August 1, 1951? A. Yes.

Q. That is your signature, is it? A. Yes.

* * *

Q. (By Mr. Dixon): Will you state whether the document which you signed on August 1st—what does it deal with?

A. It deals with the processing of peel from other citrus plants for oil.

Q. Do you find anything contained therein deal-

(Testimony of Robert Victor Clark.)

ing with the acquisition by Silzle of any oranges under any arrangement with Exchange Orange?

A. No. [816]

Q. Do you recall how you happened to execute this document on August 1, 1951?

A. Only that I as secretary executed the agreements that apparently were discussed verbally between the EOP and Mrs. Silzle.

Q. Do you recall whether Mrs. Silzle said anything to you on August 1 when you signed that agreement about any arrangement between the Silzle Company and Sunkist or Exchange Orange?

A. Yes. I was aware of it.

Q. Well, would you answer my question, please?

Mr. Williams: Your Honor, wouldn't this be hearsay?

The Court: Read the question.

(Question read.)

The Court: The objection will be overruled because it calls for a yes or no answer. We don't get to the point yet of what she said.

Mr. Williams: I will raise it again when we get to the point, your Honor.

The Court: Did she say anything?

The Witness: Yes.

Q. (By Mr. Dixon: What, if anything, did Mrs. Silzle say to you on August 1 about any arrangement she had made on behalf of the Silzle Corporation to acquire oranges under any arrange-

(Testimony of Robert Victor Clark.)

ment for processing into single-strength orange juice [817] from Sunkist or Exchange Orange?

Mr. Williams: I raise my objection again, your Honor.

The Court: The objection is on the ground of hearsay?

Mr. Williams: Yes.

The Court: The conversation of August 1 prior to the contract of September 1, 1951?

Mr. Williams: I have forgotten the exact date of the conversation, but he is being asked to repeat what was told by somebody else, not what he knows himself.

The Court: It isn't as simple as you think it is, counsel. It involves this conspiracy question now.

Mr. Williams: Shall we approach the bench?

The Court: Well, let me think a minute about it. All right, you may approach the bench.

(The following proceedings were had at the bench outside the hearing of the jury.)

The Court: The amended complaint alleges that They are, as I said, named as a coconspirator, but dence an officer of the conspirator. Therefore, what she said or did may be material in one of two ways.

It may be material as to whether it is an admission by a conspirator, in which event, and obviously a corporation can only make admission through its officers, in which event the admission would bind only the conspirator involved, which would be Silzle. Silzle is not a defendant and there [818]

(Testimony of Robert Victor Clark.)
would be no particular purpose for the admission there.

If, on the other hand, the jury should find what was said and done was in fact preparatory to or part of the conspiracy, then it is admissible, and the hearsay objection is not good.

So it is a question for the jury to determine what it is.

Mr. Williams: Your Honor, I should explain my objection further. It is based on the ground no prima facie conspiracy has been shown. Once a prima facie conspiracy has been shown, then, of course, it is admissible against us, even though it is hearsay, as an admission of a coconspirator.

The Court: No admission would ever be admissible against anyone else. If it is only an admission, it isn't admissible against anyone except the person making it. If it is done in preparation of or part of the conspiracy, then it is admissible.

Mr. Williams: Unless there is some showing of a prima facie conspiracy, unless the evidence has shown a prima facie conspiracy, then our point is it is inadmissible at this time.

The Court: But counsel can only build the proof of conspiracy one stone at a time.

Mr. Dixon: May I suggest, your Honor, that under the usual procedure, based upon my experience in these matters, assuming something has been stated here, that the procedure followed is to permit the statement to go in subject to a motion to strike at the close of the case. Otherwise, as [819] your

Honor has indicated, it would never be possible to establish any conspiracy as a practical matter.

Mr. Williams: In this case, if the plaintiff——

Mr. Dixon: I think—may I finish my statement, counsel?

Mr. Williams: Excuse me.

Mr. Dixon: ——that the evidence already before the court, the contracts and the testimony of the witnesses, Mr. Kelly and Mr. Finley in connection therewith, certainly tends to show the connection of Silzle with the overall acts and combination charged by the plaintiff in the amended complaint.

The Court: It would only be admissible on the conspiracy count, wouldn't it?

Mr. Dixon: Yes, that's right.

The Court: Well, it has been my practice, Mr. Williams, in criminal cases involving conspiracy—I have only tried one or two civil ones—to admit evidence even though it is out of order subject to a motion to strike.

Mr. Williams: Of course, with a jury that is a different situation. If the jury weren't here, that would be the proper procedure.

The Court: Most criminal conspiracy cases are tried with a jury. That is also the practice of our chief judge and most judges in this district. So that will be the ruling of the court.

Mr. Williams: May I have a continuing objection to this [820] hearsay?

The Court: Yes, you may have a continuing objection.

(Testimony of Robert Victor Clark.)

Mr. Williams: Then I won't have to repeat it.

The Court: I think I should advise the jury in what respect only they may consider this.

Mr. Williams: Whatever you wish to do on that. We just wish to reserve the objection.

The Court: All right.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: The objection is overruled, which means the witness is going to answer the question, but I want you to listen very carefully, because it is one of these situations where the matter may be admissible for one purpose and not for another. You have got to apply the law as the court gives it to you. Also, it involves a question of fact, and since facts are all for your determination, under one view of the facts, you will not consider this at all, but under another view you may consider it. I don't know what the answer will be. But assuming the witness says something besides, "I don't know or I don't remember," that will be the situation.

Here is what I am going to try to explain to you, how this is involved. The F. A. Silzle Corporation is alleged in the complaint to be a coconspirator. There is a conspiracy count in this complaint under Section 1 of the [821] Sherman Act, as you will recall.

Now, the law is that the things coconspirators do, if they are coconspirators, may be shown in certain

(Testimony of Robert Victor Clark.)

instances, what they do and say. There are two rules involved.

If a coconspirator makes an admission against his interest, that only binds the coconspirator that makes it.

Let me say in passing, since the E. A. Silzle Company is a corporation, it can only act through agents, officers. Therefore, if what Mrs. Silzle said was an admission against her interest, it would only be binding against the E. A. Silzle Corporation. They are, as I said, named as a coconspirator, but they are not defendants. So it would be an idle act to be concerned about any admissions that the E. A. Silzle Corporation might make against themselves, since they are not a party defendant. So we don't know. According to how you look at the facts, this may be considered by you to be an admission, in which event you won't be particularly concerned with it.

On the other hand, what conspirators do in the pursuit of the conspiracy after a conspiracy has been formed, what they do and what they say in the furtherance of the object of the conspiracy after it has been formed and before it is ended, binds every conspirator, so in that situation, if you take that view of the facts, what Mrs. Silzle as an agent or officer of the Silzle corporation may have said or done [822] may be very material to your consideration.

But, of course, that depends on these factual questions as to whether you find there was a conspiracy and whether this was in the pursuit of the conspiracy.

Now, let me see if I can give you two simple examples of the two rules. We have got two general rules that deal with the question of what alleged coconspirators said or did. One is the situation of the admission against interest, which binds only the alleged coconspirator who makes it. The other is the situation of the thing done or the act done or the thing said in furtherance of a conspiracy after it has been formed, which binds every coconspirator, if you find they are coconspirators.

So, now, then let's illustrate those two instances by a couple of simple examples. [823]

Let's take our men who were planning to injure this drug company. That example I gave you didn't deal with the law of evidence, it dealt with the question of how you are damaged by a civil conspiracy, so I will take another example, not to mix it up. A, B, and C conspire to rob a bank, and after they have entered into this conspiracy, which of course doesn't have to be entered into by express agreement or shaking of hands—in other words, it is entirely possible to find a conspiracy was formed by conduct and acts, you don't have to find express agreement—but after the conspiracy has been formed a policeman stops A and A says, "The jig is up, I am guilty, I did it, take me off to jail," those are admissions against interest, and when A, B, and C come to be tried, the evidentiary law of conspiracy is that it can only be shown against A,

(Testimony of Robert Victor Clark.)
the person who made those admissions, because obviously his admissions were not made in furtherance of the conspiracy.

Only acts done and things said in furtherance of the conspiracy bind everybody. And when he said, "You have got me, the jig is up, I am guilty," certainly that wasn't in furtherance of the conspiracy, so it binds only him.

On the other hand, A, B, and C conspire to rob this bank, A goes into a pawn shop and says, "Let me see what kind of a gun you have got here. Do you have a good gun cheap?"

The pawn broker says, "Yes, here is one I will sell you [824] for $10."

Well, later on investigators go around and they find out about his conversation with the pawn broker, it is then a question of fact for the jury to determine whether that act or the words he said were in furtherance of the conspiracy. And if the finders of fact, if the jury finds that those acts were in furtherance of the conspiracy, then they may use those acts or words against each of the persons that they find to be coconspirators.

Now, that is a simple example of the two situations. Now we have a question asked of Mr. Clark as to some conversation he had with Mrs. Silzle, the president of this corporation. I don't know what that answer is going to be. I am ruling that it is admissible to go into evidence under the conspiracy count of the indictment, Section 1 of the

Sherman Act count, on the charge that there has been a conspiracy.

You are the judges of the facts to determine that. And you must also determine as a matter of fact whether this was something done or something said in furtherance of a conspiracy, if such you ultimately find, or whether it was only some kind of an admission which would only bind the person and the organization making it.

Now, have you followed me on this explanation of the two situations that exist?

If you want to illustrate it in your own minds, you can [825] always think back to the simple example I gave you, which I think clearly demonstrates the difference between the two situations.

Is there any objection to the law as I have stated it or tried to state it in laymen's terms?

Mr. Williams: At one point your Honor referred to "this indictment." That no doubt stems from your extensive criminal experience.

The Court: There is no indictment here, ladies and gentlemen. This is a civil complaint for damages, and I stand corrected in that respect if that is what I said.

Mr. Williams: And one other thing. I would like to have more stress or something said about the fact that first they must find that a conspiracy exists before any of these statements are admissible.

That was implied, but wasn't brought out as fully as I think it should be.

(Testimony of Robert Victor Clark.)

The Court: Yes, it is a question of fact whether there was a conspiracy. It is a question of fact who were the parties to the conspiracy, if you find one to exist.

I have been catutioning you in my admonition not to discuss this case among yourselves. Why? So that you won't try to make up your minds in this case when you have only heard a part of the case. None of you should try to make up your minds in this case until you have heard all the evidence, all the [826] argument, and the instructions of the court. Then you will have to determine as a matter of fact if there was a conspiracy.

If there wasn't a conspiracy, that is the end of the count 1 charge. If there was a conspiracy, then you have to decide who were the parties to it. And those are questions of fact which you are the sole judges of.

Nothing that I have said is to infer that I have any view of these facts, that I think there is or there isn't any conspiracy, or any other situation here. That is up to you to decide.

And you will have to decide whether what was done was done under a conspiracy, if you find one to exist. And then you have a lot of other things to decide if you get that far along. Was there damage, and was there proximate cause, and that sort of thing.

Mr. Williams: That is satisfactory. Now, we can look forward to what Mr. Clark has to say. [827]

* * *

(Testimony of Robert Victor Clark.)

The Witness: I can't recall exact conversations that far back.

Q. (By Mr. Dixon): I know that is hard, but to the best of your recollection, if you can, will you tell the jury what she said, in substance, not the exact words, but the substance of what she said, if she said anything.

A. Well, basically, that we were to process Valencia oranges for the EOP into single-strength juice. And then as [828] this agreement bears out——

Q. No, I am just asking you now just what she said to you at that time, if anything, about getting oranges from Sunkist. That is my question, Mr. Clark. And if she didn't say anything that you remember, just say so. That is all we are trying to get.

A. I can't recall exact conversation. That would be my answer, then.

Q. I am not asking you, Mr. Clark, for the exact conversation. To the best of your recollection can you tell this jury the substance of what she said, not the exact conversation. I am not asking you for that. If you don't recall any conversations, that is the end of the question.

A. I don't recall any conversation that I can explain any further than I did.

Q. I didn't get any explanation or any answer to my question. I thought you said there was a conversation with Mrs. Silzle about the acquiring of oranges from Sunkist. A. That is correct.

Q. Now, my question, again, Mr. Clark, to tell

(Testimony of Robert Victor Clark.)

this jury to the best of your recollection the substance of what she told you at the time that this paper was signed on August 1st, which dealt with peel and orange oil, I believe, Plaintiff's Exhibit 25. [829]

A. Only that we had an agreement——

Q. By "we" you mean who?

A. That Mrs. Silzle and the Sunkist people had orally arranged to process this peel, and that we would receive a formal letter agreement. That would be about the extent of the conversation.

Q. Then the conversation dealt with the processing of peel, I take it; is that correct?

A. Well, which one are you referring to?

Q. You have it before you, Mr. Clark. It is the August 1st part of Plaintiff's Exhibit 25 that I am talking about.

A. That is in two parts, purchase of peel or processing of peel, and purchasing of single-strength juice.

The Court: Now, wait. This Exhibit 25 has various parts. The first two pages of it are a letter dated August 1, '51. Counsel's question may not have been too clear to you, but he is referring solely to the letter of August 1st, '51, which precedes a processing contract that comes later.

Q. (By Mr. Dixon): Now do you understand my question, Mr. Clark? I am talking only about what was said to you, if anything, by Mrs. Silzle at the time you signed this agreement on August 1, 1951, which is part of Plaintiff's Exhibit 25.

(Testimony of Robert Victor Clark.)

Do you understand that part of the [830] question? A. Yes.

The Court: All right. Now let's see if he can answer, and don't interrupt him.

Mr. Dixon: Thank you, your Honor.

The Witness: At the time this agreement was signed there was nothing discussed about any other program of acquiring fruit.

Q. (By Mr. Dixon): I thought that was the answer.

Then, so we are sure of it, the only thing that was discussed with you at the time you signed this agreement on August 1st, with Mrs. Silzle, was what related to the peel and the other things covered by that letter of August 1st; is that correct?

A. Yes.

Q. When was the first time that Mrs. Silzle informed you, if she did, of an arrangement between the Silzle Company and Exchange Orange for the acquiring of Valencia oranges by Silzle from Exchange Orange for processing into single-strength Valencia juice? A. Some time in July.

Q. Do you mean before this August 1st date that we have been talking about, at which time you signed this peel processing contract, that Mrs. Silzle didn't say anything to you about it, about any other arrangement for oranges?

A. Well, at that date, I can't recall. [831]

Q. If I understood your testimony, Mr. Clark, I thought you said that you had no conversation with Mrs. Silzle, and she had none with you, at or prior to the time you signed this agreement which related to peel on August 1st, 1951. Am I right in that, or not?

A. We had daily conversations about our plant and the production of citrus juice. I can't recall all of the conversations.

Q. I presume you did, but I am asking you only, Mr. Clark, about any conversations Mrs. Silzle may have had with you about acquiring oranges for processing purposes into single-strength Valencia juice in 1951, and I am trying to determine whether you had such conversations.

Mr. Williams: We object to the argumentative form of the question. Apparently he is trying to impeach his own witness.

Mr. Dixon: Well, that is absurd, counsel, and you know it.

The Court: It is difficult to make all your questions simple, but let's see if you can make this question simpler.

Go ahead.

Q. (By Mr. Dixon): When was the first time that Mrs. Silzle spoke to you, if you recall, about any arrangement with Exchange Orange, other than the one that you signed on August 1, 1951? [832]

A. Some time in July. I don't recall the exact date.

Q. I wouldn't expect that you would.

The Court: Now, ask your next question.

(Testimony of Robert Victor Clark.)

Q. (By Mr. Dixon): Can you tell the jury about what part of July that conversation took place? A. No, I can't.

Q. Was it the middle of it, the end of it? Is there anything that fixes it in your mind at all, Mr. Clark?

A. Just that it was in July some time. That is about the only answer that I can give.

Q. All right. Now, state to the jury what she told you, if she told you anything, about any such arrangement.

A. That we would receive fruit for processing into single-strength juice from the EOP.

Q. And what was the occasion——

The Court: Wait a minute now. Have you finished?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Dixon): And what was the occasion, if you recall, for this conversation? Were you about to start processing, or what?

A. It was apparently the result of an oral conversation she had with the Sunkist people.

Q. Did she say anything to you other than the fact that there was an oral arrangement? [833]

A. I don't recall.

Q. So to the best of your recollection, all she told you was that there was an arrangement?

A. Yes.

Q. When was the first time that you were informed about the arrangement set forth in Plain-

(Testimony of Robert Victor Clark.)

tiff's Exhibit 25, which you signed as the secretary and treasurer of the Silzle Company on September 10, 1951?

The Court: That is the processing contract?

Mr. Dixon: Right.

Mr. Williams: There are two September 10's, the original and the supplement. Which one are you referring to?

Mr. Dixon: They were both signed at the same time.

Take the so-called purchasing agreement first.

The Witness: I don't recall the exact date that I would be aware of its entirety. Only that we had an agreement, oral agreement.

Q. (By Mr. Dixon): To the best of your recollection, was it about the time that you signed this agreement on September 10th?

A. Prior to that time, a few days prior to the receipt of this agreement, then I became aware of it in detail. Prior to that time it was just from oral conversations.

Q. Do you mean that you had had some oral conversations with Mrs. Silzle about the arrangement a short time prior to [834] September 10th, is that correct?

A. The oral conversations with her were prior to September 10th. [835]

Q. And about how much prior to it, can you tell the jury?

A. I don't recall how much prior time was involved.

(Testimony of Robert Victor Clark.)

Q. Well, was it a week or two weeks? Is there anything at all that you recall about the the time of those conversations?

A. No, I can't recall. [836]

* * *

Q. I believe when we adjourned yesterday, Mr. Clark, we were endeavoring to determine the basis under which the oranges were delivered to Silzle by Exchange Orange under this then oral arrangement in July, 1951, and I believe you indicated that you did not have any recollection at that time of the nature of that arrangement. You handled, as I understand it, the records of the Silzle Company concerning this transaction dealing with delivery of the oranges, insofar as the books of the company are concerned?

A. Yes, they are under my supervision.

Q. Can you state what entries, if any, were made on the books of the company with reference to any amounts that might be due to Sunkist or Exchange Orange for any oranges delivered to Silzle during the months of July and August of 1951? Do you understand my question?

A. It is of an accounting nature how the amounts——

Q. That's right. Were they held in suspense or did you set up an account payable as being due to Sunkist for the oranges, or just how was it handled on the books of the company?

A. I recall it was held in suspense and then entered as a journal entry sometime at a later date.

Q. That was approximately the time at which the [841] contract, Plaintiff's Exhibit 25——

Mr. Williams: Your Honor, I object to the question. It is his witness.

The Court: All right.

Mr. Dixon: I will withdraw it.

Q. (By Mr. Dixon): Can you tell the jury about when that entry was made?

A. No, I don't recall when that entry was made.

Q. Do you know or can you tell the jury about when any entry was made on the books of the company concerning these deliveries, or how long the item was held in suspense? Approximately? I know that you can't necessarily be specific as to the time.

A. Well, a journal entry in our books could be made as late as three months after the transaction was consummated. I don't know the exact date. [842]

Q. Now, Mr. Clark, will you tell the jury about how many tons of oranges were delivered to Silzle by Exchange Orange or Sunkist in 1951 that were not paid for in cash by Silzle to either Exchange Orange or Sunkist?

A. Approximately 6,000 tons, as I recall.

Q. Was that the tonnage of oranges that was handled under whatever arrangement it was, particularly that represented by Plaintiff's Exhibit 25?

A. Yes.

VOLUME III

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record
In .... Volumes

Volume III
(Pages 973 to 1464)

Appeal from the United States District Court for the
Southern District of California,
Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

(Testimony of Robert Victor Clark.)

Q. Did Silzle have any arrangement of any kind with Sunkist or Exchange Orange in the year 1950, to your knowledge, concerning the delivery of oranges to be processed or otherwise handled by Silzle without the payment therefor on or about the time of delivery?

A. Will you repeat the question?

Mr. Dixon: Will you please read it?

(Question read.)

The Witness: No.

Q. (By Mr. Dixon): Directing your attention to the year 1949, do you recall whether Silzle had any arrangement of any kind for processing any oranges or other products for Exchange Orange or Sunkist in that year?

A. I don't know the exact time. We did process grapefruit or blended juice for the Exchange Orange Products under a processing arrangement.

Mr. Dixon: Plaintiff would like to read into the record at this time the answer of the defendants Exchange Orange and Sunkist, or part of the answer to Interrogatory No. 14.

Mr. Williams: Will you show us the part you wish to read, please?

Mr. Dixon: I was about to do so, counsel. (Indicating.)

Mr. Williams: We have no objection, your Honor, except our objection that we have to counsel using the arrangement as the basis for a cause of action, the same as on other contracts.

(Testimony of Robert Victor Clark.)

The Court: What might be called your general objection?

Mr. Williams: Yes. It is the objection we have had to the Mission contract, as I understand it.

The Court: You mean——

Mr. Williams: Under the statute of limitations. It is a matter not pleaded and is barred by the statute.

The Court: Objection overruled. [844]

* * *

Mr. Dixon: The question, ladies and gentlemen of the jury, the interrogatory, is addressed to the defendants Exchange Orange and Sunkist and is as follows:

"Give the following information with respect to other orange transactions, including custom packing, with canners for the period contemplated herein"—which was for the years 1949 and 1950 and 1951—"the names and addresses of the canners, the dates of transactions, the terms, the tons of by-product oranges involved, the case volume and the dollar volume."

And the answer of Sunkist and Exchange Orange to that interrogatory sets forth many of the agreements that you have already had presented to you, and in addition thereto it contains the following:

"Season 1949-1950, E. A. Silzle Corporation, Anaheim, California, an unwritten processing arrangement [845] whereby E. A. Silzle Corporation processed oranges and grapefruit furnished by EOP into canned grapefruit-orange blend. EOP supplied the oranges and grapefruit and paid the freight on the oranges and grapefruit to the E. A. Silzle Corporation plant and picked up the canned grapefruit-orange blend after processing.

"The E. A. Silzle Corporation furnished the cans and cases. Exchange Orange supplied the labels and sugar. The processor was allowed to keep the peel and to dispose of it without accounting to Exchange Orange. 266 tons of oranges were thus processed. 275 tons of grapefruit were thus processed.

"Cases produced from August 30, 1950, to September 16, 1950, amounted to 11,638, consisting of the following packs: 12/46 ounce cans per case; dollar volume of the processing was $15,469."

That is the end of the quotation from the answer to Interrogatory 14. [846]

Q. (By Mr. Dixon): Do you know, Mr. Clark, whether Silzle bought any of the blended juice thus processed in 1949 under the oral arrangement referred to in the answer to the interrogatory that I have just read? A. I don't recall.

Q. Do you know what happened, what was done with any of the single-strength orange juice that was processed by Silzle from oranges delivered to Silzle by Exchange Orange in 1951 under and in accordance with Plaintiff's Exhibit 25?

A. We received the oranges, processed it into single-strength juice, and then purchased the single-strength juice from the Exchange Orange Products under the provisions of that agreement.

(Testimony of Robert Victor Clark.)

Q. And the prices at which such purchases were made are set forth in the agreement, Plaintiff's Exhibit 25, are they, Mr. Clark?

A. The method of payment for the single-strength juice is set forth in the agreement.

Q. Can you state to the jury whether this agreement, Plaintiff's Exhibit 25, covered the purchase or acquisition of this juice by Silzle to the extent of the entire pack so processed by Silzle under this contract Plaintiff's Exhibit 25 with Exchange Orange?

A. Yes, it covered the entire pack made by Silzle on oranges received under this contract or this agreement. [847]

Q. I believe in excess of 163,000 cases were processed under this arrangement, were they not?

A. I believe, as I recall, the figure of 163,000 cases is the amount that we processed from oranges received from EOP.

* * *

Q. (By Mr. Dixon): Can you state to the jury whether all of the canned juice remaining in the Lawrence warehouse under Plaintiff's Exhibit 25, on February 1, 1952, was sold in accordance with the provisions of that February 1 date arrangement? A. Yes.

Q. Do you have with you the record of the sales made subsequent to that date, Mr. Clark?

A. No, I don't have the record of sales.

Q. I thought you showed me something this morning which had D sales, E sales, F sales, G sales, H sales, and I sales. [848]

A. I thought you meant invoices. I am sorry.

I have a record here showing our accounting to the EOP for the purchase of single-strength juice purchased under this agreement.

Q. Will you state what you have there with reference to those sales made after February 1, 1952?

A. I have a record prepared by our office showing our production and our movement of the merchandise, which is the sale, and the amount of money paid for the juice based on sales price.

Q. I notice we have here E basis, F basis, G basis, H basis; is that the end of the numbers, or are there some more after H?

A. In February of '52 the basis of disposing of inventory was on an out-of-state basis or in-state basis. It was no longer given the letter as identification.

Q. Can you explain to the jury what is meant by this C basis, D basis, E basis, F basis, G and H basis?

A. It would be a basis of the sales price, and the sales price I do not recall at this time.

The Court: Where did you get those letters?

The Witness: It is just a method of identifying a different sales price for the product.

Q. (By Mr. Dixon): Do you know whether that letter was given to your office by Exchange Orange or Sunkist for the [849] purpose of recording these different sales?

A. I do not recall receiving written instructions.

(Testimony of Robert Victor Clark.)

Q. Do you recall ever having been advised by anyone to place those numbers—not numbers, but letters—after or before those sales?

A. I do not recall any instructions, specifically, for those letters.

The Court: Were those letters something that your company originated as part of your bookkeeping system, or did they have some relationship to some conversation, letter, or other arrangement with EOP?

The Witness: It could be as a result of conversation between myself and the accountant at EOP, or some other person up there, which I can't recall the name of at this time. [850]

Q. (By Mr. Dixon): Will you tell the jury, then, again just what those different letters mean insofar as the records of Silzle are concerned?

A. Well, it identifies the movement of the merchandise and having a different sales price. Each letter was of a different sales price.

Q. By sales price, you mean what?

A. Sales price of the merchandise sold, the f.o.b. price.

Q. Well, I guess I didn't make my question clear, Mr. Clark: Is that the selling price of the merchandise by Silzle to a buyer? A. Yes.

Q. And does that price have any relation to the price paid by Silzle to Exchange Orange for the Valencia juice covered by those sales?

A. Yes.

Q. And what is that relationship?

(Testimony of Robert Victor Clark.)

A. The merchandise was sold under the different bases as outlined and the amount paid to the EOP was that price less certain credits given to the corporation for processing, advertising, hauling, and other things, as outlined in the agreement.

Q. By that you mean those items that are contained in Plaintiff's Exhibit 25 as being the items under the headings [851] "Less"? A. Yes.

Q. And those items include the label allowance, manufacturing cost, advertising allowance, trucking allowance, sales expense, brokerage and profit items contained therein, do they? A. Yes.

The Court: You say has a relationship. That might mean anything. What was the relationship? Was the sales price at which you sold these goods f.o.b. the same price that you paid EOP less the discounts, or by the relationship do you mean it was always greater or always smaller? What was this relationship?

The Witness: This sales price of the merchandise on these different lettered bases was sold for that price and we accounted to the EOP for that price less these items mentioned in the exhibit.

Q. (By Mr. Dixon): Mr. Clark, I believe you stated that you were in charge of production, is that correct? A. Yes.

Q. For the Silzel Company. Was the amount of tonnage of oranges which were delivered to Silzle under Plaintiff's Exhibit 25 the total amount or substantially the total amount of all the Valencia oranges processed by Silzle during 1951 into single-strength Valencia orange juice? [852]

(Testimony of Robert Victor Clark.)

A. You mean the entire year 1951?

Q. No, into single-strength Valencia orange juice.

A. Well, we processed single-strength Valencia orange juice from the beginning of the year clear through the end of the Valencia season.

Q. Yes, I understand, but did you purchase and pay for any oranges that were thus processed into single-strength Valencia juice from anyone after Silzle started to process these oranges under Plaintiff's Exhibit 25?

A. The majority of the oranges received during that period were received under this agreement.

Q. You did, however, purchase and process some tons of Valencia oranges prior to the processing that was done under Plaintiff's Exhibit 25, that is a fact, isn't it?

A. The plaintiff's exhibit has two parts. One part showed a direct sale of tonnage of fruit. I believe it is a little over 500 tons that were purchased as an outright sale of fruit.

The Court: Well, here is what counsel is getting at. This is wasting time. Let's get down to brass tacks on this. Prior to the time that you had any dealings with the EOP, the Silzle Company had any dealings with EOP in 1951, did you or did you not buy Valencia oranges from independent sources other than the EOP for the purpose of making single-strength orange juice? [853]

The Witness: We purchased oranges from independent sources and from the Sunkist organizations

(Testimony of Robert Victor Clark.)

prior to the time we had the agreement with the Exchange Orange.

The Court: Now, after you entered into the agreement, Exhibit 25, with EOP, did you thereafter buy Valencia oranges for the purpose of making single-strength juice from anybody else other than what oranges you got from EOP?

The Witness: Not as a general rule. We might have purchased some small lots here and there from growers. I don't recall exactly. [854]

Q. Now, Mr. Clark, I believe Plaintiff's Exhibit 25 calls for the production of some 12-ounce stock; is that correct? A. Yes.

Q. Did the Silzle company have a 12-ounce production line? A. Not at that time.

Q. Will you state to the jury where the juice that was canned in that size can was processed?

A. We had the 12-ounce merchandise that is covered by this agreement processed at the Winckler & Smith plant.

Q. Can you recall, or do you know anything about any arrangement that was entered into between Silzle and the Winckler company, Winckler & Smith, for that processing?

A. As I recall, we furnished the fruit and in accounting practice we sold the fruit to the Winckler & Smith company, and then purchased the merchandise from them based on the price as established by the sales price of the fruit, to get it back on our books as a purchase of merchandise.

Q. Whatever was thus processed by Winckler &

(Testimony of Robert Victor Clark.)

Smith and turned back to E. A. Silzle Company was then paid for by Silzle to Exchange Orange under and pursuant to the provisions of Plaintiff's Exhibit 25?

Mr. Williams: I am sorry. I have to object, again, to the form of the question. [855]

The Court: Overruled.

The Witness: Will you restate the question, please?

Mr. Dixon: Will you read it, Mr. Reporter, please?

(Question read by the reporter.)

The Witness: Yes.

Q. (By Mr. Dixon): I am not sure that the record already contains an answer to this question, Mr. Clark, therefore I may be a little repetitious in asking it, but is it my understanding that substantially no Valencia oranges were purchased and paid for by the Silzle company from any other supplier during the 1951 season for processing or to be processed into single-strength Valencia orange juice, after Plaintiff's Exhibit 25 was entered into?

A. If any was purchased, it was a very small amount.

Mr. Dixon: I believe that is all.

Cross-Examination

By Mr. Williams:

Q. Mr. Clark, did you have anything to do with the selling of the products manufactured by Silzle?

A. No. That would be in the hands of our sales department.

Mr. Dixon: Pardon me, counsel. I don't want to interrupt, but may I ask one other question?

Mr. Williams: Certainly.

Mr. Dixon: With the permission of the Court.

The Court: Yes. All right.

Direct Examination
(Resumed)

By Mr. Dixon:

Q. Did Winckler & Smith process any five and a half-ounce size cans for Silzle during the year 1951 into single-strength orange juice? A. Yes.

Q. And were those cans that were thus processed handled in the same manner as you ~~have indicated~~ the other size were handled that were so processed by Winckler & Smith? A. I believe so.

Q. And they were also handled in the same manner with reference to the payments made to Exchange Orange under the contract, is that correct?

A Yes.

Mr. Dixon: Thank you.

Thank you, counsel.

(Testimony of Robert Victor Clark.)

Cross-Examination
(Resumed)

By Mr. Williams:

Q. What information did you receive about the sales of products by Silzle in your capacity with the company?

A. In conferences with our sales department.

Q. Did those conferences discuss the price at which the products were to be sold?

A. Yes. [857]

Q. About how often were those conferences held in 1951?

A. Informally several times a week.

Q. Did you also see the invoices of the sales during 1951 made by Silzle? A. Yes.

Q. Did those invoices show the individual price at which the products were sold, or did they merely show so many cases in a total amount?

A. No, it shows the individual size and price received.

Q. Did you review those invoices before coming to this courtroom? A. Very hurriedly.

Q. Tell us the extent of your review.

A. I checked the sales register and tried to pick out an in-state sale as well as an out-of-state sale. [858]

Q. For what period did you check?

A. I believe from August through February or March of 1952.

(Testimony of Robert Victor Clark.)

Q. What is your sales register, what appears on the sales register?

A. The date of sale, customer invoice number, and the amount sold, the gross amount, and other debit and credit items that might appear as part of the transaction.

Q. Does the individual price per case appear on your sales register? A. No.

Q. Now, tell us what check you made. I have interrupted you. Did you finish your answer about the check of the sales register? A. Yes.

Q. Did you make any other check relative to prices before you came to the courtroom?

A. No. Only the sales register.

Q. And that did not show the individual prices of the cases, is that correct?

A. It showed the amount of sales in dollar volume and the number of cases sold, or dozens, as it might be.

Q. But did not show the individual price per case? A. No.

Q. Did you check what those individual prices were per [859] case by calculating them from the data on the sales register? A. Yes.

Q. And for what period did you do that?

A. August through March of 1952—August, 1951, through March of 1951, I believe it is.

The Court: March, 1952?

The Witness: No. Through May, 1952. I am sorry. August through May, 1952, August, 1951, through May, 1952.

(Testimony of Robert Victor Clark.)

Q. (By Mr. Williams): Did you then compare those prices with the prices set forth in Exhibit 25?

A. Very hurriedly.

Q. And will you tell us the result of that comparison? A. Basically the same.

Q. When you say basically, what do you mean by basically?

A. In the same range. I couldn't compare them exactly as I do not have the exact information for my comparison. I just took spot checks from the sales register. The amount shown on the exhibit would be the exact amount of cases sold. The check of the sales register was to refresh my memory.

Q. Did all of the prices you found on your sales register, that you calculated from the sales register, check identically with Exhibit 25, or were there variations? A. There were slight variations.

Q. So that the Silzle Company did not sell at precisely [860] the price set forth in Exhibit 25, is that correct?

A. It was basically the same. It wasn't in all cases exactly.

Q. What do you mean by basically?

Mr. Dixon: Counsel, I object. I think that question has been asked and answered at least twice.

The Court: Overruled.

Q. (By Mr. Williams): Will you explain more precisely what you mean by basically?

A. It was patterned after the same prices. There were occasions when it might be sold for more or less to the customer.

(Testimony of Robert Victor Clark.)

Q. Did you have any discussion with anyone at Exchange Orange about whether Silzle was to follow precisely the prices stated in Exhibit 25?

A. I had no discussion with anyone at Exchange Orange.

Q. Did you have any discussion with Mrs. Silzle about whether you were to follow the precise prices set forth in Exhibit 25?

Mr. Dixon: If the Court please, this witness did not sell these products. He is not the sales manager of this company.

The Court: I know, but he is an officer. Overruled.

Mr. Dixon: If he knows, he can testify.

The Witness: I don't recall having any conversation with [861] Mrs. Silzle to that extent.

Q. Did you have any understanding on the subject as to whether you were or were not to sell the products at the prices stated in the Exhibit 25?

Mr. Dixon: I object to the question, your Honor. He says whether you—meaning this witness—were to sell.

Mr. Williams: Whether the Silzle Company was to sell.

The Court: Since we are being technical about objections, the question calls clearly for his conclusion, did you have an understanding? If you want to go into some conversation, all right. I sustain the objection on that ground.

Q. (By Mr. Williams): Is it correct you had

(Testimony of Robert Victor Clark.)

no discussion with anyone concerning the prices at which Silzle was to sell with respect to the prices stated in that Exhibit 25?

A. Discussions with whom?

Q. Anyone at the Silzle Company or at Exchange Orange?

A. I don't recall any specific discussion.

Q. Do you know whether any authority was obtained from Exchange Orange to take the Exchange Orange fruit supplied to you under Exhibit 25 and have it processed by Winckler & Smith Citrus Products Company?

Mr. Dixon: I object to the question, if it please the Court. I don't want to be technical, but it obviously is improper as to form, "authority." I have no objection to any [862] question about conversation.

The Court: Well, treat it as a preliminary question. Overruled. You may answer.

The Witness: Our agreement with Exchange Orange included a 12-ounce pack and we had no line, and we had it processed at Winckler & Smith. We did not discuss it with EOP. [863]

Q. Do you know whether EOP knew that the fruit was being processed at Winckler & Smith?

A. I don't know whether they were aware of it.

The Court: Did you say 12-inch or 12-ounce?

The Witness: 12-ounce.

Q. (By Mr. Williams): I am not sure I understood your testimony correctly. Did you testify that in calculating the amounts to be paid Exchange Or-

(Testimony of Robert Victor Clark.)

ange, that the deductions were made from the Silzle selling price instead of from the price set forth in Exhibit 25?

A. No. The price as set forth in the exhibit or other oral arrangements that might have been made that are not covered in the exhibit as to the sales price.

Mr. Williams: That is all.

Redirect Examination

By Mr. Dixon:

Q. Just one question, Mr. Clark. Did anyone, to your knowledge, from Exchange Orange inspect or otherwise visit the Silzle plant in 1951 before any oranges were delivered under this oral and written arrangement, Plaintiff's Exhibit 25?

A. I don't recall ever knowing of any visit.

Q. Do you know, Mr. Clark, whether any of the fruit that was delivered by Sunkist to or for Silzle under this arrangement, Plaintiff's 25, was delivered directly to the [864] plant of Winckler & Smith, or was it delivered to your plant and then in turn redelivered to the plant of Winckler & Smith?

A. It was delivered to us, and then rerouted down to Winckler & Smith.

Q. Were there two handlings of the same tonnage of fruit, or was the truck that had the fruit rerouted from your plant to Winckler & Smith?

A. It was rerouted and a new set of papers made

(Testimony of Robert Victor Clark.)

showing a delivery of fruit from Silzle's to Winckler & Smith.

Q. And the driver then of the truck making the delivery would have an order of some kind from either Silzle or Sunkist to make the delivery to Winckler & Smith's plant, is that correct?

A. Only from Silzle's.

Q. Only from Silzle's? A. Yes.

Q. Did Silzle sign for the delivery of the fruit to the Winckler plant, or how was that handled, if you know?

A. It is customary for fruit that is to be delivered to the corporation to be signed by our receiver, and the fruit that came to us that was further diverted was signed by our receiver as received by Silzle's, and then further routed by Silzle's to the Winckler & Smith plant.

The Court: Did you have somebody at the Winckler & [865] Smith plant sign for it when it got there?

The Witness: Yes, their receiver would have shown a receipt of that fruit as part of the trucking operations.

Q. (By Mr. Dixon): Would that receipt go back to Sunkist? A. No.

Q. It would go to Silzle?

A. Silzle's. [866]

* * *

NICHOLAS J. WINCKLER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Take the stand. State your name, please.

The Witness: Nicholas J. Winckler.

Direct Examination

By Mr. Dixon:

Q. What is your residence address, Mr. Winckler?

A. 2201 North Ross Street in Santa Ana.

Q. How long have you lived at that address?

A. About three years.

Q. Where did you reside prior to that?

A. Prior to that I resided in Anaheim.

Q. Do you mind telling the jury how old you are, Mr. Winckler? A. I am 58.

Q. Were you born in the United States?

A. No. I was born in Hungary, in Europe.

Q. When did you come to the United States?

A. 17 years ago. [867]

Q. When did you become a citizen of the United States? A. In September, 1943.

Q. Will you state to the jury what business, if any, you were engaged in in Hungary before you came to the United States?

A. Well, I was engaged in farming and banking and grain wholesale, and we had extensive farm holdings, and in connection with this farm holding

(Testimony of Nicholas J. Winckler.)

we had a number of agricultural enterprises, such as alcohol plants and canneries and flour mills and dairy and cheese factory, everything which had to do with food.

Q. Well, when you were living in Hungary, did you have anything to do with any canning or processing food operations? A. Yes, I did.

Q. Will you state to the jury specifically what your experience was in Hungary, that is, what you did in Hungary in the food processing line?

A. Well, we had two canneries. We canned mainly tomato products, but we canned also some fruit juices. Fruit juices at this time in Hungary were not a major item. They were restricted mainly to beverage bases where water or carbonated water was added and used like orangeade or lemonade. No single-strength juice was canned.

Then we made some meat and vegetable products, and [868] also some fish products.

Q. Directing your attention to the plaintiff, Winckler & Smith Company, when did you become associated with that company, Mr. Winckler? I am referring now to the corporation, the plaintiff in this action.

A. In 1944, it was in December, 1944, it was 11 years ago, my attention was called to the fact that there is a plant for sale in Anaheim and I went out in December.

Q. What kind of a plant?

A. It was a citrus processing plant. It was operated by a corporation named Calton—C-a-l-

(Testimony of Nicholas J. Winckler.)

t-o-n-e, and I don't know if there is an "e" on the end or not.

This corporation, which incidentally is no longer in existence, decided to build a larger plant, a new plant, so they had no use for the leased plant at Anaheim, which was owned by a certain Lash, Incorporated, and it was up for sale. So I started negotiations in December, 1954, and in [869] January——

The Court: '44, you mean?

The Witness: '44, I am sorry.

(Continuing): '44, and in January, '45, I purchased the plant in my own name, and I decided to run the business as an individual business. But the demand was so great in the spring of 1945, and I understood there were a lot of oranges available, that I decided to take in a partner, and formed a partnership named Winckler & Smith Citrus Products Company, which was the predecessor of the corporation. We were incorporated in October, 1945, and commenced operations as a corporation on February 1, 1946.

* * *

Q. (By Mr. Dixon): I will hand you what has been marked for identification as Plaintiff's Exhibit 37, Mr. Winckler, and ask you to state what that is?

A. This is the former plant of our corporation.

Q. When was that picture taken?

A. The picture was taken in summer, 1946.

Q. That was shortly after the corporation,

(Testimony of Nicholas J. Winckler.)

Winckler & Smith, commenced operations at the plant pictured in [870] Plaintiff's Exhibit 37?

A. As a corporation, a year after the partnership was formed.

Q. Is that a representative picture of the plant as it was in 1951 insofar as the exterior of the plant is concerned?

A. Well, it is an unretouched picture, and the only difference between '46 and '51 is that a lot of additions, as far as equipment, have been made during these five years which are not shown on this picture.

Q. But the additions that you refer to, are they additions of equipment in the interior of the building, or—— A. Both.

Q. ——or additions to the exterior?

A. Both.

Mr. Dixon: Plaintiff's Exhibit 37 offered in evidence.

Mr. Strachan: No objection.

The Court: 37 received in evidence.

* * *

Q. (By Mr. Dixon): Mr. Winckler, what office, if any, did you hold in the Winckler & Smith company after it was incorporated and commenced to do business? [871]

A. I became president and general manager.

Q. As such did you have general charge of the operations at the plant, processing operations?

A. Well, I had to perform the customary duties of a general manager, with the help of the other

(Testimony of Nicholas J. Winckler.)

gentlemen that we had in the plant who all had a specialized function to perform.

Q. Will you state to the jury what product or products you processed at this plant when you commenced operations in 1946?

A. Up to 1947 we had the following products: single-strength citrus juices, which is orange juice, grapefruit juice, and a blend of the two. Then we made some lemon juice, and we made so-called citrus cocktail, and we concentrated citrus juices, that was the hot pasteurized concentrate method, which was sold for the trade, not in individual cans, but rather in drums, or for the Government, or the British Ministry of Food, who were purchasers of concentrated orange juice year after year.

In 1947 we added the lemonade to our line, and we sincerely believe that we pioneered the canned lemonade business.

Mr. Strachan: I ask that the witness not volunteer what he sincerely believes, but respond only to the questions that are put.

The Court: Yes. Listen to the attorney and answer the questions that he asks. [872-873]

Q. (By Mr. Dixon): What products did you make in 1947?

A. In 1947, besides the products made formerly or prior to 1947, we started to manufacture canned lemonade.

Q. State, if you will, to the jury whether to your knowledge there was any canned lemonade as a

(Testimony of Nicholas J. Winckler.)

product on the market for sale to the consumer at that time.

A. To our knowledge, nobody canned lemonade prior to us, prior to '47.

Q. Can you state to the jury just what that product was?

A. That product, basically speaking, was the same good old American lemonade known by everyone which consists of lemon juice, sugar and water, but it was the first time that it was all prepared ready for use, put in a can, which can simply had to be opened and you could enjoy the lemonade without adding anything to it or doing anything with it.

Q. Now, coming down through the years 1948 and 1949 and 1950, were there any additional products that were added to the line of the citrus juices that were processed and sold to the trade by Winckler & Smith?

A. In 1949, we started in a very small way to equip ourselves for the freezing and low temperature processing of citrus juices, such as frozen orangeade—I mean frozen orange juice and frozen lemonade, but we really didn't do anything on it until the latter part of 1950 to speak of. [874]

Q. Well, can you state to the jury what additional equipment, if any, was installed in the plant of Winckler & Smith in the years 1949 and 1950 which related to the processing of citrus fruit juices into any kind of product?

A. In 1949 and 1950 we added about $100,000 worth of equipment to our plant, the greatest portion of that expenditure was in behalf of frozen concentrated citrus juices.

Q. Did Winckler & Smith commence to make any frozen citrus juice products in the years 1949 and 1950?

A. In 1949 we had what I would call only small test runs. I am sorry for my accent.

Q. Is that what is sometimes referred to as pilot plant operation? A. More or less.

Q. Or was it more than a pilot plant operation?

A. It was more than a pilot plant, but it was a small capacity compared to our single-strength juice capacity.

Q. So that the jury may get some idea of the processing capacity of the plant and this equipment for making frozen citrus juices, will you state to the jury about how many tons might be so processed per day at your plant through this equipment into frozen citrus juice products? [875]

* * *

The Witness: Our frozen capacity was about 50 tons a day, 50 tons of oranges a day, based on a 24-hour round-the-clock operation.

Q. (By Mr. Dixon): Was the product of the processing called frozen orange juice, or what was it?

A. Frozen concentrated orange juice.

Q. Did your plant have any capacity to make any frozen lemon concentrate?

(Testimony of Nicholas J. Winckler.)

A. Well, the same equipment is used for frozen lemon concentrate. However, we didn't make any amount to speak of. We made frozen lemonade, not frozen lemon concentrate.

Q. Under what brand or label, if any, were the products offered, the products that you have described as being processed in the Winckler & Smith plant, offered to the trade?

The Court: We are still in 1949? [876]

Mr. Dixon: Well, for the whole period, your Honor.

The Court: All right.

The Witness: Well, we had a brand name called Ana-Gold, and the most of our products were sold under our own brand name, but we accepted some private label business, too.

* * *

The Court: Private business is where you would sell what you call brights or shiny cans?

The Witness: No, your Honor. We put the labels of our buyers on the can like Iris Foods, Monarch. They furnished the labels and we put them on.

The Court: All right.

Q. (By Mr. Dixon): I hand you what is marked Plaintiff's Exhibit 38 and ask you what that is? A. This little booklet——

Q. Can you just tell the jury in a few words what is contained in Plaintiff's Exhibit 38?

A. They are labels which are wrapped around the cans, meaning of our products. Some cans are labeled and some cans are lithographed. [877]

(Testimony of Nicholas J. Winckler.)

Q. I just want to know what this is.

A. They are can labels.

Q. Are these the samples of the labels which went around the cans containing the products that you have described as being processed and sold by Winckler & Smith from 1945 to and through 1951?

A. They are.

Mr. Dixon: Plaintiff's Exhibit 38 offered in evidence.

Mr. Strachan: No objection.

The Court: 38 received in evidence.

* * *

Q. (By Mr. Dixon): Directing your attention, Mr. Winckler, to the year 1949, can you state to the jury what the approximate total dollar volume of sales of the products of Winckler & Smith was in that year? A. It was around $1,600,000.

Q. Can you state to the jury approximately what percentage of that total amount of sales was represented by the product processed by Winckler & Smith and sold in states other than the State of California?

A. To my best recollection, in excess of 75 per cent was sold in other states but California.

Q. Directing your attention to the year 1950, will you state to the jury approximately what the total dollar volume [878] of your sales were for products processed and produced during that year?

A. In 1950, our sales were around $1,750,000.

Q. Can you state to the jury what the approximate percentage was of the total production of your

(Testimony of Nicholas J. Winckler.)

products that were sold in that year outside of the State of California?

A. It was less than 1950. If I may look at my records.

Q. I think you may, if you can't state approximately, refresh your recollection.

Mr. Strachan: I would just like to have it understood that anything that he refers to will be available to us for inspection.

The Court: That is correct.

Mr. Strachan: Yes, sir.

The Witness: It was in excess of 50 per cent which was sold outside of California.

Q. (By Mr. Dixon): Will you state to the jury what the approximate total sales of Winckler & Smith were of products processed by it in 1951?

A. It was approximately three hundred or three hundred fifty thousand dollars, I say processed, not the total sales volume, because I don't figure the Florida operation where we purchased.

Q. Then maybe I had better ask you this question: Of the total sales of Winckler & Smith in the year, what were [879] the total dollar sales of all products from whatever source acquired, that were sold by Winckler & Smith in 1951?

A. In 1951 it dropped from $1,750,000 to approximately $600,000.

Q. Now, can you state to the jury what amount of that approximately $600,000 of sales, total sales, made by Winckler & Smith in 1951 were represented by the sales of products processed by

Winckler & Smith at its Anaheim plant in California?

A. Approximately $350,000 to $400,000.

Q. What was the source of the balance of such products so sold?

A. We had an office in Florida where other canners—which we maintained, pardon me, for the purpose that other canners should can for us under our label, which in return was sold interstate under the Ana-Gold label.

Q. When was this Florida office of Winckler & Smith opened?

A. It was opened late in fall, 1950.

Q. And the balance, then, of the total sales that you have referred to as having been made by Winckler & Smith in 1951 is represented by sales of those products which were acquired through and sold by the Florida office of Winckler & Smith?

A. That is correct. That wasn't our production. [880]

Q. Winckler & Smith had no processing plant in Florida, is that correct?

A. No, we never had.

Q. And the amount so sold by the Florida office represented the purchases of canned products so sold as shiners or blanks upon which the label Ana-Gold was placed, is that correct?

Is my question clear, Mr. Winckler?

A. Yes.

Some of the merchandise that we purchased was blanks or bright cans, and the manufacturer in

(Testimony of Nicholas J. Winckler.)

Florida placed our Ana-Gold label on the can. On the other hand, a part of the merchandise purchased by us in Florida was private label business. For instance, Safeway's label was placed——

The Court: Safeway?

The Witness: Safeway Stores. Safeway's label was placed on the can, and any other private buyer's label was placed on the can and sold by Winckler & Smith as Florida juice under the buyer's label. [881]

Q. Now, Mr. Winckler, you have mentioned all of these products that were processed and sold by Winckler & Smith. Can you state to the jury whether any one of these products constituted any particular substantial percentage of the total products of Winckler & Smith?

Mr. Strachan: Can we fix the period that is referred to in the question?

Mr. Dixon: Well, starting in——

The Court: We haven't found out what he was producing in 1950 and 1951 yet.

Mr. Dixon: I thought I covered that, your Honor.

The Court: You stopped in 1949.

Mr. Dixon: Thank you.

Q. Will you state to the jury what products you processed in 1950?

A. Well, if my recollection is correct, I covered the frozen orange juice, the frozen lemonade, the canned lemonade. I have not covered the following products yet which we developed partially in 1950

(Testimony of Nicholas J. Winckler.)

and partially in 1951, and that is orangeade and lemonade in the non-frozen form or what is called shelf pack, which does not need any refrigeration.

Q. By shelf pack you mean it is canned and sold to the consumer on the shelf of the retailer?

A. Correct.

Q. From the shelf of the retailer? [882]

A. Correct. And we had orangeade and lemonade and citrus punch. We had these products in two versions. The one which is the so-called ready-to-use, without the addition of any water, where you just open the can and pour, and it is the counterpiece, the counterpart of the single-strength citrus juices.

Then we had the concentrated version in the little 6-ounce cans where 6 ounces made a full quart of orangeade or lemonade or citrus punch. Basically speaking, these products were identical. The one was ready to use and the other was a concentrate.

Q. So that Winckler & Smith produced a single-strength juice product, the concentrated citrus juice product, and a frozen juice product, is that correct? A. Correct.

Q. And in addition thereto, did it make any blended juices of any kind?

A. Yes. I mentioned that before, that we manufactured blend juices, too.

Q. You made those products in 1949, with the exception of frozen products?

A. In 1949 we did not have these beverages.

(Testimony of Nicholas J. Winckler.)

Neither did we have frozen products. Only single-strength juice.

Q. In 1950, was that the year in which the beverages and frozen juice products were added to the Ana-Gold line? [883]

A. Yes. In 1950 we added the beverages to our line, but I testified before that we did very little as far as canning of frozen products is concerned.

Q. Now, directing your attention to the year 1949, Mr. Winckler, of the total amount of products produced, will you state to the jury what the principal product produced by Winckler & Smith was in that year?

A. The principal product was Valencia orange juice, and then Valencia blended juice, a blend of Valencia and grapefruit.

Q. Can you state to the jury approximately what the percentage was of the total production of Winckler & Smith in 1949 that was represented by the single-strength Valencia juice product?

A. Approximately 75 per cent.

Q. Will you state to the jury what the approximate percentage was of single-strength Valencia juice processed by Winckler & Smith in 1950 with reference to the total production of Winckler & Smith of all products in that year?

A. In 1950 it was somewhat less because in 1950 there wasn't as much fruit available than in 1949. I don't remember exactly how much less but it was less.

(Testimony of Nicholas J. Winckler.)

Q. Will you state to the jury what products were processed by Winckler & Smith in 1951?

A. In 1951 we processed some of the products that I [884] mentioned before, such as beverage bases, frozen concentrated orange juice, then the hot pasteurized concentrated orange juice for the school lunch program, which is purchased by the Department of Agriculture, and then we packed some frozen lemonade. We haven't packed any single-strength Valencia juice at all.

Q. In other words, no single-strength Valencia orange juice was packed by Winckler & Smith in 1951, is that correct?

A. That is the only year there was no Valencia pack.

Q. Were the products which you have described as having been processed by Winckler & Smith during the years 1946 through 1951, sold by Winckler & Smith in interstate commerce?

A. Yes, they have been.

Q. And in the years 1949, 1950 and 1951, in particular, the sales so made in commerce were the approximate percentages that you have testified to?

A. Correct.

Q. Now, will you state to the jury from what source you acquired the oranges processed by Winckler & Smith into single-strength Valencia juice during the years 1946 and 1947?

A. Most of the fruit in 1946 and 1947, we purchased from Sunkist.

(Testimony of Nicholas J. Winckler.)

Q. Do you recall the approximate dollar volume of such [885] purchases?

A. I know in 1946 it was around $1,000,000 that we purchased from Sunkist. In 1947, it was substantially less.

Q. Did you make any purchases, that is did Winckler & Smith make any purchases of Sunkist in 1948?

A. Yes. In 1948 we bought, if I recall, around $300,000 worth of fruit from Sunkist.

Q. And did Winckler & Smith make any purchases during the years 1949, 1950 and 1951, of any Valencia oranges? A. Yes, we did.

Q. What was the approximate tonnage during the year 1949, if you recall?

A. Well, of course, I couldn't recall the exact tonnage, but I know that in 1949 we still bought quite a bit of fruit from Sunkist, but not as much than in previous years, and in 1950 we bought less and in 1951 we bought very little. It was always a decreasing volume year after year. [886]

The Court: Now, wait just a minute.

Counsel has asked you about interstate shipment of your goods in '49 and '50. What about 1951? Were your goods sold in interstate commerce?

The Witness: In 1951 our interstate goods were very small and came mainly from our Florida operation, your Honor.

Mr. Dixon: Thank you, your Honor. I thought I had covered that.

(Testimony of Nicholas J. Winckler.)

The Court: But you did sell some goods in interstate commerce?

The Witness: We sold goods in interstate commerce.

The Court: From both ends, California and Florida?

The Witness: From California we sold a little bit of beverages only. No single-strength juice at all, because we didn't have any. What came from California was only beverage.

Q. (By Mr. Dixon): Mr. Winckler, directing your attention to the year 1951, during that year your plant processed no single-strength Valencia orange juice? A. None at all.

Q. But you did purchase some Valencia orange juice or oranges in 1951, is that correct?

A. Yes, at the beginning of 1951, very early, we purchased some Northern California Valencias, which were used to make some blended juice, mixing it with grapefruit. And then at the middle of the season we purchased some Valencia [887] orange juice——

Q. I am talking about Valencia oranges only.

A. We purchased some Valencia oranges in the middle of the season, but we couldn't use them for single-strength juice.

Q. Did you purchase any oranges from any source in 1951 that were thereafter processed into single-strength Valencia orange juice?

A. No.

(Testimony of Nicholas J. Winckler.)

The Court: You say you couldn't use those purchased in the middle of the season. Why?

The Witness: The price was way out of line, your Honor.

The Court: Was there any problem of sweetness about that time of the year?

The Witness: No, there was no problem of sweetness. It was just a problem of price.

Q. (By Mr. Dixon): Mr. Winckler, I think you misunderstood the Judge's question. I think the Judge was referring to those Valencia oranges that you testified you had purchased earlier.

The Court: No. I talked about those in the middle.

The Witness: In the middle of the season.

The Court: He said he bought some early, and then some in the middle, and I was talking about the middle.

Q. (By Mr. Dixon): Will you state to the jury about [888] when you purchased any Valencia oranges during the middle of the season in 1951?

A. Yes. It was in August and September, and probably a little bit in October, still.

Q. What did Winckler & Smith do with those Valencias so purchased?

A. We used these Valencias, and they were small amounts, very small tonnage compared to our former run, we used it either to make hot pasteurized concentrate for the Department of Agriculture, U. S. Department of Agriculture, under the school

(Testimony of Nicholas J. Winckler.)

lunch program, or to manufacture frozen concentrated orange juice.

Q. You referred to this school lunch program purchases of Valencias.

Would you state to the jury what you mean by purchases for the school lunch program?

A. I would be very glad to. I will try to explain it as short as possible.

The U. S. Department of Agriculture has a plan to take care of surplus commodities, like butter and meat products, and fruits, and so on, and these products are manufactured or purchased, depending if it is a processed or not processed product. For instance, eggs don't have to be manufactured. Canned meat products and citrus concentrates have to be manufactured. The Department of Agriculture buys it from [889] the manufacturer, thereby to take off the surplus from the hands of the grower, and then they use it for a very worthwhile purpose and distribute it to the schools all over the United States, so that the school children can have orange juice or meat or cheese or eggs, whatever the commodity might be.

I am not certain, either I should say for a very reasonable price or free. I don't know which one the case is, if the school charges anything at all for it or not, or whether it is a donation by the Department of Agriculture.

Q. What is the fact, if you can state the fact, Mr. Winckler, with reference to the purchase price of those oranges and the price of the product proc-

(Testimony of Nicholas J. Winckler.)

essed therefrom secured by Winckler & Smith from the Government?

A. Well, I will try to answer the question. It is really two questions. One refers to the raw product, the oranges, and the other refers to the finished product.

The finished product is sold to the Department of Agriculture based on bids.

Q. That is the pasteurized concentrated orange?

A. The pasteurized concentrated orange juice. And of course the only way that you can bid is if you know how much you have to pay for the fruit. If you pay more for the fruit, your bid will be higher. If the fruit is lower, then the bid will be lower. So we had one supply for oranges, [890] independent fruit growers, who told us, "Well, we are willing to give you a little fruit for bidding on the school lunch program at $35."

Well, we bid based on the $35 price.

And we were told by the independent fruit growers that other people are going to bid based on the same price, other fruit companies, such as M.O.D. and Sunkist, and so on. So we submitted a bid based on $35, and the bid was awarded to us. When I say it was awarded to us, I don't mean that the whole school lunch program was, but a small portion of it.

Q. You mean the amount that you bid for was awarded?

A. The amount that we bid for, and we bid for

(Testimony of Nicholas J. Winckler.)

an amount by how much oranges were promised to us for that purpose.

Q. Approximately how much was covered by that bid of pasteurized juice, can you state?

A. It is purely an estimate. I think it was in the neighborhood of probably 2500 tons.

The Court: In other words, you used 2500 tons of oranges to make this product that you were selling?

The Witness: To make the concentrate for the school lunch program.

The Court: You don't mean you got a bid awarded for 2500 tons of hot concentrate?

The Witness: No.

The Court: 2500 tons of oranges?

The Witness: Of oranges, yes. Concentrate would be [891] about one-seventh in weight.

Q. (By Mr. Dixon): Now, directing your attention, Mr. Winckler, back to the year 1948, I believe you stated that during that year you did not purchase many or very many tons of oranges from Sunkist, is that correct?

A. Well, 1948, I said that we purchased a substantial amount still from Sunkist.

Q. Yes.

A. We purchased close to 5,000 tons from Sunkist, which incidentally went again into the school lunch program.

Q. Then it was the year 1949 when it was less?

A. Then the tonnage decreased very substantially.

(Testimony of Nicholas J. Winckler.)

Q. From what source did you secure the Valencia oranges in 1949 that were processed into single-strength juice and any other products into which that juice went?

A. In 1949, our main suppliers were the independent fruit growers. [892]

* * *

Q. (By Mr. Dixon): Mr. Winckler, do you know a Mr. Spurber, S-p-u-r-b-e-r?

A. Yes, I do.

Q. With what company was he connected?

A. I understand that he was the chief accountant for the Alameda Street fruit distributing plant of Sunkist, to my best knowledge.

Q. Now, directing your attention to a period on or about the month of June of 1949, will you state to the court if that is the approximate month in which Winckler & Smith began to make preparations for the processing season for Valencia oranges?

A. It was some time in June, 1949, probably the early [895] part of June, 1949.

Q. Prior to that time, June, 1949, and in previous seasons, Winckler & Smith had been acquiring substantially all of its Valencia oranges, processed at the Winckler & Smith plant, from Sunkist; is that correct? A. Most of it, yes.

Q. Did you endeavor as president of Winckler & Smith to continue to make such purchases from Sunkist as the season of 1949 commenced?

(Testimony of Nicholas J. Winckler.)

A. Yes, I did.

Q. Did you have any conversation with Mr. Spurber of Sunkist about that time with reference to that company's supplying Winckler & Smith with any Valencia oranges during the processing season in '49?

A. Not with regard to supplying. With regard to the matter of payments.

Q. State to the jury about when that conversation took place and the substance of your conversation with Mr. Spurber.

A. I talked to Mr. Kelly about the supply of oranges——

Q. This was prior to the conversation with Mr. Spurber? A. That is correct.

Q. Go on.

A. And he said, well, we could get oranges, but as far as the terms are concerned I have to talk to Mr. Spurber about it.

And Mr. Spurber requested that we pay for the oranges [896] strictly cash. As a matter of fact, according to my best recollection, he requested a cashier's check ahead of time that we take delivery of the fruit.

Q. Had Winckler & Smith been buying oranges from Sunkist during the year 1948? A. Yes.

Q. Was Winckler & Smith in reorganization proceedings during that year?

A. Yes, we were.

Q. I believe it has been previously testified in this case by Mr. Kelly that Winckler & Smith had

(Testimony of Nicholas J. Winckler.)

paid to Sunkist every dollar which Sunkist had coming for any fruit delivered to it prior to June of '49, is that correct? A. Correct.

Q. After this conversation with Mr. Spurber, what if anything did you do with reference to securing a supply of oranges for the processing which was done by Winckler & Smith in 1949?

A. Well, we didn't feel too good about these conditions, and at the same time Mr. Ward, Morgan Ward, of the Independent Fruit Growers, came to see me——

Q. Is that the same company as was listed by Mr. Kelly as one of the three companies, I believe, from which oranges might be secured in any quantities in California?

A. You mean Mr. Finley? [897]

Q. Maybe it was Mr. Finley.

A. Yes, that is the same company.

Q. That is the same company that you are now referring to? A. Yes.

Q. Go on.

A. And he came to see me and he said they have fruit and they are perfectly happy to supply us with fruit under normal terms and conditions. I told Mr. Ward, that Sunkist won't sell us except cash on the barrel head, to use a colloquial term. He said, "We will give you the regular five-day credit, and we are confident we will get paid."

So we bought more from the Independent Fruit Growers commencing 1949 than we did from Sunkist.

(Testimony of Nicholas J. Winckler.)

Q. Can you state to the jury approximately what the tonnage was of Valencia oranges processed by Winckler & Smith into citrus juices in 1949?

A. To my best recollection it was a tonnage in excess of 12,000 tons.

Q. Those were substantially all acquired from the source that you have just mentioned, is that correct?

A. I would imagine in '49 probably we acquired 85 per cent from other sources but Sunkist.

Q. Do you know what the average price per ton was for Valencia oranges in 1949? [898]

A. Well, I am not sure, but I think it is—was around $35.00 or $40.00, something around 35, 40, and it is six years ago. [899]

Q. Now, directing your attention to the year 1950, will you state from what principal source you secured the Valencias that were processed by Winckler & Smith into citrus juices in that year?

A. Well, we bought again most of our oranges from the independent fruit growers. As a matter of fact, we bought in 1950 even less from Sunkist than we bought in 1949.

Q. What was the prevailing price, average price, in 1950 for Valencias? Was that a scarce year or a flush year?

A. In 1950, if I recall correctly, there were several price changes during the season. I think we started out something like $30 or $35, and then it went up several times. The juice went up—I mean the fruit went up at a time this $5.00, from $35 to $40, from $40 to $45, and so on.

Q. Did you continue to acquire a substantial amount of your requirements from the same source in the year 1950?

A. Yes, we did. I might mention here that whenever one supplier increased the price, the other supplier followed suit.

Q. Now, Mr. Winckler, I am not certain that I have asked you this question, but will you state to the jury what the capacity of your plant is per day in tons of Valencia oranges for processing into single-strength Valencia juice?

The Court: You said "is." You mean in 1951?

Mr. Dixon: I'm sorry.

Q. Was in 1951? [900]

A. In 1951, our plant capacity on single-strength orange juice was approximately 130 tons on one shift. We had been running at the plant as much as 400 tons in 24 hours.

Q. By that you mean around the clock in three shifts?

A. In three shifts around-the-clock operation.

Q. That would be during the peak of the season when the supply of Valencias would be available?

A. Available.

Q. Available for that operation?

A. Correct.

Q. Will you state to the jury what it would average during the—withdraw that.

Will you state to the jury what the average length of time of the processing season for Valencia oranges was in 1951?

A. In 1951, I think Mr. Finley already said that the southern Valencias started to come in in June, which was used mainly for hot pasteurized concentrate, and then Valencias were available approximately to the middle of November. I think Mr. McCracken said they closed plant operations on November 8, 1951. So for practical purposes, you have June, July, August, September and October, five months. But that varies from year to year.

Q. Depending upon what?

A. Depending on climatic conditions, size of crop, and [901] how quickly they pick the crop from the trees, due to market conditions.

Q. Did your plant process any navel oranges into any products?

A. Generally not, but there are some years when there was a shortage on Valencia juice and where a certain buyer requested that we should offer to them Valencia orange juice in spite of the fact that we called to their attention that navel orange juice is not as desirable as Valencia orange juice because it turns bitter. We had a substantial navel pack in the winter of 1950 which mostly went to Canada, and in Canada they did not object so much to the bitter taste.

Q. Can you tell the jury approximately what the amount in tons of navel oranges were that you processed in 1949?

A. Well, I have here some pencil notes if I may

(Testimony of Nicholas J. Winckler.)

refresh my memory. In 1949, we run just 1,450 tons of navels, something around 1,450. They are approximate figures.

Q. Did you run any grapefruit that year?

A. Yes, we run in excess of 4,100 tons of grapefruit in 1949.

Q. Approximately how many tons of navels did you process in 1950?

A. In 1950, as I mentioned before, we had our largest navel tonnage amounting to 3,800 tons.

Q. I am not certain whether I asked you, but could you [902] state to the jury what the reason was for that run in 1950 as against the tonnage you processed in 1949?

A. The reason was twofold. In the first place, there wasn't enough Valencia juice available. The inventories on Valencia juice were depleted in both Florida and California. On the other hand, there were plenty of low-priced navel oranges available and the navel juice was used, so to speak of, as a substitute, the next best thing available.

Q. In other words, that was the year that the price of oranges was up over what the price was in 1949? A. Well, this navel tonnage was——

Q. I am talking now about Valencias, the price of Valencias.

A. The price of Valencias went up in 1950 considerably. [903]

Q. Now, approximately how many tons of grapefruit did you process in 1950?

A. Again, around 4,500 tons.

(Testimony of Nicholas J. Winckler.)

Q. Did you process any lemons that year?

A. In 1950 we processed some; not an important amount.

Q. Directing your attention to 1951, can you state the approximate amount of navels processed by Winckler & Smith in that year?

A. It was very nominal. Only 750 tons.

Q. Can you state to the jury the approximate tonnage of Valencias that were processed by Winckler & Smith that year?

A. Well, the Valencia tonnage was down to approximately 5,000 tons.

Q. And the approximate amount of grapefruit that was processed into juice that year?

A. Around 3,100 tons.

Q. Will you state to the jury what product was processed from the 5,000, approximately 5,000 tons of Valencia that you processed in 1951?

A. Yes. We processed approximately half of this tonnage into hot pasteurized concentrate, which went to the school lunch program.

Q. That was the program you described this morning?

A. That I described this morning. And the other half [904] of the tonnage, about the other 2,500—and I would like to mention it is very approximate, I could be off a few hundred tons one way or the other way—went into frozen concentrated orange juice.

Q. So that at the Winckler & Smith plant in

(Testimony of Nicholas J. Winckler.)

1951 there was no single-strength orange juice processed, is that correct?

A. We didn't can a single case of single-strength Valencia juice.

Q. Mr. Winckler, can you state to the jury from your knowledge of the operations of Winckler & Smith during the year 1949, whether an operating profit was made by Winckler & Smith in that year?

A. Yes, it was.

Q. Can you state to the jury approximately what the amount of the profit was?

A. It was in excess of $120,000.

Q. Can you state from your knowledge of the operations of Winckler & Smith in 1950 what the approximate profit of the company was in that year from its operations?

A. Profit was down in '50, because we run less Valencia. It was around $40,000.

Q. Can you state to the jury, from the basis of your knowledge of the operations of the company, approximately what the profit, if any, was in 1951 from the operations of your company? [905]

A. In 1951 we lost money.

Q. Can you state to the jury what the amount of that purported loss was, approximately?

A. Yes. The loss was substantial. We lost around $184,000.

Q. Going back to the year 1949, Mr. Winckler, that was the year that Winckler & Smith was operating, shall we say, out of reorganization?

A. Correct.

(Testimony of Nicholas J. Winckler.)

The Court: The reorganization occurred in '48?

The Witness: Correct.

The Court: Was it completed in '48?

The Witness: Well, technically the settlement was approved, if I recall, in January, 1949, which left us the better part of '49 to operate.

Q. (By Mr. Dixon): As a result of that reorganization did Winckler & Smith owe any money to the RFC or the Reconstruction Finance Corporation?

A. We had an $100,000 RFC loan, which we borrowed in January, 1947, and that loan was paid down—it was an amortized loan—it was paid down to $90,000, approximately $90,000, by 1948, when the corporation went into reorganization under Chapter 11. So that was the balance that we owed to RFC when we completed the reorganization in January, 1949. [906]

Mr. Strachan: Just for clarification, your Honor, I would like to have him state the balance as of the date of the completion of the reorganization proceedings.

The Witness: That is identical. There was no payment made during the reorganization.

Mr. Strachan: I see. Thank you.

The Witness: So when we went into reorganization I think the balance was approximately $90,000, and when we came out the balance was exactly the same.

Q. (By Mr. Dixon): I believe you testified that in the years 1949 and '50 Winckler & Smith installed some additional equipment in its plant at Anaheim? A. That is correct.

Q. What was the approximate amount expended by Winckler & Smith during those years for new equipment? A. It was in excess of $100,000.

Q. Was that equipment paid for or was it——

A. It was all paid for in cash.

Q. And represented new equipment that was put into your plant to expand the operations of Winckler & Smith in the frozen field and the other products that you mentioned this morning?

A. Yes. Not so much to expand; I rather like to use the expression to keep up with changing times and equip ourselves at least in a modest way that we shouldn't be [907] left out completely from the frozen concentrate field.

Q. During the years 1949 and '50 following the reorganization, did your company, the Winckler & Smith company, spend any money, that is, for advertising the products? A. Yes, we did.

Q. Can you state the approximate amounts spent for direct advertising, Mr. Winckler?

A. My recollection is that in '49 and '50 we spent for directing advertising, that means newspaper and television and radio and so on, in the neighborhood of $50,000.

Q. Apart from the direct advertising paid by Winckler & Smith in those years, did Winckler & Smith make any allowances, advertising allowances, to the purchasers of its product?

A. Well, I would put it that way: We had con-

(Testimony of Nicholas J. Winckler.)

siderable sales promotional expenses, inasmuch as that we introduced a number of new products, like I mentioned before, these beverage bases, and then the frozen products, and that includes traveling expense and advertising allowance, based on cooperative advertising with the chain stores, and so-called stack or display allowances. That is about the most important part of it. [908]

Q. That is in addition——

A. That is in addition to the $50,000.

Q. ——to the direct advertising by the company itself?

A. That is correct, and I forget to mention, also, store demonstrations.

Q. And that type of advertising is paid for by the company whose product is being advertised, is it, at least part of it?

A. Oh, yes, the seller. Our company had to pay all for these expenses.

Q. Do you know approximately how much dollars that item would represent in 1949 and 1950, approximately?

A. Well, according to my best recollection, I would say it was probably almost as much as the direct advertising, an additional $50,000.

Q. Now, did Winckler & Smith in 1950 or the early part of 1951 have any program for securing any additional capital for its operations?

A. Yes, we did.

Q. Will you state to the jury what that program was in substance?

(Testimony of Nicholas J. Winckler.)

A. Well, that program had a double purpose. The only way we could complete our reorganization during 1948, that we had to sell our plant on a lease-back arrangement, which is rather customary with other industries, too, and we found [909] that the lease-back arrangement didn't work out too well. It was a little too expensive for us. So we were very eager to get the plant back, I mean for the corporation, to save the lease that we paid.

Q. By that you mean that you were paying rental for the property?

A. We were paying rental for the plant. So I negotiated a deal with the people who owned the plant at this time, with the lessors, and I suggested a convertible preferred stock issue which, of course, has preference ahead of the common shareholders, and we had a tentative arrangement that in consideration of so much stock and so much cash we would get title back to the plant subject to the then existing unpaid balance which we owed to the RFC. That amounted to, roughly speaking, $150,000 plus the RFC loan.

Such an arrangement was originally provided for in the agreement by which Winckler & Smith sold the plant to the lessors.

An option was provided in this agreement, but the option called for a cash consideration and we didn't have the cash, and even if we would have had the cash, we wouldn't want to deplete our cash, so we were successful of talking in the lessor to

(Testimony of Nicholas J. Winckler.)

accept preferred stocks as a consideration or part consideration for the plant.

Now, that took about 130 or $132,000 worth [910] of preferred stocks.

We obtained the permit from the Division of Corporations——

Q. Now, just a minute, Mr. Winckler.

The Court: Was anything paid on the RFC loan after you came out of reorganization in 1948?

The Witness: Yes, your Honor. We paid in two years to the RFC approximately $40,000, which brought the balance down from $90,000 to approximately $50,000.

The Court: $50,000 when?

The Witness: $50,000 in—that was the balance that was paid down in the summer of 1951. [911]

* * *

Mr. Dixon: That's right. Plaintiff offers Exhibit 39 in evidence.

Mr. Strachan: No objection.

The Court: Exhibit 39 received in evidence.

> (The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 39.)

Q. (By Mr. Dixon): Now, Mr. Winckler, will you state to the jury how the products that you have described as having been made by Winckler & Smith Company were sold?

A. Most of our products were sold through food brokers who sold the products to chain stores, super markets, superettes, and wholesale grocers and jobbers. Some of our Florida products which were packed for us were sold directly to chain stores without a broker.

Q. Now, as president of Winckler & Smith during the year 1951, are you familiar with the costs incurred by Winckler & Smith in that year, or based upon previous years? A. Yes, I am.

Q. Can you tell the jury what the cost to Winckler & Smith was approximately for processing a ton of Valencia oranges into Valencia orange juice in 1950? [912]

So that my question may be clear, I am not referring now to the price or cost of the fruit. I am referring to the manufacturing costs, shall we say, or processing the oranges into the juice where they will be in a can ready to put on the market.

A. Well, our costs were comparable with other citrus processors. [913]

Mr. Strachan: I object to his stating comparability. I think the proper way to show this would be to make a showing of what the respective costs are.

The Court: The objection is sustained.

The answer may go out. That is your conclusion that they are comparable. Tell us what your costs were?

The Witness: Our costs were $1.35 of one case of 12/46 ounce orange juice or grapefruit juice, or any citrus juice, based on a reasonable seasonal pack, based on a volume.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: Pardon me. Was that $1.75?

The Witness: $1.35.

Q. (By Mr. Dixon): In other words, Mr. Winckler, I believe in 1950 you testified that you processed about—what was it, how many tons of Valencias?

A. In 1950 we processed 8,300 tons of Valencias.

Q. Can you explain to the jury what the operating capacity, per tons, of your plant would be upon which these figures are based? Do you understand what I mean? A. I understand.

Q. In other words, in 1949 your production, if I recall your figures, was in excess of some 12,000 tons? A. Correct. [914]

* * *

Q. (By Mr. Dixon): So there will be no question about it, Mr. Winckler, will you state to the jury what the approximate amount per tons of Valencia oranges were processed by Winckler & Smith into citrus juices, single strength Valencia juices, in 1949?

A. In 1949 we bought and processed approximately [916] 12,700 tons. Now, the greatest portion of that tonnage went into single-strength Valencia orange juice. I don't know what portion, it was a very small portion of the 12,700, went into concentrate.

Q. I believe I asked the same question—if I didn't, I will ask it again—with reference to the

(Testimony of Nicholas J. Winckler.)

approximate total tonnage of Valencias processed by Winckler & Smith in 1950?

A. Correct. In 1950 the tonnage that we purchased is identical with the tonnage that we processed.

Q. Which is how many tons?

A. 8,300, approximately. In excess of 8,000 tons.

Q. And I think you have already covered the tonnage for '51 and explained it?

A. Not completely.

Q. Of Valencia oranges?

The Court: Yes, he covered that. 750 tons of navels, 5,000 tons of Valencias, 3,100 tons grapefruit.

Q. (By Mr. Dixon): Now, getting back to my question, Mr. Winckler, can you state from your knowledge of the operations of Winckler & Smith whether there is any substantial variance in the cost of processing a ton of oranges into single strength juice, and into 12/46's, a case of 12/46's?

A. Yes, there is a very substantial difference.

Q. Will you indicate what you mean by that to the jury? [917]

A. The $1.35 manufacturing cost based on one case of 12/46 ounce cans of orange juice, that $1.35 is based on a normal pack.

On a normal pack, I mean that the plant can be in production at least two shifts for a period of three, four months. Otherwise the cost increases substantially.

(Testimony of Nicholas J. Winckler.)

Q. I take it the costs that I asked you about are based upon the 1950 operations of your company?

A. No. Our costs have been based on the operation of a number of years. A typical year would be, for instance, the 1949 operational year.

Q. That was the year in which there was 12,000 tons?

A. Over 12,000. In 1950 our cost would have been substantially higher than $1.35.

Q. Will you explain to the jury why this cost may vary depending upon the amount processed? It may be obvious.

The Court: We have had this before. If you produce one case of orange juice it is going to cost you more than if you produce a million cases. You heard that testimony from Mr. Finley.

Is that substantially correct?

The Witness: That is correct.

In 1951 we didn't run a single case, so our overhead wouldn't be allocated. [918]

* * *

Q. (By Mr. Dixon): Based upon your experience in processing single strength juice from Valencia oranges over the period of years and the average operations, processing operations of Valencia oranges into single strength juice during those years, excluding the year 1951, in which you were in charge of those operations, will you state to the jury, if you can, what the cost is of producing a case of single strength Valencia orange juice to the size of 26-ounce cans? By cost. I mean the entire cost of operations.

Mr. Strachan: I don't think the question is fair. It is objectionable because it doesn't specify particular years that are being averaged.

Mr. Dixon: Yes, it does, counsel.

The Court: I take it the question refers to beginning in 1946 and the question expressly excluded 1951. The objection upon that ground is overruled.

Q. (By Mr. Dixon): Can you indicate to the jury, Mr. Winckler, what the cost per ton would be?

A. I believe I mentioned that we figured as cost $1.35 per case based—I like to choose my words very carefully, not to use the word normal.

Q. Just answer the question.

The Court: Let him finish now.

Mr. Dixon: All right, your Honor. Go ahead.

The Witness: Based on a volume operation which is in a [920] normal proportion with our plant capacity.

The Court: Now, right there, let me ask a question. You see, that doesn't tell us anything, because we don't know what normal operation in your plant capacity would be. Now, how many tons a year, if we can ask it that way, would be a normal operation of your plant capacity, say, in 1950?

The Witness: In 1950, your Honor, I would say at least 12,000 tons.

(Testimony of Nicholas J. Winckler.)

The Court: In 1950, had you put this new equipment in?

The Witness: The new equipment was not put in—we are talking about so-called single strength juice now.

The Court: I see.

The Witness: And that new equipment was for freezing.

The Court: It did not affect it?

The Witness: It did not affect it.

The Court: So your answer would be the same for 1951?

The Witness: Correct.

The Court: The next question is, what did you mean by normal operation of your plant?

The Witness: By normal operation, I mean we should be in operation for at least three months and should be able to run the plant consistently at least five to six days a week.

The Court: And how many shifts?

The Witness: I would say two shifts.

The Court: For all that time? [921]

The Witness: All the time. Let me correct myself. The first few weeks and the last few weeks, one shift, and at the height of the season two shifts or three shifts.

The Court: Now, Mr. Strachan, you don't know me like these other men do, but if you want to object to my questions, you are free to do so. You have that right.

Mr. Strachan: I think these questions were very helpful.

The Court: I want to know as we go along, and I ask these questions—you weren't here yesterday, but I told the jury and I will tell them again, when I ask questions, it doesn't indicate I have any view on the facts one way or the other. I merely try to understand the case as we go along, and if I am confused, I think maybe some juror is.

Mr. Strachan: Well, your Honor, let me interject a question now and then for clarification, too. I think we are all trying to get a clear picture.

The Court: That's all we want.

Q. (By Mr. Dixon): Now, will you explain to the jury, Mr. Winckler, how you compute or arrive at this figure of $1.35 a case?

A. The figure of $1.35 a case is essentially made up by the following components. First, the cost of supplies. By cost of supplies, I mean the cans, the cartons and the wrap-around labels.

Second, the actual labor expended in behalf of the [922] operation.

Third, the overhead, and the overhead is a very big factor because the overhead goes on, of course, regardless if we are operating or if we are not operating.

Q. And those items that you mentioned add up approximately to the figure that you have stated?

A. Yes, based on a satisfactory operation as we explained before.

The Court: Now, you use the word satisfactory.

(Testimony of Nicholas J. Winckler.)

but by that you mean what you have described as a normal operation in view of your plant capacity?

The Witness: Correct, your Honor.

The Court: All right.

Q. (By Mr. Dixon): So that the jury may perhaps get an even better idea of this, can you break this $1.35 per case item apart and show what amount you allocate to these items, approximately?

A. Well, I could do it if I have a little time. I really don't like to use approximate figures, because they could distort the picture and that is the job of a cost accountant. I have these figures at home and when I am called to the stand again, I could——

Q. Well, maybe we could move along. I am sure Mr. Strachan will want to know how you arrived at that figure, so if you will get that [923] information——

A. I like to be careful of these figures. [924]

* * *

Q. (By Mr. Dixon): Mr. Winckler, do you have anything now that you can refer to that will indicate how you arrived at the $1.35 per case figure? A. Yes, I do.

Q. Will you do so and indicate to the jury how you arrived at the figure you gave, then, of $1.35 per case?

A. I had a chance, your Honor, to look into some papers during the recess, and I can break it down, if the court so desires. [925]

(Testimony of Nicholas J. Winckler.)

The Court: That is not the question. The question is do you have some document on which you have these figures?

The Witness: Mr. Dixon has.

Mr. Dixon: Now I am a little bit confused.

You say I have the document, Mr. Winckler?

The Witness: I am referring to the sheet that you turned over to Mr. Williams for photostating.

Mr. Dixon: Then I will have to get it from Mr. Williams.

Mr. Williams, will give it back to me?

Q. (By Mr. Dixon): Is this the document you are talking about?

A. Yes, that is the document.

Mr. Strachan: May we have the document marked if it is going to be referred to?

Mr. Dixon: I am not going to introduce it in evidence.

The Court: It may be marked for identification.

The Clerk: Plaintiff's Exhibit 40 marked for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 40 for identification.)

Q. (By Mr. Dixon): I am handing you, Mr. Winckler, what has been marked as Plaintiff's Exhibit 40 for identification purposes and ask you if that refreshes your recollection or indicates to you in any way how you arrived at the figure [926] $1.35? A. Yes, it does.

Q. Will you now proceed to break down that

(Testimony of Nicholas J. Winckler.)

figure of $1.35 per case into its component parts, if there are any?

A. Yes. Before I proceed may I state that I am talking about 1951 prices, which changed substantially since then.

In 1951 the packing cost, which includes the cans, cartons and label, amounted to 83 cents for a case of 12/46 ounce. The general factory overhead, which was allocated to a case was approximately 40 cents; and the factory labor and other miscellaneous expenses, 12 cents. 83, 40, and 12 totals $1.35.

The Court: Let me see this document.

Go ahead.

Q. (By Mr. Dixon): I am going to show you —I don't think we can mark this one for identification, ladies and gentlemen—I am pointing to a 12—will you tell the jury what size can that is?

A. That is a 46-ounce can.

Q. Is that the size can that you are talking about? A. That is correct.

Q. Exclusive of the cost of the oranges, it costs, does it, $1.35 to put the juice into this can with the label on it ready to move into the stream of commerce to the consumer? [927]

A. Without the contents, without the juice itself, $1.35, in 1951.

A Juror: May I see it?

Mr. Dixon: I am advised——

The Court: Wait a minute. Do you offer it as an exhibit?

Mr. Dixon: Yes.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: I have no objection to him letting the jury see it.

The Court: Exhibit 41 received in evidence.

* * *

Q. (By Mr. Dixon): This is the standard 46-ounce size, Mr. Winckler?

A. That is correct.

Q. And it takes 12 of those to make a case of 12/46's? A. That is correct.

Q. This $1.35 is the cost of a case of 12 of these 46-ounce cans filled with juice, is that correct?

A. Filled with juice, I am sorry——

Q. I mean excluding the juice. [928]

A. Excluding the juice cost.

Q. But it does include the cost of putting the juice into the can?

A. It does. But it does not include the juice cost itself.

Q. Will you state to the jury about how many gallons of single strength juice are contained in a case of 12/46's?

A. It is 4.31. My memory isn't so good as Mr. Finley's. I know it only to one or two decimal points. 4.31.

Q. And about how many cases of 12/46 ounce cans could be made from the average ton of Valencia oranges? A. Approximately 23.

Q. Will you indicate, Mr. Winckler, if you can, from your knowledge of the operations of the Winckler & Smith Company plant, and the processing of Valencia oranges into single strength juice,

(Testimony of Nicholas J. Winckler.)

what the cost of the juice would be in a case of 12/46 ounce cans of Valencia orange juice?

A. Mr. Dixon, I don't know if I misunderstood the question. I can answer it only if you tell me based on what fruit price. Did you mention a fruit price?

Q. I thought we had been talking—Mr. Finley and everyone else—about a $40 cost per ton of fruit, which would produce 120 pounds of soluble solids. A. In 19——

Q. And it would also produce 100 gallons of single [929] strength Valencia juice.

A. In 1951, to my best recollection the average solid content was in the neighborhood of 130 pounds soluble solids per ton, which on a $40 base price would indicate a $44 fruit price. Out of a $44 fruit price the content for a case of juice would cost approximately $1.90.

I have figured that out previously, so I remember the figure very well. We multiply 44 by 4.31, and we get a round figure slightly under $1.90. [930]

Q. Now, we have this case of single strength Valencia juice in the case and ready to go to the market, or in storage, ready to go to the market. Are there any further costs that are or must be added to the cost items that you have just mentioned? A. Yes, there are.

Q. Before this case reaches the buyer?

A. Yes, there are.

Q. The buyer of Winckler & Smith?

A. Yes.

(Testimony of Nicholas J. Winckler.)

Q. Will you state to the jury what those items are and the approximate amount, if you can, per case in 1951?

A. Well, there is a conditional expense of labor depending on if you are storing your stock bright and you have to handle it a second time and put on a buyer's label. That is a conditional expense.

An unconditional expense is the expense of sales, which includes brokerage, cash discount, and the expense of our own sales department, and then there is expense of modest advertising.

Q. Can you include all of those items under sales expense, Mr. Winckler?

A. Yes. I think——

Q. Can you tell the jury approximately how much that expense would be per case? [931]

A. A case so produced would have to sell close to $4.00——

Q. No, no. Just answer my question. Will you tell the jury what the approximate sales expense would be per case?

A. Yes, Mr. Dixon, but in order that I can answer that——

Q. All right. I didn't mean to interrupt you.

A. I have to get down to the cost that I take, 7 per cent or 8 per cent sales expense. The sales expense is figured on the gross sales price. So taking 8 per cent sales expense as an example, I have to determine first for how much the juice would sell. So let's assume the juice would sell for $4.00. Then I have to figure 8 per cent of the $4.00, which is 32 cents, I cannot determine this without taking

(Testimony of Nicholas J. Winckler.)

the gross sales price into consideration.

Q. Let's take a sales price of $2.50 per case of 12/46's. Can you tell the jury——

A. Mr. Dixon, I can't, because the two items that I stated already, the $1.35——

Mr. Strachan: Just a moment.

The Witness: ——and the $1.90——

Mr. Dixon: Just a moment.

Mr. Strachan: I move to strike everything following the answer, "I can't." [932]

The Court: It may go out and the jury will be instructed to disregard it.

Q. (By Mr. Dixon): Will you proceed, Mr. Winckler, with your answer based on what you started to——

Mr. Strachan: There is no question pending. I would like to have a question put.

Mr. Dixon: I will put it again, counsel.

Q. Will you state to the jury what the approximate sales cost per case would be for selling a case of 12/46's of single strength Valencia juice?

A. Depending on how much profit the manufacturer expects to make, it would vary between——

Mr. Strachan: I object. The witness obviously doesn't understand the question. He is talking about how much profit the manufacturer would make.

The Court: Well, now, just a minute.

Mr. Strachan: I move to strike the answer.

The Court: The motion is denied. But I think the question should be more specific. You haven't indicated whether it is 1951. You haven't indicated whether it is on the basis of this computation we

(Testimony of Nicholas J. Winckler.)

have been going through, and you haven't indicated—well, that's enough.

Mr. Dixon: You are quite right, your Honor.

Q. I have naturally been assuming, and apparently it wasn't in the question directly, that we are dealing with [933] 1951, and we were adding the sales cost to the two other cost items for the case you have previously testified to, Mr. Winckler.

A. Correct.

Q. Now, based upon that assumption and those factors, can you tell the jury what the sales cost would be that would be added to these items to get the figure that I have asked you to give?

The Court: The question that way leaves out the question of profit. In other words, you have asked him to add the selling cost to his $1.35 for production and his $1.90 for juice, and your question involves a sales price.

Mr. Dixon: Correct.

Q. With no consideration of profit, Mr. Winckler, at all. We are dealing in all these cases with the cost to Winckler & Smith, without a computation or consideration of any profit in the sale.

A. Now, just one second, please.

Without any profit, the sales cost would be $3.53.

Q. You mean the total sales cost?

A. The sales cost, 28 cents——

Q. The total cost?

A. Yes, the sales cost 28 cents, and the total sales cost of a can of 46-ounce, 12/46 ounce canned orange juice would be $3.53, not allowing anything for profit. [934]

(Testimony of Nicholas J. Winckler.)

Q. Well, I think we finally have this answer out, Mr. Winckler. That price includes all of the cost items that have been described as going into the production of this case of 12/46's?

A. No. I answered only the question that includes the manufacturing cost and——

Mr. Strachan: Just a minute. The answer is "No."

The Court: Well, let him explain the answer. Objection overruled.

Q. (~~By Mr.~~ Dixon): Will you explain the answer?

The Court: I thought he had everything there. Now he says he hasn't. Let's find out what he left out, if anything.

The Witness: May I state, your Honor, what I have in?

The Court: Yes.

The Witness: We have $1.35 manufacturing cost, we have $1.90 juice cost, and we have 28 cents sales expense, and if my addition is correct, that adds up to $3.53 total. No profit in consideration. What is not included is advertising, warehousing cost, probably interest under investment while in storage. I think that's it.

Q. (By Mr. Dixon): Now, let me ask you this, Mr. Winckler. Are there any credits that should be applied against this figure of $3.53 by way of recovery to Winckler & [935] Smith of any oil and peel from this ton of oranges?

A. Yes, there are.

Q. Can you tell the jury approximately how much that might be per case?

A. Well, oil recovery averaged approximately two pounds of orange oil per ton of fruit. Of course, the price varied, and wherever we sold oil, we couldn't get the top price for it. So that probably should be figured at $1.50.

The Court: A pound?

The Witness: A pound.

The Court: Or for the two pounds?

The Witness: A pound. $1.50 in one year, and there was a year when the oil sold as low as 60 cents a pound.

The Court: Well, that was an abnormally low price.

The Witness: That is correct. In 1951, I think it was closer to $1.50, so for two pounds we may allow $3.00 per ton. Of course, this $3.00 isn't there, because there are production costs involved, which is not included in the price, which I would say is probably in the neighborhood of 30 cents a pound. So on two pounds, the production cost would be 60 cents. If we deduct 60 cents from the $3.00 gross, we would get about $2.40 net recovery per ton of oranges.

The Court: For the oil?

The Witness: For the oil. And for the feed, after deducting manufacturing expenses and other ingredients going [936] into the manufacturing of feed, I would allow for the feed recovery probably an equal amount as the oil. A little less, or $2.00 per ton of fruit. [937]

(Testimony of Nicholas J. Winckler.)

Q. So that would be about 20 cents per case recovery?

A. Two and two forty is four forty. If we divide that by 23—it would be approximately 18 cents per case recovery from by-products.

Q. That amount would be credited against the figure that you have just mentioned?

A. Correct. For practical purposes we may say that it would bring down the $44 fruit price to $40 per ton, or $39.50 per ton.

Q. Mr. Winckler, directing your attention to the 1951 processing season——

Juror Johnstone: What happened to that other item of additional labor and other possible handling?

The Court: What was that?

Juror Johnstone: There was another item mentioned of putting it in storage, with additional labor and possible other handling.

The Court: No figure was given on that. Mention was made of warehousing; interest on material manufactured while in storage, and advertising. No figure was given on that in the $3.53 that was arrived at less the 18 cent credit.

Q. (By Mr. Dixon): Can you state, Mr. Winckler, approximately how much those items would be per case? A small item or a large item per case?

A. I would estimate probably another 10 cents per case. [938]

Q. For those items of storage, cartage, warehousing?

(Testimony of Nicholas J. Winckler.)

A. That is correct. And I have to ask the court's forgiveness. I omitted one other figure.

Q. I thought we had covered everything. But we don't want to omit anything. What did you omit?

A. We omitted the trucking cost of the fruit from the packing house to the plant, which is approximately an item of six to seven cents per case.

* * *

Q. (By Mr. Dixon): That should be added to the production cost figure without profit, that you mentioned? A. That is correct.

Mr. Dixon: Plaintiff's Exhibit 42 offered in evidence.

The Court: Exhibit 42 received in evidence.

* * *

Q. (By Mr. Dixon): I hand you Plaintiff's Exhibit 42 and ask you to state what that is.

A. That is a mimeographed price quotation of the California Fruit Growers Exchange, Fruit Distributing Plant, over Mr. Kelly's printed name, referring to Valencia prices to processors, dated April 4, 1951. [939]

Q. Was that received by Winckler & Smith Company? A. Yes, it was.

Q. By referring to this exhibit can you state when it was received——

A. It was received—it bears our corporation rubber date stamp on it. It was received on April

(Testimony of Nicholas J. Winckler.)

Q. Did Winckler & Smith purchase any Valencia oranges from Sunkist after they received this price list?

A. Yes, we purchased a very small tonnage.

* * *

Plaintiff's Exhibits 43 and 44 offered in evidence.

Mr. Strachan: No objection.

The Court: Exhibits 43 and 44 received in evidence.

* * *

Q. (By Mr. Dixon): I hand you Plaintiff's Exhibits 43 and 44 and ask you to state to the jury, if you will, Mr. Winckler, what those exhibits are.

A. These exhibits are what we call report of sale [940] slips of Sunkist Citrus Distributing Plant of fruit that we purchased from Sunkist.

Q. By referring to those exhibits can you state to the jury what the price was per ton paid for by the tonnage represented by such exhibit?

A. Yes, we can.

Q. Will you separately state what Exhibits 43 and 44 cover as to tonnage?

A. Yes, I will.

Q. State what Exhibit 43 covers as to tonnage purchased?

A. Exhibit 43 covers one small truck load of 15,820 pounds of Valencia oranges.

Q. What is the date of it?

A. April 19, 1951.

(Testimony of Nicholas J. Winckler.)

Q. What is the price per ton?

A. The price per ton——

Q. Charged for the tonnage represented by said exhibit?

A. It was the early part of the season, the solids were 110.95, and the price per ton was $38.46. These were Northern California Valencias, and therefore we got a trucking allowance of $5 per ton, which was actually paid out.

Q. By hauling allowance, you mean the charge made for hauling it down from the Exchange packing plant?

A. No. That was hauled near Porterville, I mean up north, the truck had to go up from Anaheim, I think it is 220 [941] or 230 miles. It wasn't Southern California fruit; it was Central California fruit. There were no Valencias in Southern California as early as April.

The Court: What do you mean by the trucking allowance of $5? Did that come, then, off of the $38.46?

The Witness: Yes, your Honor.

The Court: Did you send your truck up?

The Witness: No. We paid for a trucking concern. We didn't have our own trucks. That was an overcharge—not an overcharge. I withdraw that—that was an unusually high trucking charge for a 225-mile distance.

Q. (By Mr. Dixon): And that was the reason for the allowance, Mr. Winckler?

(Testimony of Nicholas J. Winckler.)

A. That is correct.

Q. In other words, can you state to the jury what the usual trucking charge is for Valencias that are delivered from the Los Angeles area or the Southern California area?

Mr. Strachan: I don't think you can generalize on a subject of that sort.

The Court: No. Distances vary too much. We have exhibits in evidence that show various of those distances and charges made by various companies.

But I don't understand this. You told us there was a trucking expense for the fruit from the packing house to the plant, which you said was 6 cents a case?

The Witness: Six and a half cents a case. [942]

The Court: Well, then, ordinarily the processor pays the trucking, does he, from the packing house to the plant?

The Witness: Ordinarily, that is correct.

The Court: And he pays that on top of the price that he pays for the oranges?

The Witness: That is correct, your Honor.

The Court: Well, then, these oranges were $38 a ton, and ordinarily you would pay the trucking on top of that?

The Witness: Yes.

The Court: Did you pay any trucking at all on this?

The Witness: The trucking expense on this fruit, if I recall, was around $6.00 a ton, and $5.00 was reimbursed by Sunkist, so we had there more

(Testimony of Nicholas J. Winckler.)

or less a trucking charge of $1.00 that we had to pay out of our pocket.

The Court: All right.

Q. (By Mr. Dixon): I just want to be sure that the record is clear, Mr. Winckler. This invoice does not represent the trucking charge made to Winckler & Smith and paid for by Winckler & Smith?

A. Correct. Part of the trucking charge.

Q. Well, does this Plaintiff's Exhibit 43 and Plaintiff's Exhibit 44 contain the actual trucking charge paid by Winckler & Smith at the time of delivery of the oranges covered by this invoice?

A. Well, on Exhibit 44, the fruit cost is not identical [943] with Exhibit 43.

The Court: Let's stick with 43 first now.

Q. (By Mr. Dixon): Let's take 43.

The Court: That's all we are talking about.

The Witness: My best recollection is the $5.00, which is called hauling allowance, covers about—that would be 83 per cent of the actual trucking expense. It is my recollection the trucking charge from Central California is $6.00 per ton, so we paid $1.00 per ton and the Exchange allowed us $5.00 per ton out of $6.00.

The Court: Are you through now with 43?

Mr. Dixon: Yes, judge.

The Court: All right. Go ahead.

Q. (By Mr. Dixon): What is the fact, Mr. Winckler, with reference to the trucking allowance on Exhibit 44?

A. On Exhibit 44. the solid content was higher.

(Testimony of Nicholas J. Winckler.)

Consequently the gross price was $43.45, less $5.00 trucking allowance again.

Q. Now, let me get this trucking allowance item clear, Mr. Winckler. Do you want the jury to understand that when this truckload of oranges, for which Winckler & Smith was charged $43.45 a ton, was delivered at the Winckler & Smith plant in Anaheim—— A. Yes.

Q. ——that in addition to the $43.45 charged thereon. [944] Winckler & Smith paid approximately $6.00 for trucking the oranges delivered under Plaintiff's Exhibit 44 to the trucker at the time of the delivery, and this allowance of $5.00 compensates for five-sixths of that amount, is that correct?

A. That is correct. We paid—may I recapitulate in my own words?

Q. Yes, go ahead.

A. We paid $43.45 for the fruit plus $6.00 trucking allowance, which is——

Q. Charge, you mean.

A. Trucking charge, which is $49.45, less $5.00, which brings it down to about $44.45 net cost.

Q. Do these other papers attached to Exhibit 44 have any particular significance other than indicating the basis of the weight and measures? I mean the weight and the soluble content, and so forth?

A. That is a record of the trucker who made the haul, and there is the official certificate of weight of the Porterville, California, city scale.

(Testimony of Nicholas J. Winckler.)

Q. And that is where the load originated?

A. That is where the load originated. And then there is attached a slip to it which is not correct.

Q. Well, what is wrong.

The Court: I think you have a slip in Exhibit 43 that concerns more than this load. I was trying to understand it. [945] Here is a commercial transfer sheet, and the second item refers to a weight of 15,820.

The Witness: Correct.

The Court: That is what is involved in Exhibit 43, isn't it?

The Witness: That is correct.

The Court: But there was also included on that transfer slip another weight of 27,180.

The Witness: That is Exhibit 44.

The Court: So that in 43 there is one slip, the transfer slip, that concerns both exhibits.

The Witness: Correct. I was referring to the slips are not correct. They don't belong to that.

The Court: All right. So the jury will understand these two exhibits, they have the same general type of papers in them. Each has a pink paper from California Fruit Growers, that is Sunkist, but 43 also has another pink slip which concerns the weight involved both in Exhibit 43 and in Exhibit 44. In other words, there was one slip for the two loads.

Q. (By Mr. Dixon): You started to say there was something wrong with one of those. What was it, Mr. Winckler?

(Testimony of Nicholas J. Winckler.)

A. The solids per ton is not consistent with the price.

Q. Well, we won't go into that. [946]

* * *

Mr. Dixon: A juror has a question, your Honor, and I hesitated to answer.

The Court: You did right. What is it?

Juror Johnstone: Does that $5.00 trucking allowance cover the whole load of nearly eight tons, or is it $5.00 a ton?

The Court: The juror asked a question. You have been talking about a figure of $6.00 for trucking and $5.00 allowance. Is that per ton or was that for the whole load?

The Witness: That is per ton. That is correct.

The Court: In other words, the charge was originally $6.00 per ton.

The Witness: Per ton.

The Court: And you got an allowance of $5.00 per ton?

The Witness: Correct.

Q. (By Mr. Dixon): Now, I guess we have that tonnage delivered to Winckler & Smith plant at Anaheim. Do you recall what was done with that tonnage, Mr. Winckler?

A. Yes. At this time we had to finish up a government order of some blended juice. It was going to the Quartermaster, and we used this little tonnage to complete our blended juice.

Q. In any event, this did not go into single-strength [947] Valencia juice?

(Testimony of Nicholas J. Winckler.)

A. No. It would have been too early.

Q. When did the Valencia orange processing season commence in California, shall we say in 1951?

A. Well, some processors are starting earlier, the ones who are manufacturing Valencia orange juice with sugar added, which is so declared on the label. Other manufacturers don't start until such time that the juice reaches the maturity that it can be canned without addition of sugar. The sugar added juice, I would say in 1951 was packed as early as in June.

Q. Did Winckler & Smith process any Valencia juice during the previous years with sugar added?

A. Yes, we had to because we had a demand for it.

Q. Did Winckler & Smith process any single strength Valencia juice with sugar added in 1951?

A. In 1951 we did not process any Valencia juice, neither with or without sugar. [948]

Q. Winckler & Smith was in the primary business of processing Valencia oranges into single strength Valencia juice, was it not?

A. That is correct.

Q. Will you state to the jury what occurred in 1951 as to why Winckler & Smith did not process any Valencia orange juice during that year?

A. The answer is very simple. We had a price of $40 per ton based on 120 pounds solids, which for practical purposes was in excess of $40 per ton, with the haul of the fruit it was $44 to $45 per ton. At the same time our competitors were in position

(Testimony of Nicholas J. Winckler.)

to offer Valencia juice to the trade as low as $2.20 a case. It would have cost us, as I figured out before, to produce it at cost, at least $3.50 to $3.60 a case, so we couldn't afford to buy fruit and sell Valencia juice for $2.20 a case to meet competition.

Q. When did it first come to your attention, Mr. Winckler; that any Valencia orange juice was being offered in the market by competitors at the price you have mentioned?

A. It was some time——

Q. Withdraw that question.

Will you explain to the jury how you start your pack and how you begin to process, and about how this processing starts at the Winckler & Smith plant? Is there any connection, in other words, with the sales program of Winckler & Smith [949] and the processing operation at the plant?

A. Of course there is.

Q. Does Winckler & Smith usually process juice without having orders for it?

A. It does not.

Q. What is the practice with reference to the marketing of the products of Winckler & Smith to the trade? A. I would like to——

Q. Explain that to the jury, please.

A. I would like to answer in the following manner: We adopted a principle since 1946 not to speculate and not to pack any inventories, and fill only firm orders, and our brokers were soliciting orders before the Valencia season started.

Q. May I interrupt you there? Was the Florida

(Testimony of Nicholas J. Winckler.)

single strength Valencia juice about out of the market at this time?

A. Well, Florida always has some inventories left. Some sizes are short or some sizes are sold out, but I couldn't answer the question with a general statement that Florida was out of the market.

Q. My question wasn't quite fair, I realize. Can you tell the jury when the Florida processing season is for single strength juice? I believe we have had some evidence from Mr. Finley on that. I am not sure. [950]

A. Yes, I am glad to repeat. Florida people start processing depending on how crop conditions and climatic conditions are, as early as September or October, and the season gets into full swing by December, and for practical purposes the single strength juice season is over by April in a normal year.

Q. In other words, if I understand your answer, Mr. Winckler, the Florida processing season overlaps to some extent with the California processing season, but it starts—— A. In fall.

Q. ——late in the year, or the fall, and ends early——

A. It ends earlier than the California season starts. However, Florida carries more inventories.

Q. After the end of the Florida processing season for Valencia juice, there is of course some canned Florida juice still in the market that hasn't been sold up to the time, perhaps, that the California processors commence to process their Valencia orange juice? A. That is correct.

(Testimony of Nicholas J. Winckler.)

Q. Is that the general condition?

A. That is correct.

Q. All right. Now, will you proceed to indicate how you market your single strength Valencia juice processed at the Anaheim plant here in California?

A. When the Valencia season approaches, our brokers [951] are contacting the trade, and are soliciting orders. These orders naturally have to be competitive (a) with other California canners, and (b) with the Florida price quotations. And in June we got the surprising news through our brokers that other California packers are offering merchandise at a very low price, if my recollection is correct around $2.20 per case. And it doesn't take a mathematician to figure out that you cannot produce, out of $40 oranges, canned juice for $2.20.

Q. Do you know or can you state to the jury what the California Valencia juice had been selling for per case of 12/46's, approximately, that had been sold in the market in the year 1950, and in the early part of '51?

A. Of course the price varied during the year of '50, because the fruit price varied as we stated before, but the last price that I remember in 1950 was in the neighborhood of $3.75, if my recollection is correct.

Q. All right.

A. I am always talking about 12/46 ounce size.

Q. Now, will you proceed to tell the jury about these reports that you got from your brokers concerning the price at which Valencia orange juice was selling in the market in the opening of the

1951 Valencia season in California, that is the processing season?

A. I am sorry, I didn't follow that question correctly. [952]

Mr. Dixon: All right. It is a long one. Will you read it, please?

(Question read by the reporter.)

The Witness: Well, to my best recollection most brokers confirmed the fact that other California citrus processors are out with a $2.20 price for a case of 12/46 ounce, f.o.b. plant.

Q. (By Mr. Dixon): Do you know or can you tell the jury what the price of the Florida Valencia juice was at that time, at about the same time? Or was this price only applicable to——

A. The Florida price around then was rather uncertain. You see—let me put it this way: I cannot answer the question with a straight figure. The Florida price in 1950 was gradually increasing, and then suddenly there was—the price collapsed, and then the prices were strictly nominal. There were quotations, but——

Mr. Strachan: Just a minute. I would like, if your Honor please, to have him tell us what he means by nominal.

The Court: Yes.

The Witness: By "nominal," for instance, that a packer would quote a price of $2.35—and I am using that figure only for the purpose of illustration—but there are no takers at that price, so there

(Testimony of Nicholas J. Winckler.)

is no business transacted. The buyer is waiting for the price to come down, and the [953] manufacturer doesn't want to come down with the price. So there are quotations without actual business being transacted.

The Court: That is what you mean by a nominal price?

The Witness: By a nominal price.

The Court: So that nominal price could be any price in the range if business didn't take place at that price?

The Witness: Correct.

The Court: All right.

The Witness: And I am trying to pinpoint the month of June, 1951, that Mr. Dixon asked what the Florida price was. Now, that is the story to my best recollection. I am not 100 per cent definite about the Florida price situation.

Q. (By Mr. Dixon): Directing your attention to the approximate time at which the processing season for California Valencias opened in 1951, did you have any conversation with anybody at Sunkist at that time about the securing of oranges for processing purposes? A. Yes, I did.

Q. And with whom did you have such conversations?

A. I had conversation at various times with the following——

Q. We have to be specific, Mr. Winckler, as to the approximate time of these conversations, and with whom the conversations were had. Now, if you will just keep that in mind. Now, tell the jury

(Testimony of Nicholas J. Winckler.)

about when the first conversation [954] was had during or at about the opening of the processing season for Valencia oranges in California with anyone at the Sunkist company?

A. The first person that I contacted was Sam Kelly.

Q. Approximately when?

A. Approximately in the middle of June.

Q. What was this conversation that you had with Mr. Kelly?

A. The conversation was——

Q. Where did this conversation take place? Was it a telephone conversation?

A. The first conversation was on the telephone. Then shortly after I had a personal conversation going down to his office.

Q. Now, let's just take one at a time, Mr. Winckler. What conversation did you have with Mr. Kelly over the telephone?

A. Over the telephone I told Mr. Kelly, "Is there any change in the fruit price?"

And Mr. Kelly replied, "No, the fruit is still $40 on our regular schedule."

So I said to Mr. Kelly, "Well, you understand the juice is offered for $2.20."

I always mean a case of 12/46 ounce.

Mr. Kelly said, "I heard so." [955]

So I said, "What are we going to do about it?"

So Mr. Kelly said, "Well, why don't you go to Morgan Ward and buy fruit from him?"

So I said, "Now, Mr. Kelly, it isn't the point

(Testimony of Nicholas J. Winckler.)
where I buy the fruit, but you know if Sunkist has a $40 price everybody else has a $40 price."

So he said, "Well, I agree to that, but I have no authorization to lower the price. However, if the $2.20 price is going to hold up, there is a likelihood that maybe the price of the fruit is going to be changed." [956]

So he sort of implied I should wait. It is too early anyhow.

So that is about the essence of the first conversation.

Q. This conversation was over the telephone?

A. Was over the telephone.

Q. When was the next time that you had any conversation with Mr. Kelly?

A. The next time, I would say it was probably 10 days later. I went to see Mr. Kelly in person.

Q. And where did you go to talk to him?

A. I went to his office on Alameda Street.

Q. Was there anyone present at the time of this conversation, to your recollection?

A. No, I don't think so. I was alone with Mr. Kelly in his room.

Q. Will you state what occurred at that time, what was said by you and what was said by Mr. Kelly?

A. Well, that conversation was rather short and abrupt. Mr. Kelly indicated he is acting under——

Q. What did you say to Mr. Kelly and what did he say to you?

A. If there is any chance that the fruit price will

(Testimony of Nicholas J. Winckler.)

be more or less in line with the juice price quoted by other California canners. [957]

And Mr. Kelly said, well, that is decided by the board of directors of Sunkist or by Mr. Wilcox, I mean it is decided with people who are above him. That was the meaning of his statement. And he suggested I should see Mr. Wilcox.

Q. Did you go to see Mr. Wilcox?

A. Yes, I did.

Q. That is the Mr. Wilcox who testified here in the trial, of Sunkist?

A. If Mr. Wilcox will testify or he has testified?

The Court: No. Is that the Mr. Wilcox who testified here?

The Witness: Yes, that is the same Mr. Wilcox.

Q. (By Mr. Dixon): When did you have a conversation with him?

A. Well, I wouldn't commit myself to a date, but it was very shortly after the second conversation that I had with Mr. Kelly.

Q. Was this a phone conversation or was this a face-to-face conversation with Mr. Wilcox?

A. Well, I had with Mr. Wilcox phone conversations and I had also personal.

Q. Which one did you have first?

A. My recollection is that I had a little bit of trouble seeing Mr. Wilcox, because Mr. Wilcox was in the East, and I think it was probably a week or so that was lost before [958] I could see Mr. Wilcox. Mr. Wilcox is a man on a full schedule. He has speaking tours, and so forth. So it could be there

(Testimony of Nicholas J. Winckler.)

was 10 days to 14 days time which elapsed between the time I saw Mr. Kelly and I went to see Mr. Wilcox at the Sunkist Building.

Q. In other words, you called at Mr. Wilcox's office?

A. I called there, yes, for an appointment.

Q. You called for an appointment?

A. Yes.

Q. This was after your conversation with Mr. Kelly in which he suggested you contact Mr. Wilcox? A. That is correct.

Q. And you finally succeeded in meeting Mr. Wilcox in the offices of Sunkist about 10 days to two weeks later, is that correct?

A. That is correct.

Q. And when would that be, approximately? The early part of July?

A. It should be very close around the first of July or the 5th of July, the very early part of July, I would say. [959]

* * *

Q. Mr. Winckler, I believe when we adjourned court the last session you were testifying concerning a conversation or your efforts to contact Mr. Wilcox of Exchange Orange in the early part of 1951 concerning the securing of a supply of oranges for processing purposes in that year.

Did you finally succeed in talking to Mr. Wilcox?

A. Yes, I did.

Q. And about when did that conversation take place and where did it occur?

(Testimony of Nicholas J. Winckler.)

A. At my best recollection, it was around the first of [965] July or the early part of July, and it was at his office.

Q. You mean in the Sunkist Building in Los Angeles? A. That is correct.

Q. Will you state to the jury what the substance of that conversation was? First, was there anyone present, to your recollection, when this conversation took place?

A. I don't recall if there was anybody present, but it could be.

Q. Well, now, will you tell the jury what the substance of your conversation with him was, what you said and what he said?

A. Well, I stated to Mr. Wilcox that certain processors are offering orange juice at the price of $2.20, which is impossible to manufacture from $40 fruit based on 120 solids, and there must be some special arrangement between some processors and Sunkist and, of course, we want to stay in business and we would like to get the same type of fruit or the same price or the same arrangement. [966]

Q. Did you indicate to Mr. Wilcox who those processors were? A. I mentioned Silzle.

Q. What did Mr. Wilcox say to you after you made this request?

A. That Mr. Finley has some surplus fruit and that he would have to talk to Mr. Finley about it; that he has no power to help me on that. Mr. Finley would be the only one who could make some arrangements.

(Testimony of Nicholas J. Winckler.)

Q. What if anything was said by him with reference to his talking to Mr. Finley or you talking to Mr. Finley about the matter?

A. I don't recall exactly whether or not he promised that he will talk to Mr. Finley, or he suggested that I should talk to Mr. Finley, but I know that shortly afterwards I contacted Mr. Finley.

Q. Do you recall about when you contacted Mr. Finley?

A. I believe it was around July 7th, I would say, about three or four days after I talked to Mr. Wilcox, and I tried to make an appointment with Mr. Finley, but he was very busy and he couldn't see me, and he asked me to call him next week.

Q. You mean the following week?

A. The following week.

Q. Did you reach him on the telephone at that time? [967]

A. I reached him on the telephone, but I did not succeed for at least a week to get any definite personal appointment with him.

Q. When you called him on the phone, what did you say to him? Did you call for an appointment or did you discuss it?

A. I called for an appointment and he asked what it is all about, so I told him that we would like to get fruit under the same terms that our competitors are getting, and I understand that he is the only one who can help me; that Mr. Kelly has only the regular $40 fruit. And he said, well, he doesn't know if he can do anything but I should call him next week.

When I called him next week, again, and I didn't get any satisfaction——

Q. About when was that call made with reference to the time in July?

A. I would say about a week later. It would be around the 15th of July or near about.

Q. What conversation did you have with Mr. Finley, if any, at that time?

A. Well, I don't recall the exact words, but the result was that I was just put off again.

Q. What did Mr. Finley tell you, Mr. Winckler, at that time? A. Well, he told me—— [968]

Q. This was a telephone conversation?

A. That was a telephone conversation.

Q. All right. Go on.

A. He said that he doesn't have any fruit available and he can't help me. [969]

* * *

Mr. Dixon: Plaintiff's Exhibit 45 offered in evidence.

Mr. Strachan: No objection.

The Court: Exhibit 45 received in evidence.

* * *

Q. (By Mr. Dixon): Directing your attention, Mr. Winckler, to Plaintiff's Exhibit 45, will you state to the jury what that is?

A. This is a letter written by our corporation to Mr. Finley of the Exchange Orange Products Company, on July 16, 1951.

Q. Now, was that letter written, to the best of

(Testimony of Nicholas J. Winckler.)

your recollection, after this conversation with Mr. Finley that you have just related?

A. Definitely so.

Q. Had you had any further conversations with him other than the one that you have just related before you wrote that letter?

A. Not before I wrote the letter.

(Mr. Dixon passing exhibit to jury.) [970]

Q. Now, will you state in substance, although the letter is in evidence—well, just withdraw that.

Did you ever receive any reply to your letter in writing? A. No, I did not.

Q. From Mr. Finley?

A. No, we have not.

Q. No reply was ever received by Winckler & Smith, then, to Plaintiff's Exhibit 45 insofar as any written reply is concerned?

A. Not to my knowledge.

Q. Did you have any further conversations after you wrote that letter, Plaintiff's Exhibit 45, with Mr. Finley? A. Yes, I did.

Q. Can you state to the jury about when those conversations occurred and where they occurred?

A. Well, I cannot state the exact date, of course, but I called periodically Mr. Finley, first urging an answer to my letter, and also repeating the request for fruit, so that we can get started on single-strength Valencia orange juice.

(Testimony of Nicholas J. Winckler.)

Q. Will you state to the jury about when those calls were made to Mr. Finley?

A. Probably I let a week go by from the date I wrote the letter, and then I called Mr. Finley.

Q. Did you reach Mr. Finley on the telephone at that time? [971]

A. Yes. Sometimes I had to call again, but the most time I did reach him.

Q. When you next reached Mr. Finley after sending this letter to Exchange Orange, Plaintiff's Exhibit 45, what conversation did you have with Mr. Finley?

A. The conversation was in substance the same as before.

Q. Was this conversation on the telephone?

A. It was on the telephone.

Q. Will you state the substance of that conversation to the jury?

A. Well, I was begging for fruit so that we can pack some Valencia orange juice, and I explained to Mr. Finley that it is impossible to pack Valencia orange juice from $40 fruit, taking into consideration the going price of the canned juices, and Mr. Finley agreed with me. He said, "Well, everybody can figure that out."

And then I asked why we couldn't have fruit on an arrangement similar to others. [972]

Q. Now, let me interrupt you there, Mr. Winckler. At the time of this conversation did you have any knowledge of the actual arrangement that might

(Testimony of Nicholas J. Winckler.)

have been entered into between Exchange Orange and either TreeSweet or Silzle at that time?

A. At that time I had no actual knowledge. The only thing that I knew, I knew these people, I knew the competitors, that they would not sell orange juice for $2.20 if they would lose money on each case that they sell. So I knew that they must have some supply of fruit other than $40 fruit, but I had no evidence what the arrangement is, or for what price they get the fruit.

Q. At the time of these conversations with Mr. Finley in July, did you—withdraw that.

I am not certain that I have asked this question, Mr. Finley: Will you state to the jury what the operating capacity in tonnage for processing oranges, Valencia oranges, into single-strength juice, was of the Winckler & Smith plant?

A. Yes. We would run up to 130 tons of Valencia in an eight-hour shift, or close to 400 tons on three shifts. We have done so years before.

Q. Can you state to the jury what the plant capacity, running on an average season basis—by that I mean depending upon the possible interruption of regular flow of fruit [973] to your plant, that is the plant of Winckler & Smith—would be during a processing season for Valencia oranges?

A. I would say that during the Valencia season, in order to operate efficiently our plant should run at least 250 tons a day, which would be about two shifts.

Q. How many days a week would you run on a

(Testimony of Nicholas J. Winckler.)

two a day shift during the processing season? In other words, can you state to the jury what the approximate amount of tonnage is that the plant of Winckler & Smith could process without placing any stress upon the plant machinery during a processing season?

A. Figuring 100 running days and 250 tons a day, which would be only two shifts, without any stress the plant could run easily 25,000 tons of Valencia oranges.

Q. Directing your attention to the fact that Winckler & Smith also processed other products, does that take into account the fact that Winckler & Smith might be processing at the same time during the season grapefruit or some lemons?

A. Usually during the Valencia season most plants, even plants that process different products, are engaged usually in processing Valencia juice, and the other products like grapefruit and lemon products and beverage bases and so on, they are usually processed in what we call during the off season or between the seasons. But it is safe to deduct from these running times or tonnages, say 20 per cent, allowing for [974] some other products to be manufactured during the Valencia season, which is usually not customary.

Q. Will you state to the jury, if you can, the approximate total amount of tonnage, the highest amount of tonnage of Valencia oranges that the Winckler & Smith plant had processed into single-strength juice in any previous year to 1951?

(Testimony of Nicholas J. Winckler.)

A. My recollection is that the highest tonnage that we processed was in 1946, and in 1946 it was between 18,000 to 20,000 tons.

Q. Now, did you have any further conversations with Mr. Finley during the month of August or September of 1951? A. Yes, I did.

Q. And were those telephone conversations or conversations with him in his office?

A. To my best recollection, I had one personal conversation with him at his plant.

Q. And when did that occur, about when did it occur?

A. I would say probably around August 1st.

Q. Who was present at that time?

A. Mr. Finley and myself.

Q. Was there anyone else present to the best of your recollection?

A. No. His secretary was in the next room.

Q. What did you say to him and what did he say to you [975] in substance at that time?

A. Well, I again asked for fruit at a price which would permit us to pack Valencia orange juice, and Mr. Finley said he couldn't do anything.

And when I pointed out to the fact that I know that he is supplying liberally Silzle and TreeSweet with fruit and their plant is running in full swing, he said something to the extent that he is sorry that he did.

Q. Did you have any further conversations with Mr. Finley at all during the processing season in 1951 after this conversation you have just related?

A. Yes, I had more conversations which related to single-strength juice pack, and then later on I was trying to get some fruit for the school lunch program, that is for concentrate, and I was turned down on the school lunch program, also.

Q. I believe we have already gone into the school lunch program? A. Yes.

Q. But will you briefly state to the jury again just what that relates to, Mr. Winckler?

A. Well, the school lunch program is a program which is, I think, almost every year arranged by the Department of Agriculture, and my understanding is that the intent for the school lunch program is to take off the growers' hands some surplus oranges, which are processed in so-called hot [976] pasteurized concentrate, and such hot pasteurized concentrate which is distributed in cans is then shipped to the various schools all over the country, and by adding water to the concentrate, you get a very similar product like canned Valencia orange juice, and this is enjoyed by the children of the various schools as a healthy drink and rich in the supply of Vitamin C.

Q. Now, did Winckler & Smith process any oranges for the school lunch program during 1951?

A. Yes, we did.

The Court: The Department of Agriculture asked for bids?

The Witness: They asked for bids.

The Court: And then made contracts on the basis of the bids?

The Witness: They made contracts on the basis of the lowest bidders, or awarded the contracts.

Q. (By Mr. Dixon): Will you state to the jury if Winckler & Smith processed oranges into pasteurized juice, concentrated juice, rather, for the school lunch program in 1951?

A. In 1951 we succeeded to get a small tonnage from the Independent Fruit Growers Association and we submitted a bid for the school lunch program and we were awarded a contract.

Q. About how many tons were processed by Winckler & Smith into concentrated orange [977] juice?

A. If I recall correctly, I think I testified Thursday that it was in the neighborhood of 2,500 tons. However, in the meantime I checked my records at home and it was only around 1,600 tons.

Q. Were those all the conversations that you had with Mr. Finley during the 1951 processing season?

A. Substantially, yes.

Q. I am not sure I asked this question, Mr. Winckler. It was my recollection Mr. Kelly stated he contacted all of the independent processors in 1951 before any fruit price was established for that season. Was Winckler & Smith contacted by Mr. Kelly before the price was set in 1951, to your knowledge?

A. No, we were not. I think Mr. Kelly testified to that extent.

Q. I believe you have already testified that Winckler & Smith ran no single-strength Valencia orange juice through its plant in 1951, is that correct? A. That is correct. [978]

Q. During the 1951 processing season, Mr. Winckler, did Winckler & Smith process any Valencia oranges into single-strength juice for the Silzle Company? A. Yes, we did.

Q. Will you state to the court and jury when that processing occurred?

A. That processing occurred from time to time. The story behind it is——

Q. Let me ask you, first, did someone from the Silzle Company contact Winckler & Smith to do this processing—— A. That is correct.

Q. ——or how did it develop?

Who contacted them?

A. The sales manager from the Silzle Corporation, a certain Mr. Wurgaft.

Q. When did this contact occur? Was it in person or by phone?

A. It usually was by phone.

Q. When did Mr. Wurgaft of Silzle contact Winckler & Smith for any processing during the 1951 season, the first time?

A. Usually two days before he wanted that we should run some merchandise for him.

Q. No. I am asking, Mr. Winckler, the approximate time, if you can recall, that Winckler & Smith was first contacted. [979]

A. We ran for Silzle in July and in August and in September. It was not a continuous run. We run one day, and then we didn't run anything for a month, probably, and then a month later he needed

(Testimony of Nicholas J. Winckler.)

some 12 and 5½ ounce pack, he didn't have a 12 and a 5½ ounce line, so he called us, say, on a Monday and said, "Well, could you run Wednesday for us 600 or 800 or a thousand cases," whatever the case may be. I don't remember the exact quantities.

Q. And that was of the 12 ounce size?

A. Only 12 ounce and 5½ ounce.

Q. And 5½ ounce?

A. They didn't have the lines. [980]

* * *

The Court: How many ounces did you say in the No. 2 can?

The Witness: 18 ounces.

The Court: It will be Exhibit 46, the No. 2 can, received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 46.)

The Clerk: The 12 ounce can will be Exhibit 47, your Honor.

The Court: Received in evidence, Exhibit 47.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 47.)

The Clerk: And the 6 ounce can will be Exhibit 48.

The Court: Received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 48.)

* * *

Q. (By Mr. Dixon): Now, the juice that was processed for Silzle during 1951 by Winckler & Smith, then, was processed in the 12 ounce size?

A. Yes, and the 5½ ounce size.

Q. And the 5½ ounce size? [982]

A. Correct.

Q. Can you state to the jury the approximate amount of tonnage of Valencia oranges that were processed by Winckler & Smith during 1951 into the sizes of cans that you have just mentioned?

A. I wouldn't be able to state the exact tonnage. However, it was a very small tonnage, because the 12 and the 5½ ounce size are not big sellers.

Q. They are used primarily for the restaurant——

Mr. Strachan: I move to strike the answer following, "I cannot state," may it please the court.

The Court: It may go out. The jury is instructed to disregard it. [983]

Q. (By Mr. Dixon): Can you state the approximate tonnage, Mr. Winckler?

A. I believe it was less than five or six hundred tons.

Q. From whom, if you know, was this tonnage received, that is to say, did you know the source of the oranges received by Winckler & Smith for this processing? A. Yes, I do.

Q. How do you know the source, Mr. Winckler?

A. Because I know that Silzle received practically all its oranges from Sunkist or Exchange Orange Products, whatever the case may be, and besides the general knowledge, on the fruit delivery tickets, the name of the packing house is always stated.

Q. And what did that indicate to you, if anything, at the time? A. Well, it indicated——

Mr. Strachan: I just want to note an objection of immateriality, your Honor.

The Court: Well, when you note an objection, is that the same as making an objection?

Mr. Strachan: I make the objection, yes sir.

The Court: Sustained as to what it indicated to you. Did you see the tickets?

The Witness: Yes, I did. [984]

The Court: What names were on the tickets?

The Witness: Well, I don't recall the exact name of the packing houses, but they were all Sunkist packing houses.

The Court: All right.

Mr. Strachan: I will move to strike the answer on the ground it is immaterial.

The Court: Overruled.

Q. (By Mr. Dixon): Now, directing your attention, Mr. Winckler, to Ralphs Grocery, I believe it is. Will you state to the jury what that company is, if you know?

A. The Ralphs Grocery Company is one of the leading chain stores or super markets in the Los Angeles area.

Q. Had Winckler & Smith been selling any single-strength Valencia juice to Ralphs in 1950?

A. Yes. We enjoyed a very satisfactory business connection with Ralphs since 1945, every year.

Q. I believe you testified Winckler & Smith processed no single-strength juice in 1951. Did you continue to supply Ralphs with any single-strength juice in 1951?

A. We were able to supply Ralphs with a little single-strength juice packed in Florida, but we were not able to supply Ralphs with California pack Valencia juice.

Q. You mean that the single-strength Valencia orange juice which you sold to Ralphs in 1951 was shipped in from Florida under your Florida operations? [985] A. Some of it. Not all.

Q. Did you furnish or sell any California Valencia orange juice to Ralphs in 1951?

A. Yes, we did.

Q. Will you state to the jury the circumstances under which that sale or those sales were made?

A. Mr. Hildebrandt, who was secretary-treasurer of the Ralphs stores for many years—he passed away a few years ago—did the purchasing of all the citrus juices, and he called me up one day personally and told me, "Winckler, if you are not able to supply us with California Valencia orange juice,

(Testimony of Nicholas J. Winckler.)

we are going to kick out the Ana-Gold brand for good."

So I complained to him that we are unable to obtain fruit this year for some unknown reason, but I will do my best to try to buy some Valencia orange juice from some other California packers and then label it with our Ana-Gold brand, and ship him at least one or two carloads.

So I made the rounds and I tried to buy at the going price Valencia orange juice from TreeSweet, from Silzle, and I was not successful.

So then I called up the products department of Sunkist in Ontario.

Q. Did you make this call, or was it made by you personally? [986]

A. No. Our assistant sales manager, a certain Mr. O'Hanlon, made the call, and he was instructed——

Mr. Strachan: I think I will have to object to this evidence as to what O'Hanlon said unless a foundation is laid for this witness testifying.

The Court: The objection is sustained.

Q. (By Mr. Dixon): Was this conversation had in your presence by Mr. O'Hanlon with someone at Exchange Orange?

A. Yes. Mr. O'Hanlon talked in my presence.

Q. And what, if anything, was said by Mr. O'Hanlon to anyone at the Exchange Orange?

A. He just simply stated——

Mr. Strachan: I think we should identify what.

(Testimony of Nicholas J. Winckler.)

if anything, the witness knows about the person with whom O'Hanlon talked.

The Court: Yes. Did you hear him put the call in?

The Witness: Yes, I did.

The Court: For whom did he ask?

The Witness: He talked to a certain Mr. Marshall.

Q. (By Mr. Dixon): All right. You may relate the conversation which occurred in your presence with Mr. O'Hanlon and Mr. Marshall.

A. The conversation was very brief. Mr. O'Hanlon stated that we are unable to pack Valencia juice this year and for some customers we need juice urgently, and if he could sell [987] us at the regular going price a few carloads of Valencia orange juice. That is what I heard.

The Court: That is all you can testify to.

Q. (By Mr. Dixon): That's all you can testify to, then, Mr. Winckler?

A. I can testify to the result.

Q. No, not yet.

The Court: When you say you wanted carloads of orange juice, you mean in cans, brights?

The Witness: In cans, brights, unlabeled.

The Court: Unlabeled, so that you could label it?

The Witness: Correct.

The Court: In other words, orange juice isn't sold in tank cars, or anything like that?

The Witness: No.

The Court: When you talk about a carload of juice, you are talking about juice in cans?

The Witness: In cans, correct.

The Court: All right. [988]

Mr. Strachan: May it please the court, I wonder if I can note an objection to all testimony relating to this particular transaction on the ground that insofar as the complaint is based on it the allegation was made after the expiration of the statute of limitations. I would like to have that be a standing objection, if your Honor please, to this whole transaction.

The Court: I think that is proper, but this is one of those items that has been discussed before, has it not?

Mr. Strachan: That is right. I don't want to discuss it; I just want to have an understanding that we could have a standing objection.

The Court: I have to anticipate what this is. I don't know yet.

The Clerk: I have marked a group of documents Plaintiff's Exhibit 49 for identification.

> (The documents referred to were marked Plaintiff's Exhibit No. 49 for identification.)

The Court: My ruling is the same. There were general allegations in the first complaint, and the amended complaint is more particular. The objection will be overruled, but you may have a continuing objection for the purpose of the record to the

(Testimony of Nicholas J. Winckler.)

entire line of questioning concerning this carload or carloads of juice.

Mr. Strachan: Without stating the objection again? [989]

The Court: Without stating it, yes.

Mr. Strachan: Thank you, sir.

Mr. Dixon: Plaintiff's Exhibit 49 offered in evidence.

The Court: Exhibit 49 received in evidence.

* * *

Q. (By Mr. Dixon): I will hand you Plaintiff's Exhibit 49, Mr. Winckler, and ask you to examine the same and state to the jury, if you will, what those various documents in Exhibit 49 are.

A. Here is an invoice from Sunkist, which was received by our corporation on October 4, 1951. It relates to a thousand——

* * *

The Court: Tell us generally what this whole exhibit [990] refers to, first, and then go ahead.

The Witness: It refers to 1,400 cases of single-strength unsweetened Valencia orange juice, unlabeled, which we purchased from Sunkist for——

Mr. Dixon: By "we" you mean who?

The Witness: Our corporation, Winckler & Smith Citrus Products Company, purchased for a total amount of $3,300.34.

Q. (By Mr. Dixon): Is this the orange juice that you just referred to in the conversation that was had with Exchange Orange by Mr. O'Hanlon?

(Testimony of Nicholas J. Winckler.)

A. That's it.

The Court: How much of a carload is 1,400 cases?

The Witness: 1,400 cases is a small carload.

The Court: Ladies and gentlemen, this document is received in evidence generally. It is also one of the matters of which plaintiff makes particular complaint as to damage. The particular matters that plaintiff claims caused damages were the TreeSweet and Silzle contracts, not the other contracts which we received in evidence generally, the General Foods and so forth, and this particular transaction.

I call that to your attention because of the fact that I have been indicating that certain evidence was received for general purposes and not in connection with items which plaintiff claims caused them damage.

Nothing I say indicates any view that I may have as to [991] the facts in this matter. The jury are the sole judges of the facts in this case.

I think I should add that the claim of plaintiff in connection with this transaction is under the theory of price discrimination.

Is that correct?

Mr. Dixon: Yes, your Honor.

The Court: Which is different from plaintiff's contention as to the other contracts.

Well, that isn't a correct statement, either.

Do you contend that the Silzle and TreeSweet contracts are claims under the Robinson-Patman Act?

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: The contention of the plaintiff with respect to this transaction, your Honor, relates to the fact that under the TreeSweet contract, TreeSweet was acquiring the same product, namely, single-strength Valencia orange juice, at a price substantially different from and below that at which the plaintiff purchased the same product, namely, Valencia single-strength orange juice.

The Court: All right. [992]

Mr. Strachan: May it please the court, I think it is objectionable at this stage of the trial to discuss legal theories and legal contentions, and I should like to have the jury instructed to disregard this discussion of contentions and theories on which it is offered, because those are matters in which the jury should be governed by instructions that your Honor will give at the conclusion of the evidence.

The Court: Whether this is done artfully or not, I am not prepared to state.

Mr. Strachan: I didn't understand.

The Court: Whether what I have said has been done artfully or correctly, I am not prepared to say. I say artfully. In the sense that I don't properly state what the contentions of the parties are, I want to be corrected. However, I disagree with you as to whether or not it is proper to advise the jury as to what issues they are trying, and in that sense your objection is overruled.

If we were trying a one-day case, I think probably the issues need not be pointed up to the jury, but I think in a case of this magnitude and complexity, and in the character of the different causes of action, in view of the fact that some evidence is received for one purpose and some evidence is received for another purpose, the jury is entitled to know what particular theory or cause of action certain evidence [993] is entered on.

Nothing that I say, and I have told this to the jury time and time again, is to indicate any view I may have. I merely would like to have the jury understand as we go along in the plaintiff's case, and when the defendants' case starts, what your contentions are and what the issues are that they must decide.

So your objection is overruled. I don't think I have stated artfully what should be stated, so I will instruct you to disregard what I said and what Mr. Dixon said.

I will merely at this time say that one of the causes of action, a part of the claim of the plaintiff, involves price discrimination under the Robinson-Patman Act, which is one of the antitrust statutes, and that this contract is offered particularly in connection with that claim of the plaintiff.

Proceed.

Q. (By Mr. Dixon): Directing your attention to Plaintiff's Exhibit 49, and particularly the invoice from Exchange—— A. From Sunkist.

Q. ——from Sunkist for the orange juice purchased from Sunkist and in the amount specified on said invoice, will you state to the jury, Mr. Winckler, whether cash was paid for this purchase to Sunkist?

A. The invoice called for 10 day terms at one and a half per cent cash discount. It was received on October 4th, [994] and the check was made out on October 11th. We took the discount of $49.47.

* * *

Mr. Strachan: As to Exhibit 50, I have only the standing objection, your Honor.

Mr. Dixon: Plaintiff's Exhibit 50 offered in evidence, your Honor.

The Court: On the statute of limitations?

Mr. Strachan: Yes.

The Court: Exhibit 50 received in evidence. The objection is overruled.

* * *

Mr. Dixon: So that the jury may know what Exhibit 50 is, may it be stipulated, counsel, that this exhibit represents a statement of the sales made by Sunkist to TreeSweet under the TreeSweet-Exchange Orange contract, Plaintiff's Exhibit 20, for and during the weeks ending September 27, 1951, October 2, 1951, and October 10, 1951?

Mr. Strachan: I will so stipulate, subject to check.

I think that is correct.

Mr. Dixon: May we exhibit this to the jury, your Honor? [996]

The Court: Yes.

Mr. Dixon: May it be stipulated, counsel, subject to your check as to the figures, that for the purchase of the 1,000 cases of 12/46's and for the purchase of 400 24/2's by the plaintiff from Sunkist, at the prices specified in Plaintiff's Exhibit 49, that for the purchase by TreeSweet of the same amounts and sizes of orange juice there would be a difference of $404.76 in favor of TreeSweet on such purchases?

Mr. Strachan: Subject to check we will so stipulate.

The Court: All right.

Mr. Dixon: If I have an error in figures, you may correct me, but I think that is correct.

Q. (By Mr. Dixon): Now, Mr. Winckler, I believe you previously testified that Winckler & Smith re-acquired the plant at which it conducted its processing operations in Anaheim sometime in 1951; is that correct? A. That is correct.

Q. Will you state to the jury about when that plant was re-acquired and the terms and consideration given by Winckler & Smith for the plant when it was re-acquired in 1951?

A. The plant was re-acquired for a cash consideration of approximately $18,000 and a preferred stock consideration of about $132,000, making the total cash and stock $150,000 even, subject to encumbrances existing against the plant, we still owed to RFC, the Reconstruction Finance Corporation, an [997] amount in excess of $50,000.

Q. That was due for a mortgage which the RFC held on the plant of Winckler & Smith?

A. That is correct.

(Testimony of Nicholas J. Winckler.)

Q. You stated that some stock was given by Winckler & Smith in addition to the cash for the plant. Was any of that stock the stock which Winckler & Smith had been authorized to issue by reason of the permit secured from the Division of Corporations of the State of California to issue such stock in 1951? A. That is correct.

Q. That is part of the stock which the Winckler & Smith company was authorized to issue pursuant to the permit which is set forth in Plaintiff's Exhibit 39?

A. That is correct. We had a permit to issue $295,000 worth of preferred shares, and $315,110 worth of common shares. Out of the preferred shares, which had a par value and an offering price of $5, that amounts to 59,000 preferred shares at $5 each.

The Court: What amounts to that?

The Witness: What we gave in consideration—out of these shares we gave in consideration for the plant, approximately $132,000 worth of preferred shares. The balance we had the right to sell to the public.

Q. (By Mr. Dixon): State to the jury, if you will, whether any of those shares were in fact sold to the public. [938]

A. We sold to the public approximately $37,000 worth of preferred shares and then we withdrew from the offering because when we——

Q. Will you state to the jury about when you withdrew the offering of stock to the public?

(Testimony of Nicholas J. Winckler.)

A. We withdrew the offering to the public some time in August, if my recollection is correct.

Q. At that time can you state approximately how many shares Winckler & Smith could—or were still available for sale under this permit to the public, approximately?

A. It will take me just a second to figure that out. Well, we disposed of $132,000 worth of preferred shares in exchange for the plant. We sold 37,000 and a few shares to the public——

The Court: Dollars, you mean?

The Witness: Dollars worth of shares, so that the total disposed of was $170,000. We still had the right to offer to the public $125,000 worth of preferred shares.

Q. (By Mr. Dixon): You stated that you withdrew the offer to the public some time in August, is that correct? A. That is correct.

Q. Will you state the reason to the jury why you did not proceed with the sale of the stock?

A. When we found ourselves without adequate supply of fruit and we knew that we wouldn't be able to can any single-strength [989] Valencia juice, which was always the most important item, and we realized that we are going to lose some money, under such circumstances we decided it wouldn't be fair to keep on offering stock to the public when we had a condition of a bad year.

Q. Now, directing your attention to the RFC mortgage, which I believe you stated the Winckler & Smith company had on its plant after it was re-

(Testimony of Nicholas J. Winckler.)

acquired, will you state to the jury whether the Winckler & Smith company made the payment of the principal amount of $50,000 approximately due on said mortgage in 1951?

A. At the maturity—I don't follow the question.

Q. Withdraw the question. Was the RFC mortgage on the Winckler & Smith company plant in default as to the entire amount due the RFC at any time in 1951? A. Yes, it was. [1000]

Q. Will you state to the jury when that default occurred?

A. That default occurred, to my best recollection, late in the fall. It was probably September or October.

Q. Was that the time at which the entire amount of the principal of the loan was called by the RFC?

A. According to the original terms the loan matured on February 1, 1952, but due to the default which occurred in the monthly payments the RFC had the right——

Q. You mean the monthly payments that were in default in 1951?

A. Yes, sir, September and October, 1951, the RFC had the right to accelerate the maturity date and make the whole loan due and payable prior to its original maturity date.

Q. And was that done by the RFC, to your knowledge, in 1951?

A. As I said, I recall that in September or October, 1951, we received a notice from the Reconstruction Finance Corporation in which they de-

(Testimony of Nicholas J. Winckler.)

clared the whole loan due and payable and stated that they are to start foreclosing procedures unless we make the payments good.

Q. What if anything did Winckler & Smith do about the RFC mortgage and the default thereon, Mr. Winckler?

A. Well, we did everything possible to refinance the loan. First we went to the RFC and we tried to get a new loan [1001] from the RFC to refinance the $50,000 for five years. The RFC told us that we don't owe enough money, they don't do so, because they feel they are well secured, so there is no reason that they should refinance the loan.

Then I went to the Bank of America. The Bank of America gave us the answer that it is customary that the RFC is bailing out some frozen loans, but the Bank of America won't bail out the RFC. So we were turned down, in spite of the fact that the bank agreed that there is a very substantial collateral for a $50,000 loan, but they had no confidence in our ability, due to the fact that we couldn't produce Valencia orange juice in 1951, they had no confidence in our ability to operate a profitable business from there on.

Q. What happened after that, Mr. Winckler?

A. Well, I tried——

Q. With reference to the RFC obligation.

A. The RFC foreclosed, and then the RFC arranged for a public sale as a result of the foreclosure proceedings.

Q. At what time did the Winckler & Smith Com-

(Testimony of Nicholas J. Winckler.)

pany file proceedings under Chapter 10 of the Bankruptcy Act?

A. We filed proceedings under Chapter 10 just about two days before the sale was scheduled by the RFC, in order to protect our assets for the benefit of our creditors and shareholders.

The Court: When was that? [1002]

The Witness: It was the latter part of February, your Honor. I think the 27th or 26th of February.

The Court: 1952?

The Witness: 1952.

The Court: Is counsel interested in having explained generally what a Chapter 10 proceedings is?

Mr. Dixon: I would, your Honor. I think the jury is probably very much in the dark as to what that is, and I was endeavoring to find some way to ask this witness to try and explain it.

The Court: Is there any objection?

Mr. Strachan: No. I think it would be clarifying.

The Court: We have, first, the general bankruptcy law whereby an individual or a corporation may either go into bankruptcy voluntarily, where they petition to be declared a bankrupt, or where their creditors throw them into bankruptcy, as we say, by petitioning. But Congress later passed some other laws, and we speak of them, as lawyers, as Chapter 10 and Chapter 11 proceedings. There may be other chapters in there, but I am not too familiar. At any rate, they are proceedings whereby a person or a corporation may petition the bankruptcy court to make an arrangement with its creditors in an attempt to preserve a business without the events following what normally follow in a bankruptcy.

There are some technical differences between Chapter [1003] 10 and Chapter 11. I think Chapter 10 involves a corporation where there is some impact upon shareholders, that is, the debtor may propose a plan whereby shareholders will have to scale down their rights, or bondholders will have to scale down their rights, and creditors scale down their rights, and then see if they can work something out to save the corporation.

Chapter 11, I think, doesn't involve bondholders or shareholders.

Is that generally correct between those two chapters?

Mr. Fisher: I think it is. In Chapter 11 proceedings, as I understand it, they cannot affect secured obligations, but in Chapter 10 proceedings they may be affected.

The Court: For our purposes we are not particularly concerned, except that is what we mean by Chapter 10 and Chapter 11.

This was under Chapter 10. The general purpose of Congress was that a corporation under Chapter 10 or Chapter 11 could then come in and see what could be worked out.

Then there have been cases in the bankruptcy court where corporations pulled out, paid all their obligations, made some plan of arrangement. There have been other cases where corporations failed to

(Testimony of Nicholas J. Winckler.)

work out some plan and then they were adjudicated a bankrupt, and all the things that follow upon a bankruptcy. [1004]

So this Chapter 10 proceedings was an application to the bankruptcy court not to be adjudicated a bankrupt, but to see if a plan could be worked out, and in the event of working out the plan, then bankruptcy wouldn't follow.

Is that enough?

Mr. Fisher: Your Honor, I might say that the Chapter 10 proceedings were filed March 20th.

The Court: March 20th instead of February. March 20, 1952. [1005]

Q. (By Mr. Dixon): I believe you testified, Mr. Winckler, that Winckler & Smith had a net profit after all operating costs, expenses, during the years 1949 and 1950, is that correct?

A. That is correct.

Q. Will you state to the jury whether Winckler & Smith had any operating profit in 1951?

A. No. Winckler & Smith lost money in 1951.

Q. Can you state to the jury the approximate amount of that loss?

A. Approximately $184,000.

* * *

Mr. Strachan: I can state it very briefly, your Honor. I don't think the subject is one proper for opinion evidence, and I think it calls for the witness' subjective conclusion from, perhaps, matters beyond the evidence. It would be [1006] argumen-

(Testimony of Nicholas J. Winckler.)

tative rather than evidentiary, and would also tend to invade the province of the jury.

The Court: The last one, I think is good. There may be others. I will sustain the objection.

Q. (By Mr. Dixon): Mr. Winckler, I am now going to ask you, as operating head of Winckler & Smith during the period of time that you have testified that you were president of Winckler & Smith, whether, if you had had access to Valencia oranges for processing purposes under an arrangement comparable to that expressed in the TreeSweet contract—— A. We did not.

Q. Just a minute. I am not finished yet—and assuming normal operations during the year in question, processing operations, under such a contract could the plant of Winckler & Smith operate at a profit during the year 1951 under such an arrangement, assuming it to have been available?

A. Very definitely so.

Mr. Strachan: Excuse me. I have the same objections to this question as I had to the last.

Mr. Dixon: It is very material.

The Court: This is a different question. The latter part of your objection on invading the province of the jury does not apply to this question as it did to the other. The question uses the word normal operations, but we have evidence in the record from this very witness as to what he meant by [1007] normal operations. I don't think the question is objectionable. The objection is overruled. The answer may stand.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Dixon): Do you want the question re-read, Mr. Winckler? A. No. I remember it.

Q. Now, answer the question.

The Court: He already answered. Did the jury hear the answer? The jury indicates they heard the answer.

Q. (By Mr. Dixon): Mr. Winckler, I believe you stated that Winckler & Smith sold its product under the name Ana-Gold, is that correct?

A. That is correct.

Q. How long did Winckler & Smith have that label or brand?

A. From 1945 on since we started to operate first.

Q. Is that what we call a copyrighted brand?

A. It is a registered trade-mark.

Q. Registered trade-mark? A. It is.

Q. What amounts, approximately, if you know, were spent by Winckler & Smith in developing the brand name Ana-Gold by advertising it?

A. Well, I cannot name the exact amount, but it would be several hundred thousand dollars in merchandising and direct advertising over the period of years from 1945 on. [1008] I might mention that we had ads running in New York papers where one ad cost as much as $6,000.

Q. Was any appraisal made, to your knowledge, of the value of the Winckler & Smith plant?

A. Yes. There were several appraisals made. The first appraisal was made, if I recall correctly, in 1946. Then the plant was reappraised, I think, in

1950. And then when additional equipment was acquired, there was an amendment made to such appraisal, and regular depreciations and appreciations were taken as the prices of machinery, equipment, real estate and improvement increased or depreciated.

Q. Can you state to the jury, if you know, what the value of the plant and equipment of Winckler & Smith company was approximately in 1951?

A. Yes, I recall very correctly. The appraised sound value, including land, the five buildings, machinery and equipment, the sound value was in excess of $730,000, and the replacement value was somewhere, I think, around $850,000 or $860,000.

* * *

Q. Before we adjourned, Mr. Winckler, I believe you testified to the valuation of the land and equipment of the Winckler & Smith Company as being in excess of $700,000, is that correct?

A. Correct.

Q. Will you state to the jury the basis of your estimate of such valuation?

A. I mentioned that we had several appraisals made in 1946, 1950 and 1951, which were made by the Union Appraisal Company of Los Angeles.

(The following proceedings were had at the bench outside [1012-13] the hearing of the jury.)

Mr. Strachan: May it please the court, I think I am going to have to ask that somebody who will take personal responsibility for the accuracy of the contents of this be brought in to identify it and testify it is a sound appraisal. Otherwise, I have no way of cross-examining on the contents.

The Clerk: There is no continuity in the record. Nothing has been said about this document yet.

The Court: Well, they are talking about a written appraisal or report about which there has been no testimony.

Mr. Strachan: I have no objection to his reopening his case at a later time and calling another witness to put the appraisal report in. It seems to me it is the work of a third person and Winckler's identification couldn't in any way support the contents.

The Court: He is right, as a matter of law.

Mr. Dixon: The question of this witness was the basis of his appraisal of the value of the property, to show that it is based upon this appraisal. That was the sole purpose of offering it.

Mr. Strachan: He has already said it was appraised.

The Court: You can mark it for identification and if anything else has to be done with it, you can do it, but the objection will be good if made.

Mr. Strachan: If all you want to do is just have it [1014] identified as the appraisal that he received and have it marked and not offer it, all right.

Mr. Dixon: On which he based his opinion, and

(Testimony of Nicholas J. Winckler.)

then just have it marked for identification. It wouldn't go in then.

The Court: That's right.

Mr. Dixon: Until someone else can identify it.

The Court: It would be to show that he was telling the truth when he said he had a report of some kind.

(The following proceedings were had in the hearing and presence of the jury.)

The Clerk: I have marked a document which we have been talking about, your Honor, as Plaintiff's Exhibit 51 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 51 for identification.)

The Court: All right.

Q. (By Mr. Dixon): I hand you what has been marked for identification as Plaintiff's Exhibit 51 and ask you if that is the appraisal that you refer to in your testimony? A. Yes, it is.

The Court: It is marked and not offered, as I understand.

Mr. Dixon: That is correct, your Honor.

The Court: All right.

Mr. Dixon: That's all. [1015]

The Court: You may cross-examine.

Cross-Examination

By Mr. Strachan:

Q. Mr. Winckler, at this morning's session you mentioned having sought to refinance either the business or the mortgage, the RFC mortgage, through the Bank of America. Can you tell us when and where you had a conference with any officer of the Bank of America?

A. Yes. It was the Anaheim Branch of the Bank of America and it was during the late part of 1951.

Q. Can you identify the employee or officer of the bank with whom you talked?

A. Yes, I can. His name is Mr. Hanson, manager of the Anaheim branch.

Q. Did you have only one conference with him?

A. I think I had two.

Q. At or about the same time?

A. Very close. The same week.

Q. Had you ever sought credit from the Bank of America prior to that? A. Yes. We——

Mr. Dixon: If the court please, I assume counsel's question is directed to Winckler & Smith, in all of these questions.

Mr. Strachan: Yes. [1016]

The Court: We will have it understood where either side uses the word "you" to this witness, they are referring to the corporate entity, Winckler & Smith.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: Unless it appears that the person is definitely involved.

The Court: Unless the contrary appears.

Mr. Strachan: Yes.

The Witness: Yes. We had credits from the Bank of America in excess of $1,000,000 during 1949 and 1950 for regular operating purposes.

Q. (By Mr. Strachan): Unsecured loans or secured loans? A. They were unsecured loans.

Q. Was that through the Anaheim branch?

A. They were through the Anaheim branch. If necessary, I have a letter here from the bank which, if counsel wants to introduce it into evidence, it is available.

The Court: Well. don't tell the attorneys how to run their case now. You let them decide.

Mr. Strachan: I will be very glad to look at it during the recess.

Q. (By Mr. Strachan): Now, in this morning's testimony you also said that you had processed what you said was a small tonnage of Valencias into single-strength juice for Silzle and that that juice was packed in 5½ and 12-ounce or No. 2 cans. [1017]

A. 12 ounce, not No. 2.

Q. 12 ounce, or 5½? A. 12 ounce and 5½.

Q. Did you pack yourself or for anyone else any Valencia single-strength juice in the 1951 season for other than Silzle?

A. No, I don't recall a single case that we packed in 1951 except for Silzle.

Q. Did you during that 1951 season pack any single-strength juice in any sizes other than 5½ and 12 ounce containers?

A. I assume the question is directed only to Valencia juice and not blend?

Q. That is correct.

A. I have no recollection except probably three or four cases for sample purposes or so on.

Q. In what sizes might they have been packed?

A. Samples are usually packed in a No. 2 container.

The Court: How many ounces to a No. 2?

The Witness: 18 ounces.

Q. (By Mr. Strachan): In discussing the capacity of the plant and the extent to which you had utilized plant capacity in prior use, I believe you said that the total plant capacity during the Valencia season would theoretically be as high as 25,000 tons of oranges, but that to be conservative and allow [1018] for times when the fruit might not be available, or for other reasons might not operate, that you regarded 20,000 as the practicable capacity, is that correct, 20,000 tons?

A. I have to qualify that. I said to be conservative I like to set aside 20 per cent of our theoretical capacity to use certain days to plan to manufacture other products, but single single-strength Valencia juice.

Q. Do you recall your testimony this morning that in the year of greatest Valencia orange juice production, you had used the plant to process approximately 20,000 tons of Valencia oranges?

(Testimony of Nicholas J. Winckler.)

A. Well——

Q. That was the year 1946, I think you said.

A. In 1946 is correct. Now, the 20,000 tons may include some grapefruit, but the majority of this tonnage at my best recollection was Valencia. [1019]

Q. Have you any way of estimating what your production of Valencia was in the 1946 season, which was the peak season of your production?

A. Well, that was nine years ago. It would be a wild guess on my part to estimate.

Q. I don't want any wild guesses, Mr. Winckler. The books and records of Winckler & Smith Company are available, are they not?

A. Yes, they are.

Q. Have you consulted those records to see what quantities of Valencias you processed in that peak year of 1946?

A. No, I have not consulted these records.

Q. Don't you know, as a matter of fact, that those books and records show that in that peak year of 1946 you processed only 13,874 tons?

The Court: Of Valencias?

Q. (By Mr. Strachan): Of Valencias.

A. And how much grapefruit?

Q. I am not talking about the grapefruit. We didn't analyze grapefruit. We were talking about the Valencia capacity, which was what you were talking about this morning. Have you consulted the books or can you consult them to verify that figure?

A. I can consult the books. I think these figures could be verified. [1020]

Q. From the books of the company?

A. However, when we talk about citrus tonnage——

Mr. Strachan: Will the Judge admonish the witness to answer questions and not give a dissertation?

The Court: I am going to watch that. But this time I want to find out what he is going to say. I may strike it out.

Your answers must be responsive to the questions. You are being examined now by the opposite side. They have a right to cut you off from long speeches.

Now, what were you going to say? We will see if it is material. Something about citrus tonnage.

The Witness: What I tried to say, your Honor, is that the form in which way the question was put is misleading, but we were discussing, if I understood correctly, the capacity and the tonnage that we were running through the plant during the Valencia season.

The Court: Now, just a minute.

The jury will be instructed to disregard the remark. Your counsel will have a chance to ask you questions later on. If you have things you want to bring out, you may make mental notes and call them to his attention.

I said "your counsel"; I mean counsel for the trustee and for the corporation.

Proceed. [1021]

Q. (By Mr. Strachan): It is a fact, isn't it, Mr. Winckler, that as the years went by the processing of Valencias became a lesser and lesser part of the citrus fruit business in California?

A. I cannot answer that question, unless the question specifies which form of Valencias; if we are talking about single-strength juice, hot pasteurised concentrate, frozen concentrate. Valencia is a general statement.

Q. Well, isn't it a fact that in the crop year of 1949 you processed 12,780 tons of Valencias, more or less?

A. That is correct. That figure I remember.

Q. Now, in the following crop year you processed only 8420 tons of Valencias, more or less?

A. That is correct, too.

Q. So that in the crop year of 1950 the Valencias that you processed were, oh, approximately 40 per cent of the plant capacity of 20,000?

A. 1950 was less than 1949.

Q. Well, 8400 is less than 12,780, isn't it?

A. That is correct.

Q. In the crop year of 1951 your tonnage of Valencias processed was 5,050, more or less, wasn't it?

A. Well, again, I have to refer to the fact that unless we are specifying in which product the Valencia orange juice goes, we don't get the picture straight. [1022]

Q. But you did process 5,050 tons?

A. But not single strength.

Q. But you did process that many Valencias, didn't you? A. That is correct.

(Testimony of Nicholas J. Winckler.)

May I have the court's permission to explain here something, in order to reveal the tonnage in the proper light?

The Court: Yes. What is it?

The Witness: I have to take exception to the statement, which was implied with the question, that the Valencia tonnage that we processed decreased from year to year. Because the Valencia crop, and the amount processed, not only by our corporation, but by other California corporations, is subject to two factors. The one is the size of the crop and, second, the salability of the juice. So in one year, let's assume 1950, if less Valencia single-strength was produced in California by the industry, it has no bearing that 1951 wouldn't process probably twice as much as 1950.

The Court: All right.

The Witness: And that is a fact which is known by government reports.

The Court: All right.

When questions are asked you, try first to answer the question. If it requires an explanation, you may give it. But answer the question that is asked of you. [1023]

The Witness: Thank you, your Honor.

Q. (By Mr. Strachan): From 1938 until 1944, when u became interested in this citrus fruit plant Anaheim, you had had little, if any, experience as an American businessman, is that not true?

(Testimony of Nicholas J. Winckler.)

A. Well, I was engaged in real estate, and in other businesses, not food processing.

Q. Weren't you asked at the time your deposition was taken in June of 1952, whether you had had any business experience in the United States before you entered the citrus business, and you said "Very little"?

A. Very little as far as citrus processing business was concerned in the United States.

Q. Well, didn't you also say that in the United States I did very little before I went into the citrus business?

A. Very little what?

Q. The question was, "How about the experience in the United States," and the answer: "In the United States I did very little before I went into the citrus business." Do you recall that?

A. That is correct. [1024]

Q. Mr. Wickler, I show you this Plaintiff's Exhibit 37, which is the aerial photograph you identified on Thursday. A. Correct.

Q. Can you tell us which of those buildings are the Winckler & Smith plant and which are other buildings, and point them out so that the court and jury can see them?

The Court: Well, point them out so the jury can see.

The Witness: Would it be permissible that I draw a frame around the buildings which are ours?

The Court: Well, you do first what counsel told you to, and then you can draw a frame.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: I would just as soon withdraw the question, if he can do it that way. I think it might make the exhibit more intelligible.

The Court: First show the jury the picture. Can the jury see this?

Show us first with your pencil which is the Winckler & Smith plant.

The Witness: Here is the railroad. Everything on this side of the railroad is the Winckler & Smith plant.

The Court: Draw your pencil around it.

The Witness: One, two, three, four.

The Court: All right. This is a slick. Has somebody got a pen that flows easily? Here is one. Let's get this marked. [1025]

The Witness: This works pretty good.

The Court: I will run those lines over to the edge a little bit so we can see them.

For the purpose of the record, on Exhibit 37 the Winckler & Smith plant is that part of the picture running diagonally through the center of the picture from the lower left-hand corner toward the upper right-hand corner of the picture.

Mr. Strachan: Very good. May I exhibit this to the jury now?

The Court: Yes, show it to the jury.

(Mr. Strachan handing exhibit to the jury.)

Q. (By Mr. Strachan): Now, I am holding Exhibit 38, which is a collection of Winckler-Smith brand labels. Were these labels the only ones, the only brand labels that were used during the period from 1949 down to the date of the bankruptcy proceedings?

A. These were our most important labels. However, I testified that we packed under private label for other—for buyers like wholesale grocers, and so on.

Q. Those were their labels, not the Winckler-Smith brand labels?

A. The Winckler & Smith had also a second label which was called the Anapride label, which were used on merchandise which we felt is not up to standards of the Anagold brand [1026] name. To compare it, it is just like Sunkist had Sunkist label and the Exchange label.

Q. Will you tell us what products were packed under this second label and identify the respects in which the products packed under that label were regarded as inferior?

A. Well, I wouldn't use the word inferior. I would say not up to the high standards of Anagold.

Q. In what respects, quality respects, did the product packed under the name Anagold differ from that packed under Anapride?

A. For instance, if the Valencia orange juice was not up to full maturity, we preferred to sell it under the Anapride label, or when we packed some California grapefruit, which is not as good grapefruit as the desert grapefruit, we used the Anapride label. In instances where there was a demand for either navel juice or navel blend, we preferred to use the Anapride label.

Q. You say you prefer to use it in these instances, but did you always use it in those instances? A. We did not use it always.

Q. You sometimes used the Anagold label where you would prefer to have used Anapride, is that right?

A. Correct. That was done when the buyer demanded it.

Q. You also mentioned, or your counsel mentioned, that there were some cans on which the label was lithographed? [1027] A. Correct.

Q. Was the Anapride label sometimes lithographed?

A. No. The Anapride label was never lithographed.

Q. What about the Anagold label or brand?

A. On the Anagold brand, we had lithographed cans in 1945 during our first year, when we had trouble obtaining fast enough regular labels. Except for the emergency, we never used on orange juice lithograph labels, but we did use lithograph labels first on all frozen product, which is customary, because in the cold storage the label usually disintegrates.

And then we used lithograph labels on our 12-ounce beverages. One lemonade can was introduced as an exhibit this morning. That is the 12-ounce lithograph beverage can that I am referring to.

The Court: Don't you think we had better tell the jury the difference between labels and lithographing?

Mr. Strachan: I would be very glad to have the witness explain that.

The Court: I take it, Mr. Winckler, that the labels are the paper labels shown in Exhibit 37, which are put around cans, and lithographing is where this printing is put directly on the tin of the can?

The Witness: That is correct. If your Honor so desires, I have some samples of both along [1028] here.

The Court: I think the jurors saw the cans.

Q. (By Mr. Strachan): The Department of Agriculture has set certain standards of quality for various grades which may be sold as U. S. graded, does it not? A. That is correct.

Q. The first or best quality is known as Grade A or fancy? A. Correct.

Q. Grade C or standard is the intermediate grade, is that correct? A. That is correct.

Q. And then Grade D is called substandard?

A. That is correct.

Q. Now, I notice on some of these labels contained in Exhibit 38. for example, the one on top is called Anagold Fancy—does that mean that the container so branded meets the standard specifications of fancy? A. May I see the label, please?

Q. Surely. A. Yes, that is correct.

Q. That means, the fancy there means exactly the same as U. S. Grade A or U. S. fancy?

(Testimony of Nicholas J. Winckler.)

A. Well, if I may; I like to explain something on that.

Q. Surely.

A. While there are established standards on orange [1029] juice like on any other food product, there is a great deal of difference used in grading of oranges which was handled in California compared to Florida. In Florida the canners got together and voluntarily made it compulsory to have the juice packed under Government supervision, and all Florida labels bear the shield of the United States inspector who officially graded it as U. S. fancy and made the statement it was packed under Government supervision.

The California industry did not adopt the same procedure, so that is the one thing I like to point out.

Then the word fancy was always strictly observed with regard to Government orders, deliveries to the quartermaster, for instance. [1030]

Q. They were all packed under government supervision, weren't they?

A. They were all packed under government supervision, but at the same time I would like to make this statement: That some time on orange juice, which under the government standards would not qualify as fancy, would be better than another orange juice that could qualify under the government standards as fancy, because there are too many components that decide what is fancy and what isn't.

(Testimony of Nicholas J. Winckler.)

Q. Coming back to this first label, does "Fancy" on the Anagold label mean that the contents of the can would grade fancy according to the standards of the United States Government?

A. We believe it would, in spite of the fact that it was never examined by a government inspector.

Q. You had your own inspection service, did you not?

A. We had our regular plant inspection.

Q. With laboratory analysis and such like that?

A. Yes, that is correct.

Q. Based on that you want the jury to understand that "Fancy" on an Anagold package means that it would meet the specifications and requirements of the Government Grade A of fancy quality? A. Correct.

Q. Here is another Anagold label. Instead of saying [1081] "Fancy" it says "Fancy California." Would the use of "California" in any way indicate a difference in quality between that product and the one that is marked "Fancy"?

A. No, it would not.

Q. So you would say that the California Fancy——

A. The word "California" is just added simply to identify it that it is packed in California and not in Florida. It would have no bearing on the word "Fancy."

Q. You want the jury to understand that the California Fancy Anagold would meet the specifications of Grade A Fancy as defined by the Department of Agriculture? A. Correct.

Q. Here is a specimen of the labeling of the Florida juice which has the U. S. Grade A Fancy and the government shield imprinted.

A. Correct. That is what I was referring to.

Q. That is what you just explained?

A. Correct.

Q. I believe under the government definitions of orange juice, a citrus product that is sold as orange juice contains no ingredient other than the juice extracted from fresh fruit, is that correct?

A. That is correct.

Q. Sweetened orange juice contains no ingredient other than the juice with dry sugar added, is that correct? [1032] A. That is correct.

Q. Those same restrictions apply to grapefruit juice and to blends, is that right?

A. That is correct.

Q. I would like to have you describe processing, we will say, of Valencia oranges in the Winckler & Smith plant. Will you tell us, first, how the raw fruit is received at the plant?

A. Raw fruit is received at the plant by trucks. From the trucks the fruit is put in the receiving bins. From the receiving——

Q. How is it put in the receiving bins? Is it tumbled in or poured in, or what?

A. All orange trucks have little doors or steel gates, which are pulled up, and the oranges flow out from the truck and are received in the receiving bin, which is about, more or less, the same height as the little doors which are on the bottom of the truck. From these receiving bins, again by these little gates, they are conveyed on a rubber conveyor belt. The rubber conveyor belt then usually takes it to a so-called fruit lift or fruit elevator, which carries the oranges either in the storage bins—the storage bins are either of steel or of wooden construction with proper air space, so that they can ventilate properly—or the oranges are conveyed, again, by automatic rubber conveyors into the [1033] plant. After they are received in the plant from the rubber conveyor the oranges go through a washing process. First they go to a washing tank, which contains heated water, either with the addition of soap, or without the addition of soap, depending how clean or dirty the oranges are. The water is heated. After proper agitation in the tank it goes to a fruit washer.

Q. Is that sometimes called a scrubber?

A. You can call it a scrubber, because it contains 13 or 15 or 17, depending on the size, long brushes, which are rotating, and the oranges are scrubbed on top of these rotating brushes under a water spray. Then the oranges are automatically conveyed by lifters from brush No. 1 to brush No. 2, then to brushes No. 3, 4, 5, 11, and so on. The oranges are completely washed as clean as humanly possible. From there a fruit lift takes it——

Q. Just before you go to that, if there is fruit from the scrubber that has soft or rotten spots, what happens to it in the scrubbing process?

(Testimony of Nicholas J. Winckler.)

A. That is a good question, because I missed one operation.

We have, like other citrus packers, fruit pickers, the way we call it, or fruit sorters. Before the fruit gets into the plant, over a rubber belt there are several women who are picking out any fruit which has noticeable blemishes, which are split or cut, and remove these parts. And we had in our [1034] plant a separate device where this handpicked fruit, which was unsuitable for extraction, was disposed of and an automatic lift took these—picked out oranges, these rejects, to an elevator upstairs, and that was conveyed directly into our dehydrator, where it was mixed with peels and used to make cattle feed.

Q. Was that sorting to eliminate the rotten fruit before or after the fruit passed through the scrubber?

A. No. Before. There shouldn't be any rotten fruit in it.

Q. When the plant was operating at capacity, as you say, of 130 tons per shift, how many of these sorters or pickers would be on this operation?

A. That varied. If we got decent fruit there was very little splits or rots in it. Sometimes two women were just standing and couldn't find any rots. At other times when the fruit wasn't so good, we had four or five or even more.

Q. You don't know, when the fruit starts down this picking table, whether it is going to be good or bad—— A. Yes, we do.

(Testimony of Nicholas J. Winckler.)

Q. How do you know that?

A. Because the fruit is placed in bins, and before it goes into the bins the fruit goes through an electric sampler. Let's say from every 50 or 100 pounds of oranges the electric sampler automatically takes out one. These [1035] samples are divided between the supplier and the processor, and these samples are examined at our laboratory, as well as in the laboratory of the supplier. So before the fruit enters the plant we know exactly what kind of fruit we get. Not only with regard to splits and rots, but also with regard to sugar content and other qualities of the orange that we have to know.

Q. Would you say that you would normally have at least two pickers and sorters?

A. Normally we had more than two.

Q. Two is a minimum?

A. Two is a minimum.

Q. What would you say was a normal staff of pickers when the plant is operating at 130 tons a shift? A. I would say four to five. [1036]

Q. Well, we got off the track a little bit. You had them coming out of the scrubber, I believe?

A. Correct.

Q. I had asked you if anything happened in the scrubbing process to defective fruit. What was your answer to that? That is defective fruit that may have gotten by the pickers.

A. Well, I said that picking was done before it got into the scrubber, so there should be no rotten fruit in the scrubber at all.

(Testimony of Nicholas J. Winckler.)

Q. So you had no picking done after the scrubbing process?

A. We had no picking done after the scrubbing process.

Q. All right. Then after the scrubbing, where does the fruit go?

A. After the scrubbing, the fruit goes to the fruit extraction—rather, juice extraction.

Q. The juice extractors which were used at the Wickler-Smith plant were what are known as citromats, is that correct? A. Citromats.

Q. And how many citromats did you operate?

A. We operated three citromats.

Q. Were those citromats owned by Winckler-Smith or were they rented?

A. They were rented on a royalty basis. They were not for sale at that time, at least. [1037]

Q. Now, will you explain the simple operating principle on which a citromat extracts juice?

A. Gladly. The citromat—when the fruit enters the machine on a little rubber conveyor belt, the rubber conveyor belt leads the fruit against a rotating stainless steel saw. The saw revolves at high speed and cut the oranges into half oranges. The flow of the oranges is continuous on a citromat or onto the conveyors, and as they go, they meet the saw, they are cut into two pieces, and the half oranges are introduced between a rotating stainless wall, and there is——

The Court: Between what?

The Witness: A stainless steel cylinder.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): It is something like a wringer on a washing machine, is it?

A. But much larger.

Q. Yes?

A. Much larger. When the half oranges pass through that citromat under gentle pressure the juice is extracted through a pressing process from the orange.

Incidentally, that pressure is regulated by a pneumatic or air pressure device and the pounds of pressure can be regulated on each citromat, if you want to exercise a higher pressure or a lower pressure.

Q. In extracting juice, the citromat also extracts some [1038] of the peel oil and mixes it with the juice, does it not?

A. Well, it does to a certain extent, that is correct.

Q. Is there some method by which the surplus oil in the freshly squeezed juice is removed?

A. Yes, there is.

Q. Will you describe that?

A. After the juice leaves the citromat, it goes to a so-called finisher. The finisher is, basically speaking, a huge strainer. It is a fine stainless steel mesh. The juice is separated from the pulp and the seeds.

The peel goes through one conveyor and the pulp and the seeds go through another conveyor.

Then the juice goes through a small holding tank into a so-called de-oiling equipment.

(Testimony of Nicholas J. Winckler.)

The de-oiling equipment—now I try to explain it so that the jury and everybody understands it, it is a little involved—is basically speaking a large container from which the air is removed and thereby a vacuum is created.

I assume that the jury knows what that means?

The Court: I think so.

The Witness: Now, the juice before introduced into that vacuum is heated up to approximately 140 to 145 degrees and the hot juice is sprayed into the big vacuum vessel. Under the vacuum the surplus oil evaporates in the vacuum.

Again I like to point out that that equipment is adjustable [1039] by creating a lower or higher vacuum or by introducing the juice at a lower or higher temperature, you can remove more or less of the peel oil.

According to Government standards, the peel oil content cannot exceed .003. We found it most desirable that the peel oil content should not be in excess of .002. We adjusted our de-oiling equipment to comply with that.

If there is too little peel oil, less than .002, we found that the juice tasted flat, because a little bit of presence of peel oil is always desirable in the juice. It is part of the orange flavor.

Then the juice which was heated up in the vacuum had to be cooled down so it just went through a condenser——

Q. May I inject another question?

A. Yes.

(Testimony of Nicholas J. Winckler.)

Q. The de-oiler process not only evaporates off peel oil, but also evaporates off certain of other liquid in the juice? A. That is correct.

Q. Now, that loss of other liquids, the liquids that are evaporated off, would amount to about five gallons for each hundred gallons of the juice processed in the de-oiling, is that approximately correct?

A. Well, I would take exception to the five gallons, because I said it before, that the de-oiler was adjustable. [1040] Sometimes it evaporates as much as five gallons and sometimes it evaporates as little as two gallons, so the five gallons is not a set figure.

Q. Well, then, the oil and the other liquids that had been withdrawn from the batch by the de-oiler go to a separator, do they not?

A. No. The liquids—the oil evaporated, we had no oil recovery, because the oil went out with the vapors. There was no oil recovery. But we recovered, as you stated, the other liquids, which is basically speaking, a part of the water contained in the natural fruit. That was collected in another small stainless steel tank which was a part of the equipment, and which stainless steel tank received that condensed other liquids automatically without ever getting in contact with any outside air.

Q. Well, was it the practice of the Wickler-Smith plant then to restore to the extracted juice after de-oiling the same identical liquids that had

(Testimony of Nicholas J. Winckler.)
been taken out of that juice in the de-oiling process?

A. Well, what we call condensate, which I said was two to five gallons per hundred gallons, which was separated by the de-oiling equipment in the receiver, the little stainless steel tank, that automatically went back into the juice because there was nothing added and nothing taken away.

Otherwise, we would have sold concentrated orange juice [1041] instead of single-strength orange juice.

Q. To follow that up a minute, then it isn't permissible when you are making orange juice to be sold as orange juice to introduce tap water into the product, is that correct?

A. That is correct, but that water that we are referring to was not tap water. That was the condensate which came from the orange, and I think you stated before that fancy orange juice means that it doesn't contain anything except what is in the orange.

Q. After the juice has been extracted and is in the tanks there following this de-oiling process and restoration of the condensate, is it tested by chemical procedures to determine quality?

A. Yes, it is.

Q. What are those tests? I mean what do they test *for*? I don't want to know what the tests are.

A. Well, I can describe it very briefly. They are tested for soluble content, for the Brix content, which is the sugar content, for the acid content, for the ratio between the acid and the Brix.

Then the cans are tested for the vacuum. The cans, if they are properly sealed, have to show a certain vacuum.

I think they are about the most important steps.

Q. If on testing a batch of juice which has been fully processed and is ready for packing, it is found that [1042] the acid content is too high to comply with the specifications for orange, fancy, we will say—— A. Yes.

Q. ——is there any way in which the acid can be reduced?

A. Not to my knowledge, but I would like to point out that the acid content was checked, not after the juice was already extracted, but it was checked primarily, as I stated before, when we received the load of fruit, and if we received a load of fruit which was not up to the proper standards, we rejected such load. [1043]

Q. All right. But if after you have processed fruit that you have accepted, and your analysis shows that it is too acid to meet government specifications, is there any way in which acidity can be reduced before it is packed in the cans?

A. The only way that I know that it can be done is that you blend a high acid tank with a low acid tank, and by blending the two tanks you bring down the acid content.

Q. Are there some products where it is per-

(Testimony of Nicholas J. Winckler.)
missible to change the acidity if you brand the product something other than orange juice?

A. I have no knowledge of any products or of any way to change the acidity.

I have to state that I am not a chemist. I was managing the plant as general manager, and my burdens just couldn't include all the little details which were involved in production. But I have no knowledge that there is any way in any plant, or in any product, to change the acid content.

Q. After the juice has been tested in the tanks, it is packed in a container of some sort, isn't it?

A. Well, after the juice is de-oiled it is received in so-called vacuum tanks, we had four vacuum tanks at 500 gallons apiece, that the juice was kept under vacuum and under proper agitation, and then the juice was used from these tanks and was introduced through the pasteurizer into [1044] the can filling machines, where the cans were filled, and then they were sealed automatically with the can-sealing machines.

Q. Was the quality of each batch checked in your laboratory after the pasteurization and canning?

A. My instructions were to check the run every 15 minutes, and when I ever had the time I satisfied myself from time to time that these instructions are carried out. Of course, when the plant is running for 24 hours, I have to say that sometimes you have employees who don't carry out always the instructions. But my assumption is, gen-

(Testimony of Nicholas J. Winckler.)

erally speaking, that my instructions have been carried out, and the cans, after they were sealed, have been checked periodically, double checked for the content and the quality, and all the aforementioned essential points, to see that it is Fancy Grade A merchandise.

Q. You mentioned that you weren't able to keep up with every little detail of the operation of this business. You were, after the incorporation of the business, the president and also the general manager of the company during the entire period down to the present or recent bankruptcy, except for the time when the trustee was in possession of the property in late '48 and '49; is that correct?

A. That is correct.

Q. Now, will you tell us to what extent you were able to keep yourself familiar with, let's start in with the operating [1045] practices and the quality of products produced?

A. In the first place, I had the customary executive duties that all business executives have to take care of; to supply the raw product—to obtain the raw product, rather, from which the finished product is manufactured; to decide from which supplier to buy the packing materials, such as cans, labels, cartons. I took a great interest in advertising, sales promotion, and merchandising. I acted more or less as the sales manager of the corporation. I usually had an assistant sales manager who helped me. But I took on the burdens of the sales manager. Then I had the burdens of financing. In

(Testimony of Nicholas J. Winckler.)

years when we produced and sold as much as $1,700,000, and even more, in a small business like ours the financing was sometimes a problem. I felt, and all employees felt, that we did a pretty good job at Winckler & Smith, which is borne out by the fact that our merchandise received good acceptance, that we kept large buyers and customers for a period of seven or eight years, that there was a steady repeat business, that there was a good demand for our brand. If we would have packed merchandise which wouldn't have been up to the grades and standards, our merchandise wouldn't have repeated and sold in fine, big stores, like Safeway and Ralph's and other large chain organizations, both in the East, as well as on the Coast.

Q. We can get into those subjects a little later. I [1046] want to find out how you carried out your administrative and executive responsibilities. You said you were in charge of financing. That meant that you were in charge of the obtaining of capital, and also the maintenance of working capital sufficient to keep your current operations going?

A. I had to see to it that our bills are paid, that there is money for the payroll, there is money for the supplies. I had to see to it that the merchandise is made, that the merchandise is sold, that the merchandise is distributed through 110 food brokers. I had my hands full.

Q. Did you keep in sufficiently close touch with what was going on in the plant so that if the labo-

(Testimony of Nicholas J. Winckler.)

ratory records began to show product inferiority, that that would come to your attention?

A. Well, I did the best I could, but besides——

Q. All right. Now, that is an answer to that one. Now, in the event that the product was not gaining, or any product was not gaining public acceptance, and the brokers were dissatisfied with the product, would that dissatisfaction, that lack of acceptance, be brought to your attention?

A. It definitely would have been, because if a broker is dissatisfied, he either would pick up the phone and call me from New York or Chicago, or would write a letter. And there is one thing that I will state, that no single letter [1047] was received by our corporation at any time that I wouldn't have read or seen it. If I was on a business trip, they kept the letters, the mail, for me, pending my return.

But to answer the question completely, I have no knowledge of any broker or consumer dissatisfaction at all, except on products which contain navel juice, or was pure navel juice.

Q. What do you say was the dissatisfaction with respect to products containing navel juice?

A. Well, generally speaking——

Q. I want you to describe fully to this jury the only dissatisfaction that you know of that was ever expressed in regard to Winckler & Smith products. Now, you say navel orange products and lemonade. Now, will you tell the jury what dissatisfaction there was with each of those products?

(Testimony of Nicholas J. Winckler.)

A. On all products, on any product?

Q. Any product. You said there were only two. lemon juice and products——

A. No. We had a good number of products.

The Court: Now, wait a minute.

His statement was dissatisfaction with navel juice and products containing navel juice.

Mr. Strachan: All right.

Q. I want you to tell us the full extent of the dissatisfaction that was expressed, to your knowledge, with [1048] respect to any Winckler & Smith products.

A. Well, sir, that is a big order, but I will try to answer it to satisfy the court, the jury, and yourself.

In the first place, let me start out this way: There isn't a manufacturer in the country, I don't care if it is food, citrus, or radios, who doesn't have some complaints from time to time. What builds brand acceptance is not if there is Miss Jones or a Mr. Jones who is complaining about something, but how frequent these complaints occur, and in what proportion these complaints are in proportion to the satisfied consumers. Now——

Q. You say you have got a big order there. Now, tell us just how much dissatisfaction was expressed with Winckler & Smith products, identifying the products.

A. I would say probably 1/10th of 1 per cent compared to satisfied customers.

(Testimony of Nicholas J. Winckler.)

Q. No. Will you tell us what products were complained against?

A. Some people complained when we ever packed navel juice. The reason for the complaint——

Q. No. Just name the products, please.

Mr. Dixon: I think the witness is entitled to answer.

Mr. Strachan: We will get——

The Court: You asked a big question. Let the witness do it his way, and then you can go back and pick up the ends. [1049] Your question was very, very broad. Now, let him answer it.

The Witness: Navel juice doesn't lend itself too well for canning. That is a very well-known fact. Because it turns bitter in the canning process. You can't use it even for concentrating or freezing. Still, at times when there was a shortage on Valencia juice, some buyers insisted that we should offer them the next best substitutes, and that was navel orange juice, or navel blend. We always called their attention to it, that navel juice makes a bitter juice. There are some buyers who will put anything on the shelf—there are careful buyers and there are careless buyers—as long as the product is priced below the competitors' product, and as long as he can make a quick turnover on it.

I am using simply hypothetical figures. At a time when Valencia orange juice would have sold, for instance, for $3.00 a case—and this is just an example—navel juice probably would have sold for

(Testimony of Nicholas J. Winckler.)

$2.00 a case. So certain buyers wanted the navel juice, and we cautioned them that navel juice is bitter, and some of your customers are going to complain. They said, "Well, leave that worry to us." So we put on the Anapride label and we packed navel juice or navel blend.

So we got two or three complaints, sometimes either from the grocery store or from some of the consumers, who wrote in a letter and said, well, the juice wasn't good, it was bitter, [1050] we didn't like it.

So at this time we usually, to appease them, we wrote a letter that we are very sorry, and sent them a replacement. Usually we had on hand, always, a few cases of Valencia juice, and would send them that juice. That was the complaint—— [1051]

Q. You always replaced the juice that was complained against?

A. We always replaced juice which was complained on to consumers, and it happened very, very seldom.

Q. What about grocers?

A. Well, the contract called for navel juice and we cautioned the grocer that the navel juice is bitter, we had no reason to replace it and we couldn't replace it. If we had Valencia juice available, we would have shipped Valencia juice, but the order called for navel juice. The order called for an inexpensive juice at a time when Valencias were either unavailable or scarce, so the best thing to do is that we ship now—to bear out that, navel juice

(Testimony of Nicholas J. Winckler.)
maturing in the winter of 1950, we shipped considerable quantity of navel juice and navel blend to Western Canada. I think it was 30 or 40 carloads, and to my best recollection, we didn't have a single complaint.

In Canada, people had no objection against the bitter taste. Just like Canadian and English people like the bitter type marmalade, while the average American public likes the sweet marmalade. So there is no absolute truths of what is good and what is worthy of complaining.

There is no question about it, navel juice has the bitter taste and people who don't like it shouldn't buy it.

So I come up to navel. Now, let me say there was another [1052] complaint which comes to me, and I am trying to think of all the complaints. We had a complaint from Mr. Finley in 1947 when we packed for him pasteurized orange concentrate. His complaint was that there were black specks in the orange juice, in the orange concentrate. Well, we did the best what we could. We scrubbed and washed the oranges the best we could do it, but there was still black specks.

At the same time I have definite knowledge about it, because I saw it with my own eyes, that Mr. Finley at his own plant had the same trouble, and the juice was put through on an illuminated table, and I don't know how many women there were with little rubber hoses and with a vacuum drier to pick out the black specks by hand from the juice.

(Testimony of Nicholas J. Winckler.)

Now, we couldn't afford to do that, because that would have made the packing cost prohibitive. I don't know if Mr. Finley is still practicing that method, but if there wouldn't be any black specks in his juice, he wouldn't have had that girl picking out with a vacuum tube the black specks.

Q. Was that a low temperature concentrate?

A. No, not a low temperature concentrate. It was pasteurized concentrate.

So we had a complaint from Mr. Finley in 1947, but that didn't prevent Mr. Finley very kindly, and I thank him very much for it, to give us again a nice processing contract in 1948. [1053]

Q. But that was with the trustee in bankruptcy and not under your management, isn't that a fact?

A. Well, the trustee——

Q. The trustee was operating the plant at that time, wasn't he?

A. The Long Island Railroad was run by a trustee for 14 years.

Q. But the trustee in bankruptcy was running the plant at the time Mr. Finley gave him the processing contract, wasn't he?

A. The trustee had the power, but mechanically at that time I was running the plant.

Q. The trustee in bankruptcy had the credit, didn't he?

A. Well, I negotiated that deal with Mr. Finley, and if you want to see it, I have a letter here to that extent, and I am very glad to put it on the court's——

(Testimony of Nicholas J. Winckler.)

Q. It was the trustee in bankruptcy that wrote a letter thanking Mr. Finley for co-operating in order to help the estate out, isn't that a fact?

Isn't that a fact? Yes or no.

A. You want me to tell you the story?

Q. Yes or no.

A. That is not a question which can be answered yes or no.

The Court: You can answer yes or no first and then explain. [1054]

Did the trustee in bankruptcy—was this a trustee in bankruptcy or a trustee in a reorganization proceeding? I don't remember.

The Witness: It was a receiver, because the Chapter 11 calls it a receiver.

The Court: Did he write the letter to Mr. Finley, if you know?

The Witness: If he wrote a thank you letter after everything was completed, he didn't ask my permission for it so I haven't seen it.

The Court: Now what do you want to explain?

The Witness: What I like to explain is the circumstances of the deal.

Mr. Strachan: There is no question pending.

The Court: You mean concerning this——

The Witness: Concerning that processing——

The Court: The contract with Mr. Finley?

The Witness: The contract with Mr. Finley.

The Court: Well, that's all right. Mr. Dixon can ask about that on redirect.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): What other complaints did you hear about, if any?

A. Well, I am trying very hard, but I have no recollection of any other complaint at the moment. If you can show me [1055] any other complaints and have some evidence, I am going to admit it, if it is a justified complaint.

Q. Mr. Winckler, you testified that in the fall of 1944 you heard that this plant at Anaheim was for sale. Did you inspect the plant about that time?

A. Yes, I did.

Q. Was the plant at the time you inspected it in operation? A. Yes, it was.

Q. By whom was it being operated?

A. It was operated by a lessee called the Caltone Corporation.

Q. Who was the owner?

A. The owner was a corporation called Lash, Incorporated, L-a-s-h.

Q. What was the condition of the plant and its equipment at the time you inspected it?

A. Very bad.

Q. What was the condition of the buildings?

A. Some buildings were good and some buildings were in fair shape.

Q. What was the condition of the machinery and equipment?

A. Well, let me, if I may, make a statement here. I have not bought anything of the machinery and the [1056] equipment. That was removed from the plant when I purchased it. I bought only one

(Testimony of Nicholas J. Winckler.)

boiler, the buildings with the railroad track, and some fruit bins, which I threw out the first year, and except for the shell of a vacuum pan, a big stainless steel pan, there wasn't a single piece of machinery or equipment which I took over.

I bought brand new machinery and I put in machinery, equipped the plant according to my own specification.

The Court: Well, the question was what was the condition of the machinery and equipment in the old plant.

The Witness: I said, your Honor, it was very bad.

Mr. Strachan: In view of the explanation, I would just as soon eliminate that question.

The Court: All right.

Q. (By Mr. Strachan): Then at the time you became the owner of the plant, it was not a going citrus fruit plant, was it? A. No, it was not.

Q. How long had it been idle?

A. We supposed to have taken over the plant around March 1st, but the lessee——

Q. That is March 1st of 1945?

A. Of 1945, but the lessee did not live up to its promise or agreement to give us possession by March 1st and kept us out from the plant until the latter part of April. [1057] By that time they removed all their equipment and they moved into a new plant which they bought simultaneously in Anaheim.

(Testimony of Nicholas J. Winckler.)

So I actually took possession of the plant very close to May 1st.

Q. Now, you purchased the plant and the small amount of equipment that you have mentioned as an individual, did you?

A. Well, it was a partnership. I purchased it in the name of a partnership.

Q. My recollection was that you said you first acquired it as an individual.

A. That is correct.

Q. Then later found that the business required——

A. That is correct. I purchased the plant as an individual.

Q. When?

A. Oh, I think the purchase agreement was signed sometime in January, 1945, either the latter part of January or the very early part of February, 1945?

Q. What purchase price did you agree to pay?

A. The purchase price was $60,000 for the empty plant, if I pay before a certain date, and $64,000 if I pay after a certain date.

Q. Was this purchase price all in cash?

A. That was all in—well, the purchase price has to [1058] be paid all in cash, and during 1945, before the deadline, it was paid all in cash.

Q. Did you finance the purchase with a mortgage or any other encumbrance of the property?

A. No, sir. We started operations——

(Testimony of Nicholas J. Winckler.)

Q. Now, just a minute. You said you personally purchased it.

A. I personally purchased it. I made a down payment.

Q. How much was the down payment?

A. $10,000 in escrow. The escrow—the condition of sale called that the escrow has to be kept open, I don't know exactly now whether four months or five months, something like that, and then when we paid the balance, the difference between the 10,000 and the 60,000, we write a check of an additional $50,000, and then the property is deeded to me.

Q. When was the last payment on that purchase price made?

A. My recollection is that it was made sometime in November, 1945, in full, but I missed the deadline by four weeks and we had to pay $64,000 instead of $60,000.

Q. Did you borrow anything on the plant?

A. Not a penny. We made enough profit in 1945 to pay for machinery and plant, for everything cash. [1059]

* * *

Q. (By Mr. Strachan): In March, I believe March 10th, you formed a partnership to conduct this Winckler & Smith business, did you not?

A. That is correct.

Q. March of 1945? A. That is correct.

Q. The partners were yourself, M. E. Goodland, and E. J. Smith?

A. No, sir. In March, when the partnership was

(Testimony of Nicholas J. Winckler.)

formed, there were only two partners; Bernard J. Smith and myself.

Q. What was Mr. Smith's business prior to joining this partnership?

A. Mr. Smith told me that he was in the trucking and bus business in Chicago, and prior to coming to California he sold out his business to the Burlington Railroad and came to California to retire, but he just didn't know what to do with his time, so he took up real estate and became a real estate broker. So Mr. Smith was in California in the real estate business for about two years when I met him.

Q. Had he been in the food processing business?

A. He had never been in the food processing business.

Q. How much capital did Mr. Smith contribute to that original partnership? [1061]

A. According to our agreement, Mr. Smith committed himself to contribute $50,000 to the partnership.

Q. How much did he pay into the partnership at the time it was formed?

A. Mr. Smith paid in several installments, he had to liquidate to sell some first trust deeds in order to make the money liquid, and finally he couldn't come up with more than $40,000, and then Mr. Smith suggested that his neighbor, a certain Mrs. Campbell, next-door neighbor, would put up the $10,000 that he was unable to put up, and Mrs. Campbell is the mother of that certain Mr. Goodland that you mentioned. So Mr. Goodland joined as a partner, I think in July, 1945. [1062]

Q. And he paid in how much capital?

A. $12,000.

Q. Your own contribution was $10,000, was it not?

A. Yes. It was $10,000, but I told Mr. Smith——

Q. Well, now, just a minute. I don't think conversations outside of the presence of the parties are admissible.

Was that $10,000 paid in cash?

A. It was exactly $12,000 paid in cash.

The Court: He is talking now about what you put in.

The Witness: Yes.

Q. (By Mr. Strachan): You put in $10,000?

A. Yes, $12,000.

Q. Your contribution was $10,000, was it not?

A. No, it was $12,000. It is coincident it was identical with the 12,000 that Mr. Goodland put in. There is no connection between the two twelve thousands. I may clarify that——

Q. Now, just a minute.

The Court: Let the witness finish his answer.

Mr. Strachan: Sir?

The Court: Let him finish his answer. Proceed.

The Witness: Out of the 12,000, 10,000 was put up by me into the escrow and 2,000 was used for the partnership outside of the escrow, making my total cash investment of $12,000. [1063]

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: May this be marked for identification?

The Clerk: Defendants' Exhibit A for identification, your Honor.

The Court: Exhibit A marked.

> (The exhibit referred to was marked Defendants' Exhibit A for identification.)

Q. (By Mr. Strachan): I will show you, Mr. Winckler, a certified copy of the documents on file on Winckler-Smith Corporation with the Commissioner of Corporations of the State of Illinois——

The Court: State of Illinois?

Mr. Strachan: I am sorry. California. Thank you.

Q. ——which contains, among other things, the letter that I show you, addressed by Hodge Moore & Company to Winckler-Smith Company attaching a balance sheet as of January 31, 1946, from the books and accounts of the partnership.

Do you recognize that letter?

A. Yes, I do.

Q. Do you recognize that balance sheet?

A. Yes.

Q. I ask you if it isn't a fact that that balance sheet shows the following as the original investment of the partners:

M. E. Goodland—$12,000.

B. J. Smith—$40,000. [1064]

N. J. Winckler—$10,000.

Total—$62,000.

(Testimony of Nicholas J. Winckler.)

A. That is correct. May I explain?

The Court: Yes.

Mr. Strachan: Do you want him to explain now or on redirect?

The Court: He may explain it now. It is customary for a witness to explain his answer at the time.

The Witness: It doesn't make any difference whether or not my investment is $10,000 or $12,000, but as I stated before, that 10,000 was put into the corporation and went into escrow to purchase land and improvements of the plant, and $2,000 I expended in behalf of the partnership in the acquisition of the plant which was not accounted for—it didn't make any difference, but I mean that $10,000 in round figures went into escrow and it is quite obvious somebody buying a plant has some expenses besides the $10,000 which goes in a lump sum in escrow, so that is what explains the $12,000.

But it doesn't make any difference whether you figure $10,000 or $12,000 investment. The smaller it is, the prouder I am that I made a success out of it.

The Court: The last statement may go out. Go ahead.

Q. (By Mr. Strachan): Hodge Moore & Company were the certified public accountants of Winckler-Smith, were they not? [1065]

A. That is correct.

Q. If Hodge Moore is right, the total investment was $62,000, and if you are right it is $64,000.

(Testimony of Nicholas J. Winckler.)

Now, as of the close of business, January 31, 1946, Winckler & Smith Citrus Products Company, a corporation, acquired the business of the partnership, did it not? A. That is correct.

Q. At that time the partnership had on hand $100 in cash, according to this balance sheet, had it not?

A. I haven't seen it. If you state so, I take your word for it. [1066]

Q. Thank you.

The current assets were less than $50,000, that is, the inventories, accounts receivable, were less than $50,000, is that correct, or don't you remember?

A. If the balance sheet states so, it is correct.

Q. The current liabilities were over $75,000. Now, the corporation's books were set up so that they did not reflect the original investment in the assets, but rather the investment plus a write-up by appraisal, and that write-up amounted to $150,000, did it not?

A. Well, if the balance sheet shows these figures, then it is so. I would like to explain if I may.

The Court: Go ahead.

The Witness: When I purchased the plant for 60 or 64 thousand dollars in January, 1945, it was a sale through this federal court, and the sale took place in the court room of the late Judge Hollzer. It was a distressed sale, just like when our plant was sold it was a distressed sale by the receiver, and I felt that when I purchased the plant for 60

(Testimony of Nicholas J. Winckler.)

or 64 thousand dollars I got a bargain. Every businessman has a right to purchase a bargain.

The Court: In these explanations, just stick to your facts and don't argue the matter.

You thought it was worth more than $64,000?

The Witness: It was worth more than $64,000, and when I [1067] made the partnership with Mr. Smith I revealed to Mr. Smith for how much the plant was purchased, but I told him that I was unwilling to put in the plant at my acquisition price. So my contribution was $10,000 in cash or $12,000, whatever the case may be, plus the value in the plant, which was in excess of the $60,000 that I acquired the plant at the federal court.

The Court: All right.

The Witness: So when we set up our corporation and we had to issue shares to the former partners, we felt that we have the right to put a realistic value on the plant to carry it on our books.

If I recall correctly, counsel mentioned that that opening financial statement showed liabilities of $75,000 and current assets of $50,000. So that showed a deficiency of $25,000. But in order to evaluate these figures I want to say that during six months of operations with the $62,000 starting capital, we paid in cash for the plant, and we paid in cash for all the machinery that have been installed in this plant.

The Court: All right. You have made your explanation.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): How much had you invested in that machinery?

A. If I could see the financial statement, I wouldn't have to guess and I could say exactly.

Q. I will show it to you. [1068]

A. Well, machinery and equipment shows eighty-eight, almost eighty-nine thousand dollars.

Q. That is cost? A. That is cost.

Q. Now, when was that money spent?

A. That money was spent during 1945, from the day that we moved into the plant, which I said was approximately May 1st, 1945, between May 1st and January 31st we spent in cash about $89,000 for machinery——

Q. Just a minute. On this machinery, that is in about seven months you spent $88,000 in cash on machinery?

A. Well, I have to qualify that. There is probably a small portion of that $88,000 included for the one boiler and for that empty shell of the vacuum tank, which I testified before was the only two items taken over from the former owners. So that should be included in the $88,900.

Q. All right. Deducting the value of the old boiler and the evaporator, whatever it was, from the $89,000 of machinery and equipment cost, how much of that would you say was spent in the seven months by the partners?

A. I can approximately state. Let me do a little figuring here. That is all machinery and equipment except the first two items, buildings and land at a

(Testimony of Nicholas J. Winckler.)

total of $17,000, which is allocated to land and buildings. If we deduct the $17,000 from the $123,000 or $124,000, that leaves for [1069] machinery, equipment, tools, trucks, furniture, fixtures, and so on a total of approximately one hundred seven if I am correct. Yes, one hundred seven. From the $107,000 I would say that probably $7,000 is represented by equipment taken over, and about $100,000 was spent for machinery and equipment, truck trailers, and so on. [1070]

Q. Can you estimate how much of the 89,000 of cost of machinery and equipment was represented by the old boiler and the other equipment that you took on in the plant?

A. Probably you misunderstood me. I just said that I estimate approximately $78,000, which would leave a net purchase for new equipment of roughly $100,000.

Q. No. I am talking only about this 89,000 machinery and equipment. A. Yes.

Q. Of the cost of the machinery and equipment, as shown here on the balance sheet, as about 89,000.

A. Correct. I would say about $7,000 was allocated for the old equipment.

Q. That would mean that the machinery and equipment paid for in cash by the partnership in the seven months of the partnership, the equipment was, say, $82,000?

A. You mean for new equipment?

Q. Yes. A. Correct.

Q. Then by this write-up on the appraisal, you

(Testimony of Nicholas J. Winckler.)

increased the machinery and equipment from 89,000 to $153,000?

A. I can explain that, too.

Q. If 80,000 of that was bought in five months, how do you write that up 70,000?

A. Well, I can explain that. When you buy machinery [1071] and equipment, according to the invoices you get one figure. If you add to the machinery and the equipment the freight, most of the machinery comes from the East, plus the installation charge, plus the wiring and plumbing and piping, which really is improvement of the property, which becomes valueless if we moved, I would say that in order to install $90,000 worth of equipment, you have to spend at least another $40,000 or $50,000.

Q. You mean to say where the machinery cost is shown at $90,000 that doesn't include all the cost of transportation and installation?

A. Definitely not installation, definitely not wiring, definitely no plumbing or piping. Maybe the freight from the East. Maybe that is included.

The Court: Let me ask, do you intend, Mr. Strachan, to go into the question of value of the plant in 1951?

Mr. Strachan: I want to show to what extent the valuation which the books put upon the plant was entirely fictitious valuation, and I am building that up by showing how much of it was cost and how much was write-up.

The Court: Well, we are only going to do it once. If you are going to do it in 1951, which is the ultimate question——

Mr. Strachan: This is leading up to it.

The Court: All right.

Q. (By Mr. Strachan): The item of buildings is shown [1072] to have cost 14,572. In the write-up there was 82,000 added to that, bringing it up to nearly 97,000, is that correct, on the face of the balance sheet?

A. On the face of the balance sheet, that is correct.

The Court: Now, just a minute. Have you finished your answer?

The Witness: Yes.

The Court: I may be confused, but as I read this statement, the column that you have been referring to as the cost column for land and building is apparently the amount that was paid.

Mr. Strachan: That's right. That is the amount that was set up on the partnership books as the cost of the buildings, the land and buildings.

The Court: The two items, land and buildings, are set up at a little less than 17,000.

Mr. Strachan: $17,000.

The Court: I notice on the other side of liabilities the notes payable, $41,000.

Mr. Strachan: That's right.

The Court: It would look to me as if this statement was prior to the time that the balance of the $60,000 had been paid.

The Witness: No, your Honor. At that time the full balance was paid and the plant was free and clear of any [1073] encumbrance.

The Court: Then why is the plant and the buildings set up for less than $18,000 in your cost column, when you testified you paid $64,000 for it?

The Witness: Well, the $64,000 is allocated between land, buildings, machinery and equipment, and improvements on leased property and so on. The $62,000 is included in the $128,000.

Now, how the accountant split it up, how much he allocated for machinery, how much he allocated for buildings, I don't know. We had no appraisal made prior to January 31, so it is strictly the CPA's arbitrary appraisal, how he split up the value of $62,000 between real estate, buildings, and the improvements.

The Court: Are you certain that this is not set up on the basis of the exact amount that had been paid in on that date on land and buildings?

The Witness: Yes, your Honor.

The Court: What was the $41,000 note?

The Witness: The $41,000 note was the bank loan that we borrowed from the First National Bank in Fullerton.

The reason I am certain it is not what we paid for it is because when we purchased in the Federal Court, and the records are still available here, I am certain, the plant, or the shell of the plant, rather, there was a purchase price agreed on of $60,000 or $64,000, without saying how much we paid [1074] for buildings and how much we paid for machinery.

(Testimony of Nicholas J. Winckler.)

and it was a blanket price. That breakdown of the accountant was according to his best judgment, but in order to help counsel, I can allocate very easily the figures, how we arrived at it.

The Court: Are you going to offer this exhibit, Mr. Strachan, this balance sheet? There has been a lot of testimony about it.

Mr. Strachan: Yes, I intend in my case to offer it.

The Court: Can we mark it B for identification at this time?

Mr. Strachan: It is a part of the larger exhibit.

The Court: It is part of A?

Mr. Strachan: Yes, sir.

The Court: We will call the particular sheet we have been talking about, then, A-1 for identification.

Mr. Strachan: I might say, anticipating a procedural question, that of this bulky document, there are only parts that are going to be material, and I think perhaps I would ask to be allowed to make a selection of parts and substitute those at the time of the offer.

The Court: You can do that by photostats.

Mr. Strachan: Yes.

The Court: All right. A-1 will be marked for identification only as the balance sheet we have been looking at. [1075]

(The exhibit referred to was marked Defendants' Exhibit A-1 for identification.) [1076]

Q. (By Mr. Strachan): In the succeeding years down to the time of the discharge in—what was it, the Chapter 10 proceedings in 1949?

A. Chapter 11.

Q. ——the corporation continued to operate and made some improvements to the property and made some charges for depreciation of the property, so that at the time of the discharge the property was shown on the books as $368,000, approximately, was it not?

The Court: Are you talking now—when you say the value of the property, are you talking about the land and the improvements and the equipment?

Mr. Strachan: The items are shown here as follows, are they not——

The Witness: Whose statement is that, may I ask? Is that our accountant's statement?

The Court: Is this also from Exhibit A?

Mr. Strachan: Yes, this is a part of the exhibit which is on file, filed by Winckler & Smith with the Commissioner of Corporations.

The Court: We will mark this next sheet that you are referring to as Exhibit A-2.

(The document referred to was marked Defendants' Exhibit A-2 for identification.)

Mr. Strachan: All right. [1077]

Mr. Dixon: It looks like the receiver's statement, if I read correctly.

The Witness: I think it is the receiver's statement. That is the reason I like to clarify these points. Let's bring it out.

It is not made by our auditor, I am sure. I think it is probably the receiver's statement. However——

The Court: Is there any question pending now?

Q. (By Mr. Strachan): Do you recognize what this is?

A. Well, I recognize that it is a financial statement, but I don't recognize by whom it was made.

Q. Well, it was filed with the Commissioner of Corporations, was it not, in connection with your application to issue securities?

A. Then it was probably—no, that had nothing to do with securities. We issued——

Q. No. But it is filed in connection with permission, this is one of the facts disclosed to the Corporation Commission?

A. I am trying to say, it is not.

The Court: Mr. Winckler, this whole file, Exhibit A, has been identified as the copy of the file from the Commissioner's office. Let's see. Where does this appear?

Mr. Strachan: It is a resume of the history, your Honor.

Mr. Dixon: If it please the court, there may be a lot of [1078] things in that file that the plaintiff corporation never filed. I don't know what is in that file. It is quite a bulky file.

If this witness knows that this corporation filed it, that is one question. But to ask him whether every paper in that file was filed by the corporation, it

(Testimony of Nicholas J. Winckler.)

seems to me, just because it appears in the file, it seems to me to be an improper question, unless he can so testify.

The Witness: I am certain that our application to issue securities was not as bulky, by far, and we applied to issue securities in May, 1951, two and a half years later than the statement was made.

That is the only time that we applied to issue securities. So why should there be a '49 statement enclosed in there?

The Court: This is the file as you got it from the Corporation Commissioner's office?

Mr. Strachan: Yes.

The Court: What I am thinking about is that they sometimes have lots of things in their files. I was trying to identify this.

Doesn't the Commissioner number his files serially page by page?

Was Ellis S. Patterson your attorney?

The Witness: Earl S. Patterson. [1079]

The Court: Ladies and gentlemen of the jury, we are trying to look over a file of the Corporation Commissioner. In this file, it demonstrates, and the witness has told you, that Earl S. Patterson was his attorney; and there is an Exhibit H, among various other exhibits submitted to the Corporation Commissioner, which shows a balance sheet of January 31, 1949, and it says "Prior to court approval of discharge." So that this date is the date when Winckler & Smith was in the bankruptcy court under a reorganization proceeding under Chapter 11.

(Testimony of Nicholas J. Winckler.)

The record, I think, shows or will show it came out of reorganization in March, 1949, sometime afterwards. We don't know who prepared this sheet or where the figures come from, but it doesn't make a whole lot of difference. Maybe it will be identified later on.

The point agreed upon between counsel is that it was submitted to the bankruptcy court by the attorney for the Winckler-Smith corporation, a balance sheet involving the time when it was under the Receiver.

Do you follow me?

Now, I say it doesn't make any difference. We probably will find out before we get through where the figures come from and what this report is based on. This didn't happen, but to give you a little example, if Patterson, the attorney for Winckler-Smith, had got a figure out of his head and [1080] gave it to the Corporation Commissioner, it was still part of the file submitted to the Corporation Commissioner.

All we know is that it was a sheet involving the receivership submitted by the attorney for Winckler-Smith. There is a lot to do about it, but that will give you some little picture of it. Is that all right, Mr. Strachan?

Mr. Strachan: Yes. [1081]

* * *

Q. Mr. Winckler, when we took an adjournment last evening you had just referred to the fact that

(Testimony of Nicholas J. Winckler.)

at the time of the arrangement made with creditors in the spring of 1949 the fixed assets at March 1, 1949, had a gross value on the books of $368,000 with a depreciation deduction of $68,000, leaving a net book value of $300,000; do you recall that?

A. Are these the figures in the statement that we checked together?

Q. Yes, and they also check with Hodge & Company's report here. If you would like to see it I can show it to you.

A. If it checks with Hodge & Company, then that is all [1093] right.

Q. Those book values included the $150,000 of write-up; that is correct, isn't it?

A. 150,000 what?

Q. Write-up on the appraisal we discussed yesterday. A. No, I don't believe so.

Q. You say that that $368,000 did not include the $150,000 that was based on the appraisal?

A. It definitely did not.

Q. Now, following March 1st you concluded this arrangement with your creditors, and in order to do that you sold the fixed assets under a lease-back and repurchase agreement, did you not?

A. That is correct.

Q. And that included all of the $309,000 of fixed assets then on the books? A. That's correct.

Q. To whom were those assets sold?

A. Those assets were sold to two men, a Chicago attorney called Maxwell Rubin and Albert B. Parwin, and there was a silent partner in the deal.

(Testimony of Nicholas J. Winckler.)

Q. Was Mr. Rubin a stockholder of Winckler-Smith Corporation? A. Not at this time.

Q. Was he at any time?

A. He became a stockholder later on. [1094]

Q. The cash that was received for the $309,000 of assets amounted to $50,000, didn't it?

A. Yes, and assumption of some indebtedness.

Q. Under the lease-back arrangement the corporation continued to occupy the plant and use the equipment, did it not? A. As a lessee.

Q. And they paid rent? A. Correct.

Q. How much rent did they pay?

A. $18,000 a year, plus approximately $6,000 real estate and personal property taxes, plus approximately $1,200 to $1,300 fire insurance. We carried about $450,000 fire insurance against the plant.

Q. The repurchase agreement provided that you could exercise the option to repurchase any time prior to March 1, 1951, did it not?

A. No. May I explain that arrangement to clear up the matter?

Q. Yes.

A. We sold the plant for $50,000 cash, subject to a $90,000 RFC loan, which would indicate a total purchase price of $140,000. We realized that the plant was worth substantially more money. However——

Mr. Strachan: I move to strike his realization. That [1095] is not explanation.

The Witness: Correct.

Mr. Dixon: I think it is.

(Testimony of Nicholas J. Winckler.)

The Court: Motion denied.

The Witness: However, we regarded that as an out from a distressed situation, and as long as the repurchase price was in line with the sales price, we had no other choice than to accept the deal and what the deal amounted to, that the plant which was sold for $140,000 could be repurchased for $190,000, and the repurchase price was set till 1951 at this price. Then it increased for the next year by an additional $25,000; in another year with an additional $25,000; and the option was in force all together for a period of five years, to 1954.

The Court: The first option for which you could buy it back for 190 ran out in 1951, did it?

The Witness: According to my best recollection, your Honor.

The Court: All right.

Mr. Dixon: If the court please, I don't want to interrupt, but this will help counsel if he doesn't already have it. We have the original agreement here which he referred to. Do you wish it, counsel?

Mr. Strachan: I will avail myself of that later. I can't, of course, do it right now. [1096]

The Court: Then if the option is exercised within a year later, 1952, it was an additional $25,000?

The Witness: Additional $25,000, and another additional $25,000 two years later, and that option was good for a period of five years all together.

Q. (By Mr. Strachan): Now, at the time you repurchased this property from Rubin, that was in the spring of 1951, was it not?

(Testimony of Nicholas J. Winckler.)

A. That is correct.

Q. What was the option price?

A. The option price was a total of approximately $200,000—$150,000 in stock and cash and then, of course, the then existing RFC balance of approximately $51,000.

Q. At the time that property was repurchased, was Mr. Rubin a stockholder of the Winckler-Smith Corporation? A. Yes, he was.

Q. Was he also an officer or director?

A. He was both an officer and director. [1097]

Q. Shortly prior to buying, repurchasing this plant and equipment, your fiscal year ended on January 31, 1951, did it not?

A. Well, the fiscal year following the reorganization ended January 31, 1950.

Q. No. I am talking about the repurchase. Your repurchase was in the spring of 1951?

A. That's correct.

Q. And it was after the close of the fiscal year, which ended January 31, 1951?

A. That's correct.

Q. Now, before you repurchased these assets, your fixed assets on the balance sheet in January of 1951, represented approximately $91,000, isn't that correct? A. No, I cannot see that figure.

The Court: How many of the ladies and gentlemen on the jury know anything about bookkeeping? Hold up your hands.

(Raising of hands.)

(Testimony of Nicholas J. Winckler.)

The Court: How many know the difference between a fixed asset and a current asset?

(Raising of hands.)

The Court: How many know the difference between a fiscal year and a calendar year?

(Raising of hands.)

The Court: Let me make a few general statements that I [1088] hope counsel won't object to. It may assist in understanding this.

Taxpayers may report either on what we speak of as a calendar year, which is from the first of January to the end of December, or a fiscal. If they take a fiscal year, they can break their year at any place along the line. So in the case of this particular corporation its fiscal year was apparently running from February 1st of one year around until January 31st of the other year. That is what is spoken of as a fiscal year. It is a break somewhere else other than the calendar year, December 31st.

In bookkeeping you have two general terms with reference to assets. Fixed assets and current assets.

Are those the two terms that we generally find in statements?

I am no expert, either.

Fixed assets refer generally to real estate, buildings on real estate, major improvements on real estate.

Do fixed assets go further than that?

The Witness: Machinery and equipment.

(Testimony of Nicholas J. Winckler.)

The Court: Is that about fixed assets?

Mr. Strachan: I think that is substantially it.

The Court: Then current assets are ordinarily the personal property, furniture, bank accounts——

Mr. Strachan: I wouldn't want to agree with that, your [1099] Honor.

I would say that current assets——

The Court: As contrasted to fixed assets?

Mr. Strachan: Usually you have fixed assets, and other assets besides your current assets.

The Court: Then we will break it down that way.

First the fixed assets, which we have described, and then other assets. Well, the other assets are generally in the nature of personalty or credits, stocks or bonds. By personalty I mean personal property, automobiles; if the company had a bakery business. they might have a fleet of automobiles; furniture that is movable, and things of that sort. Then of these other assets, which I referred to as current assets, ordinarily, at least in one sense of the word, those assets which could readily be converted into cash, so your accounts receivable would be considered as a current asset, bank accounts; if you had some Government bonds or stocks, if you had credits due, and things of that sort, they are the things which are current or liquid. So you have two breakdowns, first of all, fixed assets and other assets, and then part of the other assets may or may not be current or liquid.

I am particularly interested that you understand

(Testimony of Nicholas J. Winckler.)

fixed assets, because that is what is being discussed.

Do you want to add anything to that, counsel?

Mr. Dixon: I think inventories are generally covered [1100] as fixed assets, also.

The Court: Yes, inventories, goods on hand, and things of that sort.

Now, this is not too comprehensive a statement, because I am no professor of bookkeeping or accounting.

All right, Mr. Strachan. [1101]

Q. Hodge and Company were your auditors, weren't they? A. That is correct.

Q. Do you recognize that as a letter from Hodge and Company? A. Yes, I do.

Q. And accompanying——

Mr. Dixon: What is this, counsel? Is this something I haven't seen?

Mr. Strachan: Something you furnished to us.

Mr. Dixon: I did not furnish it to you.

Mr. Strachan: You or your client did.

Mr. Dixon: No. Don't make that statement, counsel.

Mr. Strachan: That is the only way we could have gotten it.

The Court: The jury will disregard colloquy between counsel.

Mr. Dixon: Is this from the files of the plaintiff corporation, counsel?

Q. (By Mr. Strachan): Mr. Winckler, it is, isn't it? A. May I see——

Mr. Dixon: I am asking you, is it?

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: He is the witness.

Mr. Dixon: If it is, it is all right.

Mr. Strachan: He is the witness. He recognized it.

The Court: All right. Now, gentlemen, there is a [1102] proper way to do these things and let's do it properly. First of all, if you bring a document out, Mr. Strachan, the practice in this court is, if it has not been previously exhibited to counsel, to exhibit it.

Secondly, if you are going to use a document in the examination of a witness, before it is shown to the witness, hand it to the clerk and have it marked for identification so we know what we are talking about.

Mr. Strachan: Very well.

The Court: In a case of this kind, ladies and gentlemen of the jury, there has been extensive discovery. Discovery is a technical word which means the right of either side to secure information about this lawsuit from the other side. As you have observed as this case went along, there has been a lot of work done which you must obviously know occurred or it wouldn't have been possible to have various of these papers available ready for production. So these various documents are properly obtainable by either side in connection with the case.

Now, proceed, Mr. Strachan. Let's have the document marked for identification. Is it part of another document that was heretofore marked or is this something new?

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: This is a complete document.

The Clerk: Defendants' Exhibit B, your Honor, for identification. [1103]

The Court: Exhibit B.

(The document referred to was marked as Defendants' Exhibit B for identification.)

Q. (By Mr. Strachan): Mr. Winckler, I show you the document that has been marked Defendants' Exhibit B, entitled Winckler & Smith Citrus Products Company Financial Statement, January 31, 1951, Hodge and Company, Certified Public Accountants, 205 South Beverly Drive, Beverly Hills, California. I ask you if you have seen that document or the original of which that is a facsimile before?

A. Yes, I did.

Q. Now, I am calling your attention to the balance sheet, which is the next to the last page of that exhibit, and ask you if it isn't a fact that the fixed assets as shown on that balance sheet represent machinery and equipment, $70,000; furniture and fixtures, $7,300; leasehold improvements, $20,000; tools, $183.00; total before depreciation $97,800; less depreciation and amortization, approximately $92,000 in total fixed assets?

A. You mean before or after reacquisition of the plant?

Q. This is before reacquisition, is it not?

A. That is correct. That is the machinery which we purchased.

Q. During the time that you leased? [1104]

(Testimony of Nicholas J. Winckler.)

A. That is correct.

Q. And that is all that is included in those fixed assets?

A. No. The original plant is not included.

Q. Because the original plant was owned by another person?

A. Owned by the lessor, correct.

Q. Right. Now, the lease and your option to repurchase is shown on this balance sheet as having $1.00 value. A. A nominal value of $1.00.

Q. That is what it shows, isn't it?

A. Yes. Regular accounting practice. Counsel, please, may I——

The Court: What is your request?

The Witness: There is a very important part of that report where the fixed assets are stated by Hodge and Company explaining that $1.00 repurchase amount that counsel failed to mention.

The Court: Well, we can go into that later.

Q. (By Mr. Strachan): Now, following January 31, the company exercised its option to repurchase from the lessor, is that correct?

A. That is correct.

Q. And when the lessor purchased those assets, it gave $50 in cash and assumed certain liabilities, is that correct, [1105] which were liens against the property, including the RFC mortgage?

The Court: $50,000, counsel.

The Witness: You say $50?

Mr. Strachan: $50,000. Pardon me.

Q. Gave $50,000 in cash. A. Who did?

(Testimony of Nicholas J. Winckler.)

Q. The purchaser at the reorganization sale when you sold these assets. A. Correct.

Q. And the additional purchase price consisted of an assumption of the RFC mortgage and other liens? A. Approximately $90,000.

Q. Yes. A. Correct.

Q. When you exercised the repurchase agreement, you assumed certain liabilities, which included the RFC mortgage and other liens, didn't you?

A. According to my best recollection, we assumed only one lien, the RFC.

Q. All right. In addition to that, you paid in cash $17,000 and issued preferred stock for about $133,000 to make up the balance of the $150,000 option price? A. When we repurchased it.

Q. Yes, sir. [1106] A. That is correct.

Q. That was after this January 31 balance sheet that I just showed you, that you reacquired the property? A. Yes.

Q. Now, when that property was reacquired and was put back on the balance sheet of the corporation, the assets taken back from Rubin were again written up by appraisal, were they not?

A. May I explain the transaction, your Honor? I think it would save time.

Q. That calls for a yes or no answer.

The Court: First see if you can answer the question. The question is, were the assets written up—I don't know, probably you and the witness understand this, but——

(Testimony of Nicholas J. Winckler:)

Q. (By Mr. Strachan): They were not put on the books at $150,000, were they?

A. Yes and no.

The Court: All right, now, explain your answer.

The Witness: According to our tax returns, we have to keep the value of our assets exactly in the amount that we acquired them or reacquired them. So we had actually two evaluations. The one was the base to make the federal income tax returns. If we purchase something for $100, we had to put it in for $100, and we took always the maximum depreciation allowable under the federal law. [1107]

On the other hand, when we kept our books according to realistic value, which was completely apart, for how much we purchased or repurchased it, then we kept a separate set of the inventory of such fixed assets, which were stated at the realistic appraised value, and we have appraisals made, as I testified before, by a bonded appraisal company periodically, and that we sold Mr. Rubin and his associates the plant for $50,000, which was a distress sale, had nothing to do with the realistic or actual value of the plant, because it was just putting in the pawn shop a diamond ring for $100 which was worth a thousand dollars, and as long as you can get back the diamond ring for $100 plus interest, we are not interested in the price. [1108]

The Court: All right. Now, I understand that. But now, tell us what you did.

Q. (By Mr. Strachan): After you paid $150,000 for Rubin's interest in the property, you did not

(Testimony of Nicholas J. Winckler.)

set up $150,000 as the cost of those fixed assets, did you? A. According to our tax return we did.

Q. Did you according to your balance sheet?

A. According to our balance sheet we took the actual realistic appraised value, less depreciation, according to good accounting practices.

The Court: Let me ask a question.

Mr. Strachan: Surely.

The Court: When you repurchased from Rubin and set it up, as you say, realistically, did you then take the same values, less depreciation, at which you had previously carried this property?

The Witness: In a sense yes, your Honor.

If you recall, I testified that we made an appraisal in 1946. Then between 1946 and 1951, over a period of five years, we made substantial improvements in the real estate, and also acquired substantial additional equipment. So in 1950, and also in 1951, we had the property reappraised, which was a continuation of the 1946 appraisal, just bringing it up to date.

The Court: All right. But you used, upon the repurchase [1109] of the property from Rubin, for the purpose of what you refer to as your realistic appraisal—I don't know what the bookkeeping term would be—did you use, generally, the same base that you had used prior to the sale?

The Witness: I am sorry, your Honor, I don't understand exactly the question. I don't follow the question.

The Court: You know what I am trying to find out, counsel. Do you want to pursue it, or do you want me to?

Mr. Strachan: The fact is they didn't. They got a new appraisal, which was dated January 12, 1951.

Mr. Dixon: I think the picture is somewhat beclouded by the fact that it isn't made clear to the jury that there are two appraisals here.

Mr. Strachan: That is what the judge is trying to get at.

Mr. Dixon: One in '46, I understand, and another one about '49 or '50.

The Witness: That is correct.

Mr. Dixon: And the valuations would be obviously higher or lower in both of them.

The Court: Let me see if I understand this.

You had an appraisal in '46, to start with?

The Witness: Correct.

The Court: Then did you get some reappraisals from time to time?

The Witness: We had a reappraisal in 1950, four years [1110] later.

The Court: Did you have a reappraisal, then, early in '51?

The Witness: We had a reappraisal in '51.

The Court: And the reappraisal in '51, then, was the basis upon which you set up what you speak of as the realistic value of the plant?

The Witness: That is correct. But at the same time, when we filed our tax returns we had to figure the value of the plant for the $150,000 that we reacquired it from Rubin, plus $50,000 RFC loan,

(Testimony of Nicholas J. Winckler.)

which makes two hundred, plus approximately $100,000 additional equipment that we put in ourselves during the period that the corporation operated the plant as a lessee. Consequently, our tax return will show a plant evaluation of approximately $300,000, which is based on the reacquisition price, while the so-called realistic price will show the appraised value, less depreciation.

The Court: All right. Let's go ahead.

Q. (By Mr. Strachan): Isn't it a fact that three months after you reacquired, three or four months after you reacquired these assets from Rubin for $150,000, part in stock and part in cash, you showed fixed assets as of the end of July 31, 1951, of $721,000?

A. Well, that is correct. That is just what I explained. It is based on the appraisal. [1111]

Q. That appraisal was dated January 12, 1951, wasn't it?

A. The appraisal was a continuation of the previous——

The Court: Now, wait. Start back again. Listen to the question and answer the question. Then if you want to explain you may do so.

He asked you now the date of this appraisal, whether it was January 12, 1951.

The Witness: The answer is no, but it needs some explanation.

The Court: All right.

The Witness: Our first——

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: There is no question pending. He said, "The answer is no."

The Court: He may explain it, counsel. Everything in this world is not black or white.

The Witness: The last complete appraisal that was made item by item was, I think, 68 pages, it was made in 1950. Between 1950 and 1951, I believe we acquired additional $16,800 worth of equipment. I took that from a photostatic copy from our counsel. Exactly $16,740 worth of equipment. In spring or winter, 1951, we were ready to file an application to the Division of Corporations of the State of California to issue securities, as it was discussed before.

The Court: Let's stick to the particular [1112] problem.

The Witness: Yes, your Honor. What I try to say is that the Corporation Commissioner demanded an up-to-date appraisal. The Corporation Commissioner was not satisfied with the 1950 appraisal. The appraisal is a very expensive thing. So we settled with the Division of Corporations that we will make an amendment to our 1950 appraisal. And that amendment is in one letter which I would not call an appraisal. That one letter includes only addition in machinery and equipment totaling $16,740, plus a correction in the general value, due to the increasing prices since the Korean War, which was not taken into consideration, of approximately 8 per cent. And that appraisal resulted in a gross amount of $732,000, from which amount our accountant took a depreciation for a period of six months, or something like that, and that depreciation figure brought the $732,000 down to the $721,000 that counsel mentioned.

The Court: All right. Now, let's get back. This letter which you refer to as an amendment, one-page letter——

The Witness: Correct.

The Court: ——was that dated on or about January 12, 1951?

The Witness: I believe so.

Mr. Dixon: We have it. This is the appraisal we were discussing yesterday, your Honor, and it is available to counsel or the court. [1113]

The Court: All right.

The Clerk: I have marked Defendants' Exhibit C for identification, your Honor.

The Court: Exhibit C marked.

(The exhibit referred to was marked Defendants' Exhibit C for identification.)

* * *

Q. (By Mr. Strachan): So that having started with sixty some thousand fixed assets before buying the plant and equipment from Rubin, you paid him $150,000 for the plant and equipment, and you then have seven hundred twenty some thousand of fixed assets by July 31st of 1951, isn't that a fact?

A. Well, counsel, I think I explained the situation. I don't think I have to add anything to it.

Q. Well, that is the fact, isn't it?

A. The value of the plant was always the same.

(Testimony of Nicholas J. Winckler.)

regardless [1114] how it was footballed around between buyer and seller.

Q. (By Mr. Strachan): Well, now, the Judge asked whether you took the same values on land and buildings after reacquiring the assets that those assets had at the time you sold them to Rubin.

A. No, because I didn't sell to Rubin—we didn't sell to Rubin the assets at its realistic value. That was a forced sale on a reorganization.

Q. You mean you sold the assets for less than they were worth?

A. Oh, considerably. Twenty cents on the dollar. May I explain again something?

The Court: No.

Q. (By Mr. Strachan): Did Mr. Rubin, when he sold those assets back to you, sell them back to you at twenty cents on the dollar?

A. He probably sold them back at thirty cents on the dollar or thirty-five cents on the dollar. He made a profit.

Q. He sold the assets worth approximately $600,000 for $150,000, partly cash and partly stock, is that right?

A. 150,000 plus, 200,000. Assets were sold for $200,000, that is correct.

Q. By Rubin to the corporation?

A. That is correct.

Q. Now, you continued to own the plant until some time in the spring of 1952, when it was sold, with the approval of [1115] this court, is that correct? A. That is correct.

(Testimony of Nicholas J. Winckler.)

Q. As at the end of your fiscal year ending January 31, 1951, which was shortly prior to the sale, forced sale, by this court, in 1952, the assets were still carried, the fixed assets were carried at approximately $700,000? A. That is correct.

Q. Pursuant to the order of this Court, those fixed assets——

The Court: Now, just a minute, counsel. Are you proposing to go into the sale that occurred after the adjudication in bankruptcy by this court or during the bankruptcy proceedings?

Mr. Strachan: During the bankruptcy proceedings.

The Court: For what purpose?

Mr. Strachan: To show what the real value of those assets was.

The Court: It is your contention that a bankruptcy sale is evidence of real value?

Mr. Strachan: It may be a forced sale, but I think we are entitled to show, your Honor, what was realized for the bankrupt's interest in those assets.

The Court: I will hear you on that at recess before we go into it.

Mr. Strachan: I will suspend this line of examination [1116] until the ruling.

The Court: Do you have other questions you can ask?

Mr. Strachan: Yes, sir.

The Court: All right.

Q. (By Mr. Strachan): Remember, Mr. Winckler, yesterday you mentioned——

(Testimony of Nicholas J. Winckler.)

The Court: Well, we will take a recess probably about 10:30, so maybe we could take it now and discuss this.

Mr. Strachan: This is a very short subject.

The Court: All right.

Q. (By Mr. Strachan): Remember that yesterday you mentioned that in 1948, when the corporation was being operated by a receiver pending the attempt to work out an adjustment, that there were dealings between the receiver and Exchange Orange Products Company. Do you recall having referred to that?

A. If I recall correctly, I stated yesterday that not the receiver, but I negotiated the deal in behalf of our corporation with Mr. Finley, and after the deal was made between Mr. Finley and our corporation and reduced to writing, then the corporation being under Chapter 11 in the receivership, the receiver had to enter into a formal agreement with Sunkist or, rather, Exchange Orange Products to carry out the agreement. But I made all the arrangements prior to that agreement. [1117]

Q. But the contract under which fruit was supplied for the purpose of carrying out the government contract was an agreement to supply to the receiver, isn't that the fact?

A. Well, I am not very well qualified to answer that, because there are two agreements, one between the corporation and Mr. Finley and one between the receiver and Mr. Finley, and I think that the written agreement should be self-explanatory.

(Testimony of Nicholas J. Winckler.)

The Court: Why should we spend time on this when we can agree on the legal situation, what it was?

Mr. Strachan: I would be very glad to stipulate.

The Court: My recollection is—I happened to have had the case—my recollection is that there was an application that the debtor remain in possession pending the filing of the Chapter 10 proceeding. Is that right?

Mr. Fisher: Your Honor, this refers to the Chapter 11 proceedings in 1948, not Chapter 10.

The Court: Oh, you are talking about the 1948 proceeding?

Mr. Fisher: Yes.

The Court: I know nothing about that. I'm sorry. Go ahead. Maybe we can work out some stipulation as to the Chapter 10 situation if that becomes important.

The Clerk: I have marked Defendants' Exhibit D for identification. [1118]

The Court: D for identification.

(The exhibit referred to was marked as Defendants' Exhibit D for identification.)

Q. (By Mr. Strachan): I show you the document, Mr. Winckler, that has been marked Defendants' Exhibit D, which purports to be an agreement entered into the 27th of August, 1948, by and between E. A. Lynch, Receiver for Winckler & Smith Citrus Products Company, and the Exchange

(Testimony of Nicholas J. Winckler.)

Orange Products Company, and ask you if you have ever seen that agreement before.

A. Yes, I did.

Q. Is that the agreement under which the fruit was supplied for the performance of the government contract? A. There were two agreements.

Q. Is that the agreement——

A. That's right, one of the two agreements.

Q. Is that the agreement, is that an agreement under which the fruit was supplied?

A. I answered already, counsel. It is one of two agreements.

Q. Will you name the other agreement?

A. The other agreement is a letter agreement exchanged between Mr. Finley, Exchange Orange Products, addressed to me as president of the corporation, and I don't know—our counsel has the letter. I don't know the date. [1119]

* * *

The Court: All right. It will be marked D-1 for identification. If later the plaintiff offers it, we will give it a plaintiff's number.

The Clerk: D-1.

(The document referred to was marked Defendants' Exhibit D-1 for identification.)

The Court: What is the date of the letter?

The Clerk: August 19, 1948.

The Court: Proceed.

The Clerk: I have also marked Defendants' Exhibit E, your Honor.

The Court: Exhibit E marked.

(The exhibit referred to was marked Defendants' Exhibit E for identification.)

Q. (By Mr. Strachan): I show you, Mr. Winckler, Exhibit E, which is a photostatic copy of a letter dated October 29, 1948, addressed to the Exchange Orange Products Company, signed by E. A. Lynch, Receiver, and ask you if you have ever seen that letter before.

A. No, I have not. But I accept it because I know Mr. [1121] Lynch's signature.

The Court: Just answer the question. The question is, have you seen the letter?

The Witness: No.

The Court: The answer is no. All right.

Q. (By Mr. Strachan): I think you testified yesterday you didn't authorize the receiver to write a letter.

A. I had no authority to tell the receiver what to do.

* * *

The Court: The jury is now absent. Now, I understand the defendants are going to offer evidence of the present bankruptcy proceedings and what the physical properties of the corporation sold for.

Mr. Strachan: Yes.

The Court: This comes as a—it startles me. Maybe it is proper. I didn't hear any objection from Mr. Dixon, but it doesn't seem to me that what a property would bring in [1122] bankruptcy—I was

(Testimony of Nicholas J. Winckler.)

going to say is any evidence, but maybe it is some evidence of what its market value is.

What is your view on this, Mr. Dixon? [1123]

Mr. Dixon: Well, your Honor, I have really no objection, as your Honor has suggested, to that part of the record of this court going into the record in this case, because from our point of view it shows what ultimately happened to the plant.

The Court: If you both agree, all right.

The fact startled me, that there was going to be this evidence offered. But if that is what you both want, then I suppose you both claim it has some probative value for something or other.

Mr. Dixon: May I say this, further, your Honor? It seems to me that the sale price may have some value as indicating the price at which the property was, in fact, sold as a forced sale.

I don't think it necessarily reflects the true value, but it does reflect the value where there is no purchaser, shall we say, for a restricted product.

The jury may consider that as evidence of true value, or not. I am frank to say I don't know what the jury would do with that.

But as far as the fact of sale is concerned, the plaintiff has no objection to the introduction of that evidence.

The Court: Just a minute. I understand that you have no objection to the fact of sale, that you probably will want to prove that. That is not what was worrying me. What was [1124] worrying me was these figures of the sale.

(Testimony of Nicholas J. Winckler.)

What is your view, Mr. Strachan, as to the admissibility and probative value of the sale in bankruptcy?

Mr. Strachan: Did you address a question to me, your Honor?

The Court: Yes. I probably was sitting down here and my voice was hitting this bench and not getting over the top.

I say, what is your view as to the probative value of the sale price of the property in bankruptcy? That is, the sale price as contrasted with the fact that there was a sale in bankruptcy, alone.

Mr. Strachan: I would say this, your Honor: That a sale at public vendue of assets presumably brings the worth of those assets.

In this case I believe there was an appraisal made to advise the court of the particular value of the fixed assets that were offered for sale, and the court sold, subject to encumbrances, the right, title and interest of the——

The Court: Maybe I am thinking of condemnation cases. In condemnation cases where the question is what was the fair market value as of the date of taking, the court wouldn't even let into evidence testimony of what a certain piece of property sold at a bankruptcy sale. Nor would the court ordinarily let into evidence the price at which the Government compromised and paid off—— [1125]

Mr. Strachan: A compromise, I would agree.

The Court: Maybe I am just thinking of those

(Testimony of Nicholas J. Winckler.)

cases and the rather strict rule in condemnation cases that wouldn't permit such value.

Of course the two of you are looking at it from different standpoints. Mr. Dixon wants it in because it shows there was a bankruptcy sale, and therefore he doesn't care what the value was. You are not concerned with the fact that there was a bankruptcy sale. You want to use the sale price as evidence of the value of the assets. Is that right?

Mr. Strachan: That is right.

The Court: Your purposes are divergent.

Well, if both sides think they can make something out of it, and one offers it and the other doesn't object, I am not going to keep it out, although I have serious doubt about it. It sort of affronts my concept of how you prove value, to use a bankruptcy sale for the purpose of value.

Mr. Dixon: Of course, as I have stated before, your Honor, I have no objection to the introduction of the fact of sale into the record, because I intended to put it in as part of the plaintiff's case through the trustee. I understand that Mr. Strachan intends to introduce the amount received from the sale as apparently the value at the time of the sale of the property sold.

Of course it was the price at which the property was [1126] sold. That is not in dispute. It is, however, a forced sale.

The jury might take that into consideration if value is of import, and it probably may well be in this case, as one of the factors in determining the true value of the property.

(Testimony of Nicholas J. Winckler.)

But I quite agree, and I think counsel must agree, also, that the real value—value is always an intangible thing—cannot be determined in toto by the value or the price acquired at a forced bankruptcy sale.

The Court: I will permit you to proceed on that basis. Mr. Dixon, if you are going to go any further than the mere stipulation of showing that there was the loss of the property in bankruptcy, then I suppose we have to go all the way and go into the question of value.

But it may be proper to handle the matter by an instruction on what is fair market value.

You are all familiar with the general instruction sort of to the effect that fair market value of property is that which a willing seller who didn't have to sell would sell for, and a willing purchaser who didn't have to purchase would pay, and a few other things thrown in.

Mr. Stark.

Mr. Stark: If I may, I believe you are stating the value rule in condemnation actions, which allow you to assume that at a particular time there is a willing buyer, where property is being taken involuntarily. But what we are dealing with [1127] here is a particular buyer for a voluntary sale.

The Court: We will cross those bridges when we get to them, but I will permit you to proceed.

I don't know that I quite get your suggestion, Mr. Stark. I want to understand it. Do you mean there would be a different rule as to fair market value in this case than in a condemnation case?

(Testimony of Nicholas J. Winckler.)

Mr. Stark: I am not sure—I don't want to labor the point, but I am not sure that we are dealing with fair market value in a condemnation sense. In a condemnation sense you take somebody's property as of now, because you want it, and they are entitled to find the highest use and the highest value if they can wait for a buyer.

The Court: But the defendants' position, if I understand it, is this: that Winckler & Smith's statement of values are phony, that they have inflated and written up their values, and they claim that they had a business with fixed assets of $300,000 or more —I am just taking some arbitrary figures—and they claim they were damaged. Now, let's for argument say, "Ladies and gentlemen of the jury, lay aside the question of damage, that is, whether damage occurred, and proceed for argument to say that it did, what was the damage? This company's assets had no value, it was sold in a bankruptcy sale in Federal Court for $100 over and above the amount of the RFC loan"—I think that was the amount of the sale— [1128] "therefore, actually it had a $100 value, that is what their whole plant was worth, $100."

In other words, what you propose to do, and of course you are entitled to make this argument—I am talking now about whether certain evidence is admissible to base it on—what you are doing then is saying what was the value of this plant and this business which plaintiffs say we hurt or destroyed.

So it seems to me, in theory, that generally fair marekt value is involved, although there may well be involved the subsidiary problem of whether you could have found a purchaser for this business. That, therefore, it was the type of business which had one value in one sense, but when you came to sell it maybe you couldn't find anybody who would ever buy it, which would be a factor in what it was worth.

Maybe this will clear the air for some later determination of what is the law on it.

We will take a short recess.

(Recess taken.) [1129]

The Court: Let the record show the jury present.

Proceed.

Q. (By Mr. Strachan): Mr. Winckler, yesterday—no, I guess it was the day before yesterday—in any event, on direct examination you mentioned that you made various efforts to get credit with which to refinance the RFC mortgage. You mentioned the Bank of America at Anaheim.

A. Correct.

Q. What other efforts did you make to get refinancing?

A. I had a broker contact a couple insurance companies. Then I contacted some private lenders and they all turned us down, and mainly for two——

Q. They all turned you down?

A. For two reasons.

Q. All right.

(Testimony of Nicholas J. Winckler.)

A. Are you interested in the reasons? I mean I don't want to volunteer.

Q. Is that all of the efforts that you made to get refinancing?

A. Well, bank, private lenders, insurance companies—that's all—including our own stockholders.

Q. Would that include Rubin?

A. Yes, mainly Rubin.

Q. What was the amount of that loan at that time?

A. Only $50,000, probably $51,000. [1130]

Q. In addition to trying to refinance that $50,000 mortgage, did you at any time before the properties were sold under the authority of this court, try to find a buyer for the properties? I am talking now about the plant and equipment.

A. You mean before or after the reorganization?

Q. Before the sale in 1951—no, 1952.

Mr. Dixon: If the court please, this property wasn't sold in 1952. Counsel is in error.

The Court: What was the date?

Mr. Strachan: 1954.

The Witness: No, 1953. January, 1953.

The Court: The sale?

The Witness: The court sale, I am referring to the court sale.

Mr. Dixon: It was 1954, your Honor.

The Witness: January, 1953, two years ago.

The Court: Wait just a minute. Who has the date? Well, the date isn't filled in, but the order approving the sale was made in—well, this copy shows

(Testimony of Nicholas J. Winckler.)

February, 1954. The date isn't filled in. What is the date?

Mr. Fisher: The order confirming the sale, and by the way that order was made by Referee Head, was on February 5, 1954.

Mr. Strachan: Can we have that as the stipulated date?

Mr. Dixon: Why, surely. [1131]

The Court: All right.

Q. (By Mr. Strachan): During the period from the fall of 1951, until the sale of the property that was confirmed by this court in February of 1954——

The Court: Now, wait, wait. You will have to rephrase that question, counsel, because of the history of this current bankruptcy.

What I am referring to is the fact that there was, first, the debtor proceeding and then there was an adjudication. Now, during the debtor proceeding your question would be proper. After the adjudication I don't think that period is proper.

Mr. Strachan: I don't understand that there was an adjudication, your Honor. Mr. Fisher is more familiar than I am with that.

The Court: Wasn't there an adjudication?

Mr. Fisher: May the court please, perhaps I can be of assistance.

The Chapter 10 proceedings, a petition was filed March 19th in 1952. Mr. Walker was appointed the trustee. The petition was filed under the Chapter 10 proceedings and proceeded under those proceedings

(Testimony of Nicholas J. Winckler.)

and there has never been an adjudication of bankruptcy, itself.

The Court: Is that correct?

Mr. Irwin: That is correct, your Honor.

The Court: I thought there had been an adjudication. [1132] I thought that I had so ordered.

Mr. Fisher: Perhaps this further explanation, then, is in order.

The Court: All right.

Mr. Fisher. In Chapter 10 proceedings, looking towards reorganization, they continue in Chapter 10 until there has been a finding of insolvency and an adjudication of bankruptcy, itself, and if there is such an adjudication, then a trustee in bankruptcy is appointed and they proceed, then, as an ordinary bankruptcy proceeding. In these Chapter 10 proceedings——

The Court: And the Chapter 10 proceeds until there is such an adjudication?

Mr. Fisher: Yes.

The Court: And there has not been one?

Mr. Fisher: There has not been one.

The Court: I stand corrected, then.

Mr. Fisher: Perhaps, too, this will clarify it. I have a summary, though we do have the order itself. There was a return of sale by the trustee and a petition for confirmation of the sale filed on February 2, 1954, and on the same date Referee Head made an order confirming the sale, and that confirmed the sale by the trustee to Allen A. Rubin for the sum of $100. The said Allen A. Rubin being the highest bid-der, therefore, of all of the right, title and [1133] interest of the debtor in and to all of the real and personal property of the debtor, except only the debtor's right to the use of the trade-mark Anagold, subject to all liens and encumbrances of every kind and character thereon, which said real and personal property is described as follows, and then follows the description. All of the personal property of the debtor located at and or adjacent to said real property.

And there was the sale of the Anagold trade-mark to the Muscat Co-operative Winery, and that was for $1,000.

The Court: One other thing: At the time of the sale the real property and the physical fixtures appurtenant thereto were encumbered by the RFC loan?

Mr. Fisher: That is correct.

The Court: Was there also a chattel mortgage on equipment?

Mr. Irwin: Yes, your Honor. In the RFC matter there was a deed of trust covering the real property, and a chattel mortgage covering the equipment.

The Court: Which both ran to the RFC?

Mr. Irwin: Both ran to the RFC.

The Court: The RFC had encumbrances on substantially all of the real and personal property?

Mr. Irwin: That is true.

Mr. Fisher: There was also a second deed of trust to, I believe, Rubin and Parwin. [1134]

Mr. Irwin: To be technical, it was in favor of

(Testimony of Nicholas J. Winckler.)

Parwin. And the second deed of trust and second chattel mortgage covered the entire equipment, subject to the RFC deed of trust. [1135]

The Court: What was the amount of the obligation on the 2nd?

Mr. Irwin: $57,500.

The Court: Now, can we accept these facts as being stipulated to so that the jury may consider them as facts?

Mr. Strachan: I can.

Mr. Fisher: So stipulated.

Mr. Irwin: So stipulated.

The Court: Thank you for straightening me out, Mr. Fisher. I have lived with these proceedings and I thought I knew what had happened, but I am wrong. Your question is entirely proper then, Mr. Strachan.

Mr. Irwin: May I say one thing further, your Honor? In connection with the adjudication of the bankruptcy, there was an application during Chapter 10 proceedings to have the debtor, Winckler & Smith, adjudicated a bankrupt. I believe that was in the latter part of 1952 or the early part of 1953. But my remembrance is that the court held that a reorganization by liquidation was proper in the Chapter 10 proceeding. Therefore an adjudication was denied and the plan of reorganization by liquidation was approved.

The Court: I recall. Now you have straightened me out. Thank you.

Mr. Irwin: The trustee then proceeded to carry through the liquidation, and it was pursuant to that

(Testimony of Nicholas J. Winckler.)

proceeding that [1136] the trustee then negotiated the sale which has been referred to and which was approved by Referee Head and by this court.

The Court: That also may be considered part of the facts?

Mr. Fisher: Yes. I am sure it is correct, although I had forgotten that fact.

The Court: I stopped you because I remembered erroneously there had been an adjudication and therefore I was going to make you ask a question up to the date of the adjudication, at which time, of course, the corporation's interest would terminate.

Now you may proceed, Mr. Strachan.

Q. (By Mr. Strachan): What, if any, efforts to find a buyer for the plant or any of its assets did you make between the fall of 1951 and the spring of 1954?

A. Both the trustee, Mr. Walker, as well as myself, did everything possible to find a buyer who would purchase the plant on reasonable terms and at a reasonable price. But we were turned down by everybody in the industry, as well as outside of the citrus industry, for one reason, that they said a plant which was built for the purpose of producing citrus juices and which is unable to supply oranges, or oranges at competitive prices, is of no value. It is just a hotel where you couldn't rent rooms.

Q. Would you name the persons that you know were contacted [1137] with a view to finding a buyer?

A. Well, Mr. Walker when he testifies, I am

(Testimony of Nicholas J. Winckler.)

quite sure he is going to name the people that he testified. I advertised the property and I am not prepared to list the names of all the people, but I negotiated with dozens of people who were not interested to enter the citrus industry under this condition.

Q. Would you name one person that you contacted?

A. Well, Mr. Walker talked to the Silzle Corporation. I talked to a man called Oscar Rudnick, who is a big cattleman and who had some interest at this time in the citrus industry, and was known to be a very wealthy individual, and if counsel so desires, I can give an exact list of names tomorrow. You said to mention one, so I mention Rudnick.

Q. Do you know where he is now?

A. Oh, yes. He lives and has been living for the last 35 years in Bakersfield, California.

Q. Will you name another that you contacted with a view to sale?

A. I just throwed away last week a dozen cards that I carried in my pocket. There was a retired Louisiana Chevrolet dealer who wanted to buy. Instead he bought himself a bank in Pasadena.

Q. What was his name?

A. That is what I am trying to think of. I would greatly [1138] appreciate if you would let me give you those names tomorrow, because it would be precise and I could supply names and addresses, and so on.

(Testimony of Nicholas J. Winckler.)

Q. That will be satisfactory.

A. I will be very glad to do so.

Q. What advertising did you do in your efforts to sell the property?

A. Well, I advertised in the leading newspapers, such as the Los Angeles Times.

Q. Can you fix the date of your advertising?

A. Well, I think I can probably dig up at home the actual ads.

Q. Will you refresh your recollection and bring any material that will refresh your recollection on that subject?

A. I am very happy to do so.

Q. Now, in regard to the people from whom you sought credit to refinance the mortgage, you said you contacted two insurance companies. Will you name those companies?

A. I said that I had a broker contact these insurance companies.

Q. What is the name of that broker?

A. A certain Mr. Graef, G-r-a-e-f, doing business as California Properties, Inc.

Q. Where does he do business?

A. In Los Angeles. [1139]

Q. Is he still doing business here?

A. Yes. Now it just comes to me. I contacted certain people in New York. Among others, I contacted the Blair Holding Corporation, which is a subsidiary of the Bank of America. The reason for contacting the Blair Holding Corporation was that they owned substantial interest in the Lucky Market

(Testimony of Nicholas J. Winckler.)

Chain. That is a big super-market chain in Northern California, around San Francisco.

Q. Whom did you contact within that organization?

A. In that organization I had contact with a certain Mr. Truman, and then also I had direct contact with the president, he was president at that time of the Blair Holding Corporation, Virgil Dardi, D-a-r-d-i, if I remember correctly.

I also had a contact with the California associates, which is the first——

Q. Just a minute, before you go to that. The Blair Holding Company which you contacted were in New York. Were both of their representatives that you contacted in New York, too?

A. They were both in the New York office, but they maintained offices in San Francisco.

Q. Did you contact them in San Francisco?

A. No. I contacted the New York office.

Q. Then you said you contacted another organization [1140] when I interrupted you.

A. The First California Corporation.

The Court: You said California Associates. Is that the same thing?

The Witness: No. California Properties. That is a one-man outfit who is really a business opportunity broker.

The Court: California Associates?

The Witness: No. They call themselves California Properties, Inc. The owner of this corporation is a certain Mr. Graef. [1141]

(Testimony of Nicholas J. Winckler.)

Q. Where does he live?

A. He has his office at the Commercial Exchange Building on West Eighth Street here in Los Angeles.

Now, the First California Corporation that I contacted is a large investment banking house, and the president of the First California Corporation, which has probably 24 offices all over Southern California, happened to be a director on the Blair Holding Corporation's board, and the reason I conducted these negotiations in New York was because they had at this time their annual stockholders meeting, and Mr. Evans happened to be in New York at this time, and Mr. Evans was the one who suggested that we meet in New York and discuss the matter with Mr. Dardi, the president of Blair Holding Corporation.

Q. When I interrupted you a few moments ago I think you mentioned, as the judge remarked, an organization known as California Associates. Did you contact California Associates?

A. California Properties, Incorporated; not California Associates.

Q. I see.

The Court: He explained that that was Graef's organization on West Eighth.

Mr. Strachan: I wanted to make sure that those were the same, if that is the fact.

Q. (By Mr. Strachan): You know the one who bought the [1142] assets of the corporation in February or March, 1954, to be Mr. Rubin, do you not?

A. Well, technically speaking, one of the Mr. Rubins acted as buyer, but the way I was told, the sale was financed by Mr. Rubin and by Mr. Parwin, jointly, in order to protect their second trust deed, and they had to pay off the RFC in the amount of $56,000 or $55,000, something like that, in cash.

Q. That is the same Mr. Rubin that you have mentioned before, isn't it, who was an officer and director?

A. There are two Mr. Rubins. Mr. Maxwell L. Rubin is the one who was an officer and a director of our corporation. He has a brother called Allen Rubin, who is running his law office in Chicago. Sort of the office manager of the law office. I understand they have about 12 attorneys in the law office. And Mr. Rubin is more interested in various business enterprises than running his law office, so he leaves that to his brother.

The Court: Which Mr. Rubin was the buyer?

The Witness: Allen Rubin was the buyer.

The Court: The attorney?

The Witness: Both are attorneys.

The Court: Then Allen Rubin, the lawyer you have just described that was the office manager?

The Witness: The property was acquired in his name, [1143] and I understand he is holding it in trust for Maxwell L. Rubin, his brother, and for Albert Parwin, who is a furniture manufacturer.

Q. (By Mr. Strachan): The last time you knew about the ownership of the building he still owned it in that way?

(Testimony of Nicholas J. Winckler.)

A. Do you mean at the present?

Q. Yes.

A. I know definitely that they do.

Q. Do you have any present interest in the plant?

A. Well, I have one interest. They are very anxious to sell it, and I am still trying to sell the plant, and if I sell it I probably will make a commission. That is my only interest that I have. I have no ownership in the plant.

Q. How long have you been trying to sell the property for the Rubins?

A. I would say for the last year.

Q. Is the property being used for anything now? A. No, it is not.

Q. Has it been at any time since it was sold to the Rubins? A. It is not.

Q. I believe you testified, Mr. Winckler, on your direct examination, that until the year in which you went out of business you had a highly profitable organization in Winckler & Smith Citrus Products Company, is that correct? [1144]

A. Until the day I went out of business?

Q. Until the time—no. I said until the year when you went out of business. A. Correct.

Q. Now, as a matter of fact, during the entire period of operation this business never paid a Federal income tax, did it?

A. Well, that is not so.

Q. In what year was a Federal income tax paid?

(Testimony of Nicholas J. Winckler.)

A. The first year when we operated as a partnership till December 31st we made $95,000 net profit as a partnership for six months' operation. Then we adopted a fiscal year of January 31st—I mean from February 1st to January 31st. During the month of January we discarded a lot of old equipment. As I stated, we invested year after year machinery into the plant. And we paid in 1946 income tax for the fiscal year ending—pardon me—we paid income tax in 1947 for the fiscal year ending January 31st, 1946.

Q. What you are referring to there is the partnership operation, is it not?

A. It was the predecessor of Winckler & Smith Citrus Products Company.

Q. But when you are operating as a partnership, the business doesn't pay the income tax, it is the partners, isn't that a fact? [1145]

A. That is correct.

Q. All right. Now, Winckler & Smith company never paid an income tax, isn't that true?

A. Well, that needs some explanation.

Q. Well, is it or isn't it true?

A. Well, I wouldn't be able to state it without seeing the income tax returns.

Q. Can you as you sit there now tell us of any year in which Winckler & Smith company paid a Federal income tax? A. I cannot.

Q. Isn't it a fact that it never paid an income tax?

A. You probably are right, but I can't make a definite statement without seeing the income tax returns.

The Court: Are they available?

Mr. Dixon: I think some of them are, your Honor. We are perfectly glad to say. The answer to the question is obvious. We will bring it out through our accountant.

The Court: All right. The returns are available, that is all I wanted to know.

Q. (By Mr. Strachan): As I recall your previous testimony, the corporation took over the assets from the partnership, and among the assets taken over were the earnings of the partnership business—— A. Correct.

Q. ——that had not been distributed to the partners? [1146] A. That is correct.

Q. That was $29,000 of profit?

A. Plus the other assets owned by the partnership.

Q. But the undistributed earnings of the partnership amounting to $29,000 was included in the assets?

A. Well, I could not verify the $29,000 figure without seeing the financial statement. [1147]

The Court: Has this sheet been marked before?

Mr. Strachan: I believe so.

Q. I show you Defendants' Exhibit A-1. I call attention to the tabulation at the bottom. I call attention to the fact that it shows that——

A. Total assets of $240,000.

Q. That is the way it shows there. So that it

(Testimony of Nicholas J. Winckler.)

shows that there was $38,000 of earnings and about $10,000 withdrawn, leaving a net of $29,000 in the business.

A. The total earnings are approximately $38,-897, according to this financial statement. It is not 29,000.

Q. But it also shows, doesn't it, drawings of $10,200? A. Oh, yes.

Q. So that means that there was $29,000 profit left in the business when the corporation took it over?

A. $29,000 profit, including assets, making a total of $240,000.

Q. That is what it states there?

A. That is correct. I think it is substantial.

Q. It is a fact, isn't it, for the year ended January 31, 1947, which was the first year under corporate operation, there was a loss of $11,700 on the year's total operation?

A. Well, I recall these figures.

Q. In addition to that, in the same year, you reduced [1148] your inventory value by 48,000, do you recall that?

A. Well, I don't recall the $48,000 figure, but I would make the statement I didn't reduce it.

Q. It was reduced?

A. Circumstances reduced it. That was the year of the big crash in the citrus business.

Q. But in any event you weren't able to sell your inventory at prices that were commensurate with the prices at which the inventory showed on your books, so you reduced the book value of the inventory by 48,000, didn't you?

The Witness: May I have the court's permission to explain that in a few simple words?

The Court: First answer the question. Did you reduce the inventory, the bookkeeping entry that is?

The Witness: That is correct.

The Court: That is, did your corporation reduce the amount shown on inventory by an entry of some sort?

The Witness: That is correct.

The Court: Now explain it.

The Witness: In 1946, the citrus industry, I am referring to the canned citrus juices—frozen citrus juices at that time were not existent for practical purposes—suffered a terrific setback. That goes for Florida and California alike. It is known that probably 18 or 20 plants in Florida and California ceased to operate, went into bankruptcy [1149] or liquidated.

Orange juice sold at the beginning of 1945—1946, at $5.50 a case. Within a few months orange juice price went down as low as $2.00 a case from $5.50. The world's largest citrus processing plant in Florida was ready to go into bankruptcy.

We, like other citrus canners, at this time had a substantial inventory on hand of citrus juices. The inventory represented the prices at the time when it was packed, approximately a $600,000 inventory. We had approximately $400,000 bank loans against

(Testimony of Nicholas J. Winckler.)

that inventory, secured by the inventory. As a matter of fact, we packed this inventory at the recommendation of our banker and with the assistance of our banker, who was willing to make a $400,000 inventory loan secured by warehouse receipts against this loan.

That inventory pack was fatal. That caused us to lose approximately a half million dollars.

Q. (By Mr. Strachan): How much?

A. A half million dollars. On a $600,000 inventory, we lost one half million dollars.

Q. When was that, Mr. Winckler?

A. Now, that loss was taken in installments as the price gradually went down over a period of two years. First, that year when we took the $11,000 loss, we wrote down the inventory only with $48,000. Then we took a much more [1150] substantial loss the next year, and so on.

I have here a letter from Hodge and Company which states exactly the total loss suffered by price reduction, warehousing costs, interest paid, forced advertising, and other circumstances, amounting to a total of $543,667.62, and this loss was taken over a period of three years, 1947, 1948 and 1949.

Q. Now, when you are talking about those years, 1947, 1948 and 1949, are you talking about calendar years?

A. No. I am talking about a fiscal year.

Q. The fiscal year?

A. For the 1946 calendar year, we mentioned $11,000 loss.

(Testimony of Nicholas J. Winckler.)

The Court: Don't mix up calendar years. When you talk of 1946——

The Witness: 1947 and 1948.

The Court: 1947 and 1948, and 1949.

The Witness: Our fiscal year.

The Court: What do you mean by 1947?

The Witness: By 1947 we mean our fiscal year ending January 31, 1947.

The Court: That is what you mean by 1948 and 1949 correspondingly?

The Witness: Correspondingly.

The Court: Now, just a minute. Counsel has a question. [1151]

Q. (By Mr. Strachan): That is, your 1947 fiscal year reflects principally operations conducted in 1946? A. In 1946.

Q. Yes.

A. Now, I like to state that the inventory reduction of $48,000 does not give the complete picture.

On July 31, we had, 1946, $197,000 profit on our books just before we finished the packing season. So the $197,000 was wiped out, and we took a $11,000 loss, so we actually suffered a much larger loss than the $48,000 inventory reduction.

Q. Let's see. What would that amount to? 197—— A. And 11 would be $208,000.

Q. That would be your loss, your true loss in the year ended January 31, 1947?

A. That would be our true loss, losing our profit and losing in addition to that $11,000.

Now, to finish up that situation, we made operat-

(Testimony of Nicholas J. Winckler.)

ing profits every year during 1947 and during 1948, and so on, but these operating profits have not been substantialy enough to wipe out our 500,000 inventory loss. We made operating profits in 1947 of $54,937.

In 1948 and 1949, when the receiver operated during the reorganization, he reported a profit in excess of $50,000.

But these two profits have not been sufficient to [1152] wipe out the $500,000 inventory loss, so that explains why the corporation could not pay taxes, because it is a federal law, so-called tax loss carry forward, that we could take the $500,000 that we suffered and carry it forward for several years.

The Court: All right.

Q. (By Mr. Strachan): You have told us what your total loss was in the fiscal year ended January, 1947. 208,000, I think you said.

Can you give us a comparable figure for the next year, that would be the 1947 processing season?

A. If I have a moment and see if I have a financial statement here, I probably could.

The Witness: Do you have, Mr. Irwin, some financial statements for that here?

Mr. Irwin: Not of 1947.

The Court: He is talking now about the year ended January 31, 1948. That is what you are talkabout, isn't it?

The Witness: Yes, that is what counsel is referring to. But not having the financial statement in front of me, I couldn't remember. However, I could produce it by tomorrow.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): Could you approximate for that year as you did for 1947, and tell us if you had an operating profit of so much, but that was more than wiped out by inventory? [1153]

A. Inventory write-off.

Q. Can't you give us an approximate figure on that?

A. Well, I don't think a guess on figures would be of any value to this court.

Q. You weren't guessing on 1946, were you?

A. That figure I remember because that was an outstanding year of 1946. I will never forget it as long as I live. But in 1947, nothing like that occurred. You can have the figure, counsel, by tomorrow.

Q. Getting back to what we were talking about some time ago, that is the year ended January 31, 1948, the year in which you had a loss of 72,000 before inventory adjustment, and then there was an inventory adjustment of 48,000, so if you combine the stated loss with the inventory loss, you get approximately 120,000, according to the books?

A. Pardon me. There must be some mistake in the dates. You used the 48,000 inventory write-off, if I recall, for the fiscal year ending January 31, 1947. Now you use it for January 31, 1948.

The Court: The testimony so far about the 48,000 involved the year ending January 31, 1947, counsel, according to my notes. [1154]

Q. (By Mr. Strachan): In '47 you showed a

(Testimony of Nicholas J. Winckler.)

loss of eleven thousand some odd dollars, is that right?

A. A total loss. But you stated we took an inventory write-off of $48,000, which resulted in the $11,000 loss.

Q. Then at the end of January, 1947, your cash in the bank was $9,000, your total current assets were $267,000, as compared with current liabilities of $325,000; is that about as you remember that year?

A. Well, you are reading from a statement. We could produce other statements from 1945, and then I could make definite statements. Or if you will be kind enough and show me the statement I can verify it.

The Court: Can't you have a photostat made of this so the witness can have one available when you are asking these questions?

Mr. Strachan: They have the originals at the counsel table.

Mr. Dixon: May it please the court, I want to make a statement at this time, that the defendants have had full access to all the records of this plaintiff corporation, including any of the balance sheets and statements that he is talking about.

The Court: You are using the file from the Corporation Commissioner's office?

Mr. Strachan: That is right. [1155]

The Court: Can't we have some photostats made of these sheets?

Mr. Strachan: We could. But as I understand it,

(Testimony of Nicholas J. Winckler.)

they have the originals from which these photostats were made.

Mr. Dixon: We don't have these records here in court, your Honor. I don't know where they are, to be perfectly frank. We would have to search for them in the files of this corporation.

The Court: I will instruct you to have photostats made of these exhibits that come out of the Corporation Commissioner's file, so that the witness may have one available when you question him about it.

Mr. Strachan: Fine.

The Court: Or alternatively to take the exhibit up and put it in front of him so that he can have a look at it.

Mr. Strachan: All right.

The Court: That will be a temporary stopgap until we can have copies.

Mr. Strachan: Yes.

The Court: Are we marking an exhibit number?

The Clerk: Defendants' A-3, your Honor.

(The exhibit referred to was marked Defendants' Exhibit A-3 for identification.)

Mr. Dixon: Is this from the files of the Corporation Commissioner? [1156]

The Clerk: Yes.

Mr. Dixon: I don't have copies of any of these, your Honor.

Q. (By Mr. Strachan): I show you the Winckler-Smith Citrus Products Company balance sheet

(Testimony of Nicholas J. Winckler.)

dated January 31, 1947, on the stationery of Hodge Moore & Company, and ask you if you recognize that document? A. Yes, I do.

Q. On the current assets side it shows that as of that date the company had $9,000 in cash, is that right? A. Correct.

Q. It shows $231,000 of inventories, does it not?

A. Of inventories.

Q. $231,000? A. Yes.

Q. On the liability side——

A. Pardon me. Can't we go one item after the other and not jump through the receivables? I mean if you are taking the whole financial statement, why don't you?

Q. It shows $26,000 of receivables, is that right?

A. Correct.

Q. And your current assets total two hundred sixty-seven thousand plus dollars?

A. Correct.

Q. Of which two hundred thirty-one [1157] thousand—— A. Were pledged.

Q. ——were inventories?

A. Were inventories, yes.

The Court: Which were pledged?

The Witness: Which were pledged.

The Court: All right.

Q. (By Mr. Strachan): Going to the current liabilities side it shows that the loans payable under the warehouse receipts are $292,000—is that correct?

A. That is correct. It bears out what I said.

(Testimony of Nicholas J. Winckler.)

Q. The loans on the inventories exceed the book value of the inventories, is that correct?

A. That is correct, because we took a depreciation due to the price, I mean the change in the citrus juice business, due to the crash that occurred in the citrus juices.

Q. At that time you show an $18,000 installment due on the mortgage within a year?

A. That is correct.

Q. 8,000 of accounts payable? A. Yes.

Q. And you have accrued taxes of perhaps $5,100? A. Correct.

Q. So that against your two hundred sixty-seven of current assets you have current liabilities of three hundred twenty-five thousand, is that correct? [1158]

A. That is correct. Then we have fixed assets $346,000, and other assets $21,000. And we show a net worth of $228,000, to complete the financial statement.

Q. You show the loss here of $11,700?

A. Yes.

Q. That is before the inventory adjustment?

A. No. If that is correct, that we took in 1947, January 31st, '47, an inventory adjustment of $48,000, then that is after the inventory adjustment.

The Court: Is this statement before or after?

The Witness: It is definitely after an inventory adjustment.

The Court: Speak to the jury; not to me.

(Testimony of Nicholas J. Winckler.)

The Witness: It is definitely after an inventory adjustment.

That is the reason that we show a loss, because we wanted to reflect the true picture in our statement, and when the prices of citrus juices fell substantially we had to reduce the value of our inventory.

The Clerk: I am marking Defendants' Exhibit A-4, for identification, your Honor. Another document in Exhibit A.

The Court: A-4 for identification.

> (The exhibit referred to was marked Defendants' Exhibit A-4 for identification.)

Q. (By Mr. Strachan): Do you recognize Exhibit A-4 as [1159] a Winckler & Smith balance sheet at the close of business January 31st, '48?

A. Yes, I do.

Q. That shows the loss to have been how much during that year?

A. That shows a loss of $72,221.28 for the following fiscal year ending January 31, 1948.

Q. Now, during that year did you make an inventory adjustment? A. Yes, we did.

Q. That was in approximately the amount of $50,000, was it not?

A. I think the inventory adjustment was much more substantial than $50,000, which is evidenced by the fact that the year before we show an approximately $220,000 inventory, and here the total inventory is reduced to $94,620.

Q. What would you say was the amount of the inventory adjustment made in the fiscal year ending January, '48?

A. Our accountant can testify to that.

Q. Doesn't it show down here, reduction in market value of inventory $47,849?

A. That is probably part of it. I don't know if he didn't make other inventory reductions at the semi-annual audit report. We had always July 31st and January 31st audited reports. In this report the adjustment is $47,000, [1160] it is right here.

Q. Then on the face of that report the loss on inventory adjustment, plus the operating loss, would amount to about $120,000?

A. No, there was no operating loss. There was an operating profit. The operating profit in 1947 season, which is expressed in the fiscal year ending Janaury 31st, according to our accountant's statement, operating profit was $54,937.99. But of course the inventory loss wiped out that operating profit, and still left us with a loss.

Mr. Strachan: I ask that the following page of Exhibit A be marked as an exhibit.

The Clerk: Defendants' Exhibit A-5.

The Court: A-5 marked.

(The exhibit referred to was marked Defendants' Exhibit A-5 for identification.)

Q. (By Mr. Strachan): Mr. Winckler, I show you the next page of this Hodge report, which has been marked Exhibit A-5, and is entitled Income

(Testimony of Nicholas J. Winckler.)

Account for the Year Ending January 31, 1948; do you recognize that document?

A. Yes, I do.

Q. Calling your attention to the item near the bottom of the page, Loss from Operations $75,477.29, is that not a correct statement of the operating loss for that year?

A. Not from operations. You see, we showed a loss [1161] for the year of $72,200, which corresponds with the figure of $72,200——

Q. All right.

A. If we did some write-off on inventories, how can that $72,000 total loss, as stated in the financial statement, be the loss from operations?

That should read: Loss from Operation and Inventory Write-Off.

Q. But it doesn't. Here is: Loss from Operations $75,477.29. Following that is a statement of other income and expense. Cash discounts is income. Miscellaneous income is $2,000 more. Loss on the sale of automobile $333.34. That gives you a total, other income, of $3,256. A. Okay.

Q. Now, the accountant has deducted that from the operating loss of $75,000 and has come up with $72,221.28 as the loss for the period, as he calls it; is that correct?

A. Counsel, that isn't what I am referring to. Will you show me here where the inventory write-off is?

Q. Yes, I will.

A. If you call it loss from operations, then

(Testimony of Nicholas J. Winckler.)

please show me where is the inventory [1162] write-off.

Q. All right. Here is the loss for the period, 72,221.

A. Which includes innventory write-off and some loss for the operation.

Q. Over here on the balance sheet you have a loss for the year, 72,221? A. Yes.

Q. Below that is the item, reduction in market value of inventory, $47,849.12.

A. How much is the total loss?

Q. I say you take the loss of 48,000 on inventory, plus the loss for the year of 72,000, and you come up with 120,000 loss as disclosed by that balance sheet, isn't that correct?

A. Well, I have here from the same Hodge and Company a letter which reports for the identical year operating profit of $54,937.

Q. That is not for the full year, is it?

A. It is not for the full year.

Q. All right. I would like to come back to the question.

A. I think I would like to explain, if I may, that I think when we go into these accounting figures, I think it would be a great deal more simpler—our accountant is going to testify anyhow—that we let the CPA testify to these [1163] figures, and these figures will be much more value to the court and jury than a layman's figures. I am not a CPA. Mr. Hodge is. Let him explain it. He kept the books. He has all the working papers. I don't know. I

(Testimony of Nicholas J. Winckler.)

think it would be to your interest if you agree to that, counsel.

Mr. Strachan: I ask that the witness be directed to answer the question pending.

The Witness: I can't.

The Court: Just a minute. Did you prepare these financial statements yourself?

The Witness: No, your Honor, Hodge and Company——

The Court: You did not. Who prepared them?

The Witness: Hodge and Company, CPA.

The Court: You saw them afterwards?

The Witness: I did.

The Court: Are you an accountant?

The Witness: Well, I know something about an accountant, but I wouldn't call myself an accountant. Besides, even if I would be an accountant, I could not answer the question without seeing all the working papers and inventories which are behind that final statement.

The Court: What was the question pending?

(Record read.)

The Court: I recall it now. I think there is merit in the witness' suggestion, Mr. Strachan. On the other hand, I [1164] don't want to limit your right to cross-examination. I think we will take our noon recess at this time. You may step down, Mr. Winckler.

Remember the admonition of the court, ladies and gentlemen. You will be excused until 1:45 this afternoon. That is a quarter of 2:00.

(Testimony of Nicholas J. Winckler.)

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury is now absent. I have two thoughts. First, I don't want to limit your right to cross-examination. You have a right to cross-examine.

Secondly, this witness did not prepare these reports. He is not an accountant. I am not an accountant. If you would ask me these same questions, I would want to see the complete working papers, and then I would probably have to do a lot of studying before I could ever give you an answer.

Now, I say this advisedly. I think some of your questions have been very unfair when you made a comparison between current assets and current liabilities and omitted in your question a figure for accounts receivable which the witness called to your attention.

Now, somewhere there has to be a middle line between——

Mr. Strachan: Your Honor, I would like to explain——

The Court: May I finish? [1165]

Mr. Strachan: Certainly.

The Court: Somewhere there has to be a middle line between permitting a defendant to cross-examine this man on statements he has made, to show his lack of knowledge or knowledge, to show his bias, to show perjury, if it occurs, all the things that are involved in cross-examination, to prove elements of your case.

On the other hand, the interest of the court is in proceeding along and having, if necessary, expert testimony on these subject matters, and on having something that is at least intelligible to the jury and to the court—I am not saying that I am any more intelligent than this jury sitting over here, but in trying to go through and follow some of these questions, even by looking over the shoulder of the witness in the seat, I have trouble sometimes finding out just what it is you are talking about and what it has got to do with the issues of the case.

You are a good lawyer. Somewhere in between these two situations is the proper course to follow.

2 Now, Mr. Strachan, you wanted to say something?

Mr. Strachan: Yes. I would like to explain my attitude very briefly. This witness has undertaken to state that he had a highly profitable business. In very broad general terms he has painted a glowing picture. It is a picture that is refuted, and if he had these documents before him at any [1166] time he would know it was refuted by these documents.

The Court: So you want to show——

Mr. Strachan: I want to show——

The Court: ——he is talking through his hat.

Mr. Strachan: I want to show from admissions from the very witness who overstated, I will put it, the financial results of this operation, that he was incorrect. It is not a substitute for that to take his accountant and cross-examine his accountant.

(Testimony of Nicholas J. Winckler.)

In the first place, his accountant may not say, as this witness has said, that he conducted a very profitable operation until he was put out of business. I doubt very much if the accountant will say that. So it must be on cross-examination, as I see it, of this witness.

As to the proposition of making this intelligible to the jury, it is a very difficult proposition. This is going in in sort of a difficult form.

The Court: I know your problem.

Mr. Strachan: But it is the function of counsel, first, to make the record which will support his argument and will support factually his contention, and then it is his function, when that evidence is not in itself clear, to interpret it through argument and other proper presentation. So I am now laying a foundation for what may have to be explained in detail in argument. [1167]

I forgot one aspect. You said I had been unfair. I don't think I was in that question. I wanted to show his inventories and cash, and then without going into other odd items, I went right to the footings of current assets. I didn't reduce current assets at all. I simply pointed out particular components of the total figure, and there was no misrepresentation, there was no trickery, as I see it, in comparing cash with certain current liabilities as long as I take the total of the current assets and compare those with total liabilities.

The Court: Let me say this. My recollection is that you went directly from cash and one other item

(Testimony of Nicholas J. Winckler.)

to total liabilities. However, having known you in this case, I would conclude that you had not done it intentionally and it was inadvertent.

Mr. Strachan: I did not do it intentionally.

The Court: And I may be in error in my recollection, but my recollection was you went directly from cash and one other item, without a sub-total on assets to liabilities.

Mr. Strachan: If I did, I just got ahead of myself.

The Court: It was probably done inadvertently.

Mr. Strachan: It was.

The Court: And I probably, of course, shouldn't have said it was unfair. I may be wrong in my recollection of the record. [1168]

Mr. Strachan: I may be, too.

The Court: And you may be wrong.

Mr. Strachan: Right.

The Court: Certainly you have a right to cross-examine this witness. You have a right to show, if you can, that he is a phony, that he is talking through his hat, that he gives figures without any basis for them.

It would be more understandable to me, of course, if I heard an accountant. I think you should have the same right that I told the plaintiff they could have, to make some summary sheet of various financial statements which an accountant could hand copies of to a jury, and try to let the jury see what the problem is, because you have got the same

(Testimony of Nicholas J. Winckler.)

problem the plaintiff has. With this jumble of figures——

Mr. Strachan: I have the same problem, trying to pick facts out of this book.

The Court: You have the same problem the plaintiff had, trying to make accounting figures intelligible to the jury. It is bad enough to make them intelligible to a judge when you are trying a case without a jury. I am not telling you how to do it. I just wonder whether we are getting enough out of it.

Mr. Strachan: I wish you could, because it is difficult.

The Court: For the time it takes, and I wonder whether [1169] there is some alternate that would serve your purpose and at the same time take less time.

Mr. Strachan: I would like to find it, but I do feel it important to get the admissions by this witness of these specific facts that I am going into.

The Court: You are going to follow up with an accountant who will analyze these figures aren't you?

Mr. Strachan: Yes, sir. I just don't want to have a variance between the plaintiff's testimony on some of these things and the basic materials that our accountant is accepting.

The Court: It wouldn't serve your purpose to ask this witness, to bring out the fact that he is not an accountant, he did not make these statements, that the general statements he made to the jury were generalizations based upon information supplied him by accountants, and these are the records the accountants supplied, and he will stand or fall on what these records show, and so forth?

Mr. Strachan: I don't think that would serve the same purpose, your Honor.

The Court: That could be done in a short time. That wouldn't serve your purpose?

Mr. Strachan: I am afraid not. [1170]

* * *

Q. (By Mr. Strachan): Mr. Winckler, before the noon recess, you stated at one point in your testimony that the loss for the year ended January 31, 1948, shown on the balance sheet as seventy-two thousand and some odd dollars included the loss on inventory adjustment. Upon my showing you the balance sheet and the income account, where the two items were stated separately, I asked you whether it was not a fact that the total loss for the year would be the combination of seventy-two thousand loss on operations and other annual transactions, plus forty-eight thousand of loss on inventory. Are you now able to tell us whether the total loss for the year is or is not the total of the seventy-two thousand and the forty-seven thousand, or approximately one hundred twenty thousand?

A. I could tell from the financial statement, or, [1171] rather, the balance sheet, what the total loss is. But if you kindly recall, I said before the noon recess that I could not identify what portion of the loss is allocated to the inventory loss or to any other loss, without looking over the working papers of our accountant, who made two balance sheets during the year, ending January 31, 1948.

Q. Do you mean he had two balance sheets as of January 31st, '48?

A. No. We aways had on one day only one balance sheet. But we had our books audited twice a year. We had a semi-annual audit, and then we had an audit at the end of our fiscal year, and I have not seen the audit, which we call the semi-annual audit, and I have not seen the working papers, and that is the reason I suggested that our auditor would be better prepared to answer the question than I would.

Q. Can you tell us whether the statement as of the year end shows that the total loss would be a combination of the loss of seventy-two thousand plus the loss of inventory?

A. Having seen the statement for a minute, I recall that there was a $72,000 loss stated in the financial statement, and an inventory write-off against the surplus account. Am I correct on that?

Q. Yes.

A. But how that was arrived at I don't know. I suspect that the $72,000 loss was basically speaking also [1172] an inventory loss. But part of the inventory loss was taken against the surplus account, and the other part was taken against the regular profit and loss statement.

(Testimony of Nicholas J. Winckler.)

That is what I am suspecting, but I think our accountant can verify that. [1173]

The Clerk: I am marking Defendants' Exhibit F for identification, your Honor.

The Court: Defendants' Exhibit F.

> (The exhibit referred to was marked Defendants' Exhibit F for identification.)

The Clerk: Counsel wants one of the documents in the group marked F-1, your Honor, as a subdivision.

The Court: What is F? The whole file?

Mr. Strachan: It is the whole series of income tax returns of the corporation.

The Court: All right.

Mr. Strachan: And I am identifying this one page.

The Court: All right. F-1.

> (The document referred to was marked Defendants' Exhibit F-1 for identification.)

Mr. Dixon: These are from the files of the plaintiff corporation, counsel?

Mr. Strachan: Furnished to us in discovery in this proceeding.

Mr. Dixon: No objection.

Q. (By Mr. Strachan): Mr. Winckler, do you recognize these as being the files of income tax returns of the Winckler-Smith Corporation, this in particular being for the year ended January 31, 1950?

The Court: That is F-1? [1174]

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: F-1 is the schedule attached to it.

The Court: Well, is F the entire series for various years?

Mr. Strachan: Yes.

The Court: All right.

Q. (By Mr. Strachan): Now, I show you a schedule attached to that income tax return which shows, among other things, cost of sale, and call your attention to the last entry appearing on the schedule, which reads as follows: Operating loss carry-over, loss year ended January 31, $115,559. Is that correct? A. Well——

Q. It is there that way, isn't it?

A. There are a lot of figures. May I have a moment to study?

Q. Yes.

A. I have to look at the whole return for the year ending January 31, 1950.

The Court: Well, just look at it.

The Witness: Yes. We can save time. How much profit did we report? Did you find it on the income tax return?

The Court: Well, just look at the file. You will have a chance to be examined on redirect.

The Witness: Well, that file indicates to me that we reported a net income of $72,320.60, and then we had a loss [1175] carry-forward, which is applicable for a period of five years, and which is the same loss that I testified before, that in 1946 on our overpack of inventory we lost in excess of $500,000.

The Court: Well, don't repeat that now. The

(Testimony of Nicholas J. Winckler.)

return shows a loss carry-over into the fiscal year ended January 31, 1950, of $115.000?

Mr. Strachan: No, that is not quite right, your Honor. It shows a loss carry-over to that year of $216,000, which is made up of a loss called an operating loss carry-over for the year 1948 of $115,000.

The Witness: In 1949, and $100,503.15, which offset the profit that we made in this year, so we had no obligation to pay income tax, but I want to emphasize the word operating loss. I am not a tax expert, but I know that as far as the Internal Revenue people are concerned, they don't care if the loss is a real operating loss or it is an inventory loss. As long as there is a loss in the financial statement, they call it an operating loss.

So that doesn't mean actual production loss. That includes the loss under inventory and, basically speaking, that is what it is. [1176]

Q. That is just what I thought. In that year you had a $70,000 operating loss, plus——

A. Profit.

Q. I am talking about the year of 1948, where you had an operating loss of $72,000, your balance sheet also showed a $48,000 loss on inventory, and here it says that the loss for the year was $115,000.

A. I tried to say that that $115,000 includes the inventory loss that we took for that fiscal year ending January 31st.

Q. Of 1948? A. Of 1948.

Q. Well, that is what the balance sheet of

(Testimony of Nicholas J. Winckler.)

Hodge and Company showed, wasn't it, an operating loss of seventy-two, and an inventory loss, and the total was about 120,000?

A. But I qualified that, that the word "operating loss" does not mean that we sold merchandise for less than it cost us to produce. Operating loss necessarily includes inventory losses, too. In other words, I want to qualify——

Q. Can you explain why it is that the balance sheet prepared by Hodge, which I showed you this morning and will show you again, shows an operating loss of 72,000, but your income tax shows an operating loss of $115,000?

A. Well, Mr. Hodge will be able to explain it better than I can. [1177]

Q. Can you explain it?

A. But I think I can comment on it.

There are certain deductions, exemptions, that according to the law you can take on an income tax return, which are not necessarily identical with the regular accounting practices of a corporation.

You have on your personal income tax deductible items. You can take a blanket deduction for charitable donations. That doesn't mean that to the penny you have spent for charity exactly the amount that you deduct. There are just little thousand red tapes on an income tax return that keeps the CPA's in business. And that is the reason that I suggested that a CPA should testify to that, rather than I. He will explain. His professional reputation

(Testimony of Nicholas J. Winckler.)

is at stake that the income tax returns are made out correctly.

Q. Is that all? A. That's all.

Q. You pointed out from the document that I just showed you that for income tax purposes the profit you returned for the year ended January 31, 1950, was 72,000.

I asked that this document be marked.

The Clerk: Defendants' Exhibit G marked for identification.

The Court: Exhibit G marked.

(The exhibit referred to was marked Defendants' Exhibit G for identification.) [1178]

Q. (By Mr. Strachan): I show you Defendants' Exhibit G and ask you if you recognize that as a financial statement as of the end of 1950?

The Court: That would be January 31st, '51?

The Witness: January 31, 1950, ending January 31st, 1950.

Yes, I do recognize it.

Q. (By Mr. Strachan): Referring to the last page, I ask you if it is not a fact that the profit for that year is stated at $121,360.21?

A. Yes, it is, that is what we always [1179] claimed.

Q. During that same year, the plant and equipment was sold to Rubin on this sale-leaseback option arrangement for $50,000, was it not?

A. I don't think it was during the same year. I think it was the year before. If I can see again the

(Testimony of Nicholas J. Winckler.)

financial statement or the balance sheet, it will speak for itself.

The Court: Is this from Exhibit A?

Mr. Strachan: Yes.

The Court: What is the next sub-number?

The Clerk: A-6, your Honor.

The Court: A-6 marked for identification.

(The document referred to was marked Defendants' Exhibit A-6 for identification.)

Q. (By Mr. Strachan): I now show you——

A. Does the same question still stand, whether or not the assets are——

The Court: Just a minute, Mr. Winckler. Wait until a question is asked.

Q. (By Mr. Strachan): I now show you Defendants' Exhibit A-6 and ask you if on that you recognize a computation of the loss on the sale of fixed assets by Hodge and Company dated August 22, 1949?

A. In the first place, that computation refers to the fiscal year ended July 31, 1949, and for the income account for the six months ended July 31, 1949. The former exhibit [1180] or document that you showed me was a financial statement ending January 31, 1950, and the question was asked whether or not during the same year the assets of the plant were purchased by Rubin, and I made the statement that I believe it was done the previous year. If I could see that balance sheet that you put on this desk before again, I could identify it.

(Testimony of Nicholas J. Winckler.)

Q. I will get it for you. A. Thank you.

Q. I now hand the witness Defendants' Exhibit G.

A. You are correct. It states on the first page here the fixed assets there sold as of March 1, 1949, under lease and option to repurchase agreement, which provides for the lease, and so on. There is a total evaluation of land, buildings, machinery, and so on, at $457,510.29. So that sale was done during the fiscal year ending January 31, 1950, technically.

I believe that the sale actually took place in January of 1950, but it was not confirmed by the court until after January 31, 1950. So there is again a difference between our accounting procedure. We started out our fiscal year commencing February 1, 1949, with the knowledge that we are operating a leased plant and did not figure the assets of the plant in our books except only leasehold improvements, which means moneys that we invested in the rehabilitation of [1181] buildings and equipment.

From a tax angle maybe the laws and regulations are different, but in order to take away any kind of a shadow that there is some kind of a misunderstanding here between the tax returns and the actual financial statements, our tax returns show in two columns, the one column shows the figures which are applicable according to government laws and regulations, as far as tax return is concerned.

Next to it, it shows actually the figures that we are keeping in our books so that the Internal Revenue people had the chance to see both figures, so the

(Testimony of Nicholas J. Winckler.)

jury shouldn't be under the impression that there were two sets of books or two different kinds of appraisals, or anything like that. It was all on the same income tax return.

Q. Now, getting back here to Exhibit A-6, isn't it a fact that Hodge and Company's report states that on March 1, 1949, the corporation sold all of its fixed assets subject to the mortgage payable thereon for the sum of $50,000, which resulted in a loss of—well, we will call it $169,000.

A. That is correct. [1182]

Q. Now, this profit for the year shown in the income account, for the year ended January 31, 1950, of one hundred twenty-one thousand some odd dollars was before reflecting the $169,000 loss on sale of fixed assets, was it not?

A. No, it did not reflect the loss on fixed assets, because operation naturally commenced after the date that the sale took place. It affected the surplus account, but not the operating profits.

Q. So the loss on the sale of assets in that year more than offset the operating profit, isn't that a fact?

A. Not according to that financial statement, and not according to the income tax return that we filed. The fiscal year ending January 31, 1950, was a year of a clean profit of $121,000. That is the way I see it.

Q. You mean that your operating profit actually during that year amounted to $121,000, plus enough to offset the loss of $169,000?

(Testimony of Nicholas J. Winckler.)

A. The $169,000 operating loss——

Q. No. But it was a loss in the year, wasn't it?

A. The $169,000 loss on sale of the plant property, according to our accounting, if I have that correct, was a loss which occurred during the reorganization, during Chapter 11. The plant was sold by the receiver, in fact. That was a court sale, too. And the receiver, with court approval, in the court of Referee Head, sold the plant. And that [1183] took place during the months of December, '48, and January, '49.

Now, I don't know technically which is the date of the court approval, but I know that the receiver submitted that sale to the referee and the referee confirmed it. So that loss was taken during the reorganization.

We started operating after the reorganization was completed, and the proceedings were dismissed, and the corporation was restored to its full rights. We started operations not before May or June, 1949.

So the fiscal year ending January 31, 1950, in no way could be involved with the previous year when the plant was sold by the receiver at a loss of $169,000 to Rubin and associates.

Q. That was as of March 1st, wasn't it, of 1949?

A. I don't recall which is the technical approval date, approved by the court.

I am certain that the sale verbally was approved in the courtroom of Referee Head during the fiscal year ending January 31, 1949, and not 1950.

(Testimony of Nicholas J. Winckler.)

Q. Would you accept Hodge's statement as to the date of that sale and that loss as being correct?

A. I think I would. However, I think it would be much more precise if the records from Referee Head's office would be made available, because they would speak for themselves. It would be more conclusive, I believe, than an accountant's [1184] statement.

Q. Now, isn't it true, also, that during the fiscal year ended January 31, 1950, you owed the corporation an indebtedness, or several indebtednesses totaling $38,140.33, which the company wrote off?

A. Well, that isn't so simple.

Q. Well, isn't it a fact?

A. It is not a fact. It is far from being a fact.

Q. All right. That $38,000 write-off, if it did occur, would have increased the loss for the year, wouldn't it, by about $40,000?

A. I wouldn't think it would have had any effect on the loss one way or the other way.

Q. Now, to get this straight, if on one day the corporation's books showed as due from Nicholas J. Winckler $38,140.33, and on the following day they wrote that off of their books, so that it no longer appeared as an asset, you say that wouldn't make any difference?

A. No. If counsel would permit me to explain that, that is a rather involved transaction, but I think two minutes' time could clear it up.

That $38,000 indebtedness resulted from two items. In 1946 my service contract called for a sal-

(Testimony of Nicholas J. Winckler.)

ary and a bonus, and the bonus was payable semi-annually. In 1946, on August 1st, or rather July 31st, which was the end of our first [1185] semi-annual fiscal period, we showed profits in excess of $200,000, that was before the crash occurred, and I had a drawing account against my bonus, and I drew $20,000. That is one item. The other item, when years later in 1950, when the plant was sold in court to Rubin and Associates, there was a condition to the purchase, and the condition to the purchase——

Q. When was this, now?

A. January, 1949. I beg your pardon. I was one year off. January, 1949. There was a condition on Mr. Rubin's side that Mr. Smith should be paid off. And out of the $50,000 consideration that Mr. Rubin paid over in cash, with the court's knowledge and approval, there were two escrows opened, the one $40,000, which went to complete reorganization; the second portion of $10,000 went in a separate escrow earmarked for the purpose of acquiring Bernard J. Smith's stocks. Mr. Rubin didn't want Bernard J. Smith in the business.

Now, Mr. Rubin requested that I purchase the stocks from Bernard J. Smith, and I did so, and used the $10,000, which he supplied, to purchase the stocks of Bernard J. Smith.

Now, here is the unusual situation—— [1186]

Q. Did you give your note to the corporation for the money that you paid——

A. Well, I come to that.

(Testimony of Nicholas J. Winckler.)

Q. Let me ask you, didn't you give your note for the purchase of the Smith stock to the corporation?

A. Not that I recall, but let me finish, and I probably can clarify that. So I purchased the stocks of Bernard J. Smith with $10,000 supplied by Rubin. Technically, the $10,000 was corporation money, so on the books of the corporation I had to be charged, debited, for that $10,000.

However, at the same time Mr. Rubin, in consideration of financing the future operations of the plant, requested that I sell him 50 per cent of all the stocks then outstanding in Winckler & Smith for a token consideration of $5,000.

I felt that the stocks in the corporation then, after the reorganization was completed, and after we made $120,000 profit, have been worth many, many times the $5,000 that Mr. Rubin requested and succeeded to acquire 50 per cent of all the outstanding shares.

Now, our accountant was left with a problem, how to charge the $10,000? I hadn't received the $10,000. I bought from Smith 38 per cent of shares for $10,000 approximately, and then sold simultaneously 50 per cent of shares for $5,000. [1187]

That wouldn't make good sense on my part, would it?

Q. What did the corporation get out of it, out of the $10,000?

A. What the corporation got out of it? The corporation got out of it working capital.

(Testimony of Nicholas J. Winckler.)

Q. I mean out of the $10,000 that went to purchase the stock of Smith.

A. Well, that was part of the Rubin deal. The corporation got a loan of $45,000 immediately and got additional working capital, got bank credit, and so on, and so on, and the corporation was able to get back into business, discount its accounts receivable and draft collections, and so on. We did about a million and a half of business and made $120,000 profit, so the corporation came out all right.

However, the subject still remained open, how to treat that money. So here is how we solved the problem.

We went to the Internal Revenue people and we asked the Internal Revenue people that they should rule on it. We showed them all the original documents, the Rubin agreement, the reorganization, the sale of the plant, and how I got the money, how it was used for, the Smith deal, and everything, and not until 1954 did the Internal Revenue people rule on it, and the ruling was that that indebtedness of 30 odd thousand was regarded as a proposition of long term capital gain, and the Internal Revenue people held that I in fact have not sold [1188] my 50 per cent stocks to Rubin for $5,000, but I sold it for $5,000 plus the forgiveness of an indebtedness, which indebtedness could have been either $11,000 or 31,000, because it was unclear whether or not I was obligated to repay a bonus which I earned, but which later on, due to change in business conditions, was lost.

(Testimony of Nicholas J. Winckler.)

So I paid taxes after that long term capital gain of $30,000, and after the Internal Revenue people ruled, then the entries in the books were made accordingly.

Q. The corporation didn't get the money that you paid Smith for Smith's stock, did it?

A. The corporation never furnished the money, because Rubin paid that money. It came out from Rubin's pocket and not the corporation pocket.

Q. It came out of part of the 50,000 that Rubin was to pay the corporation, didn't it?

A. Yes, but Rubin committed himself only to pay $40,000 to the corporation and the $10,000 was a separate deal, and that was a condition. In order to pay $40,000 to the corporation, he said, "Well, I am going to pay into another escrow $10,000 earmarked for the sole purpose that Smith is going to be bought out from that business."

Q. When you bought that Smith stock with the money that came from the $50,000 purchase price and took the stock yourself, the corporation set up a charge against you—— [1189]

A. I didn't took it. You see, Rubin wanted to buy that stock because he wanted 50 per cent of the shares. I couldn't deliver 50 per cent of the shares and be still a shareholder, a principal shareholder, without getting Smith out.

So what happened. I bought Smith's shares, which amounted to about 36 per cent or 38 per cent, and simultaneously Rubin got 50 per cent of the shares. So Rubin got more shares than we bought from

(Testimony of Nicholas J. Winckler.)

Smith. He used me only as a tool. I was the go-between. That he did for tax purposes.

I didn't acquire the additional shares. I lost shares.

Q. You didn't use your own money in this transaction, did you? A. No.

Q. The stock certificates were transferred from Smith to Winckler, weren't they?

A. From Smith to Winckler, and simultaneously——

Q. Now, at that time the corporation charged you on its books with the amount of money that you used to buy Smith's stock, didn't it?

A. Well, let me put it that way, that——

Q. Can't you answer that yes or no?

A. I cannot answer it yes or no, but I will make it very clear. At that time I did not spend much time accounting, [1190] so I don't know what they charged, but later on I found out that they have charged the 10,000 on the books against my account, and I went to Hodge and complained about it.

Hodge told me that he was misinformed about the transaction.

Q. Who misinformed him?

A. Our regular accountant.

Q. Wasn't Hodge your accountant?

A. Hodge is an auditor, a CPA, who is running his own business, his own office, and who was auditing periodically our books. He came down once a month and he furnished us a certified audit twice a year.

(Testimony of Nicholas J. Winckler.)

Besides that, the corporation had its own accounting department. We had a chief accountant and we had sometimes one, sometimes two junior accountants.

When Hodge came to the office I was not always present. I was probably on a business trip or back East, so Hodge admitted that our chief accountant did not give him the correct picture about that $10,000, and when I showed Hodge all the documents, he said, "I would have never left that $10,000 as a charge against your account if I would have known all the circumstances."

I have a letter somewhere in my files at home where Hodge is giving me a letter to that extent and a copy of that letter was used officially with the Internal Revenue people. [1191]

So whether or not the $10,000 temporarily was charged against me or not is, I think, unimportant. The main thing is it should never have been charged against my account.

Q. Isn't it true, also, that because of that forgiveness of indebtedness and the use of part of the purchase price of $50,000 to purchase stock which you got for which you never paid the corporation anything, the trustee in these reorganization proceedings now pending filed an objection to your claim?

A. The trustee did file a technical [1192] objection——

Mr. Dixon: If the court please, I object to that.

I think we ought to try to draw a line somewhere in this line of questioning.

The Court: Sustained.

Mr. Strachan: I should like to make an offer of proof, but I can do that at some later time.

The Court: Well, you may, but whether the trustee objected or not wouldn't mean anything. The trustee might have been right or he might have been wrong. The fact that he elected to object doesn't prove anything.

The Clerk: I have marked Defendants' Exhibit H for identification.

(The exhibit referred to was marked Defendants' Exhibit H for identification.)

Q. (By Mr. Strachan): I show you Exhibit C, which is the financial statement of Winckler & Smith Products Company prepared by Hodge Company, and I show you—— [1193]

* * *

Q. (By Mr. Strachan): ——as of July 31, 1951, and I show you the income account, which is the last document there, and ask you if it isn't a fact that that shows for the first six months of that fiscal year a loss for the period as $148,307.86?

A. That is correct.

Q. Now, referring to the balance sheet, which is a part of that exhibit, it shows that the total current assets were one hundred thousand dollars, made up of $92,000 of inventories and finished products, which were pledged to secure loans of $58,000?

(Testimony of Nicholas J. Winckler.)

A. No, they were not all pledged. That includes $11,000 not pledged.

Total current assets, five thousand cash, two thousand seven hundred—less two thousand seven hundred—just a second. Five thousand cash, accounts receivable $20,300, less $17,000 advances by bank or finance company, leaving a net receivables of $2,700, inventories $92,000, out of which $11,000 is not pledged, the balance was pledged, making [1194] total assets of $100,000—current assets of $100,000. And we show here fixed assets in the amount of $721,000, and other assets in the amount of $21,000.

Q. So you show total assets on that statement of eight hundred——

A. $842,000. And we show liabilities of $220,000.

Q. You mean current liabilities?

A. Current liabilities.

Q. Those current liabilities included——

A. Included the mortgage, because the mortgage was all due and payable within one year, and according to regular accounting practices anything which is payable within 12 months is regarded as a current liability.

So the $220,000 current liability includes the $50,000 mortgage.

Q. That is that RFC mortgage?

A. That is the RFC mortgage.

Q. You owed your trade accounts payable——

A. We owed the trade accounts and brokers about $97,000.

That offsets the 100,000 current assets. But our

(Testimony of Nicholas J. Winckler.)

current liabilities exceeded our current assets at this statement, because we lost $145,000.

That was the bad year. That is what we are complaining about. [1195]

Q. And that shows that the loss for the period prior to July 1st or to July 1st, 1951, was $148,000.

A. Correct.

Q. Now, I will show you the document that has been marked Defendants' Exhibit H, which is the report of Hodge and Company to the Board of Directors of Winckler-Smith for the fiscal year ended January 31, 1952; do you recognize that?

A. Yes, I do.

The Court: January 31st what year?

Mr. Strachan: '52.

The Witness: '52.

Q. (By Mr. Strachan): The income account shows the loss for the yearly period to be $184,523.20?

A. That is correct. That is the same year.

Q. Mr. Winckler, as I recall it, you testified that within what we might call the crop year of 1951 you processed no orange juice, single-strength orange juice, except, I believe, under contract for the Silzle company; is that correct? A. Except what?

Q. Except the juice that you processed for Silzle and Company? A. That is correct.

Q. And I think you testified that the orange juice that you packed for Silzle was packed in 5½ ounce and [1196] 12½ ounce containers only?

A. In 12 ounce containers.

(Testimony of Nicholas J. Winckler.)

The Court: 5½ and 12?

The Witness: Yes.

Q. (By Mr. Strachan): Two sizes only?

A. Correct.

Q. And that you didn't in that year pack any juice in other sizes for anyone?

A. That is my best recollection.

The Court: Mark that entire book with the exhibit number next in order, which will be I, and then pick out the pages, starting with I-1.

(The exhibit referred to was marked Defendants' Exhibit I for identification.)

The Clerk: The pages carry serial numbers.

The Court: Then we can just refer to the [1197] page.

Q. (By Mr. Strachan): I show you this volume that has been marked Exhibit I, called Winckler & Smith Daily Laboratory Statistics, January 8, 1951, to December 17, 1951, and call your attention particularly to sheet No. 735, dated July 10, 1951, and ask you if you recognize that as being the form of daily laboratory statistics used in the plant.

A. Yes, I do recognize the form.

Q. At the extreme—well, it starts out Plant Equipment, and then a code—what does that code mean, do you know? A. I wouldn't know.

Q. And then the column in the left-hand side says "Time," and then the next column is headed "Raw Juices Extracted," broken down into subheadings, "Brix" and "Acid." A. Yes.

(Testimony of Nicholas J. Winckler.)

Q. Can you tell us what, in the ordinary course of business, was recorded under the column "Time" and what was recorded opposite that time in the column "Raw Juice Extracted"?

A. Well, under the column "Time," as the word implies, it means when the sample was examined, the hour when the sample was examined.

Q. Where is the sample obtained?

A. On the raw juice?

Q. Yes. [1196] A. From the raw fruit.

Q. From the fruit or from the juice?

A. No. Well, I don't know how to answer that. You can't get juice unless you have fruit. The juice has to be extracted from the fruit.

Q. But this is taken from the tank, isn't it, or whatever vat the juice is in after it has been extracted from the fruit?

A. Well, I am not able to answer that question. That could have been samples taken from the fruit bin as the truck was unloaded, and then—just a second—the fruit extracted in the laboratory for sample purposes to identify the Brix content and to identify the solids, that could be one thing.

Q. Brix and solids are one thing, are they not?

A. No, they are not. Brix and solids are two different things.

The Court: Well, tell us again, because I don't know.

The Witness: Well, the way Mr. Finley explained it, and I try to get close to his explanation, soluble solids are all solids included in the orange. In other words, not only the sugar content, but also the acid content.

Now, the amount of soluble solids is, basically speaking, the result of two factors, how many gallons of juice is in a ton of oranges and what the solid content is of [1180] one gallon of juice. You can have oranges which will produce, instead of average 100-gallon yield, only 90 gallons, but that 90 gallons is so much sweeter, so that the solid content is still higher than most other juice where the yield is 100 gallons.

The Court: Can you tell us in a few words? Solids in all the content——

The Witness: All the solid content, except water, which is contained in a ton of oranges.

The Court: And Brix is what?

The Witness: Brix is strictly sugar content.

The Court: All right.

Q. (By Mr. Strachan): Now, to get back to this, this is a record of some juice that was processed and canned as of July 7, 1951, is that correct?

A. I haven't seen these damn things for so long I have to look at them a little better. In the first place, what I don't see—it doesn't state what it is.

Q. Doesn't it say O.J. up here, for orange juice?

A. I read that O.S.

Q. Did you have a product known as O.S.?

A. No.

Q. You had one O.J. for orange juice, didn't

(Testimony of Nicholas J. Winckler.)

you? A. It could be grapefruit juice.

Q. You mean O.J. could be grapefruit juice rather than [1200] orange juice?

A. I don't know what the O.S. means. It can be the truck driver's initials. It can be anything.

Q. Take this next page, 736. That says G.F.

A. That is definitely grapefruit juice.

Q. You are sure that is not the driver's initials?

A. I don't think so. It wasn't prepared by our regular chemist. It was prepared by a girl named Comstock.

Q. Who is she? Was she an employee?

A. She was for some time, years ago. Now, let's see here. What is the question now? If we canned orange juice or not?

Q. Can you tell from this whether that referred to orange juice?

A. I wouldn't be able to make a definite statement one way. There is a tiny little letter mark on the top, and the next page—here is a G.F., and here is an O.J., and there is one mark that could be O.J. or O.S., and I cannot identify definitely one way or the other way.

I still stick to my testimony that we didn't can any orange juice except Silzle in any volume to speak of, and I think my testimony included that I am not including in such statements a few cases we may can for sample purposes.

The Court: Well, does this sheet show the number of cases? [1201]

The Witness: No, it doesn't, your Honor.

(Testimony of Nicholas J. Winckler.)

The Court: This is laboratory testing?

The Witness: This simply shows samples take at a certain hour of raw juice.

The Court: All right. Go ahead, Mr. Strachan

Q. (By Mr. Strachan): That is page 735, is it Yes. Well, whatever the product was, can you tel us in what size cans it was packed, according t this record?

A. According to this record it was packed i 46-ounce cans. Now, I want to——

The Court: Is that a No. 3 can?

The Witness: Well, they call it sometimes incorrectly a No. 3 can.

The Court: All right.

The Witness: It is the same can as the 46-ounce. I want to repeat again——

Q. (By Mr. Strachan): Some of the juice went into 18-ounce cans, didn't it?

A. Some went to No. 2. This column is for No. 2 cans, and this column is for the 46-ounce cans.

Now, I want to re-emphasize again that I always add to my statement according to my belief or according to my best recollection.

The Court: All right. All right.

The Witness: I don't think I should waste the Court's [1202] time by repeating it every time.

The Court: You have said that. All right.

The Witness: It could be we might have canned a few cases to Silzle other than the 12-ounce and 5½-ounce.

I know one thing, we didn't can any single-

(Testimony of Nicholas J. Winckler.)

strength Valencia orange juice for the trade, for our trade.

The Court: All right. Ask your next question, Mr. Strachan.

Mr. Strachan: I will ask that this book be marked with the next exhibit number.

The Clerk: Exhibit J.

The Court: That will be Exhibit J.

(The exhibit referred to was marked Defendants' Exhibit J for Identification.)

The Court: Are those pages numbered serially, too?

The Clerk: It seems to be a book of account.

The Court: Well, we will catch the pages later. Go ahead. [1203]

Q. (By Mr. Strachan): While we are waiting, Mr. Winckler, I think if you examine the column of "Fill," you will see that there were a number of gallon cans filled with that juice.

A. Do you mean go through the whole book?

Q. No. Just on that one page.

A. On this page I just see under "Fill" 18-ounce, and then "Fill"——

Q. 128, 128, 129; 1, 2, 3, 4, 5, 6, 7 cans of gallon size?

A. That is correct. You see, we didn't had a heading for each can size. We had five or six can sizes. That wasn't 46 ounces, as I stated. We usually put the 46-ounce in this column here (indicating).

The Court: What are these down here?

(Testimony of Nicholas J. Winckler.)

The Witness: That is a 46-ounce can. 46.6.

The Court: That is ounces?

The Witness: Ounces. We always overfilled a little bit.

The Court: There are three sizes?

The Witness: 18-ounce, 46-ounce can, and a gallon size can. [1204]

* * *

Q. (By Mr. Strachan): In this laboratory record I notice that on the first line you have a date and an analysis of the juice extracted.

A. Yes.

Q. And then you skip a line, and then show over in the canning section the size of cans and other matters? A. Correct.

Q. Does that mean that the lot that is analyzed on the first line is the lot that was disposed of or packed or canned as shown on the blank line following it? A. Definitely not.

Q. It doesn't?

A. It doesn't. You see, you take the juice and the plant is going, by the time you take a can you don't know, it may be from a different truck load, entirely different, you don't know from which bin it comes. There is absolutely no connection.

Q. Then you are never able to identify from this record [1205] that these canned products——

A. Was made from that juice?

Q. Was made from that juice?

A. Absolutely impossible.

Q. Do you recognize page No. 292——

(Testimony of Nicholas J. Winckler.)

The Court: Of Exhibit J for Identification?

Mr. Strachan: Yes.

Q. (By Mr. Strachan): Do you recognize that as being a summary of the fruit processed?

A. Well, I have to admit that I do not. That was handled strictly by the accounting.

I think they are photostats which are made smaller from large books. I don't think this is the original size.

Q. You don't think these are——

A. I never had the time to go into these details of the accounting department. As a matter of fact, I even don't recognize that it is our record.

Mr. Dixon: May I ask one question of counsel, your Honor?

Are these records that you are exhibiting to the witness contained in the same kind of a book that you have them in now, or are they a compilation of a lot of photostats of records that you have taken from various books of the plaintiff corporation?

Mr. Strachan: There are apparently four different groups. One section is devoted to cash disbursements, one [1206] to cash receipts——

Mr. Dixon: That doesn't answer my question.

Mr. Strachan: Yes, it does.

One to the sales records, and one section devoted to the summary of fruit received, fruit used, and production.

The Court: Then the answer is that they are from four different sets of record books?

Mr. Strachan: There are in this one binder, yes.

(Testimony of Nicholas J. Winckler.)

The Court: The original record books were in four different sets, and the photostats, then——

Mr. Strachan: Have been combined in this one.

The Court: Were these sheets reduced in size, do you know?

Mr. Strachan: I don't know.

The Witness: I would think so.

Mr. Fisher: I rather think they were, your Honor, but I am not sure.

The Court: The witness intimated something like that, so I wondered if we could straighten that out.

Mr. Fisher: It has been a long time since it was done. I rather think they are a reduction in size.

Mr. Dixon: Then they are not the size of the records as they would appear from the original books of the corporation, I take it?

Mr. Strachan: As I understand it, they are true facsimile [1207] copies reduced in size.

Mr. Dixon: Reduced in size from the original records?

Mr. Strachan: I think that may be true.

The Court: A photostat would be just as good reduced in size, but it would have some bearing on whether the witness recognized the age, that's all. [1208]

* * *

Q. (By Mr. Strachan): I show you this sheet 292 contained in Defendants' Exhibit J, calling your attention to line dated 7/10, that is July 10, 1951, which shows under the heading Tons Received, Valencias, 78.39 tons, is that correct?

A. Well, that is what I read.

Q. And under the tons processed, Valencias, for that day, it shows 64.39 tons? A. Yes.

Q. Then in the column entitled Gallons Yield, it shows oranges, 790 gallons? A. Yes.

Q. And then under Feed Tons, it shows—is that 103?

A. It shows, I would say that is pounds, 10,000 pounds. It would be five tons of feed.

Q. And how much oil?

A. 105 pounds of oil, which is about correct. But we don't know if that is Silzle or what. I just want to clarify that. [1210]

Q. From the laboratory records it appears that some of the juice was packed in gallon cans. We know that wasn't packed for Silzle in gallon cans, don't we?

A. I would almost venture to guess that it was packed for Silzle.

We never had much business in gallon cans. It must have been a special request by Silzle.

That is an assumption. It is not a statement.

Q. Well, now, some of it was packed in 46-ounce cans. I thought you testified that you never packed 46-ounce cans for Silzle?

A. That was my best recollection. But I just looked over, the other day, some records that we had here before the court, and I think you have, and counsel has these records, too, and the very

(Testimony of Nicholas J. Winckler.)

little Valencia which was received cannot justify any kind of a pack to speak of.

The financial statement shows only $3,400 worth of Valencia sales, which I earmarked as the being the carload of juice which we purchased from Sunkist and delivered it to the Ralph's grocery stores.

After all, I have to rely on records just the same as our counsels do, and if I see a financial statement where it is broken down in sales, the Valencia sales only $3,400, I think that is conclusive evidence that we shipped and sold only $3,400 worth of Valencia juice, which is the carload [1211] which we purchased from Sunkist and shipped to Ralphs.

Q. Some of this production on July 10th was packed in 18-ounce cans. You didn't pack any 18-ounce cans for Silsle, did you?

A. I have an explanation for that.

We worked at this time with Silsle on a so-called good neighborly policy, and we tried to help them out, and at the same time tried to make at least part of our overhead.

I testified before that Silsle did not have a 5½ ounce or 12-ounce line. So we run it for them. But it could have happened that on a certain day Silsle was running, for instance—and I am using it as an example—grapefruit juice, and they got in a couple truck loads of oranges, so they called on us that we should help them out, their plant is busy running grapefruit juice, and we should run it for them.

That could have happened. But my statement

(Testimony of Nicholas J. Winckler.)

definitely stands, that we have not packed any single-strength Valencia orange juice for ourselves, to speak of, except for a few cases of samples, probably.

Q. You were running samples, then, were you?

A. We were running samples.

Q. They weren't samples of stock in your inventory, then?

A. The samples are used—whenever the crop comes in [1212] the samples are used to send it out to the brokers and let them test the quality of the new crop, and then——

Q. You mean that your samples were made up in advance of the product that was going to be sold from the samples, is that it?

A. Not in advance. Concurring with the opening of the Valencia season. Only this year the samples didn't follow any order, because we couldn't get Valencias at the proper time and proper price.

Q. There has been a good deal of discussion in the record of the arrangement that was made with your creditors in the spring of '49. Can you tell us approximately how much—what per cent of your unsecured creditors' claims were paid as a result of the arrangement? A. I can.

During the receivership we had the school lunch program and we earned $50,000, which the receiver had in cash at the bank. Then we got——

Q. What $50,000 was that?

A. The receiver—during the receivership we run that school lunch program, which was discussed before. It was discussed before lunch here, where we got the fruit from Sunkist on credit terms, and on that contract, with the by-products, oil and feed, we made approximately $50,000 profit. The receiver had that amount in the bank. [1213]

Then we got $40,000 earmarked to be paid for creditors from Rubin.

So we had a total cash consideration ready for disbursement of $90,000. From this $90,000 the cost of administration the fees of the receiver, and attorney fees and so on came out first, and then we had some secured creditors—— [1214]

Q. The expenses incurred by the receiver came out first, too, didn't they, the operating expenses?

A. The operating expenses, and there was surplus of $50,000. He paid his operating expenses and had $50,000 left, so I would say in rough figures there was $90,000 available for disbursements for the reorganization. First came the cost of administration and attorneys. Then the secured creditors. And then the unsecured creditors.

The unsecured creditors were grouped in two categories, I would say. In one was the bank, which originally was a secured creditor holding warehouse receipts on substantial inventories, as I think I stated, five or six hundred thousand worth of inventory at the price when it was packed. But as the price of citrus juices broke, as I stated, late in 1946 and keeping on in 1947, the bank found itself unsecured, because the loan was larger than the value

(Testimony of Nicholas J. Winckler.)

of the collateral. So the bank changed position and became an unsecured creditor.

So the receiver, of course, and the court handled the reorganization, the plant was sold in court and $90,000 was available. I don't recall exactly how much the unsecured creditors got. It was a small difference between—if my recollection is correct, they got only 13 or 14 cents on the dollar in course of the reorganization.

However, after the reorganization the corporation paid all these small creditors in full, and the only one, to [1215] speak of, who really lost money was the bank, who forced the issue of liquidating the stocks.

Incidentally, I like to point out here one thing. If we would have had these stocks one year longer, we would have gotten about $2.50 more for the merchandise than it was sold for.

Q. Isn't it a fact that the total of the unsecured claims was $252,000 and that the total paid was less than $28,000?

Mr. Dixon: If the court please, I really rise to object to any further questioning along this line. I don't see its materiality to the issues of this lawsuit. I have no objection, if the court feels it is of any assistance in any way to the issues of this case, but so far I don't see it helps in any way.

The Court: The objection is sustained for the reason that this was done under court order. What may have happened prior thereto that led to court proceedings is one thing. After it came into court.

what the court does is not chargeable to any litigant.

Mr. Strachan: I would like to make an offer of proof, if I may.

The Court: You may.

Mr. Strachan: Out of the presence of the jury or in the presence of the jury? [1216]

The Court: You can do it later, yes.

Q. (By Mr. Strachan): Did you pay all of the smaller creditors off the amount that they lost on this bankruptcy?

A. I would say almost everybody. I know that we paid all our brokers. We paid our fruit suppliers 100 per cent. I am holding here a letter in my hand, a photostatic copy, of the Davenport Brokerage Company, which states that:

"Especially we want to thank you to pay in full the loss we took on your account three years ago. There are not very many firms who would have felt themselves obligated, as you did, to reimburse us for this loss, and we wish to assure you we are going to reciprocate by obtaining just as much business as possible from your Florida production this winter and from California again next summer."

Signed Davenport Brokerage Company, J. E. Schmeltzer, and dated December 1, 1949.

That is from Davenport, Iowa.

Q. Isn't it a fact that Exchange Orange Products Company was one of the small creditors who took a loss in that bankruptcy?

A. Of how much?

Q. I say isn't it a fact that it was one of the mall creditors?

A. I don't know. I don't recall that the Exhange Orange Products is a creditor. [1217]

Mr. Dixon: If the court please, I object to the uestion. The representative of this company, perhaps Mr. Strachan was not here, has testified they ever lost a dime on anything ever sold or delivered o this company, the plaintiff corporation. I think ou may not have been here when that testimony as offered.

Mr. Strachan: The records of this court will how otherwise.

The Witness: How much?

Q. (By Mr. Strachan): You don't have any ecollection? A. I have not.

The Court: Well, let's settle the objection.

Mr. Dixon: I think it is immaterial.

The Court: The objection is overruled. Mr. Finey did testify as Mr. Dixon indicated, but he may ave been misinformed or there might have been ome other fact——

Mr. Fisher: May the court please, I would like o correct that, if I may. I think the testimony was ade by Mr. Kelly, who was the Sunkist man in harge of the Citrus Distributing Plant, to the effect hat Sunkist did not lose. I recall no testimony of Mr. Finley to that effect.

The Court: We can find out later. My recollection may be subject to correction. I think the question was asked of both of them, but I may be wrong.

(Testimony of Nicholas J. Winckler.)

The jury will have to recall the testimony that was [1218] given and not take it from the court. My memory is no better, and many times it will be worse than your recollection will be.

The objection was overruled. The question was answered, was it not?

Mr. Strachan: Yes, sir.

The Court: It may stand. What was the answer?

(Answer read.)

Q. (By Mr. Strachan): The amount that was lost, the difference between what was paid the unsecured creditors and the amount that was owed them before this arrangement, was approximately $200,000. After the arrangement had been concluded, the creditors had accepted their loss, the amount of that loss, due to the settlement, was put on the books of the Winckler-Smith Corporation as a part of the corporate surplus, is that not a fact?

A. Well, again, from a correct accounting angle, how that has to be handled should be answered rather by a CPA than by myself. [1219]

Q. Well, do you know whether or not the $200,000, which was lost by the creditors in this arrangement, was put on the books of the corporation after the arrangement as an increased corporate surplus and so reflected additional capital in the business?

Mr. Dixon: If the court please, I object to the question. There is no evidence here that I recall of any loss by the creditors of $200,000 in this arrangement.

Whatever the records of this proceeding back in '47 are——

The Court: All right. I will sustain the objection.

If you have some document there, Mr. Strachan, exhibit it to the witness.

Mr. Strachan: I wonder if the court can't take judicial notice of its own files, or allow me to read from its own files.

This is the original court file that I hold.

Perhaps we can't take judicial notice of it, but I think I should be permitted to read from the original records of this court.

The Court: Your question concerned something about surplus. Do you propose to follow up?

Mr. Strachan: Well, yes, but Mr. Dixon's objection was that there was at this point no evidence in the record as to what the loss to the unsecured creditors was, and the [1220] court's order approving the arrangement shows that in the aggregate on the page that I have opened the court's record to.

Mr. Dixon: And if the court please, the objection is on the further ground that it is wholly immaterial to the issues of this lawsuit, and in no sense of the term tends to throw any light on the issues of this lawsuit.

The Court: What is the materiality of it, Mr. Strachan?

Mr. Strachan: The materiality is that the books of account and the balance sheets, after this reorganization, were made to reflect, as an additional asset, the amount that had been lost by the creditors, and thereby showed a condition of solvency, which was entirely fictitious.

The Court: That is the sole purpose of the offer?

Mr. Strachan: That is right. It is to show that the book statement of values is incorrect.

The Court: All right. Subject to you hooking the matter up, the matter which you have indicated, I will overrule the objection.

Would it be proper to read from this file?

Mr. Dixon: Yes, I have no objection to reading anything from the official records of the court.

The Court: Have you checked to see if there were any further payments to creditors?

Mr. Strachan: That, I believe, is the final approval, [1221] as I understand it, your Honor.

The Court: I think I should read the totals paid to the various classes.

This is an order for payment made in bankruptcy case 45850-B, entitled In the Matter of Winckler & Smith Citrus Products Company, Debtor.

I say bankruptcy case, because we classify under our numbering system all Chapter 10's and 11's, and actual bankruptcies, as bankruptcy proceedings, and of course as I told you before, Chapter 10 and Chapter 11 are part of the Bankruptcy Act.

This was, however, not what we speak of as an orthodox bankruptcy. It was a reorganization proceeding.

The order was made June 28, 1949. Creditors were divided into various classes.

Class B creditors, as I read the file, were paid in full a total of $7,914.33.

Class C creditors—and this order doesn't indicate the basis of this class—were apparently paid in full $9,280.28.

Class D creditors were apparently paid in full $2,397.27.

Class E creditors were apparently paid a pro rata —and that seems to be the last group of creditors— their total claims totaled $252,358.37, and they were paid pro rata $27,829.18.

Now, this is an order for payment. I assume that payment [1222] was made pursuant to the order?

Mr. Fisher: Yes.

In the file elsewhere is an order confirming the third amended plan, and that plan provides for the classification. The $252,000 class, which we are referring to, were the unsecured creditors.

The Court: General unsecured creditors?

Mr. Fisher: General unsecured creditors, yes.

Q. (By Mr. Strachan): Mr. Winckler, I will put the question again: Isn't it a fact that the difference between what you owed your unsecured creditors before the bankruptcy arrangement or settlement, and the amount that you paid them, which was in excess of $200,000, was written into the books as an addition to capital surplus?

A. May I see the financial statement that you are referring to?

(Testimony of Nicholas J. Winckler.)

Q. I am just asking if it isn't a fact. I don't have a financial statement before me now.

A. Well, it wouldn't be of much value that I talk by memory, if there are financial statements available. And the reason that I want to see the financial statement is because I want to prove that not a penny, which figured in reorganization, was used to increase capital assets of the corporation, according to financial statement made later on by accountants. [1223]

Now, any forgiven indebtedness in the course of the reorganization has to be carried through the books some way. The Internal Revenue people are interested in it, and the books have to be brought up to date to show the difference between the amount actually paid and the amount which was actually owed.

Now, I am not an accountant, but I could ask the question, in which way would you write it off if not against capital surplus? [1224]

Q. I ask you whether you knew that it had or had not been put on the books of the corporation so as to become a part of the corporate surplus with the same effect as if it represented an addition to capital.

A. I cannot answer that question without seeing the financial statement, but I can——

Q. As you sit there, you don't know, is that the answer?

A. But I know one thing, that it was done the proper way and the right way.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: I move to strike the answer and ask that the witness answer the question whether he knows or does not know.

The Court: He has answered that he doesn't know. The balance of the statement may go out. The jury will be instructed to disregard it. We will hear from expert accountants.

Q. (By Mr. Strachan): One of the products that you mentioned having manufactured and offered for sale was a group called Citrus Cocktail, is that right? A. Correct.

Q. What products did that embrace?

A. The Citrus Cocktail is, basically speaking, a blended juice which was mentioned in this court several times, a blend of orange juice and grapefruit juice. The only difference [1225] between the regular blended juice and the citrus cocktail is that there was a little bit of lemon juice added to it, which gave it a tangy flavor, and the citrus cocktail was really meant to be more or less part of the trade-mark.

Q. Now, it was composed only of orange juice and grapefruit juice——

A. Orange juice and grapefruit juice and——

Q. And lemon juice.

A. There was a very little lemon juice added to it.

Q. A little lemon juice.

A. A little lemon juice to flavor it. That made the only difference between the customary blended

(Testimony of Nicholas J. Winckler.)

juice which is manufactured by everybody and the Citrus Cocktail.

Q. During what periods did you pack Citrus Cocktail?

A. We packed Citrus Cocktail in 1946 and we packed in 1949 and we packed in 1950. Whenever we could get—we didn't pack in 1951 because we couldn't get Valencia oranges, I believe. It could be that we packed a very small quantity even in 1951.

Q. Were the oranges used in the Cocktail Valencias? A. Yes, they were.

Q. Did you ever use any navel oranges in packing the cocktail?

A. Not that I would recall of. We definitely didn't use any navel oranges prior to 1949. It is possible that in [1226] 1949 maybe we used a very small quantity to blend it with the Valencia oranges, but I don't believe so.

Q. There was no citric acid or anything of that sort added to change the acidity of the product, was there?

A. No. Lemon juice was added to change the acidity.

Q. Never any citric acid?

A. Never any citric acid.

Q. Now, that cocktail was packed in two sizes, wasn't it, No. 2 and No. 3 can?

A. Correct. No. 2 and the 46-ounce.

Q. Combining those two, I believe your books show that you produced in the year ending Janu-

(Testimony of Nicholas J. Winckler.)

ary 31, 1947, the crop year 1946, you might say, a total of 271,700 cases of that, is that about right?

A. In excess of 270,000 cases?

Q. Yes. A. That could be right.

Q. And that you sold a little less than 190,000 cases, is that right?

A. Sold up to which date?

Q. To that same date, that is in the fiscal year ending with January, 1947.

A. Well, that is probably right, too.

Q. So that you then had in inventory 83,000 cases.

A. Well, that sounds right. We are talking about [1227] Citrus Cocktail alone now. We are not talking about orange juice.

Q. That's right, just the cocktail. [1228]

* * *

Q. Mr. Winckler, you named yesterday several persons you contacted in your efforts to refinance the loan on the plant and persons you contacted in an effort to sell the plant. I believe you said you would furnish us with a complete list today.

A. Yes. I would be very glad to. The complete list includes probably over 100 people and companies, but I brought along part of the file and I am glad to mention the following names. I mentioned already Blair Holdings Corporation. I am holding in my hand a letter dated December 26th——

The Court: Don't read the letter. You have the letter there. [1233]

The Witness: Yes. Also one June 3, 1952, Wag-

(Testimony of Nicholas J. Winckler.)

enseller-Durst Incorporated, Investment Securities.

Morgan & Company, 634 South Spring Street.

A certain John H. Arnold, Beverly Hills.

Harry and Myron Kunin, West Eighth Street, Los Angeles. They have been in the food business.

Dempsey & Tegeler Company.

Angelus-Mesa Land Company.

ReaLemon-Puritan Company of Chicago.

Q. Do you know what business they are engaged in?

A. Yes. They are engaged in the citrus processing business. I believe they are very well known to Sunkist.

Q. I didn't get that last.

(Record read.)

A. Wilbur Ellis Company.

Incidentally, they turned down the deal on account that they handle export fruit for Sunkist.

DiGiorgio Fruit Corporation of San Francisco and Bakersfield.

Well, counsel, shall I go on?

Q. Why don't you select the more important ones.

A. A certain Sig Brandiss of Los Angeles.

A certain Stewart Wood Lemon of Long Beach.

A certain William Carter Kingbury, Los Angeles. [1234]

Q. Mr. Winckler, it would perhaps shorten this up, and it would suit our purposes just as well, if we could just leaf through the file when we are in

(Testimony of Nicholas J. Winckler.)

adjournment some time. Would that be satisfactory? A. It is up to our counsel.

Mr. Dixon: I think at this time this line of questioning should be continued until it is finished, your Honor. The file is here at the request of the defendants.

Mr. Strachan: We have an opportunity to examine the file, I suppose.

Mr. Dixon: I don't think they are entitled to examine his personal files.

This was brought here merely in answer to an inquiry of the defendant, and the correspondence that is referred to may be used by the defendant and exhibited to them if they wish to see it.

The Court: Let's proceed.

Do you want further names?

Mr. Strachan: I would rather see the file.

Mr. Dixon: I am not going to——

Mr. Strachan: May I see it?

The Court: What is the purpose, counsel, of wanting to see the file? This is not a file of the company. What is the purpose in wanting to see the file?

Mr. Strachan: I would like to see what the nature of [1235] the correspondence is. I think I am entitled to see anything that the witness uses from the stand for the purpose of giving testimony.

Mr. Dixon: If the Court pleases, I have no objection, as I stated, to counsel inquiring and looking at any document that this witness is using to give a name. However, the defendant has asked for

(Testimony of Nicholas J. Winckler.)

the full names of companies contacted by this witness, and I don't think he is entitled to go into any personal file on a fishing expedition at this stage of the trial. I, therefore, object to his being permitted to even look at the file, with the exception of having access to any papers that this witness is using.

The Court: What would be the purpose of looking at the file and the correspondence?

Mr. Strachan: I think it would satisfy my purpose and let me know whether I need go further here, if I could simply see the letters from which he has taken the names up to this point.

The Court: What is the purpose? What would be your purpose in looking at the letters?

Mr. Strachan: To see what the nature of the negotiation was, whether they give any indication of what the reason for denying credit was.

The Court: And, therefore, for purposes of impeachment? That would be the sole purpose. [1236]

Mr. Strachan: That wouldn't be the sole purpose. It might be for the purpose of showing substantial evidence on the issues in the case.

The Court: Substantial evidence in correspondence between this man and third parties?

Mr. Strachan: I wouldn't regard it as correspondence, sir.

The Court: If the third party wrote a letter, it would be hearsay.

Mr. Strachan: It wouldn't be hearsay if it was in response to a letter from him. It would be an

(Testimony of Nicholas J. Winckler.)

exchange of letters in the ordinary course of business.

The Court: But I am looking at what you want factually. Supposing the man replied and said, "I won't buy your plant; it is not worth a dime"—would you contend that would be admissible?

Mr. Strachan: I should think so, yes.

The Court: I don't agree with you.

Now, let's see what might be in Winckler's letter. Supposing Winckler said, "This plant is worth $1,000,000"—that would be impeachment, would it not?

Mr. Strachan: I would regard it as being a self-serving statement, rather than impeachment.

The Court: Supposing the letter said, "My plant is only worth $10,000; do you want to buy it?"—that would be impeachment? [1237]

Mr. Strachan: It would be more than impeachment, sir, in my view. It would be an admission that the plant had only that value.

The Court: Well, for impeachment purposes you have to have some foundation and not go on a fishing expedition. We have had extensive discovery for a long period of time; files that have been asked for have been made available. I am not at this late date going to interrupt the trial for further inquiry into that subject.

Mr. Strachan: I want to make it clear. I am not proposing an interruption of the trial. I propose an off-the-record opportunity to examine the papers.

The Court: Proceed.

Mr. Strachan: May I have a ruling on my request for access to the papers that he has mentioned so far?

The Court: Based on the showing you have made to date, the motion is denied.

Mr. Dixon: May the record also show, your Honor, that the plaintiff has no objection to having any papers containing the names of any of the people that this witness has thus far testified to made available to counsel for further cross-examination.

The Court: The ruling will be modified to the effect that the documents that he has referred to may be exhibited [1238] to you at some recess.

Mr. Strachan: Thank you.

Mr. Dixon: I think I should further clarify it. I don't think this witness' testimony even shows that there was in all of these instances correspondence. He is testifying to people that he contacted.

The Court: Well, there were certain instances where he exhibited a letterhead to the reporter. The record doesn't show what those were.

The Witness: Your Honor——

The Court: If there is any claim of privilege as to any of the documents involved in the names heretofore recited, it can be called to the Court's attention later.

The Witness: May I make a statment with regard to these letters?

The Court: Yes.

The Witness: These letters I don't think have any importance one way or the other way——

(Testimony of Nicholas J. Winckler.)

The Court: Look, your opinion on that score is not what we are concerned with, Mr. Winckler. I have ruled on this matter. [1239]

Q. (By Mr. Strachan): Mr. Winckler, on examining the transcript of your testimony, I find that at record page 1042 you were asked the following question and made the following answer. This is in relation to the laboratory processing of product:

"Q. After the juice has been extracted and is in the tanks there following this de-oiling process and restoration of the condensate, is it tested by chemical procedures to determine quality?

"A. Yes, it is."

Now, in the light of that, don't you think it is a fact that in the laboratory records I showed you yesterday, Exhibit I, I believe it was page 735——

Mr. Dixon: That is I for identification, counsel?

Mr. Strachan: Yes.

Q. ——where it says raw juice extracted, Brix and acid, that the laboratory results shown in those columns refer to the laboratory results of the processed juice in the tanks?

A. I think, counsel, we covered that in length——

The Court: Well, just answer the question.

The Witness: But the question was asked in a different manner yesterday, and I like to repeat the question of counsel because I remember very well how he asked it.

The Court: All right.

(Testimony of Nicholas J. Winckler.)

The Witness: First you asked me the question whether or [1240] not that raw juice is the juice from the fruit as it is unloaded from the truck, or is it the juice from the tank. I am not in position to say what is in the transcript, because we don't have any transcripts at our disposal——

Q. I don't believe that is true. Hasn't the Court made the transcript available to the plaintiff in this case?

The Court: I told them it would be available, but I don't think the transcript was because the transcript of the day before is delivered the following morning to my office, so yesterday's transcript, even if asked for, would not have been available until 10:00 o'clock this morning.

Mr. Strachan: If there is any question about his previous testimony, I would like to clear it up.

Mr. Dixon: Proceed, counsel. You have quoted from the record.

The Court: Let's let him read 1042.

Q. By Mr. Strachan): This is the transcript for Wednesday, the day before yesterday.

A. This is the first time I see the transcript.

"Q. After the juice has been extracted and is in the tanks there following this de-oiling process and restoration of the condensate, is it tested by chemical procedures to determine quality?

"A. Yes, it is."

Have I read it correctly? [1241]

A. Yes, you did.

(Testimony of Nicholas J. Winckler.)

Q. Now, in the light of that, I ask you again if it is not a fact that the results of chemical analysis appearing in the column "raw juice extracted" is a record of the results of the laboratory tests taken from the processed juice at that time?

A. And I am repeating again, and you will find it in the transcript, the other question, that when you asked me if that is the test of the raw oranges extracted in the laboratory or it is the test of juice coming from the tank, my answer was, "I don't know," and I repeat the same answer.

Q. You don't know, then, whether this record of the chemical analysis of raw juice extracted is the record of the analysis that you mentioned at page 1042 of your testimony?

A. I have no further comment. I gave you the answer to the question already once.

The Court: It is asked a second time. This is cross-examination. What is your answer now? Do you know or don't you know?

The Witness: I do not know.

The Court: All right. It has been asked twice. Go on to something else.

Q. (By Mr. Strachan): Now, do you recall that I asked you earlier the following questions and that you gave me the [1242] following answers:

"Q. Now, isn't it true, also, that during the fiscal year ended January 31, 1950, you owed the corporation an indebtedness, or several indebtednesses totaling $38,140.33, which the company wrote off?

"A. Well, that isn't so simple.

(Testimony of Nicholas J. Winckler.)

"Q. Well, isn't it a fact?

"A. It is not a fact. It is far from being a fact."

Do you recall that testimony?

A. Yes, I do.

Q. It is a fact, is it not, the corporation wrote off that indebtedness? A. It is.

Q. It is a fact that it was written off?

A. I testified to that extent yesterday, if I recall.

Q. You said it is not a fact at 1185. Was that testimony true or false?

A. Will you repeat that again, please?

Q. The questions and answers?

"Q. Now, isn't it true, also, that during the fiscal year ended January 31, 1950, you owed the corporation an indebtedness, or several indebtednesses totaling $38,140.33, which the company wrote off?

"A. Well, that isn't so simple. [1243]

"Q. Well, isn't it a fact?

"A. It is not a fact. It is far from being a fact."

Is that testimony true or false?

A. That testimony is true.

The Court: Now, just a minute. The question has been asked twice. The record will show a long explanation at the time this answer was given. The question was two-fold, that he owed the corporation money and that it was written off. That matter was then gone into extensively as to both parts of the question. I don't think we want at this time to reread this long explanation, unless somebody——

Mr. Strachan: I am not proposing to do that, your Honor.

I will ask that these two pages entitled minutes of a special meeting of the board of directors of Winckler & Smith Citrus Products Company, a California corporation, be marked.

I would just as soon remove them from the book for the exhibit purposes, but I don't know how to operate this thing mechanically. [1244]

* * *

The Court: All right. Mark it and you may substitute a photostat. What number did you assign, Mr. Clerk?

The Clerk: Defendants' Exhibit K.

(The exhibit referred to was marked Defendants' Exhibit K for Identification.) [1245]

Q. (By Mr. Strachan): I show you this document, Exhibit K for Identification, which on its face purports to be minutes of a special meeting of the board of directors of Winckler & Smith of June 24, 1949, showing Nicholas J. Winckler and Arthur D. Pedlar present, on the second page bearing a signature of Nicholas J. Winckler as chairman, and Arthur J. Pedlar as secretary, and ask you if you recognize the document. A. Yes, I do.

Q. It is a part of the corporate records of Winckler & Smith Corporation?

A. Yes, it definitely is. I think it is in the minute book.

(Testimony of Nicholas J. Winckler.)

Q. Isn't it true that the resolution adopted reads as follows——

The Court: Do you want to offer the exhibit in evidence before you read it?

Mr. Strachan: No. I want to use this for impeachment purposes. I don't think it is proper at this stage for me to offer it. If counsel wants to waive it, I would just as soon have it received in evidence by agreement.

The Court: Proceed.

Q. (By Mr. Strachan): "Resolved, that this corporation secured a loan for the sum of $45,000 from Maxwell L. Rubin and/or his associates, and the indebtedness of Nicholas [1246] Winckler to this corporation in the aggregate sum of $38,140.33 will be considered fully paid and cancelled and of no further force and effect."

That is correct, is it not?

A. That is what it reads, but it needs some explanation.

Q. Does it not also contain this statement: "Mr. Winckler stated that he had made diligent efforts to secure a loan from all sources, and that it appeared that the only available loan was the aforesaid $45,000 loan received from Mr. Rubin and his associates. The chairman stated that he had sold one-half of the capital stock to Mr. Rubin and he requested that the corporation cancel the aforesaid indebtedness of Winckler in the sum of $38,140.33."

A. I am glad you read that, counsel, because that ties in exactly with my explanation.

(Testimony of Nicholas J. Winckler.)

Q. It also says:

"Mr. Winckler explained that he was presently indebted to the corporation in the sum of $38,140.33 by reason of moneys which had heretofore been advanced or were to be advanced to Winckler in connection with the purchase of certain stock which was at the time owned by Bernard J. Smith and Louise Campbell." A. Correct.

The Court: Can the record show the date of these minutes, [1247] counsel?

Mr. Strachan: Yes. The minutes are dated June 24, 1944.

The Witness: 1949.

Mr. Strachan: 1949. I am sorry.

In addition to that I would like to have marked the immediately preceding document as Defendants' Exhibit L.

The Clerk: Defendants' Exhibit L.

The Court: Exhibit L marked.

(The document referred to was marked as Defendants' Exhibit L for Identification.)

Mr. Strachan: Which is a waiver of notice and consent to a special meeting.

Mr. Dixon: May I see it, counsel?

Mr. Strachan: Surely.

Q. (By Mr. Strachan): On June 24 of 1949 you were a member of the board of directors of the corporation? A. That is correct.

Q. Mr. Rubin was a member, was he not?

A. I don't recall. You have copies of the min-

(Testimony of Nicholas J. Winckler.)

utes. I haven't seen the minutes for years. You can ascertain from the minutes when Mr. Rubin was appointed as a board member.

Q. Mr. Pedlar was not a member at that time, was he? A. At which time?

Q. June 24, 1949.

A. He signed it as secretary, and the minutes state [1248] that present were Nicholas J. Winckler and Pedlar, so how could we hold a board meeting if Pedlar wouldn't be a director?

Q. There was no corporate action at that time making Pedlar a director, was there?

A. I have to repeat again, I haven't seen the minutes for years. You have photostatic copies. You can find out when he was elected to the board.

* * *

Q. (By Mr. Strachan): I show you the document which has been marked Exhibit L and ask you if that bears your signature?

A. Yes, it does.

Q. And it also bears the signature of Arthur D. Pedlar, P-e-d-l-a-r?

A. Yes, it does. May I proceed to explain that?

Q. Who was Mr. Pedlar?

A. Mr. Pedlar was our controller.

Q. At that time?

A. At that time, yes. [1249]

Q. You know he was not a director at that time, don't you?

A. I answered before already, counsel, that

I haven't seen the minutes for years. You have photostatic copies. I don't know. I assume if he acted as director, he was a director.

Q. You assume that even though you knew of no corporate record to support the action he might take as an assumed director?

A. Look, I had the power at this time to appoint as director anybody that I pleased to, so why shouldn't I have appointed him? Why do you think that I am going to write up minutes which would work out against my own interest, if I let somebody act as a director without being duly appointed as a director? Wouldn't that be foolish on my part?

Q. Do you say he was a director?

A. I didn't say. You said it.

The Court: Counsel, the question has been asked three times whether he knew, and he says he doesn't know.

Do you know where in the records the matter appears, or is it your representation that it does not appear anywhere?

Mr. Strachan: Was that directed to me?

The Court: That is directed to you.

Mr. Strachan: It is my understanding that Mr. Pedlar was not, according to any corporate record, a member of the [1250] board of directors.

The Court: In other words, you find no record to that effect?

Mr. Strachan: What?

The Court: You find no record to that effect?

Mr. Strachan: That is correct.

(Testimony of Nicholas J. Winckler.)

The Witness: You don't find a record of Mr. Pedlar's resignation as a director?

Mr. Strachan: I find no record of his being elected or otherwise qualified as a director.

Mr. Dixon: If the Court please, I am going to object to any further line of questioning of this type. I understood it was for the purpose of impeachment. Counsel is now going into the question of whether there was a director present, whether as a matter of law it was necessary to have one. The stock ownership of this corporation would be necessary to explain all of those details.

The Court: The objection is sustained.

Mr. Dixon: Objection is made to any further examination of this kind.

The Court: I have sustained your objection.

Mr. Dixon: Thank you, your Honor.

Q. (By Mr. Strachan): Do you remember in the Chapter XI proceedings on December 10th and December 18, 1942, you were examined before a Referee in Bankrutpcy, the Chapter XI [1251] proceedings now pending in this court?

A. Well, there are no Chapter XI proceedings pending in this court.

The Court: Do you mean X or XI, counsel?

Mr. Strachan: Chapter XI, I understand.

The Court: The first proceeding was a Chapter XI; the second one was a Chapter X.

Mr. Fisher: Correction. It was in the current Chapter X proceedings. I am sorry I misled Mr. Strachan.

The Court: All right. [1252]

Q. (By Mr. Strachan): Do you recall having been examined?

A. Yes, I do. I don't recall the date, but I have been examined.

Q. Do you remember who counsel was that conducted that examination?

Mr. Dixon: If the Court please, I again rise to object to this line of questioning. I don't see that it has any relevancy to the issues of this lawsuit. If we are going to go into the proceedings before the referee, then the transcript would show, but I don't see its materiality and I object on that basis.

The Court: Is this impeachment, counsel?

Mr. Strachan: Yes, sir.

The Court: Let me see the document.

Mr. Strachan: It begins on page 32.

The Court: And how far, counsel?

Mr. Strachan: Down to, I think it is through 37.

The Court: There are certain parts that are proper, but not the whole transcript.

Mr. Strachan: I didn't intend to do that.

The Court: Pages 32 to 37.

Mr. Strachan: Yes, your Honor. I will say the following questions and the following answers.

The Court: Stick to the matters that are pertinent. Give us the page, too, as you go along. [1253]

Mr. Strachan: Yes, sir.

Q. Do you recall who was present at the time of this examination?

A. In December of 1952?

(Testimony of Nicholas J. Winckler.)

Q. Yes.

A. Well, I assume the attorneys involved in the case.

The Court: Well, who were they? Name them.

The Witness: Well, I think probably Stutman of Stutman, Quittner and Stutman, or Mr. Quittner.

The Court: Who do they represent?

The Witness: They represented the debtor corporation, Winckler & Smith.

The Court: Represented Winckler & Smith?

The Witness: Yes, sir. Then I assume Mr. Walker was present, and his attorney, Mr. Irwin.

Q. (By Mr. Strachan): The two gentlemen who are sitting here?

A. The two gentlemen sitting there.

The Court: Mr. Walker was the trustee?

The Witness: Mr. Walker was the trustee of the debtor.

The Court: And Mr. Irwin was——

The Witness: Was attorney for the trustee.

The Court: All right.

The Witness: Referee Head was the one who conducted the examination. [1254]

The Court: He presided?

The Witness: He presided. I don't think there was anybody else present that I know of.

Q. (By Mr. Strachan): You were asked at that time certain questions as to whether Mr. Pedlar was shown by the corporate records to be a director at the time of the June 24, 1949, meeting.

You said, "Well, the minute books"——

(Testimony of Nicholas J. Winckler.)

The Court: Let's have page and line, counsel.

Mr. Strachan: I am sorry. Page 33. It begins on the first full line. The answer——

The Court: What was the question?

Mr. Strachan: I will go back and read it. I will start at page 32, line 16, for sake of continuity.

"Q. Can you show me any minutes where he was elected as a director? It is a short period between those dates, 17 days?

"A. May I check for a second the book?

"Sure.

"A. Well, didn't you remove certain minutes from the book?"

The Court: Now, just a minute, counsel. We will take a short recess. Ladies and gentlemen of the jury, you will be excused. Remember the admonition of the Court.

(The jury left the courtroom at 10:45 [1255] a.m.)

The Court: The record will show the jury absent.

I said at the bench I thought you were a good lawyer. I am not so sure. You may impeach this witness until the cows come home. You can say to him, "Mr. Winckler, did you ever remove any minutes from the books," and if he says, "No, I never did," then you can impeach him by that transcript.

Mr. Strachan: Your Honor——

The Court: But you can't ask him the question —let me finish first.

Mr. Strachan: Surely.

(Testimony of Nicholas J. Winckler.)

The Court: You know this as well as I do, to impeach a witness you have to lay a foundation. That is fundamental. You say to the witness, "Did you or did you not say Mr. Pedlar was or was not a director?" Then he gives you an answer. Then you may impeach him on that subject.

You have asked no question about whether he removed exhibits from the book. There are questions in there, a lot of matter which is clearly extraneous to the foundation laid. I went over the transcript and I said there are many things in there that are impeaching and there are matters that are not on the foundation you have laid. I didn't spell it out for you. I said you are a good lawyer, in substance, and I think you will know how to handle it.

What do you have to say? [1256]

Mr. Strachan: I have this to say, your Honor. I think you are under a misapprehension. I did not intend to show Mr. Winckler had removed minutes, because the record is to the contrary. The portion of the record that I was reading from is a portion in which Mr. Winckler asks if some of the minutes have been removed, not whether he removed them. So it is perfectly all right.

The Court: Let me see the transcript.

Mr. Strachan: Yes, sir.

The Court: There are several questions in there where you can get your impeachment.

Mr. Strachan: I was going to avoid this by starting at the top of page 33, but you asked me for the question.

(Testimony of Nicholas J. Winckler.)

The Court: I know. In addition to laying a foundation for impeachment, the next step is to say, on a certain date at a certain time, and then as a matter of courtesy to counsel, give the page of the transcript, was the following question asked and did you make the following answer?

If the witness says, "Yes," that is the end of it. If he says he didn't——

Mr. Strachan: Mr. Winckler's testimony is rather rambling and it takes several pages of it to get to the ultimate fact, which is he admits there is no corporate record that Pedlar was a director.

The Court: The question was, where I stopped you— [1257] the trouble with the transcript is the question, the thing following the question is the word sure, and then the thing that follows the letter A is the question.

You may be right that this was Winckler's statement to somebody else, "Didn't you remove certain minutes?"

Mr. Strachan: He is asking Mr. Walker if Mr. Walker didn't remove the minutes, and we will find on the next page Mr. Walker denied he did. [1258]

The Court: All right. Well, this goes on. You started in with a proper question, which I am going to mark here in blue.

Then proceeds all this matter about removal of minutes, colloquy about "However"——

Mr. Strachan: I wouldn't put that in.

The Court: Who is it? Mr. Irwin; not Mr. Walker. Apparently Mr. Irwin and the witness, "Are you trying to tell the Court"——

I am just looking through this, now.

Now comes an answer, if you want to follow me here, on page 33, line 14. That is an answer to the question over here, is that right?

Now, what else?

(Counsel and Court looking at document.)

Mr. Dixon: I would like to be heard, your Honor.

The Court: On what?

Mr. Dixon: On an objection to this line of questioning on the ground that it is wholly irrelevant and immaterial and does not tend to produce any evidence that will throw any light or be helpful on any of the issues in this lawsuit.

If I understand counsel, his purpose apparently is, in going into this record in the proceeding in this Court, is to in some way show or persuade the jury—that is the only [1259] value it could have, as I see it, if it is for that purpose—that what Winckler said with reference to this $39,000 loan, so-called, back in 1949, was stated yesterday differently from what the record before the trustee or the proceedings in this Court will show.

The Court: We don't reach any problem like that on the part of the transcript shown me. There may be further impeachment. This man is a witness in the case. Any time a man becomes a witness his credibility is put in issue.

Mr. Dixon: That is correct.

(Testimony of Nicholas J. Winckler.)

The Court: Anything that goes to his credibility is proper. And counsel has marked out certain sections. He is checking now for other provisions which bear on the foundation he laid on this matter of Pedlar being a director.

You are at a disadvantage in not having a transcript, I take it. Or do you have a transcript?

Mr. Dixon: I don't have.

Mr. Strachan: I can show it all to him.

The Court: Otherwise you would be in a position to follow along. But you don't have it.

Is there something further, counsel?

Mr. Strachan: Yes, your Honor.

(Counsel exhibiting document to the Court.)

The Court: We might as well take a recess at this time.

(Recess taken.) [1260]

The Court: The record will show the jury present in their proper places.

Ladies and gentlemen of the jury, what goes on between counsel and the Court is none of your concern. In this particular case there was a misunderstanding between Mr. Strachan and me, which has been entirely cleared up. Nobody is at fault in the matter. We straightened out our misunderstanding, and so we are really back where we were before.

Don't let matters like this concern you. The Judge has the unenviable position of trying to conduct a trial. The facts in this case are going to be decided by the jury. I am not deciding them. Nothing I say or do is any indication of what I think about the facts of the case.

I will have to eventually instruct you on the law, and from time to time I will try to give you some preliminary instructions on it, but the facts are in your sole discretion. You are the finders of the facts, and as such you are judges, judges of the facts.

Mr. Dixon: May the record show, your Honor, an objection by the plaintiff to any further questioning of this kind on the ground it is wholly irrelevant and immaterial to any issue in the lawsuit, and on the further ground that for the purposes of impeachment, if that be the purpose, that the proper foundation has not been laid as required by [1261] the Code of Civil Procedure of California.

The Court: Well, the objection will be overruled.

I am going to say a word about what is meant by impeachment. Every witness for the plaintiff or defendant who takes the witness stand puts into issue his credibility, and it becomes the function of the jury subsequently to determine what weight to give to each witness, and the Court has a rather long instruction it gives you on that, on how to judge the credibility of the witnesses.

You have to weigh the witness' intelligence, his relationship to the case, the way he has testified, what he has said, all the factors that will assist you in determining what weight to give to a particular witness.

That instruction also tells you that in looking at inconsistencies or supposed inconsistencies, you should determine whether the inconsistency is a minor one or whether it goes to some material issue in the case, that people who see things and relate them and recall them often see them differently, honestly relate them differently, and that innocent—if I remember the instruction—innocent misrecollection, like failure of recollection, is a very common experience.

So you must, therefore, judge all these factors in deciding what weight to give to a witness' testimony.

The law provides that a witness may be impeached. Now, that is a lawyer's word. But counsel is entitled to show [1262] that a witness has made contradictory statements, and it is a question for the jury to decide whether the statements were contradictory. It is a question for the jury to decide how pertinent to the issues in the case they are and what effect they have on what you ultimately find by your verdict.

Therefore, when a Court says that evidence is admissible which is offered on impeachment, that doesn't mean that the Court believes or disbelieves that the witness has been impeached. It is merely like other evidence admitted to you for your consideration to make that determination. [1263]

(Testimony of Nicholas J. Winckler.)

Just like when I admit a contract in evidence, that doesn't mean that I have any view about that contract. Or when a conversation is admitted in evidence over objection, the mere fact that I overrule an objection and let it in doesn't mean that I think that the witnesses to that conversation told the truth or didn't tell the truth. That is your job.

So in this case Mr. Dixon is correct that this evidence has nothing to do with the issues of the case, but it is admissible, and therefore I overruled his objection, on the general question of what we speak of as impeachment.

Is that statement satisfactory to both counsel?

Mr. Dixon: That is satisfactory.

Mr. Strachan: I think it is very helpful.

The Court: You may read those questions and answers.

Q. (By Mr. Strachan): Mr. Winckler, in these proceedings before Referee Head on December 10th and 18, 1952, were you asked the following questions by Mr. Irwin and did you make the following answers:

Page 32, commencing at line 16:

"Q. Can you show me any minutes where he was elected as a director? It is a short period between those dates, 17 days.

"A. May I check for a second the book?

"Q. Sure." [1264]

Now, down on line 20, page 33:

"A. My best recollection is, Mr. Irwin, Mr. Pedlar was appointed as a director of the corporation.

If you wish, at a later date in the minute book you will find that certain directors were present, where Pedlar was as a director.

"Q. I am granting he signed as a director.

"A. But we have to find where he was appointed as a director?

"Q. Are there any minutes in there?

"A. It will take a little time."

That was read from page 33, lines 14 through 23, inclusive.

Page 34:

"A. Arthur D. Pedlar is a certified public accountant and I don't think he would sign if he was not lawfully a director.

"Q. I am asking you to show in the minutes where Pedlar was elected a director.

"A. I cannot find it here, Mr. Irwin."

Were you asked those questions and did you make those answers at that time? A. I did.

Q. Then at the same hearing you were interrogated with respect to whether or not Mr. Rubin was a director of the corporation at the date of the meeting on June 24, 1949, and I [1265] ask you if Mr. Irwin at that time asked you the following questions and you made the following answers, appearing on page 35 of the transcript, lines 11 to 19, inclusive:

"Q. Now, Mr. Rubin was a director of the corporation on June 27th?

"A. Yes, he was.

"Q. 1944? A. Yes.

(Testimony of Nicholas J. Winckler.)

"Q. I misquote. June 24, 1949, and these minutes of June 24, 1949, recite they are the minutes of a special meeting of the board of directors.

"A. Yes."

Were you asked those questions and did you make those answers? A. I was.

Q. You were asked the questions?

A. Correct.

Q. Did you make those answers?

A. Correct.

Q. During the fiscal year ending January 31, 1950, isn't it a fact that you purchased 60 shares of the company stock from Mrs. Campbell?

A. The fiscal year ending 1950, you said?

Q. Yes, sir. A. The answer is no. [1266]

Q. I am mistaken. You purchased the stock in July of 1946, did you?

A. That is correct.

Q. Isn't it a fact that Mrs. Campbell was paid $6,778 for the stock and that the corporation paid for the stock which you took from Mrs. Campbell?

Mr. Dixon: Now, if the Court please, I am going to register an objection to this kind of inquiry on the grounds it is wholly irrelevant and immaterial to the issues of this lawsuit and does not tend to throw any light on any of the issues of this lawsuit. It is entirely too remote to any such issue.

The Court: What is the probative value, counsel?

Mr. Strachan: It has two purposes, your Honor. One is to show that the credit of the corporation was impaired through diversion of corporate assets, and that Mr. Winckler personally withdrew this as a part of the $38,000 from the corporation which was never restored.

Mr. Dixon: In 1946, counsel?

The Witness: Correct.

Mr. Strachan: That's right. That was a part of the debt which in 1949 was forgiven.

The Court: The objection is sustained on the ground of remoteness. The question relates to 1946. You may show any matters concerning the $38,000, but I don't think there is [1267] any necessity to go into component parts of it. We are concerned with happenings in the year 1951, and particularly those events immediately preceding it.

Mr. Strachan: I would like at a later time to be able to make an offer of proof, your Honor.

The Court: All right.

Q. (By Mr. Strachan): Mr. Winckler, the forgiveness of that 38,000 some odd dollars of your indebtedness to the corporation was a loss to the corporation, and income to you, was it not?

A. I believe, counsel, I explained it at length yesterday, but I like to answer the question again. As far as the $38,000 is concerned, we have to divide that amount in two separate parts. The $11,000, or, rather, $10,000, which was supplied by Mr. Rubin in 1949 and paid over to Bernard J. Smith to acquire his stocks, that was a transaction in 1949.

If we deduct $10,000 from the 38,000, we have a balance of 28,000 left. This $28,000 was drawn by me according to my best belief as part of a bonus arrangement that I had with the corporation way back in 1946.

So I don't believe that the amount of $38,000 should be handled as a lump sum.

Q. Wasn't the forgiveness of that $38,000 income to you in the year 1949?

A. The forgiveness—— [1268]

Mr. Dixon: I object to the question, your Honor. It calls for a conclusion of the witness and is a tax question, which is wholly irrelevant and immaterial to the issues of this case.

The Court: Sustained.

Q. (By Mr. Strachan): Isn't it a fact that before the referee you testified that the $38,000 of forgiven indebtedness was income to yourself?

Mr. Dixon: Same objection, your Honor.

The Court: In 1949?

Mr. Strachan: Yes, sir. No, his testimony is in 1952, that the forgiveness in 1949 was income to him.

The Court: In 1949?

Mr. Strachan: Yes, sir.

Mr. Dixon: Same objection.

The Court: Objection sustained. You don't contend he got this $38,000 in cash?

Mr. Strachan: Yes.

The Court: In his hand?

Mr. Strachan: Yes.

The Court: You may ask him if he did.

Mr. Strachan: A part of it, of course, was the

(Testimony of Nicholas J. Winckler.)

transaction by which he got the 60 shares of stock from Mrs. Campbell which the corporation paid for. That was one of the items that make up the 38,000. He got this stock and the [1269] corporation paid for it.

The Court: My question to you was, you don't contend, do you, that he recived $38,000 in cash or in property in the year 1949. He has admitted that 28,000 of this was moneys drawn by him as bonuses, as he recalls, in 1946. He had admitted he got the money in 1946.

It is also in the record that in this bookkeeping long explanation, which I will not go into, that it was crossed off the book.

Is it your contention there was physical delivery of $38,000 in money or stock to him in 1949?

Mr. Strachan: It is my contention that in 1946 he didn't get this money as a bonus. In part, he got it through having the corporate funds used to purchase the stock from Mrs. Campbell, which he personally took. It was his borrowing to say the best, of funds.

The Court: In other words, the contention is he got the stock in his own name in 1946.

Mr. Strachan: That's right.

The Court: And that the money for that stock, that he paid for that stock was charged to his account and was part of this 38,000?

Mr. Strachan: That's right.

The Court: That was in 1946?

Mr. Strachan: That's right. [1270]

The Court: Why not bring it down to date? What is your contention in 1949? What did he get in 1949?

Mr. Strachan: That item, together with $6,000 from the 10,000 that he says went to Smith and was received by himself, that he took that stock. In the aggregate, all of these items add up to $38,000, so that in the period from 1946 down to 1949, he had taken from the corporation or had applied corporate funds to acquire stock of an aggregate amount of $38,000, which was carried on the books, and then in 1949 they wiped the slate of all these transactions that go back to 1946. That resulted in lessening the corporate assets by $38,000, and resulted in his having enjoyed comparable income in 1949, and he so testified before the referee.

The Court: Comparable income in the sense of a credit on the books?

Mr. Strachan: No. Forgiveness of an indebtedness is income in the year in which the forgiveness occurs. [1271]

Mr. Dixon: If the court please, I wish to again renew my objection to this line of inquiry on the ground that it is wholly irrelevant and immaterial to any of the issues of this lawsuit. This is not a stockholders lawsuit, or Sunkist is not a stockholder in this corporation. This is not an action by the trustee for recovery of money that allegedly may be due, if there was any due. This is an entirely different proceeding, and I think this line of questioning has no bearing upon any of the issues of this case,

(Testimony of Nicholas J. Winckler.)

except to the extent that possibly it might show, if true, that some of the statements in the balance sheet were incorrect, and that is for the jury to decide.

Mr. Strachan: It goes further than that, if it please the court——

The Court: Haven't you proved the ultimate fact that you say you are trying to prove, namely, that $38,000 was crossed off the books in 1949?

You have already proved that.

Isn't that your ultimate fact?

Mr. Strachan: That is one of the important facts. But there are other subsidiary facts which I should be allowed to go into. I should be allowed to show, for example, that behind that $38,000 was not this involved bonus arrangement that was talked about. It was actually the use of corporate checks to buy stock for Winckler personally. [1272]

The Court: I don't know whether counsel can get together on some stipulation as to these ultimate facts. I am not prepared to say at this time whether you should go into it. If you do go into it, for the purpose of our colloquy here in the presence of the jury, I am going to advise the jury that this is not a stockholders suit, this is not a suit charging misconduct against some officer for appropriation of funds; that the only issue at all on which this matter would be pertinent is the question of what was this corporation like in 1951—in other words, what was its worth, what assets did it have, was it a going concern, was it a hollow shell, did it have assets and what were they, and so forth.

You have already proved and have in the record that $38,000 of assets that appeared in the books as a debt due from Winckler were in that year crossed off, and therefore the books of the corporation showed that $38,000 less in assets following that transaction in '49.

Mr. Strachan: It is more than just a bookkeeping transaction, because one of the questions here is why did the company fail in business.

I think, clearly, if a stockholder withdraws $38,000 of assets that were supposed to be devoted to the business, and applies them to his own personal uses, that that bears very directly on one of the reasons why the corporation went [1273] broke.

Mr. Dixon: If the court please, I think this has already been in the record and the record shows that this witness testified that this money was secured from the corporation for bonuses back in 1946, and not subsequent to that time.

I renew my objection, again, on the grounds previously stated.

The Court: The objection will be sustained until at least we can hear your offer of proof and go into the matter further.

Mr. Strachan: All right.

Q. (By Mr. Strachan): I believe, Mr. Winckler, you testified that you had complaints against the Winckler & Smith products, that those related only to the navel single strength juice—is that correct?

A. It is not.

Q. Well, did you have complaints against other of your products?

A. I think the record will show that I said that Mr. Finley had a complaint in 1947 on certain concentrate that we were producing for him.

Q. Oh, yes, I remember that. But I mean complaints from your brokers or customers.

A. The record shows what I testified and according to [1274] my best recollection what I said.

Q. Do you recall some complaints against the so-called Citrus Cocktails which were sold under the Anagold brand name?

A. Which year; from whom?

Q. At any time.

A. Well, counsel, Citrus Cocktail was produced first almost 10 years ago. You have to help me, if you want from me an answer on that. After all, this isn't a memory contest.

The Court: Also, to recall what we had here on direct, he said there had been complaints occasionally from some customer, that is, the ultimate customer, in which event they had sent back cans.

I think your question should specify whether it is from brokers——

Mr. Strachan: Brokers.

The Court: ——or people they wholesale to, or from individuals.

Q. (By Mr. Strachan): Do you recall if any brokers complained against the Anagold blended juice at any time?

(Testimony of Nicholas J. Winckler.)

A. It is probable, if it was blended juice made with navel, I think I testified so before.

Q. You testified that for the most part you did not use navel juice in blends, didn't you [1275]

A. No. I testified just the opposite way, that I used navel for blended juice, and sometimes straight navel juice.

Q. Did you use any navel juice in the blends in 1947? A. It could be. I am not certain.

Q. Who was the Davenport Brokerage Company of Davenport, Iowa?

A. The Davenport Brokerage Company was one of our brokers, and it is identical with the Davenport Brokerage Company whose letter I read yesterday in the record, which is giving us a very fine pat on the back. "There are not very many firms who would have"——

The Court: Just a minute. The question was who were they. Go on.

Q. (By Mr. Strachan): Do you remember a letter they wrote on July 20, 1949, complaining about some Anagold blended juice that they sold for you in 1947? A. Yes. If I may explain that.

Q. Let's get the letter first.

I will ask that this facsimile of a letter addressed to Winckler-Smith on stationery of Davenport Brokerage Company, bearing the Winckler & Smith received stamp July 23, 1949, be marked for identification.

The Clerk: Defendants' Exhibit M for identification.

(Testimony of Nicholas J. Winckler.)

The Court: Exhibit M. [1276]

(The exhibit referred to was marked Defendants' Exhibit M for identification.)

Mr. Dixon: May I see it?

(Mr. Strachan handing exhibit to Mr. Dixon.)

Q. (By Mr. Strachan): Do you recognize that letter as one you received in the ordinary course of business? A. Yes; I do.

Q. There is no indication there that that has any reference to Valencia juice, is there?

A. Well, you have to give me at least five seconds to read it.

Q. Pardon me.

The Witness: May I ask, if the court please, that I explain that in my own words?

The Court: Well, just a minute. Is there a question pending?

Q. (By Mr. Strachan): The question is, there is no indication that that relates to Valencia juice?

A. There is no indication one way or the other way.

Q. All right. A. I like to explain.

Mr. Strachan: Let me read this letter first, and then you explain.

The Court: All right. Well, wait a minute. You have to offer it in evidence. Do you offer it? [1277]

Mr. Strachan: I am offering this as impeaching his statement that there were no complaints.

(Testimony of Nicholas J. Winckler.)

The Court: This is just a technical matter. If you are going to read it, you have to offer it in evidence.

Mr. Strachan: I might just as well be nontechnical and say I will offer it in evidence.

The Court: All right. Exhibit M received in evidence.

(The exhibit referred to, marked Defendants' Exhibit M, was received in evidence.)

The Court: Now you may read it.

Mr. Strachan: "Dear Mr. Winckler:

"If you will check back, on the last sales that we made in 1947 for your account"——

The Witness: Pardon me. Will you state the date of the letter?

Mr. Strachan: Thank you, Mr. Winckler. This letter is written in July, 1949.

Mr. Dixon: What is the date in July?

Mr. Strachan: July 20th, and it was received on July 23.

"If you will check back, on the last sales that we made in 1947 for your account was some Anagold blended juice with lemon added to Smith Brothers & Burdick Company, Davenport. Smith Brothers & Burdick Company have had trouble with [1278] this juice from the day it arrived. They have sent the merchandise out and it has been returned so often that the cases are practically worn out and those cases that are not worn out, the cans have swelled and blown up all over the merchandise so that it is one grand mess.

"They advised yesterday that they are going to truck the whole mess down to the city dump and junk it and they wanted to know how we wanted it handled. They feel that they are entitled to reimbursement for any unsold portion which they may have on hand and which they may be forced to junk. Kindly advise.

"Yours very truly,
"DAVENPORT
BROKERAGE CO.,
"By J. H. SCHMELTZER."

Q. Is that the same Schmeltzer that wrote that letter you referred to yesterday?

A. That is the exact Schmeltzer.

The Court: All right, you may explain.

The Witness: In the first place, I like to refer that the merchandise in question was packed in 1946. It is identical with the 280 or 86,000 cases that counsel mentioned yesterday that we packed so much citrus cocktail, and so much was sold. It is all in the record.

Some of the citrus cocktail was sold as citrus cocktail, [1279] I believe I explained that as citrus cocktail. I believe I explained that citrus cocktail differs from blended juice by adding a little lemon juice to it.

Another part of the inventory was sold as blended juice with lemon added, just giving it the name.

So when this letter was written by the Davenport Brokerage Company, the merchandise was three years old. I think if counsel will check with the Canners League of California, or the National Canners Association, it is usually not customary to guarantee merchandise beyond one year. Some people guarantee merchandise only for six months.

In 1947, we got complaints, a great deal of complaints in connection with various sales that we made.

When I testified that we haven't received any complaints except for as I testified, I referred to quality complaints, and I didn't go back beyond 1949 for the following reasons.

The court will remember that I testified about the break in the citrus market in 1946. By the end of 1946 and 1947 the whole grocery trade, coast to coast, wanted to get rid of citrus juices, want to return citrus juices, with all kinds of legitimate and illegitimate opinions. The trade got stuck with $5 and $5.50 merchandise that they couldn't sell for more than $2 a case. The trade lost $3.50 and, of course, the food trade did the best to get rid of the merchandise or get what it is called price protection, which [1280] means refund of the difference between the present price and the price it was sold.

The fact that Smith Brothers had merchandise on hand in 1949, which they bought two years before in 1947, proves that due to the drop in price, they couldn't sell it.

So I think that explains the situation about complaining. That complaint is entirely unfounded and the merchandise cannot be good and palatable in 1949 which was packed in 1946, and mainly in a hot state like Iowa, where the temperature goes very high during the summer months and it is kept without refrigeration.

Q. Do you remember that your broker, Schmeltzer, said that the Smith Brothers & Burdick had had trouble with the juice from the day it arrived?

A. Well, the broker usually represents the buyer, because that is where his income comes from.

Q. You pay him a commission, don't you?

A. Well, yes, but the brokers have to serve the buyers, because the buyer is always king.

Q. The buyer is what?

A. King. Pardon me for my colloquial language. Without the buyer, there is no sale, and without the sale there is no brokerage.

So it is usually the buyer's market. That is the term that is used in the industry, in the food industry. [1281]

Well, if we wouldn't have taken care properly of our buyers—you cannot satisfy everybody all the time. The same Davenport Brokerage Company wouldn't have written six months later a letter which is the biggest compliment.

The Court: All right. You read that letter.

The Witness: That is all I have to say, your Honor.

The Court: All right.

Ladies and gentlemen of the jury, we are to take the noon recess. The court will take up earlier, but the jury will be excused until 2:30 this afternoon. Remember the admonition of the court. You will now be excused.

(The following proceedings were had outside the hearing and presence of the jury):

The Court: The record will show the jury absent. Is there any possibility that the defendants' accountant and the plaintiff's accountant can go over this matter of the $38,000 and break something down that could be used without having to go into the matter? As I see the matter, you have in the record there was a write-off of $38,000 in 1949. That is the ultimate fact. I am going to hear you this afternoon on an offer of proof.

But what I think you are going to offer to prove is how this figure was built up, and you have already told me some goes back to 1946, where apparently, whatever Winckler got, he was charged with some money, and other things happened, he [1282] kept being charged with this money until eventually the account showed $38,000.

The ultimate fact is, and the thing you want to rely on, as you have told me, that the corporation lost $38,000 in 1949 and that was crossed off. That is the ultimate fact. Whether it is going to move this case along to go back and prove what the $38,000 was made up of is pretty hard for me to say.

If the corporation lost assets, the loss is not what built up the $38,000. The loss was the crossing off of $38,000.

Mr. Strachan: So far as the composition of the total sum is concerned, I don't think we will have any difficulty with the plaintiff. Mr. Walker is fully familiar with the thing, and I think if our accountants were to set up a statement based on their analysis of the books as to what the components were, Mr. Walker would agree to it.

The other matter as to which I intended to offer proof was to show the origin of the debt was not what Mr. Winckler said it was. It was not a bonus.

The Court: In other words, you want to rely on the bad boy statute. You want to show Winckler was a bad boy and took money from the corporation.

Mr. Strachan: Well, it goes a little further than that.

The Court: How does that have any bearing on the issues [1283] of this case? He could have been a thief and took this $38,000 day by day in thefts, and it would be charged up against the corporation. The ultimate fact is that it was crossed off in 1949. Now, just because you want to use the bad boy statute against the witness, that doesn't always follow that you can. [1284]

Mr. Strachan: No; but there is another aspect to it, too, judge.

Winckler has testified that as part of the deal when Rubin came in that Simth was to get $40,000. In the days when they were adversaries, Mr. Irwin and Mr. Walker did a very thorough job before the Referee showing that there was no such agreement, that there was no escrow here of $10,000 payable to

Smith. Actually Smith got only $4,000 and Winckler got the balance.

The Court: I am not going to stop you from proving your ultimate facts, but I have serious question as to whether these——

Mr. Strachan: I can make a short offer of proof.

The Court: Whether these build-up things are important. If you want to use them for impeachment, then they become collateral issues. It wouldn't be impeachment on material issues in the case, and it is a recognized rule of law that you can't fish something up that is collateral and put it in a posture, then, to impeach the witness on some collateral matter.

Mr. Strachan: I didn't raise it. It was raised by Winckler's redirect, so to speak, when he was making his explanation.

The Court: I don't care who raised it. The rule is you can't impeach on a collateral matter. So the question [1285] arises, is it a collateral matter or a material matter?

You say to the witness, "Isn't it a fact that on such-and-such a day you tipped your hat to a lady along the quarry?" It doesn't make any difference whether he did or not, and you, therefore, can't impeach on it.

Now, let's assume that Winckler claimed there was an escrow for $10,000 and you claim there wasn't, and that Mr. Walker or Mr. Irwin proved there wasn't—is that an ultimate issue in this case? Is it any material issue? The ultimate facts that money came into the corporation or went out of the corporation can be shown, but I don't think I am going to sit and hear testimony as to why certain items were charged to Winckler.

In other words, you say $38,000. Supposing you could prove that some of it was stock that he took in his name and his account charged, some of it was advances of some kind, some of it was checks he just wrote, but eventually it was $38,000 charged on the books, and it is crossed off—for the purpose that you are trying to prove, the only material thing is that $38,000 in assets was crossed off.

If we went into every collateral issue to try to show what happened in '46, whether he took a ten dollar bill out of the till, and whether he told his partners before the corporation was formed that he had taken $10, and after the corporation was formed what he did with $50, here and there, it [1286] wouldn't advance this case any, except to prove that Winckler is a bad boy.

That isn't the way you are going to prove Winckler is a bad boy, and that isn't a proper way to prove this case.

Mr. Strachan: I don't think that what I will offer will be comparable to the snitching of ten dollars or stealing from the stamp drawer, or anything of that sort.

I would suggest, your Honor, over the lunch hour I try to work up a succinct statement——

The Court: All right. Let's assume that you have proof to show that Winckler was a thief, do you think it would be material in this case?

Mr. Strachan: Thief from whom?

The Court: From his own corporation, from his shareholders, do you think it would be material to prove that in this case?

Mr. Strachan: That he stole corporate assets?

The Court: Yes.

Mr. Strachan: Yes.

The Court: How? Can a thief be hurt by an illegal conspiracy——

Mr. Strachan: A thief from his own corporation.

The Court: If you can prove what was stolen diminished the assets of the corporation so that it had probative value on what this corporation was in 1951, all right. But merely [1287] because Winckler might be a thief, you can't go back and offer proof to show that he was a thief in '46 and '47 and '49. That is what we call the bad boy statute. You are just trying to make somebody a whipping boy on the theory that it will in some way influence your case.

I think that you are entitled to show what this corporation was in '51. Was it a hollow shell, did it have $700,000 in assets, or did it have fifty, was it a going business, what were these assets worth, as bearing on the question and solely on the question of were they damaged. It has nothing to do with whether or not defendants violated the antitrust laws. We will concede that, is that right? But it does bear definitely on the question of damages.

Mr. Strachan: It bears on more than damages.

The Court: What does it bear on?

Mr. Strachan: It bears on the question of why he went broke. It bears on the question of causal relationship.

The Court: I will amend my statement, damages and causation.

Mr. Strachan: That is right.

The Court: Because your defense is, first, you didn't damage him——

Mr. Strachan: And, second, that he put himself out of business.

The Court: ——and, second, he went broke himself. [1288]

Mr. Strachan: That is right.

The Court: But you don't prove that by proving he was a bad boy in '46 and '47.

Mr. Strachan: I will try to come in with a succinct offer of proof, and I don't think we ought to let our blood pressures go up.

The Court: Okay. [1289]

* * *

Mr. Strachan: May it please the court, so far as the subject of the makeup of the $40,000 indebtedness which was forgiven, we will have our accountants work up a schedule showing what we understand it to be, and see if we can't have an agreement on it. So at the present time I won't pursue that.

Now, in regard to the facts as to the purchase of the B. J. Smith stock, Mr. Winckler testified in this proceeding that there were two escrows opened. One was $40,000, which went to complete the reorganization. The other was $10,000 in a separate escrow which he said was earmarked for the purpose of acquiring Bernard J. Smith's stock. He also testified that Rubin committed himself to pay $40,000 to the corporation. The $10,000 was a separate deal. In order to pay the $40,000 to the corporation, he said, "I am going to pay into another escrow $10,000 earmarked for the sole purpose that Smith is going to be bought out from the business."

The facts as we understand them are that the agreement as it appears in the Winckler-Smith corporate minutes was an agreement of January 27th between the company and Rubin which provided to set up escrow No. 1 which called for [1290] the payment of $40,000 to Lynch as receiver upon the compliance with specified conditions, and the other escrow provides the escrowee should, under specified conditions, pay over and deliver to the corporation said executed lease and said $10,000 in cash.

Now, neither of these escrows mention Bernard Smith.

If the witness were to testify to any other set of facts than these, then I would want to refer to his testimony in the proceedings before Referee Head, which contains the following at page 80, beginning at line 7:

"And you believe, also, that there was a provision in the escrow instructions for the payment of that $10,000 to Smith?

"Yes; I believe so.

"I hand you a copy of the escrow instructions which have been furnished me by the bank, which are the instructions in escrow 2, and point out wherein there is any reference to Smith in these escrow instructions.

"A. Well——

"Q. Do you find anything there?

"A. No; I do not."

That's all I had in mind on that subject. [1291]

The Court: We will see if there is some objection here.

Mr. Dixon: I am sorry, your Honor. Pardon me.

The Court: There has been an offer of proof made. You heard it, I suppose?

Mr. Dixon: Yes; I did, your Honor. I certainly fail to see any relevancy to the offer of proof as made. I still think the objection to it is sound.

The Court: Do you object?

Mr. Dixon: Yes; I do, your Honor.

The Court: The objection is sustained, and on this ground: The offer that you have made indicates that there were apparently two escrows. Now, you want to show that the situation as to these escrows was not exactly as Mr. Winckler said it was. Is that right?

Mr. Strachan: That, and——

The Court: That is clearly a collateral matter. If we go into that, we have to go into the escrow instructions, we have to go into all the things to find out what the escrow provided, how they were handled, and one thing and another. It is entirely a collateral matter. It has no bearing on the issues of the case and it is one of those things that if multiplied it could prolong lawsuits forever. That is why we have the rule here that these collateral matters cannot be gone into.

And if it is for the purpose of impeaching [1292] Winckler, again it is impeachment on a collateral matter.

I don't think there is any sound basis for admitting them.

There is no dispute that certain money came in, which is the ultimate fact. There is no dispute that Smith went out. And how the escrows were handled and what Winckler said about them will assist this jury not at all.

Mr. Strachan: In my opinion, your Honor, it shows something more than that. It shows there was a diversion of $10,000, which under the terms of the contract of the escrow was to be applied and paid to the corporation, that was diverted from the corporation to Mr. Winckler personally.

The Court: You can show what money went into the corporation, you can show what money went out, you can show what assets this corporation had. As to who it went to and how the escrows read, and how it was worked out, is not material.

Suppose he stole it, suppose he worked out some fancy deal that he stole it, if you prove that it went out of the corporation, haven't you proved all you are entitled to?

Whether Winckler is a thief is not an issue in this case.

You are going to be permitted to show what assets this corporation had, that it crossed off $38,000 in assets; you are going to be able to show what you think the value of its [1293] fixed assets were, and various things that are claimed as assets; but you are not going to go into the history of how these things came about, even if it is shown that Winckler is a bad boy.

Supposing you had a case where some transaction would prove his inability to run a citrus plant, that might be closer to the mark, but if I understand what you are talking about, it doesn't concern that at all. It would concern his ability to sneak out $10,000. That is not an issue in the case. [1294]

* * *

NICHOLAS J. WINCKLER

called as a witness by the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

* * *

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Winckler, I show you Defendants' Exhibit N for identification and ask you if you recognize that as a letter received by you in the ordinary course of business? A. May I read it?

Q. Surely. [1296] A. Yes.

Mr. Strachan: I will offer it in evidence.

Mr. Dixon: No objection.

The Court: Exhibit N received in [1297] evidence.

* * *

(Testimony of Nicholas J. Winckler.)

Q. Mr. Winckler, when you packed navel juice under the Anagold label for buyers who wanted it packed that way, you realized, did you not, that you were risking the value of the Anagold name?

A. Is there any connection between these questions and what you asked before, or you are not interested in my opinion in regard to the Memphis letter? I mean I wasn't asked what my opinion is about the Memphis letter.

Q. No. I thought Mr. Dixon would do that on redirect.

A. I see. Pardon me.

Mr. Dixon: I will take care of it. [1299]

Q. (By Mr. Strachan): You realized, did you not, when you packed navel juice under the Anagold label that you were risking the good name of Anagold? A. Well, I think——

Mr. Dixon: If the court please, I object to the form of the question unless it is connected up to something. It is entirely too general in nature.

I frankly don't understand the question, myself. Maybe the witness does.

Mr. Strachan: The witness testified that he preferred to pack navel juice under Anapride, so as to protect the good name of his Anagold label. Now, I am asking him whether he didn't realize at the time that he packed navel juice under Anagold that he was risking the value of the Anagold name.

The Court: The objection is overruled. You may answer.

The Witness: I believe that my testimony in that

(Testimony of Nicholas J. Winckler.)

matter answers your question. I said that I preferred to pack under other label than Anagold label. Why would I prefer, unless I realized that I would risk the name of the Anagold label if I packed merchandise which is second grade or not up to the Anagold standards?

Mr. Strachan: I will ask that this letter, copy of a letter written by Winckler & Smith Citrus Products Company to Russell Brokerage Company, of April 4, 1949, be marked as an exhibit for identification. [1300]

The Court: Exhibit O. [1301]

* * *

Q. (By Mr. Strachan): Do you recognize that as a copy of a letter sent by you on or about April 4, 1949, to the Russell Brokerage Company at Oklahoma City, Oklahoma?

A. Yes; I do. Let me read the letter.

The Court: Just a minute. You have just been asked one question, and counsel has indicated he might have an objection.

You say you recognize it?

The Witness: I do.

Mr. Strachan: I offer it in evidence.

Mr. Dixon: I object to it on the ground that I don't think it has any relevancy or materiality to any of the issues in this lawsuit.

Mr. Strachan: It is the second paragraph that I had in mind reading. [1303]

The Court: The objection is overruled. However,

(Testimony of Nicholas J. Winckler.)

the next to the last paragraph has no pertinency.

Mr. Strachan: No. I didn't intend to have any reference to it.

The Court: You may read any other part you want to. Received in evidence as Defendants' Exhibit O.

Mr. Dixon: Is the entire document in evidence, your Honor?

The Court: Well, wait a minute. We can't receive it and put a limit on the paragraph. Let me see it again.

Well, you can either cut the paragraph out of the letter or I will set aside my order admitting it, and you may read such parts as you want into the record and not use it as an exhibit. Which would you rather do?

Mr. Strachan: I have offered the document as a whole, but in view of that limitation——

The Court: You are not offering it for that paragraph I referred to?

Mr. Strachan: Not for that paragraph, but I don't think that paragraph renders the document inadmissible.

The Court: No; but I suggest one of two alternatives, that we eliminate the paragraph, or that we read the document into the record eliminating that paragraph. Then you won't need it as an exhibit. It wouldn't be an exhibit then and you would just read the letter into the record.

Mr. Strachan: As to the document as a whole, then, [1304] you sustain the objection?

The Court: No. I am suggesting a couple of alternatives. You have situations come up all the time, counsel, where some document is presented—that isn't the case here, but, for example, somebody has put some scribbling along the side and nobody can identify it. Then you have a question of a stipulation of counsel that a certain part be ignored or it is clipped off, or it is covered up with a piece of paper pasted thereon. There are a thousand and one ways to take care of a situation like that.

Mr. Strachan: I would agree if there had been an alteration of the document, but this is a document which the witness has testified was sent by him in due course, and I think the entire document is admissible.

The Court: You apparently now are expressing more interest in the paragraph than you did before. I think it has nothing to do with the case. You can read the whole letter. I will let my order stand. It is received in evidence. Objection overruled.

(The exhibit referred to, marked Defendants' Exhibit O, was received in evidence.)

The Court: Read all or any part of it.

Mr. Strachan: I will read only the second paragraph. This is a letter dated April 4, 1949, written to Russell Brokerage Company at Oklahoma City, signed by Nicholas J. [1305] Winckler, president.

"I doubt that we will do anything on navel juice. We want to be more careful then ever before as far

(Testimony of Nicholas J. Winckler.)

as quality is concerned, and we are afraid it would be a mistake to pack navels."

The Court: May I have the letter, Mr. Clerk? It is in evidence now, so I will read the paragraph about which the discussion occurred.

"As far as the loss is concerned that you may suffer by receiving dividend on your old balance, all brokers agreed enthusiastically to accepting our proposition to pay one extra payment on future business until such time as such loss is completely absorbed."

I didn't want you to think there was any great mystery about the paragraph about which the discussion occurred.

Mr. Strachan: Did your Honor say that the letter read one extra payment or one extra per cent?

The Court: I said payment.

Mr. Strachan: Yes; and the text of the letter is per cent.

The Court: You are right.

"* * * all brokers agree enthusiastically to accepting our proposition to pay one extra per cent on future business until such time as such [1306] loss is completely absorbed."

Thank you, counsel.

Mr. Dixon: Your Honor, may counsel approach the bench?

The Court: Yes.

(The following proceedings were had at the bench outside the hearing of the jury.)

Mr. Dixon: I was going to suggest, your Honor, that if counsel will give us the letters, if there are going to be very many of them, we can take a short recess and save a lot of time. That is just a suggestion, if you have any more of them.

Mr. Strachan: Well, I think I have something like—it won't take but a minute to look.

The Court: All right.

Mr. Dixon: I am just making the suggestion for whatever it is worth, because I have no idea how many of these they are going to use. Do you have many more of them?

Mr. Strachan: I have 25 or 30. I intend to read excerpts from most of them.

Mr. Dixon: Then I would suggest by all means that we have a chance to look at them.

The Court: Do you want to go on with something else or do you want to take the recess right now? Do you want to do it in the order in which you prepared your material?

Mr. Strachan: I would like to do that. [1307]

(The following proceedings were had in the hearing and presence of the jury:)

The Court: Ladies and gentlemen of the jury, you will be excused for a short recess. Remember the admonition of the court. Court will stand in recess.

(Recess.)

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury absent.

Mr. Dixon: May it please the court, I think the suggestion I made perhaps bore fruit because I was submitted photostats of some 56 or 58 letters, which I understand counsel intend to offer into the record in this case. I have just had an opportunity, of course, to make a very cursory scanning of them.

I notice some of them appear to have things marked on the side. I mean the document, the original, has apparently been marked. These documents have been made available to the defendants. I don't know who mutilated the document or placed the marks thereon.

In many other instances the letters are letters which refer to previous correspondence between the parties. There is no way in which the correspondence can be tied in without having the previous letter.

Some of them are very general in their nature. They [1308] deal primarily with, as I have had a chance to scan them, with products other than single strength juice. There may be some of them within this group that deal with it, but they cover a period of apparently three years, from 1949 on.

Now, as I see it, the problem is one of evidence here. I am certainly not going to try this case, as far as the plaintiff is concerned, through correspondence files. If we are to go into these matters it is obvious that we would be here, and Winckler, the witness, would probably be on the stand, if we were to have to go into each one of these letters in an effort to discuss the contents thereof, or to explain the so-called alleged complaint, or to bring in other documents by way of subsequent correspondence with the same parties that might deal with the same question, it is obvious we would be here through 1956. [1309]

If counsel have complaints substantiated, it seems to me the proper way to show that is by having the witness here to testify to the complaint, rather than by correspondence, because that is the best evidence.

And on the ground, generally, at this time, that there is no proper foundation laid for these documents, that they are mutilated and incomplete, and would call for endless explanation by the plaintiff if introduced in evidence, and they are not the best evidence for which they are apparently being offered, the plaintiff enters a general objection at this time to all of the documents that have been submitted to us for inspection.

It may well be that there may be some here that can be utilized. As I have said, I have only had an opportunity to make a very cursory examination of them, but from the examination that I have made I am satisfied that even after an extended and further examination my position would still probably be the same, because I am not going to try this case on correspondence.

Furthermore, plaintiff regards this as wholly irrelevant and immaterial, because there has been no foundation laid by the defendants here for this kind of testimony or evidence, and certainly there has been no evidence here showing that the defendants had any knowledge whatever of any of the things that are set forth in these letters of [1310] correspondence prior to the time of this lawsuit.

If I understand the purpose of discovery and the purpose for which this material was made available to them for inspection, it was so that if they wanted to follow through and bring in live witnesses to testify to apparently what these documents were supposed to cover, that they would have that oportunity to bring the witness in that could testify concerning the contents. In other words, it was my understanding that this material was made available to counsel for the purpose of furnishing them with leads, if they wanted to follow them through. And they are certainly not competent evidence.

The Court: What probative value do you contemplate these letters would have?

Mr. Strachan: I think these letters would show a great many things. One, that contrary to Winckler's broad statement that they had an excellent product, it was generally found to be objectionable, and that the trade did not accept it, and that customers were dissatisfied.

The Court: All right. One, that the product was inferior.

Mr. Strachan: Yes. And others of the letters will show that contrary to Mr. Winckler's statement that there was good will attached to the Anagold label, as a matter of fact it will show that the Anagold label had no value, but [1311] was a detriment to sales.

The Court: The value of the label, what people thought about the label?

Mr. Strachan: That is right.

The Court: Is that what you expect to prove by these letters?

Mr. Strachan: That is one of the things.

The Court: What do you say about the hearsay objection?

Mr. Strachan: I say that Mr. Winckler has testified here that the only complaints he ever received were with respect to the navel juice.

The Court: Plus customers. He testified that he had numerous complaints from customers, the ultimate receivers, to whom he had always sent cases of juice.

Mr. Strachan: I don't think it was limited to that. That he never received complaints about his product except with respect to navel.

The Court: Mr. Strachan, I won't argue that with you. Look at the record. You recall him telling about occasions where, not one of his customers, but a consumer, would get juice that they were dissatisfied with, and he would send cans of juice. So your statement is too narrow. But go ahead.

Mr. Strachan: Furthermore, he testified that in his [1212] administration, whenever there were complaints against quality of product, or anything else about his organization, all of the correspondence came to him personally.

The Court: Suppose it did, how does that have any impact upon the hearsay rule?

Mr. Strachan: I think when he testifies that he hasn't had complaints, he has seen all the letters, and you show the complaints, I think even without that testimony these letters would be admissible to show that the customers complained that the quality was bad.

Now, so far as Mr. Dixon claiming surprise——

Mr. Dixon: Oh, no, your Honor——

Mr. Strachan: ——I might say——

The Court: I haven't heard any claim of surprise. A complaint that he didn't know what these letters were, but not in the sense of surprise.

Mr. Strachan: My suggestion is, your Honor, that instead of trying to rule in advance on the whole group of documents, that we take it a step at a time.

The Court: How long do you contemplate that your cross-examination of Winckler will take to conclude?

Mr. Strachan: I think if it is not interrupted, not more than a day beyond this. I would hope that it would be that. It might run over a little while.

The Court: Well, obviously, I can't rule on a pack of [1313] letters that I haven't seen. On the other hand, if what you offer these letters for is what you say you offer them for, to prove poor quality of goods and poor value of a trade name, I think the objection is well taken.

Mr. Strachan: Let's take it an exhibit at a time, possibly.

The Court: We could take one or two up as a pilot case, and then make some offer of proof as to the rest, but let's not take the time to go through one at a time. Let's find out what we have got.

You know there was an old Roman by the name of Martial, and he wrote certain epigrams. One of them was about a lawyer whose name was Postumas. He had hired this lawyer to defend him in a case where his neighbor had charged him with stealing three goats. So after the trial went on a ways the Roman citizen pulled his lawyer's coattail and he said, "Sir"—I wish I could quote it verbatim.

I think it is worth quoting. Just a minute.

After the trial proceeds a while, he pulls his lawyer's coattails and he says, "Sir, my suit has nothing to do with assault or battery or poisoning, but it's about three goats which I complain, have been stolen by my neighbor. This the jury desires to have proved to them, but you, with swelling words and extravagant gestures, dilate on the Battle of Cannae, the Mithradatic war, the perjuries of [1314] the insensate Carthaginians, on the Syllae, the Marrii, and the Mucii. It is time, Postumas, to say something about my three goats."

Now, this case involves some nice issues in anti-trust law. This case involves, probably, some points of first impression. Now, we have spent a lot of time today talking about the breakdown of a $38,000 item that was crossed off the books. Now, we have got a bunch of letters, many of which will be, probably, clearly within the hearsay rule, where somebody has made a complaint. How can the plaintiff cross-examine a letter that is offered? Somebody says, "Your stuff wasn't good," in the letter, how can the plaintiff cross-examine to find out if the man who wrote the letter tells the truth? That is the purpose of the hearsay rule. [1315]

Mr. Strachan: This was the broker who was writing in the ordinary course of business.

The Court: Broker or consumer, what's the difference? He has made a statement. What is the purpose of the hearsay rule?

Now, we have got some nice points in this case, and I suppose that sometime we will get down to grips with the issues in the case.

Mr. Strachan: Your Honor, I think it was perfectly clear from the opening statement on behalf of the defendants that there were more than questions of law involved in this case. There are questions of fact, questions whether the public actually was ready to receive the goods. Whether the goods were good or bad may not be proved, but the evidence by these letters will show that the trade expressed dissatisfaction and was having difficulty marketing the goods.

Mr. Dixon: Well, counsel—pardon me. Have you finished?

Mr. Strachan: Yes.

Mr. Dixon: The record in this case thus far shows sales by the plaintiff corporation in all the products in excess of one and a half million dollars for the years 1949 and 1950.

Now, it seems to me that is entitled to some weight and consideration insofar as the public acceptance of the products involved in this case are concerned, particularly when it relates primarily to Valencia orange juice processed by this [1316] company, which constitutes approximately 80 per cent of its products and sales.

Now, the plaintiff has some complimentary letters from consumers in these files, too, and those have been exhibited to counsel. I would not have the effrontery as a lawyer to present that kind of evidence to this court in support of any of the issues or allegations of this complaint.

The Court: All right. Let's take one letter here, February 2, 1950, and mark it Exhibit P for identification.

It will be stipulated, I take it, it came from the files of Winckler & Smith?

Mr. Strachan: Yes, your Honor.

Mr. Dixon: Yes, I will so stipulate, your Honor.

The Court: You offer it in evidence and then Mr. Dixon will make his objection and I will rule.

Mr. Strachan: I want the witness on the stand to identify the letter.

The Court: It has been stipulated it came out of the files of Winckler & Smith.

Mr. Strachan: May I see it?

Mr. Dixon: That is probably one of the worst, but that's all right.

Mr. Strachan: I was going to use this as one of a pair. I would like the two together.

The Court: All right. Let's look at the other one. [1317] The one I had is dated February 2, 1950, and the second is dated February 6, 1950, both from the same company, although with two different employees signing the letters. They may be both marked as Exhibit P.

(The exhibit referred to was marked Defendants' Exhibit P for identification.)

Mr. Dixon: What is the name of the company?

The Clerk: Pavey.

The Court: Are they offered?

Mr. Strachan: Yes. I will offer the exhibit in evidence.

The Court: What is the objection?

Mr. Strachan: I would like to have the stipulation go this far, that if they were presented to the witness he would testify, not only that the letter was from the file of the Winckler-Smith Company, but that it was received in the due and ordinary course of business and was brought to the attention of the witness, Winckler.

The Court: Will you so stipulate, Mr. Dixon? Read it, Mr. Reporter.

(Record read.)

Mr. Dixon: I assume that is correct. We will so stipulate, yes.

The Court: All right. What is your objection? Call the jury down and we will send them home and we will proceed with some of this. What is your objection? [1318]

Mr. Dixon: The exhibit is objected to on the ground that it is hearsay, incompetent, and on the ground that no proper foundation has been laid to the extent that any knowledge of the letter was in the possession or within the knowledge of the defendants prior to the time it was submitted to them under discovery proceedings.

On the further ground that it tends to throw no light upon any of the issues in the lawsuit, and the admission in evidence would deprive the plaintiff of the right of cross-examining and explaining any of the inferences and comments that are contained in such letter, a document that might tend to lead to the conclusion or inference that the product referred to in the letter was of the type that was sold by the plaintiff during the course of its business during the year in question.

And that it is not competent evidence and not the best evidence to prove that the product referred to therein was not good or up to the standards of the product that was put out and sold to the public in the volume and in the amounts in dollars already disclosed by the record in this case to have been sold by the plaintiff during the years 1949 and 1950, to which this exhibit relates.

The Court: The objection is sustained on the grounds stated, and on the further ground that going into the issues raised by this series of some 50 odd letters, of which this [1319] is the first exhibit marked for identification, would inject into the case interminable issues, and the case could never be completed.

On the further ground that the letters, at least the ones I looked at, refer to the bitter quality of the pack, which has been described as the navel juice, and the witness Winckler has already admitted he had complaints about the bitterness of his canned navel juice, and, therefore, it is not even proper impeachment evidence.

Mr. Strachan: I will ask that this letter dated March 22, 1950, addressed by Bagley and Company, Salt Lake City, Utah, to Winckler-Smith, bearing the received stamp of Winckler & Smith as of the date of March 23, 1950, be marked as an exhibit for identification.

The Clerk: Exhibit Q.

(The exhibit referred to was marked Defendants' Exhibit Q for identification.)

The Court: Now, just a minute. Bring the jury in.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: Ladies and gentlemen, we have some other work to do, so I am going to excuse you. When you come back again it will be January, 1956, and it will be Tuesday morning at 10:00 o'clock.

The court wishes each of you a Happy Holiday and expresses [1320] that to you in behalf of counsel as well as the court.

Remember the admonition of the court. Do not discuss this case among yourselves or with anyone else or permit anyone to discuss it with you. Do not form or express any opinion on the merits of the case until it is finally submitted to you for your decision.

You will be excused until 10:00 o'clock January 3, 1956.

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: As to Exhibit Q for identification, we have the same stipulation and the same objection?

Mr. Dixon: I believe so, your Honor. The same objection, your Honor, plus the additional objection that this letter does not even indicate what product is involved. Same stipulation, yes, your Honor.

The Court: Objection sustained.

Now, can we sort these letters out as to categories, or make an offer of proof on them, or what do you want to do?

Mr. Strachan: I would be willing to have your Honor make a suggestion as to the procedure. I think that they are so dissimilar, perhaps it would be well to give individual consideration, but if your Honor has concluded to rule in bulk on the letters——

The Court: First, I don't know how you can get away from the hearsay objection, no matter what the man may say [1321] in the letter.

Mr. Strachan: It is not hearsay, your Honor, and if your Honor's mind might be open on this——

The Court: What do you mean, it isn't hearsay?

Mr. Strachan: Correspondence received by a party to litigation in due course of business is not ordinary hearsay. At least, if it is dealt with under the hearsay rule——

The Court: It depends on what you are offering the correspondence for. If you are offering the correspondence for the truth of the statement contained therein, then it is hearsay.

Mr. Strachan: We are not.

The Court: Then you are playing horse with the court.

Mr. Strachan: No.

The Court: Because you just got through telling me that the purpose of the letter was to show that the trade considered this product inferior.

Mr. Strachan: That's right. We are not offering it to show that it was or was not. It is to show that it was not accepted by the trade. If your Honor would like to have us submit a memorandum or an organized argument on the thing, because I am quite surprised at this turn of events, I should be very glad to prepare a memorandum or more complete argument based on authority. [1322]

The Court: I see that a number of these letters concern navel orange juice.

Mr. Strachan: Well, as to that, your Honor——

The Court: They could be put in one category.

Mr. Strachan: It wasn't navel orange juice that I had in mind on that particular letter, I believe. It was this——

The Court: Which letter?

Mr. Strachan: These that refer to Anagold where navel juice was packed under the Anagold label are introduced for the purpose of showing that, among other things, the Anagold label value was impaired.

I haven't had time to review the transcript fully, but here is the sort of thing that Mr. Winckler testified to:

"Q. Did you keep in sufficiently close touch with what was going on in the plant so that if the laboratory records began to show product inferiority, that that would come to your attention?"

I am reading from page 1047 of the record beginning at line 11.

"A. Well, I did the best I could, but besides——

"Q. All right. Now, that is an answer to that one. Now, in the event that the product was not gaining, or any product was not gaining public acceptance, and the brokers were dissatisfied with the product, would that dissatisfaction, that lack of acceptance, be brought to your attention? [1323]

"Q. It definitely would have been, because if a broker is dissatisfied, he either would pick up the phone and call me from New York, or would write a letter. And there is one thing that I will state, that no single letter was received by our corporation at any time that I wouldn't have read or seen it. If I was on a business trip, they kept the letters, the mail, for me, pending my return. But to answer the question completely, I have no knowledge of any broker or consumer dissatisfaction at all, except on products which contained navel juice, or was pure navel juice."

The Court: All right.

Now, there are other things, too, but there is an admission that he had complaints on navel orange juice. Now, when you bring in letters, even if we look at them just as impeaching, or if you look at them as letters of complaint, without telling the jury what the contents were, where there is any reference to the navel juice they are not impeaching. He has admitted that.

Mr. Strachan: But, on the other hand, I think we are entitled to show that because he packed inferior products, including navel, and Citrus Cocktail, under the Anagold label, that it did not have value, but actually it was a detriment to the product when it was put in the course of commerce.

The Court: Have you made any investigation of how many [1324] customers they had, how many consumers used this product?

Mr. Strachan: Not consumers. We have made some studies showing how many brokers they dealt with in a given year.

The Court: Here is one, for instance, that talks about buyers getting stuck with Anagold beverage bases. Unable to sell them at regular price.

What does that mean, get stuck, unable to sell them?

Mr. Strachan: It means that they couldn't be marketed at the prices for which they were held. The public wouldn't——

The Court: Does it mean they were inferior, or does it mean there was a price situation? What does it mean?

If you inject an issue like that in the case, then you have to find out how did the buyer get stuck. Did he buy more than he could sell in his community. did he buy a certain amount and some other product came out that undersold him?

He could get stuck a number of different ways

"Stuck" has several connotations, and you would get an issue in the case that there is no end to.

Here is another one of these: "Everyone who bought got stuck with it."

Mr. Strachan: It indicates the attitude of mind of the trade, that it was an attitude that was not willing to accept these products.

The Court: Do you think that a sheaf of letters would [1325] indicate the attitude of a trade in connection with sales as extensive as the evidence shows this plaintiff had?

Mr. Strachan: I think they are quite persuasive, and they certainly are in direct contradiction of Mr. Winckler's very broad testimony.

The Court: I have heard of provisions for sampling public opinion, and in unfair competition cases I understand that courts have admitted sampling of public opinion, but I never heard of sampling public opinion by going through the files and finding out what complaints were rendered, and then bringing those complaints in and saying this is a sampling of public opinion.

There is no mathematical basis to the number of consumers, to the number of dealers.

I think the best thing to do would be to turn the letters back to you. You will find, probably, that they fit in various categories.

Mr. Strachan: Your Honor, the difficulty with that—I tried to form categories of them and groupings of them, and I found that there was so much overlapping, letters dealing with several aspects of the dissatisfaction, that I am convinced that you can't classify them that way.

I will do the best I can, but there will be some overlapping.

The Court: See what you can do with them, if you want [1326] to make your offers of proof.

And I will be glad to have any memorandum that you want to submit. I would be interested to see a case where you could prove general consumer dissatisfaction with a product by going into a firm's files and finding what complaints they received.

I will wager that there is no firm that does business but what you could go in their files and pull out a sheaf of complaints.

I would just like to make that as a little bet. With as good a product as Sunkist puts out, I will wager that you have complaints.

If that is the way you prove broker and consumer dissatisfaction, I would be very much surprised.

I would like to read a case on that. So you could present a little memorandum, and I will be glad to look it over.

Mr. Strachan: I might say that there are some more files at the office that I haven't had an opportunity to go through, and I may want to select some of those. If so, I will include those.

The Court: More files to similar effect as this?

Mr. Strachan: I haven't been over them yet. I don't know what they are.

Would your Honor care to suggest what sort of categories you would like to have me group these in? [1327]

The Court: Well, first of all, the navel complaints, I don't think you have got anything there, because there is an admission in the record that he had complaints on these navels.

In fact, the only navel juice that he sold, as I understand, that he didn't get complaints from was the carload to Canada. Apparently the Canadians like the bitter taste.

The second category would be these letters that are ambiguous, that you don't know what they mean. I just read two or three of them, where the dealer says he was stuck.

What does that mean? Stuck because it was inferior? Is that the inference you want to draw? Or was he stuck because he bought too much?

That demonstrates, of course, the reason why cross-examination is permitted, because if you called the witness here and showed him the letter:

"Did you write this letter?

"Yes.

"What do you mean by 'stuck'?"

You might get twenty different answers.

Mr. Strachan: I think that letter means that the broker, because of past experience with Winckler-Smith products had met with sales resistance.

The Court: Then to make any fair presentation to the jury, you would have to take a certain year—I am just [1328] pointing out some of the problems you have got—you would have to take a certain year and find out how many cases were sold, you would have to find out how many cases brokers bought, which would be probably the same as the amount sold, how many cases were involved in these complaints. Now, when you got all through, if you had a percentage when you wound up that there was dissatisfaction with—let's take some hypothetical figure of one-half of one per cent—it clearly would not be proper evidence.

If your computation, when you got through, showed that there was a sizeable complaint, and if you got over the hearsay objection, you might have a different story. But to go through and pick out letters of complaint and to offer the letters as evidence that the product was inferior, and that the Anagold label had little value, and that customers, broker customers, had no buying interest in the product, I can't follow you.

Mr. Strachan: Let me say this: That we don't offer the letters that say the quality was poor, for the purpose of demonstrating or proving that the quality was or was not good. What we offer those for is to show that the broker and his trade were not accepting them, or were unwilling to accept the quality because of past experience. So far as the Anagold label is concerned, there is a showing in some of those letters saying it is a positive detriment. [1329]

"We won't buy any more of your product unless you take that label off and substitute another label."

That is a business fact. It is not hearsay. It is a customer saying to the man who is trying to sell them the product, "I won't buy that unless you give me a different label. I have had bad experience."

Now, that isn't hearsay. That is just a term of business contract.

The Court: But, Mr. Strachan, supposing you brought this witness in who wrote the letter, and you said to him—rather, the plaintiff said to him on cross-examination, "You have written a letter here. How many cases did you buy?"

"I bought three cases."

Or you might bring the man in and you might ask: "How many cases did you buy?

"We had five carload lots.

"What was this complaint about?

"This complaint was about five or six cases in the last carload."

You see how the facts that surround each of these transactions are necessary to understand what is involved?

Mr. Strachan: Perhaps I could put a hypothetical case that would illustrate what I have in mind.

If this were a suit in which Mr. Winckler claimed that by some defamation the defendant had prevented him from getting [1330] a contract, and the question of the defamation was in issue, but the defendant could come in and show that the person with whom he was contracting had, without regard to this supposed defamation, or this supposed other interference, written a letter saying, "I will not give you this contract unless you do thus and so," that letter, I say, would be admissible without more.

The Court: The letter was written to [1331] Winckler?

Mr. Strachan: If there were, yes. That would show what the state of mind of the other contracting party was, why he imposed certain conditions, why he wouldn't take products with the Anagold label. He said, "Mr. Winckler, I won't take your product unless you put some other label on, I won't do business with you."

That's what we have.

The Court: Then the plaintiff is bound by that letter, without a chance to cross-examine that man.

On cross-examination he might say to this man, "Now, you say in your letter you won't take my product because it is inferior. Isn't it a fact, Mr. Jones, that it was only after the defendant told you what a louse I was that you wrote me this letter?"

He says, "Yes, that's true. He came in and told me what a louse you were. I didn't want to put that in the letter, so I just wrote the letter and said I wouldn't take the product."

That's the very purpose of cross-examination, to find out what lies behind statements.

There are other statements where the fact that a certain thing was done may be shown without regard to the contents of it, but that is far different from offering the letters. I don't know how you would handle that, or what issue it would pertain to. There certainly is no impeachment as far as [1332] navel juice is concerned.

I will see your memorandum and see what you can do to sort these out, and we will rule on some more of them.

Mr. Strachan: Where did we leave the record?

The Court: There were two offered and objection was sustained to two, P and Q.

I would like your memorandum to start out with a brief discussion of what the probative value of these documents is, because in analyzing the admission in evidence I always find it helpful if you state what you contend the probative of this testimony is.

Mr. Strachan: To what are you directing it?

The Court: What is this going to prove? What do you want to prove and how does this tend to prove it? And then you look at the document. That little formula always helps me. I am not as smart or fast a thinker as some people, but that little breakdown very often helps in trying to determine whether something is admissible.

Mr. Strachan: We shall try to organize it in that way.

The Court: Bear in mind you have already stated what you intend to prove, but you may on reflection want to crystalize that or specify [1333] more.

* * *

The Court: Yes. I am just going to inquire, do you have this memorandum on this evidence question?

Mr. Fisher: We do have, your Honor. [1338]

* * *

Mr. Strachan: * * * Another matter that I wanted to mention was the stipulation which appears on page 997, I believe, of the record.

The stipulation that Mr. Dixon requested that I enter into as to the amount by which the purchase of 1400 cases of bright goods, as they are called, differed from the price at which TreeSweet, I believe it was, might have acquired the same quantity, as it appears in the transcript I think it might be misconstrued and be broader than I intend the stipulation to be.

It reads:

"May it be stipulated, counsel, subject to your check as to the figures, that for the purchase of the 1,000 cases of 12/46's and for the purchase of 400 24/2's by the plaintiff from Sunkist, at the prices specified in Plaintiff's Exhibit 49, that for the purchase by TreeSweet of the same amounts and sizes of orange juice there would be a difference of $404.76?"

I didn't intend that to be a stipulation that if TreeSweet had purchased as an isolated transaction those quantities of goods, that the price would have been $404 lower. It was my intent only to stipulate that in the event TreeSweet had [1339] taken down the same amount of quantities under this——

The Court: Contract?

Mr. Strachan: ——joint venture, it would have accounted, under the terms of that contract, for those quantities, which it might have sold at a price lower than this spot price that was quoted to Winckler-Smith.

Mr. Dixon: Yes, your Honor. I presume counsel is endeavoring to state his position that these were not sales or matters which go to, possibly, questions of law which may be involved in his defense.

The sole purpose of this evidence is to show that the plaintiff paid the amounts specified in the exhibit for 1400 cans of single-strength Valencia Orange juice. The exhibits offered by the plaintiff showing the amounts billed or paid by TreeSweet during a comparable period per case indicate that had those prices been charged under the contract—and they were—that they would have paid that much less than the plaintiff paid.

The Court: But you are relying entirely on the contract transactions?

Mr. Dixon: Yes.

The Court: You are not reading into this stipulation anything else?

Mr. Dixon: No.

The Court: That is your point, isn't it? [1340]

Mr. Strachan: I just wanted to make clear to the court and counsel that we took the position that the two sales were not under the same or similar circumstances and weren't comparable.

I didn't want to be precluded from that contention by the stipulation.

The Court: All right. [1341]

* * *

The Court: The record will show the jury absent.

Mr. Dixon, have you looked over this memorandum?

Mr. Dixon: Yes, I have, your Honor. I am ready to comment on it at any time your Honor is ready.

The Court: Very well.

Mr. Dixon: May it please the court, the question presented by the memorandum and now before the court relates to the admissibility in evidence of certain letters or copies of letters which were secured from the files of the plaintiff corporation. They are claimed to be admissible as evidence in this case under two theories: No. 1, to show the state of mind of the person from whom the document was received or sent and, second, to impeach the testimony of Mr. Winckler.

Now, there isn't any question in my mind, and there isn't any question about the law as to the admissibility generally of statements of declarants to indicate a state of mind.

I submit, however, that that is not the situation presented by these documents and will indicate the reason why I do not think they are admissible under that theory. I had this same question presented during the trial of a case, United States vs. Standard Oil Company of California, which was an anti-trust case, in which the government had witnesses on the stand, most of them competitive suppliers of Standard, who had endeavored to sell their product to the dealers and [1343] had been informed by the dealer to whom they were endeavoring to make a sale that while they would like to buy the product, they did not dare to do so because of various arrangements that they had with Standard, exclusive dealing arrangements, potential forfeiture of their lease, and so forth.

The objection was made when a question was asked of the witness by myself——

The Court: These were witnesses you were offering?

Mr. Dixon: These were witnesses which the government was offering and who were on the stand and available for cross-examination.

I asked the witness, who was a competitive supplier of Standard, whether he had endeavored to sell his product.

He said he had, and then became specific as to specific dealers and contracts made and the results thereof of the efforts to sell, and during the course of that examination the witnesses testified that they had endeavored to sell to the dealer, but the dealer told them just what I indicated, that he couldn't buy or didn't want to buy for the reasons [1344] given.

Judge Yankwich had ruled that question improper, as being hearsay, when first asked. However, upon reconsidering the matter on the following day he reviewed his ruling and allowed the question and the answer on the basis of the cases which have been cited in this memorandum.

Now, there are some other cases on the subject that might be referred to that counsel have not cited. I refer to American Co-operative Serum Association vs. Anchor Serum Company, 153 F. 2d 907, as being a reported decision, and also refer to an unreported decision of United States vs. Kohler, decided by the District Court in Pennsylvania in March of 1953.

The Serum case dealt with a comparable question that we had in the Standard case, and the court said that the reasons given a seller of a product by a prospective purchaser as to the reasons why the prospective purchaser could not buy the seller's product is admissible and is not hearsay or self-serving.

Now, in the Kohler case certain reports and letters written by salesmen of competitors to a defendant reporting conversations had with potential customers, to the effect that they would like to buy the salesman's product but had to buy the fittings from the defendant in order to get any products, was admissible to show the state of mind of the customer making the statement reported. The court went on [1345] to say, however:

"It must, however be supported by other evidence that the defendant did, in fact, refuse to supply the potential customer except under tie-in requirements, and the testimony of five of approximately six hundred of defendant's distributors was not sufficient to indicate the existence of a tie-in policy."

The Court: Was that last statement as a matter of law or as a matter of fact?

Mr. Dixon: I think it was a matter of law, your Honor. I will have to get that decision to refresh my recollection of it. But my recollection at the moment is that standing alone in the issues of the case, that it was not enough, and that is why I am coming down to the issues in this case, because in both the Serum case, in the Standard Oil case, and in the Kohler case, this evidence was admissible to show a state of mind of a particular person, which statement related to a restraint, which was the issue involved in the lawsuit. In other words, it dealt with the violation charged and not with something that was wholly collateral to any issue that might be raised in the lawsuit.

That is the first distinction.

The second distinction is that the witness reporting the hearsay statement was in the courtroom and available for cross-examination. In other words, the competitive supplier [1346] was there for cross-examination by the defendant, and they were cross-examined.

It is to state the obvious to indicate to the court that there is no cross-examination of anybody available by these documents that the defendant is endeavoring to offer as evidence in this case, and as I think your Honor has already suggested, were we to admit these letters and documents, 60-some odd letters, all of which purport to apparently deal with complaints, certainly the plaintiff would not be bound by any statement contained therein and would be entitled to go fully into and explain, and to offer further correspondence, if any, in the case that related to these letters that the defendant is offering in evidence.

As I have indicated before, some of these letters that are offered refer to other letters and are in reply to letters received by or sent to the plaintiff.

Now, the whole picture must be in the case. I don't think that you can determine the state of mind, if that is what these are purportedly offered for, of a broker, by merely showing a single letter, which may be capable of many, many different interpretations and explanations. [1347]

Now, that is obviously an entirely different situation from what is set forth in the cases that I have just mentioned, because these declarations, or whatever you want to call them, in these letters certainly do not, in my judgment, in any way relate to the fundamental issue in this lawsuit, which is whether or not these defendants combined and conspired and violated the antitrust laws as charged in the complaint.

They suggest that they do relate to the question of damages. I submit that I fail to see how in any sense they can relate to the issue of damages, because, let us assume that we have these 60 letters, and we assume they picked all they could find in their pickings of the file of this plaintiff for this purpose, the plaintiff corporation here has sold, and this is not in dispute, over a million and a half dollars worth of its products during the years 1949 and 1950. Some of these letters, as I recall them, go back even beyond that date. That certainly is evidence of some public acceptance of product, and I would say the fact that the sales were made is evidence of the creation of a market for the plaintiff's products.

Now, as your Honor has already suggested, as evidence of damage, going to the damage question here, it is wholly unsupported on the basis of my analysis of the sales made or the products involved. Some of them apparently, and [1348] I just chanced to scan them Friday, dealt with, I think, navel juice, which the plaintiff has already testified that they had some complaints about. Certainly they wouldn't be admissible on that for any reason.

Some of them apparently are offered for the purpose of showing broker dissatisfaction with the product. Well, if the broker were here and the plaintiff had an opportunity to cross-examine, I think we could soon determine the extent of that dissatisfaction, but the plaintiff is certainly not to be bound by a broker's statement as to why he didn't or wasn't selling the plaintiff's product, because he may have had any number of reasons for not doing so, most of which would obviously not be disclosed in the written communication.

So it deals wholly with a collateral issue, these documents that they had offered, and would certainly raise a collateral issue. I would, therefore, say they are inadmissible on that ground to show the state of mind of anybody with reference to any of the issues in this lawsuit.

Coming now to the question of impeachment witnesses, I don't have the record before me, but I understand on pages 1047 to 1053, Mr. Winckler testified at length concerning complaints. There was rather an extended examination made by counsel of Mr. Winckler in which he endeavored to fully cover this subject. It is my recollection that the testimony [1349] given here in this brief does not in any sense of the term cover the whole testimony of Mr. Winckler on this subject. Mr. Winckler did admit, as I recall the testimony, that he had complaints, some from customers, some from brokers.

I say it would be most unusual in a business of a million and a half dollars a year if there weren't some complaints, particularly when you are selling food products. Mr. Winckler didn't testify he didn't have any complaints.

He says broker or consumer dissatisfaction, to take their term. Well, what is that? That is a conclusion, obviously.

Further testimony of Mr. Winckler shows, I believe, that he had from time to time some complaints. Now, the plaintiff here has plenty of letters, your Honor, from consumers praising the product of the plaintiff here and inquiring as to where they could get more. It seems to me—well, I just wouldn't want to even endeavor to offer such documents in evidence in this case by way of rebuttal or any other reason, but I think they are good evidence if this is competent, in reply.

But there again we are dealing with a collateral issue, that is not the issue in this lawsuit, as to whether this product was good. The record shows it was sold, and whether it was good, whether some people liked it, whether others disliked it, is wholly immaterial, as I see it, to [1350] the issues in this lawsuit.

The issue in this lawsuit is as to whether or not the defendants combined together and violated the antitrust laws as charged in the complaint. That is the primary question.

If the jury decides in the affirmative on that question, they then proceed to the causation question and damages. The damage here is not that which relates to whether or not the customers, a few of them, and I think Winckler testified it was maybe less than one-half of one per cent, or something like that, of the total sales made, I don't recall the testimony, but I don't think it makes any difference, but the issue here is as to whether or not the plaintiff corporation lost, No. 1, profits which it might have earned in 1951 by reason of any of the acts complained of here, alleged to have been committed by the defendants and, second, whether or not this plaintiff furthermore was forced out of business by reason of that loss of profits, which made it impossible for it to make and meet its commitments, financial obligations, in 1951, which resulted in the institution of proceedings under Section 10 of the Bankruptcy Act in March of 1952. That is obviously a causation question for the jury to decide.

Now, the jury may never get to the second question. They may decide that the damages here are limited to the loss [1351] of profits, if they decide the defendants have violated the antitrust law, but these documents, this sheaf of documents, 60 documents, approximately, that the defendants are asking this court to put into this record, I submit are not admissible, absent some testimony here of the brokers, of the persons making them, the availability for cross-examination by this plaintiff, and even then I think that is a collateral issue and such testimony would be irrelevant to any of the issues of this lawsuit.

So on the basis of the cases and the principles of law, which I do not deny to be applicable in the proper type of case, I submit that the cases and authorities cited are not applicable to the facts and the issues in this case, and they are certainly not applicable for the purpose of impeaching this witness on the basis of his testimony that is already in the record.

The Court: Before I hear from the defendants, let me see the transcript, 1047 to 1053.

(Mr. Strachan handing transcript to the court.) [1352]

The Court: All right. Who wants to be heard on this?

Mr. Fisher.

Mr. Fisher: Your Honor, we believe very strongly that this evidence is admissible. It is an exception to the hearsay rule. The California cases, and there are a number of them, bear it out. It is followed in the Federal Courts. The cases that we have cited——

The Court: Let's not argue about the rule. There is no doubt about the general rule of law. The particular question is the application to this case.

The almost startling example of the rule would be in a criminal case where a defendant was claiming self-defense, and he therefore is permitted to testify that X told him that the deceased had said, "The first time that I see that so and so I am going to kill him."

Now, whether the person ever made that statement, or not, is not important; the important fact there in the factual background is that this information was passed on to the defendant. True or false he is claiming now that he relied on it.

So we are all familiar with the rule of law, where items are admissible for the purpose of showing a certain thing was done, without respect to the truth of the matters contained therein.

Mr. Fisher: That is right. [1353]

The Court: The question is its applicability to this case.

Mr. Fisher: All right. The witness, Winckler, testified that he sold his products through brokers. My recollection is that there is testimony to the effect that he had 110 brokers. The plaintiff claims that the alleged actions of the defendant caused him damage, caused him damage in loss of profits, good will. There has been a good deal of testimony with reference to the trade-mark Anagold. This has a definite bearing in showing the state of mind of the brokers with reference to his product and the marketing of his product, and the brokers are an essential link in the distribution of plaintiff's product, and, therefore, it has an important bearing and is not a collateral issue, with respect to the alleged good will and the value of the trade-mark Anagold.

The Court: Now, let me ask a silly question. I hope it won't interrupt your chain of thought so that you can get back on your argument.

This is not a case where the plaintiff says that, "We made Valencia juice in '51, but we couldn't sell it because the brokers wouldn't buy it." It is not a case where they say, "We had trouble selling it, and therefore we got stuck with a lot of juice."

This is a case where the plaintiff says, "We never made any Valencia juice in 1951, because of the acts of the defendants. [1354] Therefore we sustained a loss because we couldn't make juice."

It is pretty hard for me to see the pertinency, therefore, of what brokers might think about it. If they didn't have any juice to sell to the brokers, it wouldn't make any difference whether every broker in the country was down on it. If they never had any juice to sell, they never got that far along.

Mr. Fisher: But it does go to the value of the good will allegedly damaged by the alleged acts of the defendant.

The Court: You may have a point there. In other words, if there was damage, what was the good will and how was the good will damaged, therefore you claim that this is pertinent to proving good will?

Mr. Fisher: Exactly.

The Court: Go ahead.

Mr. Fisher: It bears directly on whether the plaintiff had the good will that they claim they had, whether they had the public acceptance, whether they could have sold their product had they made it, in 1951.

To my mind it is not a collateral issue. It bears directly on the question of damages.

The Court: Of course by your memorandum you concede something that you didn't concede the other day when we were discussing this matter. I had this principle of law in [1355] mind, but nobody ever raised it. I asked what your showing was and the purpose. I asked various questions. You were offering the letters in toto. Now you disclaim by your memorandum that the contents of the letter, the factual matter therein, has any bearing. You offer the letter to show that complaints were made.

Mr. Fisher: Show that complaints were made and to show the intent, the state of mind of the brokers writing these letters. Not as to the truth or falsity of the statements made therein. [1356]

The Court: That's right. You want to show a complaint was made.

Mr. Fisher: That's right.

The Court: Which might be satisfied if the court permitted, for instance, the fact to be shown that a letter was written, without disclosing the nature of the contents of the letter.

Mr. Fisher: I don't see, your Honor, how the mere fact that the letter was written would show the state of mind of the broker. It seems to me that to get to the state of mind of the broker you have to have the letter in evidence.

The Court: You are thinking about the same thing I am, if these letters ever went to the jury, there would have to be extensive instructions as to how they could consider them and for what purpose.

Mr. Fisher: I think that is correct, that they should be limited with respect to the purpose.

The Court: Have you considered the fact that these letters are probably also double hearsay? In other words, the broker is apparently relating the complaints he had from a grocer, probably triple hearsay, who, in turn, then passed on complaints he may have had from the customers.

Mr. Fisher: I don't see that it is far different from the California case that I cited, Phillips vs. Glazer. That was a slander of title case, and the Appellate Court approved [1357] the admission in evidence of statements made by prospective purchasers out of the presence of the defendant. The court said:

"It is contended that the statements ascribed by the witnesses to prospective purchasers were hearsay and incompetent. In the same breath appellant admits it is an exception to the hearsay rule when the intentions, feelings or mental state of a certain person at a particular time is material to the issues. These authorities establish the rule that such declarations when used not to prove the truth of the matter asserted but to establish the state of mind of the declarant are not within the hearsay rule."

The Court: I haven't read this case, but I am a little confused about it. Page 4, line 32, you say, "Statements made by prospective purchasers," and on page 5, quoting from the case, you talk about statements to prospective purchasers.

Now, what was the factual situation? Statements to a prospective purchaser or by a prospective purchaser?

Mr. Fisher: It was by prospective purchasers.

The Court: Then quoting from the case on page 5, line 3, you say to prospective purchasers. What was the factual situation?

Mr. Fisher: The factual situation there was that there [1358] was a man that owned a lot down in Malibu and he claimed that the building on the adjoining lot was built over his line. He posted up a big sign to the effect that there was this encroachment, and anyone buying this property would be subject to damages if they were to lease it, and so forth. It was a slander of title suit.

The Court: Against him?

Mr. Fisher: Yes.

The Court: By the owner of the adjacent lot?

Mr. Fisher: By the owner of the adjacent lot. They permitted their brokers to—a person who had the leasing, apparently, of the property, to testify to the reaction of the purchasers, prospective purchasers, I should say, the statements of the prospective purchasers.

The Court: The plaintiff, in other words, who claimed his property was slandered was permitted to put his broker on who related statements by prospective purchasers?

Mr. Fisher: That is my recollection of the case.

The Court: The broker, therefore, would testify that prospective buyers would come in and say, "Well, I can't buy the property. Apparently it encroaches on this man next door. Therefore, I won't buy it." Right?

Mr. Fisher: It was the state of mind of the prospective purchasers. The court admitted it by showing the reaction of these prospective [1359] purchasers.

The Court: As testified to by the brokers?

Mr. Fisher: As testified to by the brokers.

And in the du Pont case, United States vs. du Pont, there was a letter which was admitted in evidence showing the state of mind of Durant, the writer of the letter. Durant had been deceased a number of years. It was admitted for the purpose of showing the state of mind.

Now, here, these letters of brokers are sought to be introduced to show the state of mind of the brokers.

The Court: Do you intend to lay any further foundation as to how many customers, how many brokers in total were involved? How many were involved in these letters?

Mr. Fisher: Well, they are, if you please, substantial.

Mr. Strachan: May I speak to the court on that subject?

The Court: Yes.

Mr. Strachan: I was going to suggest, if your Honor indicated you intended an adverse ruling on the offered evidence, to suggest that instead of completing the record at this time, I be allowed to review these letters. It is not a complete collection. The way I have approached this case so far has been to deal topically with various occurrences which we feel affected the lack of success of Mr. Winckler's business. I know there are some letters of others I haven't reached yet that are not included in this group.

On the other hand, in the 67 letters which [1360] are here, there are some which are not complaint letters. I think they are admissible on the basis of admissions, perhaps, Mr. Winckler's own letters.

So I would suggest, procedurally, that I defer the offer at this time until I could get a little better organized. I doubt whether there would be any substantial change in the foundation we offered.

The Court: You don't propose to offer how many brokers he dealt with as related to how many letters you have?

Mr. Strachan: Not as foundation for these exhibits.

The Court: Well, of course, this is a hypothetical case, but supposing it would be shown that the man had 10,000 brokers and you offered a letter from one broker as to his state of mind. Do you think the court should admit that?

Mr. Strachan: If it bore on the issue, yes.

The Court: When the question is the state of mind of the brokers collectively? The acceptance of the product?

Mr. Strachan: I think you can show the experience that each broker had in his own territory, and why it was in that territory the products were not publicly accepted by the market.

The Court: Well, I don't know for sure what I am going to do with it, but if I were the plaintiff in this case, I am no trial expert, but if I were the plaintiff and you would put in evidence like that, I think I would have a field day. [1361] Talk about the house that Jack built, which one of my brothers referred to in the Karseal case.

It was the plaintiff's complaint they didn't get to make any juice, so you are going to defend on the basis in part that even if they got to make the juice, they couldn't have sold it. That doesn't take us very far along to a solution of this issue.

Mr. Strachan: Well, we don't agree with plaintiff's theory that he didn't make juice because he couldn't get fruit. I rather think when the evidence is completed it will be very clear he couldn't get fruit because he couldn't pay for it.

The Court: Do I understand you to say now you are not prepared to make your offer of proof at this time? [1362]

Mr. Strachan: If I did, your Honor, I would want to reconsider and make a reoffer later if I found it wasn't sufficient, so I would rather have your Honor give me an opportunity to review the whole subject and get all of the files together, in the event the ruling is adverse.

I might say this: I do think that an exclusion at this particular time would be particularly hurtful to the defense, because Mr. Winckler has testified that there were no complaints. We started in to show some complaints. We got three or four letters in, and then we were stopped. I think we stopped at about the point where Mr. Winckler had said that Mr. Schmelzer who wrote that one complaint letter had paid him a high compliment six months later.

There are three other letters after that so-called compliment to show that Schmelzer was extremely dissatisfied with the merchandise that he was trying to move.

The Court: Of course your memorandum starts in with the proposition that this is admissible on the issue of causation, and then the last paragraph of/ the memorandum states that they are a direct contradiction of his testimony, which is impeachment. So you are really approaching it on two grounds.

Mr. Strachan: That is right.

Now, on that causation ground, if I may, your Honor. You may recall in Mr. Hurd's opening statement he talked about the cyclic nature of Winckler's enterprise. He [1363] would start in business, he would do some business, and then he would lose and lose and go into bankruptcy; he would come out of bankruptcy and make a fresh start, and about every four years he goes in bankruptcy. Now, one of the elements of proof, that the failure of the business the second time was not due to inability to get juice, will be a showing that steadily from 1949 through '51 his business was on the skids, it was going downhill, and by the middle of the summer of 1951 he had nothing to buy fruit with. He was absolutely broke. And the reason that he was in that condition was because he had had lack of success with the blends, he had had lack of success with his navels, he had hurt the brand name with the navels; he had had lack of success with his ades, he took big losses on those; he hurt the market for, even, single-strength juice. So by the time he gets down to the first of July, the 31st of July—I have forgotten which it is—he is absolutely broke and he can't stay in business anyhow.

That, we say, is a consequence and a causative result of these business practices which spoiled the market for the Anagold product, and also destroyed his broker organization.

The Court: As to impeachment, I haven't any doubt that producing letters as to navel juice is not impeachment, because of the admissions made by Winckler, so you will [1364] have to sort your letters out on that basis if you are offering them for impeachment. Those that involve navel juice are clearly not impeachment.

As to impeachment of Winckler on other products besides navel, you probably should be permitted to show the fact of a complaint as to some other product brought to his attention, in view of his very broad statement about complaints.

However, it will be limited, and the jury would have to be instructed exactly what issue it was pertinent to.

I am talking now about impeachment. I don't have much problem about the impeachment problem. I think you would be entitled to show impeachment about products other than navels, or navel blend, and not entitled to show any impeachment on any matters involving navel.

Most of those letters did concern navels.

If you had one of those ambiguous letters that doesn't tell what the brand is, if you could develop from the witness that it concerns something other than navels, then, again, I think you would be permitted to show the fact of the complaint.

As to those ambiguous letters that talk about being stuck, I think that those are not proper. I don't think they are impeachment. They open up an entirely new issue, new collateral issue. What does he mean by "stuck"? What was he stuck with, and why was he stuck, and when, and a lot [1365] of issues which would merely multiply endlessly the issues in the case?

So my thinking is fairly clear on impeachment. If you want to sort your letters out on that basis, I will see what you have got.

Mr. Strachan: Might I raise this next question, your Honor?

Here is a letter from Winckler to the Mississippi Sales Company. He says:

As soon as we have prices we will wire you. However, we are wondering why you suggest that we give you orange juice under some label other than Anagold. Your explanation would be greatly appreciated, and we will be glad to comply with your request, but we would like to have this explanation.

And his broker writes back:

We have your letter of the 16th, and in answer to our letters of the 4th addressed to the attention of Mr. Winckler, and we know that you want an explanation as to why we want a label other than Anagold. Our reason for asking this question is due to the fact that a good many jobbers here were caught with large stocks of your orange juice under the Anagold label, and it stayed on the [1366] wholesalers' and the retailers' floors and they had to reduce the price considerably to move it, and we think if we could secure another label we would have less sales resistance.

Now, I don't know whether the juice that was shipped there was or was not Valencia. I think that is largely beside the point, because the fact is that Anagold had developed a bad name in that territory, and I think we should be allowed to show that, quite without regard to whether it is a Valencia or navel product.

Mr. Dixon: If the court please, I would just like to comment on this last statement of counsel. It seems to me that is the most complete non sequitur that I ever heard. Merely because some brokers had some Anagold juice in stock, and they may not have been able to sell it because they didn't want to let it go at a price which would mean a loss to them, or the Florida market might have flooded it, and therefore this juice didn't move, is no reason at all to offer that, or to permit any inference 9
to be drawn—and it is purely an inference and conjecture at the best—that this so-called "caught" situation resulted from an impure or bad product. And that is the inference that counsel wants this jury to draw from that letter.

That is my objection to this whole type of use of this type of a document in evidence. [1367]

I know of no case, your Honor, where the court has gone to the extent that counsel wants this court to go in this case.

In the situation referred to in the California case it appears to me, although I haven't had a chance to get the facts, that they were talking about

—a witness was on the stand and he was permitted to say what prospective purchasers had told him as to why they wouldn't want to buy the land. That is the statement of a declarant. In other words, the decision refers to the declarant's statements.

A declarant means somebody who has made an oral statement to me. It does not deal with documentary evidence.

I don't know the circumstances under which the Durant statement of 1920 was admitted in the case against duPont.

That would be more analogous to what they are offering here, because here they are dealing solely with letters or documentary evidence, not oral statements alleged to have been made to a witness on the stand available for cross-examination who was permitted, and properly so in my judgment, to give that kind of testimony.

But counsel has just read this letter, from which he wants the jury, obviously—otherwise it has no purpose—to infer that Anagold had a bad name—that is his inference—in Mississippi, because some brokers got stuck with the brand down there. [1368]

They may have been stuck for a number of reasons. They couldn't move it because Florida moved in with a low price and they were stuck with a higher priced product, so they didn't want any more of that, because it stuck in their mind. They didn't want any Anagold, but they would take the same juice under a different name.

Are we to infer from that that the product was bad?

That is what counsel wants this to go in for, if I understand his offer.

The Court: No. He is arguing in that particular case that it is in to show the lack of value to the Anagold trade name. So that if the juice was good, but the label had a bad reputation, he would argue that, therefore, they didn't have a good trade-mark and, therefore, they couldn't have sold their products had they been able to make them.

Mr. Dixon: That is right, your Honor, but he has to infer that. There is nothing in that letter, unless I am misinformed—I don't have it before me—that indicates that the product itself was bad. Maybe there is. I don't have the letter. But that isn't the statement that the broker is alleged to have made in this letter, that the product was bad. He just didn't like the label. Why? Because of any number of reasons, where I am entitled—the reason that I gave is just as good as the reason that counsel wants this jury to infer, without any foundation in the letter at all. [1369]

The Court: But your argument there would be the argument as to what inferences you would draw from the letter.

You could draw yours, and they could draw theirs.

That letter may or may not fit this rule.

If it came within this rule that the letter was only admitted as a basis of some complaint, and not for the truth of what was said, then, of course, the issue would only be, was a complaint made—and not the truth of what was said.

Now, the very purpose of that rule, of course, is to assist in cutting off these endless inquiries into the facts of the matter that lay behind these things.

So, for instance, if it is permitted to show that X made a complaint, that is the end of it. Not what he complained about, but that he made a complaint. Then the only issue is, did he complain?

If you go into what he said, then you open the door up—unless you can instruct a jury to ignore this matter that you bootleg in under the offer, even with the restrictions given by the court—then you open up issues as to whether this was true or not true, and the question of trying to rebut the inferences that might arise from the alleged factual matter.

Now, the letter that you refer to, Mr. Strachan, are you offering it solely to show that such letter was written, or are you offering it to show some of the facts contained [1370] therein?

Mr. Strachan: I am offering it to show what facts were contained in the representation made by the broker to Winckler. Not to show that he correctly represented the facts, but to show what facts were represented.

The Court: You are raising the general issue of broker acceptance of the product and the trademark, is that right?

Mr. Strachan: That is one of the issues to which this is directed.

The Court: Well, that is the issue, outside of impeachment, I take it. What other issue is there outside of broker acceptance of the product and the trade-mark? You are not offering it, so you say, to prove that the products were defective. [1371]

Mr. Strachan: That particular letter has no reference to quality of product.

The Court: I am talking about these general letters. You are not offering the letters to show the products were defective. You disclaim that. Mr. Fisher concedes for you there should be instructions to the jury if they do go in.

Mr. Strachan: That they are not proof of the facts that they contain.

The Court: So you are offering them to show the brokers' state of mind, as it were, as to the product?

Mr. Strachan: That's right.

The Court: Does that sum it up?

Mr. Strachan: That's right, plus Mr. Winckler's knowledge of the facts presented in the communications.

The Court: Now, wait a minute. You mean plus Mr. Winckler's knowledge of the state of mind? You said the facts contained in the letters.

Mr. Strachan: Yes, knowledge of the brokers' statement of their state of mind, that's it.

The Court: Then you are offering these generally for the brokers' state of mind as to the product and the trade-mark, and Winkler's knowledge of the brokers' state of mind?

Mr. Strachan: Yes, sir.

The Court: Disclaiming any interest in the facts themselves [1372] that lay behind the letters?

Mr. Strachan: Well, I don't say we are disclaiming any interest in the facts. We are disclaiming any claim that the letters are admissible as proof of the truth of the statements that they contain.

The Court: Have you made any search as to how broker intention in the merchandising field and customer intention is proved?

Mr. Strachan: No, sir.

The Court: It seems to me that there must be some law on it. You run into it rather commonly in the unfair competition field. You don't run into it, I suppose, in the antitrust field. You run into it in the unfair competition field, particularly in the matter of palming off. I haven't made any search on it, but I know that it is enough of a problem that some courts have sanctioned the sampling of opinion, the thing that is done in the commercial field and not ordinarily done in the law, but it has been permitted in some cases, the use of an accurate scientific sampling of opinion, as it were, in the trial of a legal case.

Mr. Dixon: If the court please, it seems to me there is another problem. Let's assume some of these letters go in. Where are we to stop? In other words, am I to be precluded then from inquiring of Winckler concerning this transaction? Am I to be bound, or are we to be bound by whatever [1373] inference counsel wants the jury to draw from the letters? It seems to me we just start an endless circle here concerning these transactions.

I submit that the exception to the hearsay rule doesn't apply to this situation at all. It has a legitimate and proper basis of use where you have a witness on the stand relating that kind of testimony.

The Court: Well, you might look further. I didn't feel like doing a lot of work. The only thing I had at home was the Model Code of Evidence. I noticed in certain of these questions of admissibility of evidence that under the Model Code the court was given very wide discretion. I don't know whether that comes within the discretionary field or not. I don't know.

What Mr. Dixon suggests is what bothers me. There has to be a cut-off point in order to keep the lawsuit from becoming a series of small trials on issues on the fringe, rather than the trial of the major issues of the case.

Mr. Fisher: May the court please, may I suggest the court consider United States against du Pont, where the court said, and this is where there was a matter of admitting in evidence a letter which had been written by Mr. Durant, and he died afterwards, before the trial:

"Wherever an utterance is offered to evidence the state of mind which ensued in another person in [1374] consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it. The condition of the speaker's mind, as to knowledge, belief, or the like, may be evidenced by his utterances as assertions or considered circumstantially as affording indirect inferences. Therefore on this principle the hearsay rule interposes no obstacle to the use of letters, or any form of verbal utterances by one person as circumstantial evidence showing a state of mind. Such a declaration, however, is to be received only as circumstantial evidence to show the fact of the utterance indicating the state of mind or intent, but are not to be used to prove the truth or correctness of such statement."

The Court: Well, Mr. Fisher, I have no doubt that is the law. Where you have one man involved, your problem is simple. The criminal example is the same thing. The problem is a simple one where you have one individual involved.

Here we don't have one man here. You have a question of what was broker acceptance of the Winckler product and trade-mark by various brokers that handled the product. You bring in certain letters and from the statements, from letters that you claim come within this rule, then collectively you are going to argue that represents the general state [1375] of mind of the brokers.

I submit the problem isn't that easy. I am not sure I know the answer to it, but it is a different problem than the one-man proposition where you have an issue involving one man. You have an utterance made. It is admitted, not for the truth of what was in the utterance, but for the fact that he made an utterance. It is a common happening in the court, and we instruct the jury they may consider it for one purpose, but not for another purpose. That isn't what we have got here.

Maybe you can argue that is what you have got collectively. You have got a series, and so forth, but even then you are more interested—really, you are interested in showing generally what was the public acceptance of this product. If the public acceptance was good, even if some broker didn't like it, he couldn't have sold it. If the public acceptance was bad, he couldn't have sold it even if the brokers did like it.

So you get mixed up with broker and consumer acceptance of a product. The offers that you make disturb me. I haven't ruled on that end of it.

I think I have indicated what I will rule on the impeachment end. The impeachment end pretty well falls into place.

But this one I will have to give some more study.

All right. Any other suggestions before we [1376] adjourn? I am going to adjourn now until tomorrow morning.

Mr. Dixon: I was going to just make this added comment, your Honor. With reference to the du Pont situation, I would be the first to concede that that carried a statement by Durant, knowing what I know about the du Pont-General Motors case, that would be admissible without any question, because there the question was whether there had been conspiracy, and the statement, while I haven't read it, of Durant was he was forced to sell his stock by the pressure put on him, to show his state of mind. That would be clearly admissible, but that is not this situation, in my judgment, and that is not what counsel is offering it for, because we have to show the number of brokers, and we have to go into numerous collateral situations if we are to even begin to reply to them on that basis.

The Court: It would also seem to me before this evidence would be admissible in any event, if it is admissible on that other theory, there would have to be a more extensive foundation. There would have to be a foundation as to the number of cases sold, the number of brokers that sold them, and we would have to make some determination as to the materiality of this, even if it is admissible on the other score, because it is the type of thing that is damaging. You can instruct the jury on what the law says, and the law says that we can infer the jury follow the instructions. [1377]

Mr. Strachan: Of course, that is all information that is readily available to the plaintiff in the case from their own records.

Mr. Dixon: That is not part of our case.

The Court: That wouldn't answer the question. I said it seemed to me, I am not ruling on that, that a foundation is required. Just because the plaintiff may know what the foundation is, that doesn't supply it for the court record.

Also, if these letters, of course, are considered as impeachment, we have no obligation under our rules to call attention to them, because our pretrial requirement that you exhibit documentary evidence or advise what documentary evidence you are going to use, does not apply to impeachment, but we are beyond the impeachment point now. You are using them for another purpose, and apparently they were not exhibited nor was attention called to them so that the matter came on with the documents not having been called to the attention of the plaintiff.

Mr. Strachan: I didn't participate in the pretrial aspects of the case, your Honor. It is my understanding there has been a substantial compliance with the requirement of that rule in this, that when defendants were given access to the plaintiff's books and records, the agreement was that those which they selected, and presumably they were being selected for evidentiary purposes, would be identified and that copies [1378] would be made for the plaintiff's use, so that the plaintiff has been on notice ever since the documents were made available that they were selected for evidentiary purposes.

The Court: From what I understand, you selected thousands of documents, and that wouldn't be a compliance, as I understand it, with our requirement. Mr. Stark was asked whether or not —something was said about Mr. Stark saying he had returned some of this information to the plaintiff. Mr. Stark was asked whether he had called their attention to the fact that these were going to be offered in evidence, going to be used, and he said it was not, if I remember rightly.

Mr. Williams: May I clarify what happened here?

The Court: Yes.

Mr. Williams: I selected these documents from the files of the plaintiff, which were not made available to us until about the middle of November. These are the brokers' files. There were quite a few arguments about whether we would or would not get discovery of them. So we obtained these copies for the first time in November. We obtained them with an agreement with the plaintiff that, in the first place, they would be allowed to look at all the documents we marked from plaintiff's files before we made copies of them, and they then gave us permission to make copies of them with the understanding we would give a complete set of the documents of [1379] which we made copies to the plaintiff. That was done. That is how the plaintiff happens to have copies of all of these documents.

The Court: You mean a photostatic set was given to the plaintiff?

Mr. Williams: Yes, made at our expense under the arrangement we had with them. Mr. Stark delivered that set to Mr. Dixon. I prepared the set.

As I understood your pretrial order, my recollection, which may be incorrect, was that it applied to documents that we expected to use from primarily our files, because we assumed that the plaintiff knew what it had in its files. So I have never construed that to mean documents from the plaintiff's own file.

Mr. Dixon: Well, I just want to clear the record on this point, your Honor, since there has been some discussion on it. These files were made available to counsel en masse, so to speak, with the request that if they made copies of anything that they make also a copy for us so we would know what they had made copies of, that's all, which counsel did.

They did not tell us they ever expected to use these documents, and I had assumed they wanted access to the files for the purpose of getting leads, and that is as far as the matter has gone. Counsel has never indicated to me, as Mr. Stark said, that he expected to use all these documents. [1380] If he had, it would be an entirely different story. I would have had an opportunity to look them over, to have segregated them, and I could have made a more intelligent discussion and argument on them at the time they were offered last Friday, had they done so. [1381]

* * *

The Court: The record will show the jury absent.

I am prepared to make a further ruling on this evidentiary matter. Rulings are, I suppose, always tentative. I might change my mind. But I think I have got the answer.

Let me say preliminarily I never have failed to have wonder and amazement when I read Wigmore. I don't think there is any text ever written where the text writer sets out more logically and accurately and reasonably rules of law than does Wigmore. It is hard to read and you have to find the particular section, because it is so detailed, but I pay that compliment to a great text writer.

We have presented here the question of certain letters, documentary evidence which has been offered by the defendants or which will be offered by the defendants generally to prove the state of mind of brokers who handled the Winckler & Smith products, state of mind as to the goods and the trademark of Winckler & Smith, and Winckler's knowledge of their state of mind.

That then presents the two-fold problem, one, that the letters are offered allegedly, not for the truth of the statements contained therein, but for their evidentiary value, [1385] circumstantial evidence of the assertions made, regardless of the truth, and, secondly, the question of impeachment which would be involved on Winckler's knowledge of statements made, in view of his previous testimony.

I have already indicated my ruling on the impeachment question. I read the transcript over and I am satisfied with it. Certain of the letters may be proper on the question of impeachment.

Now, as to the other problem as to the admissibility of these letters for purposes other than impeachment, first, I made a check of McBaine's Evidence Manual, largely California law, and the pertinent section there is Section 221. I will read the heading:

"If, however, evidence of words spoken is not admitted to prove the truth of the matters asserted, but merely to prove that the words were uttered, then it is not hearsay."

The cases cited indicate that that clearly concerned the situation of the state of mind of the person to whom the utterances were made.

That then got me thinking about the problem, and we went into Wigmore for a more detailed breakdown, and beginning at Section 1776, Third Edition, is a subtitle: "Hearsay rule not applicable, verbal acts, res gestae, etc."

Then follows the section quoted in defendants' brief: [1386]

"True history of hearsay rule is nowhere illustrated and emphasized than in those cases which fall without the scope of its prohibition. The essence of hearsay rule is the distinction between the testimonial or assertive use of human utterances and their non-testimonial use.

"The theory of the hearsay rule is that, when a human utterance is offered as evidence of the truth of the facts asserted in it, the credit of the assertor becomes the basis of our inference, and, therefore, the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra-judicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the hearsay rule."

Most of that is quoted by the defendants. [1387] Proceeding in the same section we then find, page 180:

"What here remains, then, is to distinguish and mark off the various classes of utterances which legally pass the gauntlet of the Hearsay rule because it does not apply to them. The classes of utterances thus exempt may be grouped under three heads:

"1. Utterances material to the case as a part of the issue;

"2. Utterances accompanying an ambiguous or equivocal act, itself material, and serving to complete the act and give it definite legal significance; that is verbal parts of an act;

"3. Utterances used circumstantially, as giving rise to indirect inferences, but not as assertions to prove the matter asserted.

"But before examining these several branches of the principle, it is necessary to turn aside for a moment and inquire into the origin and scope of the term 'res gestae,' which finds here its main and least inappropriate application."

Then Wigmore proceeds to take up res gestae, which we are not concerned with. He then takes up the three subdivisions that he listed. One, the utterances material as a part of the issue. Section 1770 concerns particularly marriage, [1388] breach of promise, notice, insurance proofs, defamation. And from reading the section—and I will let you read it—our problem does not come within that part.

Then he takes up utterances forming a verbal part of an act in Sections 1772 to 1786, and again we do not come within that particular part of it.

Then he takes up 3, utterances used as circumstantial evidence, and that is the part you gentlemen are interested in. Sections 1778 to 1792.

Incidentally, the du Pont case that you cite is cited in the supplement under one of those sections.

Going, then, to this third subdivision beginning on page 234.

Section 1788:

"The hearsay rule forbids merely the use of an extra-judicial utterance as an assertion to evidence the fact asserted. Such a use would be testimonial, that is, we should be asked to believe the fact because Doe asserted it to be true, precisely as we should be asked to believe Doe's similar assertion if made on the stand. What the hearsay rule forbids is the use of testimonial evidence—that is, assertions--uttered not under cross-examination. If, then, an utterance can be used as circumstantial evidence, that [1389] is, without inferring from it as an assertion to the fact asserted, the hearsay rule does not oppose any barrier, because it is not applicable."

Then comes 1789, and this is the most common example of this exception. It does not apply here.

Section 1789:

"Knowledge, belief, good faith, reasonableness, diligence, motive, sanity, as evidenced by receipt of information or by reputation."

The text reads:

"Whenever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned."

Now, stopping right there. If we are interested in these letters as evidencing the state of mind which ensued in Winckler in consequence of the utterance, then we have nothing but the impeachment problem. In other words, we do have an impeachment problem if Winckler knew of these letters of complaint and had denied that he received complaints, except as to navel juice. But this Section is limited to the state of mind which ensues in another person in consequence [1390] of the utterance.

So we will skip 1789.

Then we come to 1790. This is the least used of these two exceptions. It is the hardest to see and understand.

"Utterances as indicating circumstantially the speaker's own state of mind."

The text reads:

"The condition of a speaker's mind, as to knowledge, belief, rationality, emotion, or the like, may be evidenced by his utterances, either used testimonially as assertions to be believed, or used circumstantially as affording indirect inferences. Utterances of the former sort may be received under the Exception for Statements of a Mental Condition."

We are not concerned with that.

"Yet such direct assertions of a mental condition as, 'I know that Doe is insolvent,' or 'I dislike Roe,' are relatively less common as a source of proof. The usual resort is to utterances which circumstantially indicate a specific state of mind causing them.

"To such a use, then, the hearsay rule makes no opposition, because the utterance is not used for the sake of inducing belief in any assertion [1391] it may contain. The assertion, if in form there is one, is to be disregarded, and the indirect inference alone regarded. This discrimination, though well accepted in the law, is easy to be ignored, and it needs perhaps to be emphasized."

Then he proceeds to summarize, page 239:

"These various circumstantial uses have already been examined in dealing with the different kinds of circumstantial evidence; and the precedents are collected under those respective heads. It remains here merely to note briefly the chief kinds:

"(1) Utterances are receivable as evidencing indirectly insanity or other organic mental condition, or as evidencing physical condition as to illness or the like.

"(2) Utterances indirectly evidencing knowledge, belief, consciousness, and the like, are equally admissible. Some difficulty may here arise when the fact of belief or consciousness is itself of doubtful relevancy."

Then it goes on and he comments on some matters concerning marriage, legitimacy.

"(3) Utterances indirectly indicating fear, ill will, excitement, or other emotion on the part [1392] of the speaker are also admissible, whether the person be one whose state of mind is in issue, or be a witness whose bias is to be ascertained."

There he talks about utterances with a mob or riotous assemblage.

"Section 1791. Utterances serving to identify time, place, or person.

"1792. Witness' statements used in impeachment."

Now, it is therefore clear to me from reading this text that letters which would indicate a general state of mind, knowledge, or consciousness, belief or disbelief, would be admissible. But when you try to add to that a specific thing, namely, that the broker had a particular belief that he didn't want to handle Winckler & Smith products, you are entirely out of the rule. You have then run up against the requirement that if this matter has any more value than the mere fact that it was uttered, and to show some general state of mind, then you run against the hearsay rule and the witness must be produced for cross-examination as to the truthfulness of this particular belief or viewpoint or intention, whatever it is that you want to show.

From reading the text in detail, I am firmly convinced that the letters are not admissible for that purpose.

They are, further, not admissible for the further reason [1393] that the question in issue is not the state of mind of the broker in 1946 and '47 and '48, or '49 or '50; the question in issue directly is what was the broker's state of mind in 1951 had the plaintiff manufactured juice, and had the plaintiff asked the brokers to sell in '51 would the brokers have sold? [1394]

Now, to argue that something as remote as this, that happened several years ago, on some presumption that things once shown to exist would continue to exist, to my mind is too remote on the issue as to the broker's intention and what he would or would not do in 1951, which is the time in issue.

Nor are such letters admissible to show merely general state of mind and not a specific one, to have any bearing on the question of the value of good will, or anything of that sort. If you are offering them for that purpose, notwithstanding your disclaimer that you are not interested in the facts contained, you are therefore going beyond the exception permitted, and you are going into a particular thing within the letter which should be the subject of cross-examination.

Reading the text in detail, I may be in error, but I am not in doubt.

Mr. Strachan: I am not trying to argue after the ruling, but I do want to state it is our position that these letters do bear on the subject of causation. They do have a bearing on the question of whether there existed good will. They do have a bearing on why the Winckler-Smith business was unable to market its products, not only in 1951, but because its business had been deteriorating steadily for a period of three years, and by 1951 it had lost substantially all of its broker organization. I just state that. [1395]

I might add that I don't think in his categories Wigmore has taken into account the law as applied in the du Pont cases and the California Broker cases and those other cases where the document or the utterance was received, not only to show what influence it might have on the attitude of the recipient of a communication, but to show the attitude and state of mind of the speaker.

I also think and contend that the documents are admissible as a part of the records of the plaintiff passing in the ordinary course of business on a subject which was of mutual interest to the parties to the communication.

Your Honor's indication as to what the scope of the ruling would be, I would like to have applied to particular documents, and I don't think it would be advantageous to anyone to have the matter handled before the jury. It would only confuse the jury and might raise some prejudices, so I would like to work out some sort of a stipulation and arrange to apply your ruling to each document. I think there will be some in the 65——

The Court: There may be some that would come under other rules.

Mr. Strachan: That's right.

The Court: I am addressing myself now to the general offer under this alleged exception to the hearsay rule. There may be other rules that apply, admissions against Winckler, and things of that sort.

I might call attention to the fact that in the du Pont case, although the judge has written a very good opinion there, the interesting thing is he started out with one rule and then switched over to another rule. He started with the rule that you quoted in part: "Wherever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it," and so forth, and then he switches to the condition of the speaker's mind may be evidenced.

Actually, what was involved in the du Pont case was evidence of the speaker's mind and not the recipient. He started out with the more common rule and then switched to the other one. It is a little hard to read the case, although I think he clearly is in line on the state of the speaker's mind.

Of course, in the du Pont case the letter pertained also to a particular issue and was current as of the time of the issue and bore directly on that issue. It was not a matter such as we have here.

But I am not going to say whether I think the decision was right or wrong, except it certainly can be distinguished.

The Glazer case, of course, comes within the other portion of Wigmore on particular things at issue and does not come [1397] within the rule here.

But you work out some way to offer them, and if you can segregate them as to certain groups, it will help to do that.

Mr. Strachan: When would your Honor like to take this matter up? I would like to get it disposed of before we resume with the jury for the reason I had organized the remainder of the cross-examination in such a way that I would expect to intersperse these broker letters as I went through the cross-examination on various subjects.

The Court: Do you have them well enough in mind now to present them without having to take them up one at a time? Is that what you want to do? Present them one at a time?

I suppose we could give each an identification number and look at each one of them.

Mr. Strachan: It seems to me that is the only way to avoid error, your Honor.

The Court: Well, is there any objection to taking them up now?

Mr. Dixon: No, I have no objection, your Honor. I just wish to add this comment, that this whole subject, of course, has been opened up by the defendant on cross-examination into something which is certainly beyond the scope of the direct examination. I haven't objected to it because it doesn't make any difference, probably, when it comes in, but when I started out, I thought it was going to be limited to [1398] one or two things, but it now appears that this whole approach of the defendants is apparently being directed to the question that there wasn't any good will here. That seems to me a matter of defense rather than part of the cross-examination, and I suggest that at this time this might more properly come within the issues of the defendants' case, if that is what they are contending it is offered for.

As to the impeachment question, and that is what I understand one of the letters has already been admitted for, although my memory may not be correct on that, the testimony that is relied upon for that purpose seems to me to require further clarification. If it is the answer of the witness, "I have no knowledge of any broker or consumer dissatisfaction at all, except on products which contain navel juice, or was pure navel juice," then the dissatisfaction, the broad term might require explanation.

I assume from the position taken by the defendants here that they are trying to impeach this testimony or this statement of the witness on the ground that these documents are complaints as to quality of which he had knowledge.

The testimony of the witness, it seems to me, before any impeachment use could be made of any of these documents, the witness should have an opportunity to explain, and since this is cross-examination, and I have not had that opportunity to clear what he means by consumer dissatisfaction, [1399] as to what he understands a complaint to be, because I have gone over all of these letters that the defendants are seeking to offer into the case at this time, I am frank to say that much of the material contained therein appears to be purely routine correspondence between a broker and the supplier concerning the problems of marketing, and as to whether or not some of the inventory that was on the shelf, for instance, lemonade, in October, that hadn't been moved during the summer months, should be sold and disposed of at that time, or whether it should be carried over until the succeeding spring, and some of these letters deal with that product.

After you go through two or three of the letters and orgainze them, and it was a terrific job for me to do that, but they tie in and show that the problem was moving inventory in a product that should be sold. That I am sure Sunkist or anybody in the fruit business does. My point is this, your Honor——

The Court: I indicated the ruling on impeachment yesterday, that I was going to admit letters that made complaints or product other than navel, but not letters that talk about, for instance, being stuck, which wouldn't mean anything.

Mr. Dixon: My only point, your Honor, is this. Impeachment, of course, is—I am not concerned about what the jury would consider with these letters, to be perfectly frank, for that purpose, but it seems to me if that is what [1400] they are going to offer some of these for, that they should come within the rule and go through the procedure, "Did you state so and so?" and then come up with a contrary statement.

The Court: When we find letters that will be admitted in the presence of the jury, we will then follow the regular procedure, but here outside of the presence of the jury we are going to apparently go through them, and those to which objection is sustained, of course, will have nothing further to do with the jury.

Also, some of the letters which may be in doubt, counsel would have a right to interrogate Mr. Winckler about.

Suppose there was a letter which complained about a certain product and he couldn't tell from the letter whether it was navel juice or Valencia? Then he would have a right to inquire of the witness, if he so desired, "What does this pertain to?"

If it pertained to navel, I am going to exclude it for impeachment purposes. If it pertained to Valencia, I will probably admit it, because of Mr. Winckler's broad statement that he had had no complaints except as to navels.

Now, of course, on examination by counsel for the plaintiff, he would be entitled to make whatever explanations he can. That is proper.

Mr. Dixon: The only point I was raising, your Honor, [~~1401~~] is the langauge here of consumer or broker dissatisfaction, as to what that meant within the scope of these letters and documents.

The Court: That is the subject of cross-examination.

Mr. Dixon: Yes.

The Court: You can ask him and the defendants can ask him.

Mr. Dixon: My point, your Honor, at this time is the defendant hasn't made it clear, at least to me, as to what this witness means by dissatisfaction. It may well be that it would be with the product and that he would regard anything of that kind as in the nature of a complaint, but if I understand the defendants' position on these documents, they are trying to use them for impeachment purposes on the theory that these are complaints, and that he has testified that there were no complaints, not with the language of a complaint, but the language of consumer dissatisfaction.

The Court: Any disadvantage that you find yourself in in that respect, nobody is doing it but

Mr. Winckler when he made the broad statement that he knew nothing about broker dissatisfaction.

Mr. Strachan: I want to add this, that I have some letters, I don't have them here now, because they relate to a different subject, which are part of the broker correspondence, that I would offer on the theory that they showed [1402] dissatisfaction with the plaintiff's methods of business, quite apart from the quality. There are inquires about his credit standing, expressing doubt as to his credit worthiness, and there are some that also object to his lack of consistent prices, his prices going all over the lot.

The Court: I know of no basis for impeachment on those so far.

Mr. Strachan: I don't say that those are—well, he says he knows of no broker dissatisfaction. I want to say, in addition——

The Court: His answer has to be read in connection with the questions asked, whether he had complaints, and so forth, and I have read the record, "and the brokers were dissatisfied with the product, would that dissatisfaction, that lack of acceptance, be brought to your attention?"

The questions were related to dissatisfaction with the product.

Mr. Strachan: Well, I do intend to offer the broker letters on these other subjects on our theory that they show a state of mind and that they go to the question of causation and they go to the question of good will.

The Court: State of mind on the part of the broker?

Mr. Strachan: Yes, sir, as expressed to Mr. Winckler in the due and ordinary course of business, as Mr. Dixon has just said, showing that in this correspondence that dealt [1403] with the problem of marketing the product, these were the reports made. I think they are admissible on that ground, too.

The Court: We will cross that bridge when we get to it.

Mr. Dixon: May I make this comment for the record? I spent all afternoon and all night last night until about 11:00 o'clock going through the material which I had had, but never had occasion to examine. I found two letters there that might deal with credit, which are the only ones I found, inquiries by two brokers, which dated back to 1949.

I don't know what other documents counsel has or expects to use, but I am merely asking them at this time if they have any additional documents other than what are contained in here and which were turned over to us by Mr. Williams after they searched these files, I would like to see them sometime in recess or at least have them presentd to us so I will know what we are going to talk about, because I have gone through the material and organized it.

The Court: Well, that will have to be done.

Mr. Strachan: You mean we must disclose to Mr. Dixon in advance of cross-examination which documents which we secured from their files we intend to refer to?

The Court: If the document is offered for impeachment purposes, no. If the document is offered for some of these other purposes, then to speed up the trial, if for no other [1404] reason, counsel should be advised of what evidence is going to be offered. The only exception to that rule is the impeachment rule. If a document is offered solely for the purpose of impeachment, you will not be required to——

Mr. Strachan: That requires us in effect to advise them of the scope of the cross-examination in advance, which I don't think we will be required to do.

Your Honor mentioned yesterday that there had been some ruling that all documents that were to be used for evidentiary purposes by the defendants should be disclosed to the plaintiff. I have had the record checked on that and I am advised that that was limited to this. When the plaintiffs were ruled upon to give access to the defendants to all its records relating to transactions between the defendants and Winckler & Smith, it was provided that we should give notice of which documents in our files, our files, we intended to use, and there was nothing in the ruling that required us, after having had discovery, to reveal the defense case based on defendants' documents to the plaintiff before trial.

The Court: Well, No. 1, the pretrial in this case, of course, took an abortive turn, with which you are familiar.

Mr. Strachan: And I hope nothing else in the case takes such a turn, because it was a very unfortunate turn.

The Court: Secondly, there is a pretrial order, general order, that was made. I imagine it was made in this case. [1405] It is a very short pretrial order which we customarily make. I don't know whether it was actually filed in this case or not, but it provides——

Have you the form of it there, Mr. Clerk?

I assume this was made early in the case, although it could not have been, because it came from Judge Byrne, and he has a different kind of order. I don't know whether he made this order or not.

"It is further ordered that not later than seven days prior to pretrial hearing, counsel for the parties confer to ascertain what matters may be covered by stipulation, what documents each party proposes to offer in evidence, what may be to clarify the issues,"
and so forth.

A previous portion read:

"The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof. So far as practicable all documents which either side expects to offer in evidence, excluding proof which may be offered by way of impeachment, shall be produced for examination at this hearing."

That is the customary pretrial order in this court. I won't say whether that order was heretofore made or not in this case. It will be made now. You will be exempted from [1406] exhibiting matters which you intend to offer for impeachment.

As to other matters that you offer as part of your case, I don't care whether you offer them as part of cross-examination or whether you offer them on direct, but counsel on the other side should be advised what these documents are and not merely be given the answer, "They came out of your [1407] files."

One very obvious reason, of course, is that this is a corporation in a bankruptcy proceeding. It is not a going business. We all know what the state of its files are, and the fact that you merely say the document came out of your file is not sufficient.

To avoid delay in the trial as we proceed, counsel should know what these documents are, except impeaching documents.

There is nothing strange or startling about that rule.

If we had carried on with our pretrial we probably would have had all these documents either numbered, or tagged and exhibited, before we ever started in.

Mr. Strachan: We will certainly make every effort to do what your Honor has required here.

I want to say this. By reason of the fact that I have been active in this case for only about a week, I haven't fully selected the documents, but as soon as I know what documents we intend to introduce, I will give them to Mr. Dixon or give him an identification of them.

The Court: That would be very helpful, and as you well know, it will speed up our trial.

Mr. Strachan: I would like to have it speeded up, because I think, in general, delay is harmful to the defense as well as to the plaintiff.

The Court: This goes for the plaintiff, too. So far I haven't seen anything that the defendants weren't aware of [1408] that you asked for. Apparently they had it at their fingertips when you asked for it, so they apparently knew what you were going to offer. But this goes for both sides. I want documents that you are going to use exhibited prior —and I don't mean five minutes before, I mean a day or so at least before you use them—so the other side will know what you are going to use and it will avoid the necessity of reading long documents, and finding out what their position is going to be before the offer of the document. [1409]

* * *

The Court: The jury is now absent. Do you have some of these documents?

Mr. Strachan: Exhibits P and Q, you ruled on before. I would intend to reoffer those, because it indicates—— [1413]

* * *

The Clerk: No. My record shows P is not in evidence. They are being now reoffered. A reoffer of P and Q is now pending.

The Court: Does the record show what the Anagold brand Citrus Cocktail is?

Mr. Strachan: Yes, sir. It is a mixture of [1415] orange juice and grapefruit juice, with a little lemon added, I think.

Mr. Dixon: That is the product, your Honor, that there was so much discussion about concerning the overpack in 1947, which resulted in the terrific inventory loss and the proceedings under Chapter XI in 1948, was it, or '47? '48.

The Court: Was there any testimony by Winckler on the question of whether he had any complaints as to the Citrus Cocktail?

Mr. Strachan: He said the only complaints that were ever brought to his attention were limited to the navel products.

Mr. Dixon: As I understand it, navel juice is used in the making of the Citrus Cocktail, your Honor.

Mr. Strachan: Not at all times, as I understand it. I believe his testimony was that occasionally a little navel juice was used.

The Court: Well, just to pick up a few things. "N" apparently was received in evidence. I will permit further inquiry as to what is in the Citrus Cocktail. If it turns out that this particular shipment that refers to these three buyers contains navel juice, I propose to strike the exhibit, Exhibit N, but that would depend on foundation of the matter.

Mr. Strachan: That will be a matter of redirect, won't it, if he wants to make a motion to [1416] strike?

The Court: Since it has gone into evidence, it may be handled on redirect.

Mr. Dixon: What is that? [1417]

The Court: Exhibit N, dated August 18, 1949.

Mr. Dixon: I have it right here. The whole letter?

The Court: What's that?

Mr. Dixon: The whole letter?

The Court: The whole letter went into evidence. Part of it was read, but it involves this cocktail.

Mr. Dixon: That again, I think, your Honor—may I make this comment with reference to this whole matter? As I said, I spent all last night sorting these letters out, and there are letters from the same broker—the entire correspondence, without some of these isolated letters as they would read them, would appear to make a little more sense to me. There is a reply to this letter of August 24, which I think must be read in connection with this letter to show to what it relates. I am frank to say that——

The Court: Let's see the reply.

Mr. Dixon: Here it is, your Honor. I put it together last night. That is why I object to introducing just one letter without the connecting correspondence or reply to it, if there is any, because it just takes up an insurmountable amount of time to have to go into these letters to explain them when the letter itself may cover it.

The Court: Well, since we brought this subject up, I suppose we will mark these two letters for identification and we will have them all before us when the question arises. [1418]

Mr. Strachan: Which is that, your Honor?

The Court: The two replies to your Exhibit N. N has been received in evidence. I have indicated I will hear some inquiry as to what was involved, and when I do it may go out or it may not. If it doesn't go out, there will probably be an offer of the corresponding reply letters, so I am merely asking that the two reply letters, to keep them in order, be marked N-1 and N-2 for identification.

Mr. Strachan: Not as a defendants' exhibit?

The Court: This is marked for identification. If the plaintiff offers them in evidence, we will give them a plaintiff's number, but this only concerns our mechanics. At least the clerk will have them in his file as N-1 and N-2 for identification.

Mr. Strachan: We don't happen to have copies of those here, your Honor. Will you make a note of that, Mr. Williams?

The Clerk: Shall we use your copies, Mr. Dixon?

Mr. Dixon: It is all right to use my copies. I have no objection.

The Court: Pull them off and mark them N-1 and N-2 for identification.

The Clerk: The August 24 letter will be N-1 and the February 24, 1950, letter will be N-2.

Mr. Fisher: August 24 of what year?

The Clerk: 1949. [1419]

(The exhibits referred to were marked Exhibits N-1 and N-2 for identification.)

Mr. Dixon: Now, if the court please, with reference to the one that has been marked Exhibit P, by putting in letters from Winckler & Smith on January 31, 1950, and February 14, 1950, the complete explanation is made. It relates to navel orange juice and here are the letters, your Honor.

Mr. Strachan: We are not to that point with our case, your Honor.

Mr. Dixon: I thought you had marked P.

Mr. Strachan: I am not marking any of Winckler's self-serving replies.

Mr. Dixon: We are not talking about self-serving.

The Court: Wait a minute.

Mr. Dixon: All right.

The Court: I am trying to unravel what has been done so far. P has not been received in evidence, has it?

Mr. Strachan: No, your Honor. As a matter of fact, there was a ruling near the adjournment last week and I am reoffering it now.

The Court: You are reoffering it. I ask you to inspect the correspondence, Mr. Strachan, that Mr. Dixon handed me to see whether or not you will agree that the letter concerned navel orange juice, that your P concerned navel [1420] orange juice.

Mr. Strachan: It relates in part to Valencia, but it also relates to Valencia packed under the Anagold brand, and for that reason we tender it as showing that the Anagold brand name was injured through the packing of the inferior product under that name.

I am sorry. I think I misspoke myself back there. It relates to the packing of the inferior navel juice under the Anagold brand. We therefore offer to show that the practice of packing navel under the

Anagold brand impaired the Anagold trade name value.

The Court: But you don't offer it for impeachment?

Mr. Strachan: Well, I think it is not impeachment as to product, but it does show, and I offer it as showing that in the ordinary course of business it was reported that the brokers had found sales resistance because of the packing of navel juice under the Anagold brand.

The Court: Your objection is the general objection you made the other day?

Mr. Dixon: The general objection, your Honor, yes.

The Court: Sustained, but before I sustain it, let us mark the other letters for identification that supplement P so we will understand what the basis of it is. The letter of January 31, 1950, from Winckler & Smith to Hansel of the Pavey Company will be P-1 for identification and the letter [1421] of February 14, 1950, will be P-2 for identification, and the objection to the offer of Exhibit P is sustained on the general grounds stated by counsel and by the court in the colloquy the other day and this morning, and on the further ground that counsel's offer indicates he wants the letter in for the purpose of showing the factual matters recited in the letter.

(The exhibits referred to were marked Exhibits P-1 and P-2 for identification.)

Mr. Strachan: No, I don't offer it as proof of any of the matters asserted in the letter.

The Court: You told me you offered it to show the broker dissatisfaction with the Anagold label, and so forth. That was the statement. We can have it read by the reporter. Read it, Mr. Reporter.

Mr. Strachan: I am showing that the brokers asserted a dissatisfaction with the Anagold label because of the fact—they said it was a fact that the inferior navel juice had been packed under that Anagold brand.

The Court: Objection sustained. Now, that takes care of P. [1422]

The Court: Q has been marked for identification. It is a letter of April 4, by Winckler & Smith to the Russell Brokerage Company. Have you found it, counsel?

Mr. Dixon: Russell Brokerage?

The Court: Yes.

Mr. Fisher: My notes have that Q is the Bagley letter.

The Court: That is because of the clerk's writing. Let us take up O. The exhibit I refer to was Exhibit O. Is it in evidence, Mr. Clerk?

The Clerk: It is according to my record.

Mr. Dixon: What is that?

The Court: Letter of April 4, 1949, Winckler & Smith to Russell Brokerage Company.

Mr. Dixon: April 4, 1949. I have it, your Honor.

The Court: This also was read in part to the jury and it involves navel juice. I will entertain now or later a motion to strike it. [1423]

Mr. Dixon: I will move to strike Plaintiff's Exhibit O from the files on the grounds it relates to navel juice and shows it clearly from the face thereof.

Mr. Strachan: May I make a statement as to my position?

The Court: Yes.

Mr. Strachan: It is my position the portion of that read to the jury shows that Winckler was aware of the damage that would be done to the Anagold trade name if he were to pack navel juice, and his subsequent packing of navel juice under that brand name, was responsible for impairing the value of the trade name, or he did it in disregard of any claimed value of the trade name had.

The Court: Let me read it again. I see nothing in the letter that talks about packing navels under the Anagold label.

Mr. Strachan: He said it was an inferior juice.

Mr. Dixon: No.

Mr. Strachan: "I doubt whether we will do anything on navel juice. We want to be more careful than ever before. We are afraid it would be a mistake to pack navels," and he went ahead and packed navels.

The Court: Do you have proof after April, 1949, he did pack navels?

Mr. Strachan: That is in the record. The year in which he packed most of the navel juice was 1950, I think. [1424]

The Court: It is in the record. It has been read to the jury. I think the easiest thing to do is to deny the motion to strike and leave that one in.

Mr. Dixon: Then, if the court please, the other letter that they took out of the files, October 7, 1949, shortly afterwards, to this same company should be available, I think.

The Court: I will mark the letter for identification. However, the letter you submit, Mr. Dixon, does not reply to the letter of April 4, 1949.

Mr. Dixon: That is correct, your Honor. It does, however, certainly, in my judgment, overcome any inference which counsel wishes the jury to draw from any statements that might be contained in the letter that he offered in evidence.

The Court: Mark the letter of October 7, 1949, as O-1 for identification. [1425]

* * *

The Court: Well, there is no need to make this record any more cumbersome than we have. I have indicated that I will ascertain what this blended juice was that was referred to, and if it was navel, I am going to strike the letter, so let's do that now and get on with the matter.

Come up, Mr. Winckler. You have been sworn.

Mr. Dixon, you are mixed up here. This file you handed me with the letter of July 25 does not concern N. It concerns M.

Mr. Dixon: That is correct, your Honor. That is why I was trying to get my exhibit straight, so I would know what I had.

The Court: Let's take N up here.

Mr. Dixon: N?

The Court: N.

NICHOLAS J. WINCKLER

a witness called on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

The Court: Mr. Winckler, I show you Exhibit N, which has been received in evidence. It talks about Anagold brand citrus cocktail. It was written in August, 1949. It talks about Anagold citrus cocktail damaged the market when you shipped two or three years ago your Anagold citrus cocktail, on the second page. [1426]

What kind of juice went to make the Anagold citrus cocktail?

The Witness: Sometimes, your Honor, we used navel. Whenever Valencias were available, we used Valencias. That citrus cocktail juice referred to in that letter goes back to, I think, 1946. It would be impossible at this time for me to make a definite statement whether or not it was Valencia or navel. However, I remember this letter. I didn't read it today, but I remember this letter. It is a southern broker where we didn't sell much. They complained that the customers lost money.

The Court: All right.

The Witness: Due to the price decline. [1427]

The Court: Now, M, Mr. Dixon.

Mr. Dixon: We believe the letter of July 25, 1949, your Honor, should be added to that letter, by way of explanation and clarification of what Exhibit M is referring to.

The Court: Is foundation waived on this Exhibit M-1?

(Testimony of Nicholas J. Winckler.)

The Clerk: Defendants' Exhibit M-1 marked for identification.

(The document referred to was marked Defendants' Exhibit M-1 for identification.)

Mr. Strachan: I will stipulate that M-1 is a copy of a letter written by Mr. Winckler to the addressee and sent to the addressee on or about the date it bears.

Mr. Dixon: In reply to the letter Exhibit M, counsel?

Mr. Strachan: Yes.

The Court: Do you offer M-1?

Mr. Dixon: Yes, we offer M-1, your Honor.

The Court: M-1 received in evidence.

Mr. Strachan: Might I state an objection to it?

The Court: Yes.

Mr. Strachan: My objection to the offered letter is that it has no tendency to disprove the fact, that the statement contained in Exhibit M was the assertion made, and it is offered only for the purpose of showing the assertion made.

The Court: I left M in evidence. It has heretofore been put in evidence. It is remaining in evidence because [1428] it has been offered for the purpose of impeachment, not on the ground that it proves the assertion made, or that it is offered for any of those other reasons. I have sustained an objection to that. So M was received for impeachment purposes. Now, in view of that fact what is your objection to M-1?

(Testimony of Nicholas J. Winckler.)

You can't object upon the ground that M went in for a purpose that I didn't admit it for.

Mr. Strachan: M-1 has no tendency to minimize or alter the impeachment contained in M.

Furthermore, I did not offer M-1. It should have been a plaintiff's exhibit. I object to it as not being relevant to anything contained in Exhibit M, or admissible on any issue in the case.

The Court: We permitted the objection to be made after the ruling. The ruling will stand that it has a bearing on the impeachment issue, which is the only purpose that M is in evidence for.

Now, what the record may show in front of the jury, I don't know. We may have to go back on that to indicate.

Mr. Strachan: Is M-1 going to stand as a defense exhibit?

The Court: If you object to the M-1 on it, it will be given a plaintiff's exhibit number.

What is the next number for the plaintiff, Mr. Clerk?

The Clerk: Plaintiff's Exhibit 52. [1429]

The Court: It will be Plaintiff's Exhibit 52 in evidence, instead of M-1 in evidence.

(The document formerly marked as Defendants' Exhibit M-1 for identification was received in evidence and marked Plaintiff's Exhibit 52.)

The Court: Let me see. M, N, O, P, and Q. Have we talked about Q yet. Has Q been offered?

Mr. Strachan: Yes, I offered Q.

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: If your Honor would bear with me.

The Court: It is a letter of March 22, 1950, to Winckler & Smith from Bagley & Company.

Mr. Dixon: I am somewhat at a disadvantage here, having to give up my copy and having to keep my records straight so I will know what I have got.

What about O?

The Court: O is in evidence.

Mr. Dixon: What is O?

The Clerk: The Russell Brokerage letter.

The Court: I am going to take a recess. You can look at that later on.

I am going to ask you a question about Q, Mr. Winckler.

Q has been marked for identification, it is a letter of March 22, 1950, to Winckler & Smith from Bagley & Company. Do you know what kind of juice is involved?

The Witness: Your Honor, that letter was written in [1430] March when there was no southern Valencia oranges available, and we are certain that we didn't have any Valencia carryover from the previous year, meaning 1949. At the early part of the season we sometimes send out samples which show the current condition of the pack, or, rather, a sample of the juice available, which is maybe accepted or turned down. But this merchandise has not been packed, and I would not regard this letter as a complaint.

The Court: You haven't answered my question.

(Testimony of Nicholas J. Winckler.)

Can you tell from the letter and the date and the company what the juice is that is referred to?

The Witness: I cannot state it for sure, your Honor. But inasmuch as there is no Valencia juice available in March, and navel is packed during the winter months in January and February, it is an assumption on my part that it could be navel juice.

The Court: The objection to Q is your general objection, Mr. Dixon?

Mr. Dixon: Yes, your Honor.

The Court: Overruled. It is received in evidence for impeaching purposes only. [1431]

* * *

The Court: Let the record show the jury absent. We wound up by putting Exhibit Q in evidence for limited purposes.

Mr. Dixon: Your Honor, I am sorry. I was working on the file when this exhibit was discussed. I wish to move to strike this exhibit on the ground it refers to navel juice and that the reply of the plaintiff dated March 28, 1950, clearly so indicates.

The Court: We are mixed up here. I put Winckler on and he said he thought, but he couldn't say for sure, and I therefore took his evidence most strongly against him and concluded it might refer to something else.

Have you seen the reply, Mr. Strachan?

Mr. Strachan: Is it marked?

The Court: No, but we will mark it. The letter of March 28, 1950, to Bagley and Company by

(Testimony of Nicholas J. Winckler.)

Winckler & Smith will be marked Plaintiff's Exhibit 53 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 53 for identification.)

The Court: Is it stipulated that foundation is waived on Exhibit 53?

Mr. Strachan: I will admit it is a letter written by——

The Court: By Winckler & Smith to Bagley and Company in reply to Exhibit Q.

Mr. Strachan: Yes, and I will object to the admission [1434] of 53 on the grounds it is a self-serving statement and, furthermore, it has no bearing on the admissibility of Exhibit Q for the limited purpose for which the Exhibit Q is offered.

The Court: I am not receiving Exhibit 53 in evidence, but merely marking it for identification as part of the foundation to rule upon this motion to strike Q, but I am now going to strike Exhibit Q on the ground the foundation now made shows Q concerned navel juice and therefore it is not admissible for impeachment purposes, and I rule it not admissible under the general purposes that you have heretofore talked about as being a letter which you offer to show not the facts thereof, but merely the state of mind of the broker. Exhibit Q will be stricken.

(The exhibit previously marked Defendants' Exhibit Q was stricken by the court.) [1435]

The Court: Are we prepared to start on some of these others?

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: As I understand it, we furnished, in the order that we expected to refer to them, a set of the additional exhibits. I don't know whether Mr. Dixon is going to object to each and every one or not.

Mr. Dixon: May I say to the court, your Honor, obviously I have been swamped with these exhibits, having been shown them just at this time, as to what they expect to offer in evidence.

I have here about, I don't know how many of these letters, but I have alphabetized everything so that I can get to their exhibit as quickly as I can. I think we have found about five of them, and I would suggest, your Honor, that we might save time by permitting me to go through the files here and try to match their documents.

Of course I cannot read it, even, and tell whether I am going to object to it or not, until I have it available.

The Court: I want you both to make any kind of a record you want, but I am going to rule as I have indicated. Now, it ought to be pretty easy to solve some of these problems.

For instance, this last letter Q, you probably didn't have the reply letter, so you couldn't tell from the letter what the story was. If you had had the reply letter and knew that the foundation would show navel, then of course [1436] that letter could have been laid aside with the series that involved navel, and at one time make an offer of proof of the whole bunch, and we would have the objection and have a record made.

I know what your problem is. The difficulty is these letters involve different things. In other words, you may get a letter that would involve an admission against interest. That is a different problem. You may get a letter involving impeachment, and some of those will be admissible and some will not. I am excluding the impeachment on navel, because of the admission made. I am not excluding the impeachment on the other products. But I am excluding evidence on your—what we will call your general ground, for want of a better term. [1437]

* * *

The Court: You had better do some sorting yourselves, because apparently the plaintiffs have not gone back to dig out correspondence on these letters, unless you dug them out. Apparently you did it thoroughly enough so that you have further correspondence or replies, at least in certain cases.

Mr. Strachan: I can tell you how it happened, your Honor. I was selecting the documents that I was relying on. I regarded the replies as matters that I wasn't going to rely on, not having any bearing on the foundation, and for the most part they are self-serving and wouldn't be admissible. So I didn't select those.

The Court: They wouldn't be self-serving. A letter written back in '50, '51, before the suit was filed, when somebody kicks about the juice and the company replies and says, "Well, it is navel juice and

(Testimony of Nicholas J. Winckler.)

we are sorry about it," or something, how could that be self-serving?

Mr. Strachan: It is their own statement, their own unsworn statement.

The Court: That wouldn't make it [1438] self-serving.

Mr. Strachan: Here is another example: There is complaint against the quality of a product, other than Valencia. Winckler writes back and says, "We can't agree with you, we think that is a fine juice." That is a self-serving statement.

The Court: It might have that effect. But if you will recall, so far—there may be one exception in the case of M, where I let Plaintiff's Exhibit 52 in evidence. In this recent case I didn't admit 53. I merely used the showing made on 53—in the case of Q and 53 for identification, I merely used the showing made in 53 as further foundation to indicate whether the letter was properly in as impeachment, so I didn't admit 53 into evidence.

Mr. Strachan: Your Honor made a suggestion before the recess that I think might be productive. If Mr. Dixon will select the documents that he wants to have considered in connection with these, have them marked now—you don't have to rule on those, but if he will just sort out of the documents that we furnished to him, and in the order in which we furnished them, which is the order of proposed offer, and tell us which, if any, of those he will not object to, then we can deal only with those where he has objection.

The Court: I think he can do that. As you bring the letters up, he will know whether he has an objection. But I think you will have to go through your letters to avoid a [1439] situation like Q, where we had Q coming along and I admitted it on the basis of the fact that I couldn't tell whether it was navel or not, and Winckler when I questioned him said he wasn't sure, that he didn't think it was. Maybe it was. I don't know. But then in came the reply which indicated that it wasn't anything but navel juice. So, clearly, in trying to be consistent under the ruling I have made, Q shouldn't have gone in evidence, and I wouldn't have had to strike it. [1440]

* * *

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Winckler, on your direct examination you testified that you packed lemonades, orangeades, you were the first to can those in canned form. Do you recall that?

A. Yes, I do. On lemonade, not on orangeade.

Q. Not on orangeade?

A. My statement was restricted to lemonade.

Q. But you did pack orangeade, too?

A. Later on, but not first.

Q. You also had a product known as Citrus Punch; was that regarded as an ade or not?

A. Yes, it was. It was a beverage, beverage base.

Q. What was the composition or formula used in making these ades, bases?

A. Well, every ade or base was, of course, different. [1446] The lemonade base consisted of lemon juice, concentrated lemon juice and sugar. The orangeade consisted mainly of concentrated orange juice, sugar, and probably some oil of orange. I don't know the exact formulas, but that is approximately. And Citrus Punch, as the name implies, contained various fruit juices, and sugar, of course, such as orange, lemon, lime, probably grapefruit. It is stated on the label.

Q. Did you control the composition of these ades in such way that it would be uniform with respect to acidity and the other constituents?

A. Well, our laboratory certainly did. It is just a customary procedure in any food manufacturing plant that a product of that nature should be of uniform quality as far as humanly possible.

Q. Was any citric acid used in any of these products to bring it up to the required acidity?

A. Probably it was, or it wasn't. I don't know. But you have the labels, and the ingredients copied on the label states exactly what was used.

There is even a can displayed among the exhibits, if I recall correctly.

Q. Well, if you were making a standard product and a batch of it came through with substandard acidity, would there be citric added to that to bring up the acidity? A. On what product? [1447]

(Testimony of Nicholas J. Winckler.)

Q. On any of these ades, orangeade, lemonade, or Citrus Punch.

A. I am going to take the label book, if it is permissible, and I am going to refresh my memory by looking at the labels.

The Court: Well, read the question again. If you know. If you don't know, say so.

Read the question, Mr. Reporter.

(The record was read by the reporter.)

The Witness: On lemonade, definitely no; on orangeade and Citrus Punch, probably yes; I am not certain. [1448]

Q. Do the orangeade labels and the citrus punch labels say whether or not they contain citric acid?

A. If I have a moment, I will check it.

The Witness: Mr. Clerk, may I have the exhibit of the 12-ounce can? I think you have it right here on the table, the smaller blue can.

The Clerk: Exhibit 47?

The Witness: That is it. Thank you. May I read?

Mr. Strachan: Surely.

The Witness: This lemonade contains filtered water, real lemon juice and sugar. No preservative or artificial color added.

And then it also states in prominent lettering Vitamin C enriched, so it contains added Vitamin C, and the proportion of the Vitamin C which is added is stated on the back of the can.

Q. (By Mr. Strachan): There is no citric acid mentioned on that label?

(Testimony of Nicholas J. Winckler.)

A. No. I stated before that on the lemonade there is no citric acid added.

Q. What about the orangeade label? Does that label show citric acid added?

A. I am trying to find it. Just a second. Here is the orangeade. Yes, on the orangeade the label shows citric acid added, and I read again. Ingredients: filtered water, [1449] orange juice, sugar, dextrose, orange emulsion, citric acid, Vitamin C, U. S. certified color.

You see, that is a beverage just like 7-Up or Coca-Cola. That isn't a fruit juice, so the addition of these ingredients is permissible if stated on the label.

Q. You announced the offering of these ades in the summer of 1950, as I recall, is that correct?

A. Yes, I think so.

Q. And you obtained a plant in Brooklyn for the manufacture and packing of ades, and so on?

A. Well, we didn't obtain a plant, but we made custom packing arrangement with a plant in Brooklyn for the so-called ready-to-use beverages, which means not the small concentrated cans, to save freight. Instead of packing it at Anaheim in our former plant and then shipping the water and sugar and cans and all the ingredients which are obtainable in the East, as well as here on the coast, we made arrangements that we would ship the ingredients which are produced in our plant, and then the merchandise would be finished and put into cans in that plant in Brooklyn. I think we canned a very negligible quantity of these products.

(Testimony of Nicholas J. Winckler.)

Q. And then after you had manufactured these ades, you put consignment stocks in warehouses at various places in the United States, didn't you?

A. Yes, at some markets. [1450]

Q. At how many points did you have consignment stocks in warehouses?

A. I wouldn't have the slightest idea.

Q. Do you have any idea what quantity was made in 1950?

A. No, I do not, without looking at the records.

Q. These ades are more or less a seasonable article, are they not, primarily a summer drink?

A. Well, I would say all beverages, alcoholic or non-alcoholic, sell more readily during the summer months than during the winter months.

Q. When the fall came along, you had on hand in a number of warehouses unsold stocks of these ades, is that correct? A. Yes, like anybody else.

Q. And you offered to reduce the price on those in October in order to move them out of the warehouses, isnt' that a fact?

A. Like most people do. [1451]

Q. You wrote to numerous brokers in October offering them reduced prices in order to move the ades, I believe; is that correct?

A. Well, I don't know if I wrote. Maybe our sales department.

Q. Winckler & Smith did, is that correct?

A. Well, it would be unnatural if they wouldn't.

Mr. Strachan: I will ask that these three documents, being three letters dated October 23rd, signed

(Testimony of Nicholas J. Winckler.)

by the company, and addressed to Hullar-Craig of New York, Syracuse, New York; Poole & Company, Boston; and Smith & Swinton of Cleveland, be marked as a defendants' exhibit.

The Clerk: As one exhibit?

Mr. Strachan: Yes.

The Clerk: Defendants' Exhibit R, for identification.

The Court: Exhibit R.

(The documents referred to were marked Defendants' Exhibit R for identification.)

Q. (By Mr. Strachan): I show you the three letters and ask you if you recognize those as a form of letter that was sent out on or about October 23rd to the brokers in regard to the ade products.

A. I see these three letters are practically identical.

Q. Yes.

A. Yes, I can identify them. [1452]

Q. And those letters offer a 50 cents a case price concession to move the stock immediately, is that correct?

A. Yes, 50 cents a case on four dozens, or 12½ cents a dozen. It is a very moderate price reduction.

Mr. Strachan: I suggest that the volunteered statement be stricken, your Honor.

The Court: It may go out.

Mr. Strachan: I will offer the exhibit in evidence.

Mr. Dixon: If the court please, I think the exhibits are clearly irrelevant and immaterial and add nothing to the issues in this lawsuit. I therefore object to them on that ground. The witness has testified that he had inventories at the close of the season. I don't know what these letters add to the testimony.

The Court: The objection is overruled. I, also, am in doubt. It is a close question. They may have some evidentiary value. Exhibit R received in evidence.

(The documents referred to were received in evidence as Defendants' Exhibit R.)

Q. (By Mr. Strachan): In November of 1950, you had come to the conclusion that that was the wrong time of year to try to move the ades and asked that the brokers remove all offerings and wait until the next spring to reoffer, the ades; is that correct?

A. Well, I don't know how many letters do you have in [1453] your possession which state that. Because that would be the only way that I could answer that question. Maybe in some market we reached such a conclusion; in other markets we decided to sell it and not to hold it until next year, depending on whether or not we wanted to force distribution in a market or not. [1454]

Mr. Dixon: I might say, if the court please, that there is a reply to this letter of October 23, which counsel has, and also, I think, a reply to the other

(Testimony of Nicholas J. Winckler.)

letter, which I think ought to be exhibited in all fairness to this witness if he is going to pursue this line of inquiry.

The Court: Let's see the letter. You are talking about Exhibit R now?

Mr. Dixon: Inquiring about something over five years ago.

The Court: Well, these may be the letters counsel is now referring to. I don't know. Go ahead and let's see.

Mr. Strachan: Here is a series of letters written by Winckler-Smith that I would like to have marked as a group. November 1, 1950—— [1455]

* * *

The Clerk: There are five letters all together in the group. It will be Defendants' Exhibit S for identification.

* * *

Q. (By Mr. Strachan): Mr. Winckler, I show you the five letters that have collectively been marked Exhibit S and ask you if you recognize those as letters written by Winckler-Smith to brokers at Salt Lake City, Boston, Syracuse, Fargo, North Dakota, and Louisville, Kentucky.

The Court: It is stipulated these letters came from the files of the plaintiff?

Mr. Dixon: Yes, your Honor.

The Court: All right. Do you recognize them, or not? [1457]

The Witness: Yes, I do.

The Court: All right. Ask your next question.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): Those letters state as follows, in substance, do they not—I am reading from——

The Court: Just a minute. Do you want to offer them in evidence?

Mr. Strachan: I beg your pardon, your Honor. I offer them in evidence.

The Court: Mr. Dixon, they have been offered in evidence.

Mr. Dixon: No objection, your Honor. Well, wait a minute.

The Court: Exhibit S received in evidence.

(The documents referred to were received in evidence and marked Defendants' Exhibit S.)

Q. (By Mr. Strachan): "We have come to the conclusion that this is the wrong time of year to try to move the merchandise and therefore are suggesting that you withdraw any offers you have made at reduced prices and continue to offer lemonade according to the list price. We feel that the bulk of the warehouse charges have already been paid, and we will if necessary sit on the merchandise until next spring when we are sure the movement will become very good in your area."

That is correct, isn't it?

A. That is correct. [1458]

Q. Can you tell us approximately the volume of merchandise that was then consigned to warehouses and was carried over until the following spring?

A. I think, counsel, you asked me that question

(Testimony of Nicholas J. Winckler.)

before, and my answer was that I can't tell you. I don't know. [1459]

* * *

The Clerk: I have marked Exhibit T.

(The exhibit referred to was marked Defendants' Exhibit T for identification.)

The Court: Do you have your copy in your hand?

Mr. Strachan: Yes, your Honor.

The Court: Let me look at them. T was the number assigned, Mr. Clerk?

The Clerk: T, yes.

Mr. Dixon: I have the copies, counsel. Are they offered in evidence, your Honor?

The Court: No. Is it stipulated that the three letters attached to Exhibit 2 came out of the files of the plaintiff?

Mr. Dixon: So stipulated, your Honor, yes.

The Court: Do you offer them in evidence?

Mr. Strachan: Not at this time. I want to show them to Mr. Winckler. [1460]

The Court: All right.

Q. (By Mr. Strachan): Mr. Winckler, in the spring and summer of 1951, you renewed your efforts to sell this merchandise, did you not?

Mr. Dixon: What merchandise, counsel? Are you speaking about particular merchandise referred to in these other letters?

Mr. Strachan: The ades that were carried over from the previous summer.

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: I object to this question, your Honor, unless it is relating to these previous letters that he put in evidence.

The Court: He has stated he is referring to the ades which had been carried over.

What is your answer? Yes or no? Did you in the spring of 1951, renew your efforts?

The Witness: Every manufacturer is always trying to sell his merchandise.

The Court: Just answer the question.

The Witness: Yes.

The Court: All right. [1461]

Q. (By Mr. Strachan): Did you receive any reports from any of the brokers with respect to their ability or inability to sell these ades at the prices that you authorized during the summer of 1951?

A. I am certain that we received from the brokers some kind of reports.

Q. I show you the three letters that have been marked as Exhibit T and ask you if you recognize those.

The Court: It has been stipulated that they came out of the company's records, counsel.

Mr. Dixon: If the court please, since this is apparently being given to this witness, and since counsel knows that there are letters that preceded these, or in reply to them, I suggest that the reply, either preceding or antedating this exhibit, should also be exhibited to this witness.

The Court: Just wait a minute now.

Do you recognize the letters?

(Testimony of Nicholas J. Winckler.)

The Witness: Yes, I do.

The Court: Ask your next question, Mr. Strachan.

Q. (By Mr. Strachan): Does that refresh your recollection as to the price at which you authorized any of the brokers to try to dispose of this merchandise?

A. I am reading the second letter now, if I may.

Q. Pardon me. [1462]

A. Yes, I remember those.

Q. What was the price at which you had authorized the sale of this merchandise, these ades, in the summer of 1951?

A. Well, I couldn't make a general statement. The price varied in territories to meet competition. In one territory it was higher, and in another territory it was lower.

Q. What was the lowest price f.o.b. Anaheim that you can recall having quoted?

A. I don't know.

Mr. Strachan: I will offer Exhibit T in evidence.

Mr. Dixon: I object to the exhibit, your Honor, on the ground it is wholly irrelevant and immaterial to any of the issues in the lawsuit.

The Court: You made what we call a general objection at some length the other day.

Mr. Dixon: Yes, sir.

The Court: Do all counsel know what I am referring to?

I am just wondering if we can't save time and repeat that objection by reference. Can that be done?

Mr. Strachan: Certainly, as far as I am concerned.

The Court: We are talking about the objection made, it must have been Friday, wasn't it?

Mr. Dixon: Furthermore, your Honor, on the ground that the exhibit does not contain——

The Court: Just a minute. It was along about the time [1463] of the exhibits M, N, O and P, somewhere in there, there was a lengthy objection made. Counsel agrees that may be repeated by reference. Now, do you have further objection?

Mr. Dixon: I do, your Honor, on the ground that the exhibit offered does not contain the reply to the letter of July 16th from the plaintiff—I believe that was the one you offered, wasn't it, counsel, July 16, 1951?

Mr. Strachan: There are three letters. One is May 3rd, one July 16th, and one was November 21st.

Mr. Dixon: All right. Objection to the one of July 16th is on the ground that the reply thereto, dated July 18th, from the plaintiff, was not made a part of said exhibit; on the ground that the letter dated November 21, 1951, to the plaintiff did not contain all of the correspondence in connection with that letter, particularly the reply of the plaintiff to the Davenport Brokerage Company, dated December 26, 1951; and on the ground, as to the exhibit dated May 3, 1951, that it did not contain the letter addressed to Davenport Brokerage Company by the plaintiff, to which the letter of May 3, 1951, was a reply. [1464]

The Court: Your purpose in this offer is what, Mr. Strachan? You had dual bases for some of these offers. Is the offer on the basis of the matter we discussed this morning?

Mr. Strachan: Yes.

The Court: Objection sustained.

* * * *

(The following proceedings were had at the bench outside the hearing and presence of the jury:)

The Court: Can we have this understanding, that we can refer to Mr. Dixon's general objection as the long objection that was made, plus the additional objections that might be pertinent?

Mr. Strachan: Yes.

The Court: And when he makes the general objection, that will take care of that. It will be incorporated by reference.

And on your side, you indicate the letters are offered either for impeachment, admissions against interest, or as circumstantial proof of intent of the brokers, state of mind of the brokers. [1465]

Mr. Strachan: Or, if you want to shorten it up even more, I will say they are offered on the theories we discussed before you this morning.

The Court: That theory is the state of mind of the brokers with reference to handling these products.

Mr. Strachan: That is part of the grounds.

(Testimony of Nicholas J. Winckler.)

The Court: When we talk about what we discussed this morning, that is what we are talking about. We had some slop-over on impeachment, and so forth.

Mr. Strachan: Yes.

The Court: But the understanding of the discussion we had this morning was the state of mind.

Mr. Strachan: That's right.

The Court: Now, as to this Exhibit U, it is stipulated that these came from the company's files?

Mr. Strachan: Yes, your Honor, all of them.

The Court: And they are offered on the basis of the matters discussed this morning?

Mr. Strachan: That is correct, your Honor.

The Court: And you make the general objection thereto?

Mr. Dixon: General objection. I haven't seen the particular ones, but I assume the general objection will apply.

Mr. Strachan: You can look at this copy.

Mr. Dixon: I don't want to take the time. [1466]

The Court Objection sustained.

(The following proceedings were had in the hearing and presence of the jury:)

The Clerk: I will mark these Defendants' Exhibit U for identification.

(The exhibit referred to was marked Defendants' Exhibit U for identification.)

The Court: I think the jury should be informed

(Testimony of Nicholas J. Winckler.)

the objection is sustained to Exhibit U for identification.

Q. (By Mr. Strachan): Do you recall that in July, 1924——

The Court: 1924?

Mr. Strachan: Pardon me, your Honor.

Q. ——July 24, 1951, you had an inventory in several warehouses in the Middle West that you would like to dispose of in Chicago?

A. Inventory of what?

Q. Of the ades and bases. A. Could be.

Q. Do you remember that in July your list price on lemonade and orangeade in 12/46 packages was $2.60 f.o.b. Anaheim, and that you were offering to sell those ades in Chicago at a delivered price of $2 a dozen?

A. I don't remember, but if there is correspondence to that extent, maybe you know more about it. [1467]

Q. Do you remember that in August you quoted an even lower price than that, namely $1.70 per dozen delivered in Chicago?

A. I don't remember, but if I see the letter I can identify it.

Mr. Strachan: I ask that these two letters to Calkins & Company in Chicago, dated, respectively, July 24th and August 1st, 1951, be marked.

The Court: Exhibit V for identification.

The Clerk: Defendants' Exhibit V.

(The documents referred to were marked Defendants' Exhibit V for identification.)

(Testimony of Nicholas J. Winckler.)

The Court: Is it stipulated that these letters came from the files of the plaintiff?

Mr. Dixon: So stipulated, your Honor.

Q. (By Mr. Strachan): I ask you to examine the documents that have been marked Exhibit V?

A. What is the question, please?

Q. Does that refresh your recollection that the product that was listed at prices of two-sixty f.o.b. Anaheim was offered for a dollar seventy delivered in Chicago as of August, 1951?

A. Yes. It was a very small inventory, as you see, only 259 cases, and we wanted to close it out.

Mr. Strachan: I will offer the Exhibit V in evidence, [1468] your Honor.

Mr. Dixon: Well, no objection, your Honor.

The Court: Received in evidence as Exhibit V.

(The documents referred to were received in evidence and marked Defendants' Exhibit V.)

The Clerk: I am marking Exhibit W for identification, your Honor, two letters.

The Court: Exhibit W marked.

(The documents referred to were marked Defendants' Exhibit W for identification.)

The Court: Is it stipulated that the letters in Exhibit W for identification came from the plaintiff company's records?

Mr. Dixon: So stipulated.

Q. (By Mr. Strachan): Mr. Winckler, I think you testified earlier in this case that after the inventory losses you took on the Citrus Cocktail,

(Testimony of Nicholas J. Winckler.)

which was packed, I believe, in 1946 or '47, you established a policy of never packing for inventory, but only packing against placed orders; do you recall that testimony?

A. I recall that testimony. However, the testimony applied only on Valencia orange juice. It does not apply to bases or beverages. It applied to products which are of seasonal nature as far as the crop is concerned. [1469]

Q. Now, why do you apply that only to the seasonal nature of the crop and not Valencia oranges?

A. There is a very good explanation.

Mr. Dixon: Just a minute. I object to the question, your Honor, as wholly irrelevant and immaterial to the issues of this lawsuit and not tending to prove or disprove any issue.

The Court: Overruled.

The Witness: There is a very good reason for it. The Valencia crop comes in, as it was discussed here in the court before, around July, and the Valencia season ends after November 1. Immediately following such date Florida starts processing citrus juice. Consequently, the inventory then packed would carry from November to the next Valencia orange season, would be subject to the price fluctuation imposed on by the much larger Florida pack. In other words, if Florida decides to cut the price by 50 per cent, that automatically would influence the California price crop, except for such people like TreeSweet, who have the fruit

(Testimony of Nicholas J. Winckler.)

on consignment. They can afford to carry inventory on orange juice, but not a packer who has to pay cash for it.

On the other hand, Florida does not pack lemonade and to my best knowledge at that time Florida did not pack any concentrated beverage bases, so there the inventory is not subject to Florida price policies. [1470]

Q. When did Florida ever pack citrus cocktail?

A. Well, I am not aware that Florida ever packed citrus cocktail.

Q. These ades were an instance in which you did pack citrus products for inventory and consigned them to a warehouse, and that was not your policy with respect to Valencia juice, is that correct?

A. That is correct, and my testimony referred only to Valencia juice, about not packing inventory since 1946.

Q. Citrus cocktail was not Valencia juice, that was a beverage, and you packed that?

A. Citrus cocktail, as was explained in my testimony before, is basically speaking a pure citrus juice, a blend of orange and grapefruit, with addition of a little lemon, but does not fall in the category of a beverage.

Mr. Strachan: I will offer Exhibit W in evidence.

Mr. Dixon: General objection, your Honor.

The Court: Exhibit W received in evidence.

* * *

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: Reading from the first page of Exhibit W, this is addressed by Winckler-Smith to S. A. Wortier of New Orleans, Louisiana.

"We are in receipt of your wire informing us that Hill has offered $1.25 for 12/46 ounce [1471] and 50 cents per dozen for the 12-ounce for the entire stock, which includes 390 cases 12/46 oz. of lemonade, in the E. D. Cambon Company warehouse, and 24 cases 12/46 oz. and 3 cases 48/12 oz. of lemonade in the Maloney warehouse.

"We accept this offer for immediate sale and agree to Cambon invoicing the total sale, deducting his warehousing bill of $341.82, and remitting the balance to us.

"As per our telegram, we ask that you please forward your order to us covering this sale so that we can forward brokerage to you covering the sale of the entire quantity.

"We have taken a severe whipping in disposing of this inventory at this price but we are accepting this loss in view of the fact that it would cost considerable to move the inventory to another location. When you consider the manufacturing cost of this merchandise, plus the shipping charges and storage charges, plus brokerage selling cost, you can see how we come out on the deal."

Q. Mr. Winckler, are you able to state to the court and jury the entire cost and loss involved in having packed for inventory these ades that we have been discussing?

(Testimony of Nicholas J. Winckler.)

A. You mean the total?

Q. The total cost to Winckler-Smith. [1472]

A. I am unable, that is quite obvious.

The Court: You are talking now about overall loss for all ades packed?

Mr. Strachan: On this whole are project.

The Court: You are not talking about the 300 or 400 cases shown there?

Mr. Strachan: No. I am talking about the entire loss on the total ade program.

The Witness: I couldn't state it, of course. However, it was very nominal, because these inventories were all very thinly spread, two or three hundred cases in one market.

Mr. Strachan: I move to strike his statement that it was very nominal.

Mr. Dixon: I think he is entitled to——

The Court: Overruled.

* * *

Q. (By Mr. Strachan): Mr. Winckler, you testified several times, I believe, that you didn't in the canning season of 1951 process any single strength Valencia juice, is that [1473] correct?

A. That is correct to my best recollection.

Q. Did you have any single strength juice that you carried over as inventory into 1951?

A. Probably some Florida juice.

Q. Any California juice?

A. Not that I remember.

Q. Do you recall that you ever offered any

(Testimony of Nicholas J. Winckler.)

Valencia single-strength juice for sale on the West Coast in 1951?

A. Oh, yes, I did. We did, I mean.

Q. Although you had none in inventory?

A. That is correct. We tried still to sell and to produce.

Q. When you first started this citrus fruit business you bought a considerable part of your fruit from Sunkist, did you not?

A. You said when I started the citrus group business?

Q. Citrus fruit business.

A. Juice business?

Q. Yes.

A. Yes, we bought considerable fruit from Sunkist.

Q. And how long was it, in what period was it that you bought a considerable part of your raw fruit from Sunkist?

A. 1945, '46, '47, and '48. [1474]

Q. That was down to the time when you went into the reorganization proceedings in '48, is that correct?

A. Including the reorganization proceedings.

Q. At the time that you went into the reorganization proceedings, were you buying from Sunkist on credit, or cash?

A. I don't remember for sure. If the terms were changed, they were changed just shortly before we were ready to go into reorganization.

Q. Originally you bought an open account credit,

(Testimony of Nicholas J. Winckler.)

is that correct? A. That is correct.

Q. Then shortly before you went into reorganization proceedings the terms were changed so that you paid cash?

A. Well, I would like to qualify the word "cash." It means that instead of getting a week's credit, if I remember correctly, we reached an understanding that we are going to send a check daily for the fruit which is delivered every day.

Q. That is, you would pay the same day for the fruit received, was that the arrangement?

A. Yes.

Q. So at the time you went into the reorganization in 1948 you didn't owe Sunkist anything for fruit, did you? A. Not that I recall.

Q. When you came out of reorganization proceedings after having sold the property with a lease-back arrangement, [1475] sold the plant and equipment under that lease-back arrangement, on what terms did Sunkist offer to sell you fruit?

A. If I recall correctly, they wanted a cashier's check.

Q. At the time the fruit was delivered?

A. Either at the time or prior to delivery.

Q. You had other sources of supply of raw fruit, did you not?

A. Well, we had the other source of supply.

Q. What do you mean "the other"?

A. Well, I think it was testified here by other witnesses in the court that there are, basically speaking, two sources of supply, the Independent

(Testimony of Nicholas J. Winckler.)

Fruit Growers and Sunkist, so the other source of supply was the Independent Fruit Growers.

Q. That was the source that was represented by Morgan Ward as its broker, is that right?

A. Well, I wouldn't use the term broker. I would say he is the general sales representative over a period of many years.

Q. Will you tell us what terms of payment were arranged between you and Morgan Ward for the period immediately following your reorganization and adjustment with creditors in 1948?

A. What do you mean "immediately following"? You mean for the next few months or for the next two years or what [1476] term would that question include?

Q. I will change the question. After the reorganization and the resumption of operations by the corporation, you made arrangements to acquire fruit from the Independent Fruit Growers represented by Morgan Ward?

A. That is correct.

Q. Did you negotiate the terms of payment with Ward at that time?

A. I don't know exactly at what time. I won't be held to two weeks or three weeks. But generally speaking during the 1949 packing season, which was our first year, and we were operating after completing the reorganization under Chapter XI, we got very liberal credit arrangements with the Independent Friut Growers.

(Testimony of Nicholas J. Winckler.)

Q. Can you tell what the terms of payment were?

A. They are not always the same. Generally speaking, the terms were that we have to pay our bills weekly or up to 10 days. Sometimes arrangements were made where we bought fruit subject to that we won't pay for 30 days, and sometimes special arrangements were made like, for instance, when we packed for the school lunch program, that we are going to pay for the fruit when we get the proceeds from the Government, which maybe took some time two months.

Q. Did the arrangement that you negotiated with Morgan Ward provide that you would pay the independents not only [1477] the price of the fruit per ton but a $1 a ton in addition, which was to be applied to liquidating the unpaid indebtedness to the independents as a result of the reorganization proceedings?

A. If you will be kind to recall, I made the statement previously that according to my best recollection we paid all the small creditors in full, so that was a voluntary offering like to any other creditor in this category, that we wanted to make good and pay them voluntarily every dollar that we owed them, and we did.

Q. Well, isn't it a fact that you arranged with Morgan Ward that you would pay a dollar above the price of the fruit for every ton until the loss that had been sustained in your reorganization proceedings had been wiped out?

(Testimony of Nicholas J. Winckler.)

A. You are saying the same thing that I do. I don't recall if it was a dollar a ton or two dollars a ton or 50 cents a ton, but I know, assuming that the dollar a ton is the correct one, I don't recall, anyhow, that $2,000 was paid up very quickly, I think within six weeks that we started to [1478] pack.

The Court: Well, counsel is asking this question: Assuming you paid a dollar a ton, or two dollars, whatever it was, extra to Morgan Ward, did Morgan Ward and you bargain for that, or did you do it voluntarily?

Is that what you are asking, counsel?

Mr. Strachan: I am just asking him what the arrangement was.

The Witness: That was a voluntary——

Mr. Strachan: I am not asking about negotiations.

The Witness: That was a voluntary offering that we made to these creditors, and Morgan Ward was one of them, and it was greatly appreciated. There was no demand made, no bargaining. It wasn't a condition of the deal.

The Court: Now, counsel, you say your question was what were the arrangements; but I take it that is what you were getting at. If you had some other matter that you were getting at, you may go ahead.

Q. (By Mr. Strachan): In addition to Sunkist and Morgan Ward there were other sources of supply available to you, were there not?

A. Well, I would not say there were sources of supply. I think we had testimony here that there were two other groups, one co-operative called Mutual Orange Distributors, who at that time had their own citrus packing plant, juice plant, and it was very seldom that they had a surplus of [1479] fruit over and above what they needed for their own plant. A second group which was discussed here was the American Fruit Growers. They are not a co-operative, but they are in the produce business, and they built, if I recall correctly, in 1949, or shortly thereafter, a plant of their own. So fruit from them was very seldom available. Which does not mean that occasionally we may not have been successful in picking up a few truckloads. But it cannot be regarded as a steady, permanent source of supply on which a manufacturer could rely.

Q. Don't you know, as a matter of fact, that in each of your crop years, '49, '50 and '51, that you actually secured more fruit, more tonnage of fruit from these other sources, than you did from Sunkist? A. Oh, yes.

Q. I am not talking about Morgan Ward; I am talking about the other two, the sources other than Morgan Ward and Sunkist.

A. Well, the question is if I know. The answer is I don't know, but it would be meaningless because we bought so little from Sunkist. So if these other sources were a few per cent more or a few per cent less than Sunkist, it wouldn't have any importance.

The importance is the bulk of our supply was secured from the Independent Fruit Growers.

Q. Is it a fact that in the crop year—take [1480] the fiscal year ended with January of 1950, that is the packing year of 1949, that you obtained 10,500 tons of your raw fruit from Morgan Ward, and 3,500 from Sunkist, and 4,300 from sources other than Sunkist and the Independent.

A. Would you be kind enough to repeat these figures?

The Court: Read it, Mr. Reporter.

(Question read by reporter.)

Mr. Dixon: What was the question, oranges or fruit?

Mr. Strachan: Total fruit.

Mr. Dixon: What do you mean—oranges, navels?

Mr. Strachan: Valencias, navels, grapefruit, and lemons.

The Court: The question will be understood to mean fruit generally.

The Witness: Well, that totals 18,300 tons. I just wanted to check if it would approximately check out right. I think it is correct. Without looking at the records I would not be able to say if these figures are correct or not, but '49 was a year when fruit was plentiful, and the fact that—if that figure is correct, and we did obtain out of the 18,300 tons, 4,300 tons, which is approximately 20 per cent or 23 per cent, from other sources, but the

(Testimony of Nicholas J. Winckler.)

two main suppliers, it would have no bearing for the later years to come, '50 and '51. [1481]

Q. All right. Let's take the next year, which is the packing year of 1950, your fiscal year ended with January, 1951. A. Okay.

Q. Isn't it a fact that in that year you obtained three times as much tonnage from sources other than the Independents and Sunkist as you obtained from Sunkist?

A. Will you be kind enough, counsel, to give me the three figures just like you gave me in 1949, that I can compare it?

Q. Yes.

The Court: This is fruit generally, too?

Mr. Strachan: Yes, total raw fruit.

Q. 11,500. A. From whom?

Q. From Independent. A. Okay.

Q. 1,300 from Sunkist? A. Yes.

Q. 4,100 from sources other than Sunkist and Independent.

A. Probably it would simplify my answer if you could tell this court, counsel, how you figure the 4,100 other than Independents and I like to give an explanation, if I may do so.

The Court: Well, can you answer the question as it [1482] stands now?

The Witness: I cannot.

Q. (By Mr. Strachan): Your answer is you don't know?

A. I don't know, but I like to be helpful and clarify it.

(Testimony of Nicholas J. Winckler.)

Q. Now, for the next year, which is the fiscal year ended with January, 1952——

The Court: This is the packing year 1951, right?

Mr. Strachan: Yes.

Q. ——your total fruit purchases were approximately 6,000 from the Independents?

A. Yes.

Q. This is tons? A. Yes.

Q. 715 tons from Exchange.

A. From Sunkist, you mean.

Q. Sunkist, right, and 1,455 from sources other than Independent and Sunkist, making a total of about 8,100 tons.

Mr. Dixon: That is all kinds of fruit, counsel?

Mr. Strachan: Yes.

The Witness: I like to make the explanation——

The Court: Well, is this correct, or do you know?

The Witness: I coudn't answer it, your Honor, without that I can explain the third category in all three years.

Q. (By Mr. Strachan): Well, what were the sources that [1483] are included in that third category other than Sunkist and Independent?

A. It is quite likely that the big percentage of that third category is also the Independent Fruit Growers, and my explanation to that is that the Independent Fruit Growers are made up of a great number of packing houses. They are a voluntary association. They are not bound by any kind of rules or regulations. If they want to offer their

(Testimony of Nicholas J. Winckler.)

fruit through Morgan Ward, they may do so. If they want to sell their fruit directly to a juice packer, they can do so, and I know that each year there were certain independent fruit growers who were not willing to sell through Morgan Ward and said, "I won't wait for my money two months until you get it from the school lunch program. If you can use my fruit and pay to me within a week or five day, I give it to you."

So this third category of 4,300, 4,150 and 1,455 in 1951, my assumption is that these figures include a number of independent packing houses who have not sold their fruit through Morgan Ward, but are still members of the Independent Fruit Growers.

Q. Well, along that line, would you say that in this third category there was no fruit in any of these years from Mutual——

A. No, I would not say that. I said just the opposite. If you recall, I said here 15 minutes ago, while there are [1484] two basic sources of supply, that does not mean that we couldn't pick up some fruit occasionally from the remaining two sources who had their own manufacturing plant. One was the American Fruit Growers, later on doing business, also, as Golden Citrus Juices, and the other was Mutual Orange Distributors, doing also business as Real Gold Products Co. The latter two names are the names of the manufacturing divisions of these organizations.

Q. Well, in the light of your explanation, would you say that for the purpose of this lawsuit we

(Testimony of Nicholas J. Winckler.)

could fairly treat that third group as a part of the Morgan Ward independent group?

A. No, I wouldn't go so far. I would say that it is probably made up of some members of the Morgan Ward group and some of these other sources which I mentioned before.

Q. But you don't know how much would be independents belonging to Morgan Ward, MOD, or American Fruit Growers?

A. How could I, going back seven years, without seeing the records, books, or anything like that?

Q. Well, from 1949, when you came out of reorganization, down to the time you closed up your business, you bought less and less percentage of fruit from Sunkist, is that correct, in each year?

A. That is correct.

Q. In the year ended with January, 1950, your first year [1485] of operation after reorganization, you bought 17½ per cent from Sunkist—I am talking about Valencias now only.

A. Now we are changing to Valencias?

Q. Valencias, yes. As far as Valencias are concerned, isn't it true that in the first year following your 1948 reorganization proceedings, you bought approximately 17½ per cent from Sunkist and 82½ per cent from Morgan Ward and the others?

A. Is that a question?

Q. Yes.

A. It is possible, but I wouldn't vouch for the correctness of these percentages.

Q. In the next following year, which was the

(Testimony of Nicholas J. Winckler.)

packing year 1950, which in your books ended with your fiscal year January, 1951, isn't it true that 98½ per cent of your tonnage of Valencias you bought from the Independents and only 1½ per cent from Sunkist?

A. It is possible.

Q. And isn't it true that in the next following year, the last year of your operation, you bought 98½ per cent from Morgan Ward and the others, and less than one-half of one per cent from Sunkist?

A. Well, you said 98½. You mean to say 99½?

Q. I did. You are right. 99½.

A. Well, that is possible, too. [1496]

Q. In 1949 Morgan Ward negotiated on behalf of the Independents a custom packing arrangement with you, did he not?

A. Probably toward the end of the season. If you qualify that question to the extent that a certain percentage or a small percentage of the tonnage was based on a custom packing arrangement, so that we shouldn't be under the impression that the whole tonnage was based on a custom packing arrangement.

Q. Do you remember the terms of that agreement, which I believe was entered into in August of 1949, related to the packing by you of single strength Valencia juice?

A. Well, I have a recollection that there was an agreement. I would like to see it if I have to answer questions pertaining to this agreement.

(Testimony of Nicholas J. Winckler.)

Q. In that year——

Mr. Dixon: Is this '49 or '51?

Mr. Strachan: '49. This is single strength juice; not frozen.

Q. (By Mr. Strachan): By that agreement you were to process at least 60 per cent of the Independents by-products oranges, were you not?

A. I would like to see the agreement before I testify to the agreement.

Mr. Dixon: Is it in writing, counsel? [1487]

Mr. Strachan: Yes.

Mr. Dixon: I, frankly, haven't seen it. That is the reason for the question.

Mr. Strachan: Are you sure you don't have this, Mr. Dixon?

Mr. Dixon: I have '51, but I don't have '49.

The Court: This has never been exhibited to counsel?

Mr. Strachan: It was obtained from them.

The Court: I understand all these records were obtained from them. You were given permission to obtain records; that doesn't mean that Mr. Dixon ever saw these documents.

Mr. Dixon: I have not seen it, your Honor, no.

The Court: Do you want to look it over?

Mr. Dixon: Yes, I would appreciate it.

The Court: Do you have an extra copy of this so that he could look it over tonight and you could go on with this cross-examination tomorrow?

Mr. Strachan: We have extra copies at the

(Testimony of Nicholas J. Winckler.)

hotel. I hadn't intended to put the agreement, as such in. I just wanted to get the essential terms of it.

Mr. Dixon: I think the agreement would speak for itself, and that is why I asked the question whether it was in writing or oral.

Mr. Strachan: I don't think the terms of the agreement [1488] are in issue here.

Mr. Dixon: Maybe not.

The Court: The witness has said, in answer to your question, that he would like to see the agreement. You may either exhibit it to him or abandon your line of questioning. Mr. Dixon is entitled to see it.

I am going to direct again, that the exhibits to be used be exhibited prior to the time that they are used in the courtroom, unless they are impeaching exhibits.

Mr. Strachan: I didn't think that it would go in as a document. I thought we would just go into it as the history between the Independents and this witness, because I don't think there is any issue about it.

Mr. Dixon: Counsel, I won't hold up your examination by taking the time to read it at this time.

Mr. Strachan: The witness just wanted to see it.

Mr. Dixon: I suppose it would speak for itself.

The Court: It will be marked as an exhibit for identification as Defendants' Exhibit X.

(Testimony of Nicholas J. Winckler.)

(The document referred to was marked Defendants' Exhibit X for identification.)

(Document handed to the witness.)

The Witness: Well, I would like to save the court's time. I glanced as quickly as possible through a six-page agreement. I couldn't read it, of course, carefully. [1489]

Q. (By Mr. Strachan): In substance, didn't that agreement provide that you would be furnished 60 per cent, at least, of the by-products oranges that the Independents had for processing?

A. Well, the way I see the agreement is that we secured about 60 per cent——

Mr. Dixon: Now, counsel, I would like to read the agreement. Does it so provide specifically?

Mr. Strachan: Yes. It says at least 60 per cent of the by-products oranges shall be furnished to him.

The Court: Would you call his attention to page and line, Mr. Strachan?

I thought maybe you had it before you there.

Mr. Strachan: No. That is the only copy I have.

Mr. Dixon: It so provides, counsel. So stipulated.

The Court: Does the record show you stipulate?

Mr. Dixon: Yes.

The Court: State to the jury what it provides so we will have no confusion.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: The agreement provides, as I understand it, that the Independent Fruit Growers Association will furnish to Winckler-Smith at least 60 per cent of its by-products oranges. Winckler & Smith agrees to pay for the fruit, after it is canned into single strength juice and it has been disposed of. Until disposed of the goods will be [1490] kept in a public warehouse. And the price was an escalated price based on the selling price for the canned product. That is, if the product sold at $4.25 for a case of 12/46 ounce cans, the oranges were to be paid for on a basis of $43 a ton. For every five cents that the price of the finished product increased above $4.25, the price of the raw fruit would be increased $1.00 a ton. For each five cents that the orange juice might fall below $4.25 per case, it would be $1.00 a ton deducted from the $43 price.

I believe that is the substance of the agreement.

Mr. Dixon: If the court please, I am going to object to any characterization by counsel of a document which is in writing, itself, and can be introduced in evidence. [1491]

The Court: Well, this is a shortcut, Mr. Dixon. You can look the transcript over in the morning and look at the document, and if that is a fair summary, we will save some time. If it is not a fair summary, either one of you can offer the document in evidence and read parts of it.

Mr. Dixon: Thank you, your Honor.

The Court: The objection is overruled.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): That agreement was entered into and you operated under it, did you not, Mr. Winckler?

A. Yes. Well, of course, there are many other provisions of this agreement which were not mentioned.

Q. And there was a final settlement of the rights of the parties under that agreement as of the end of 1949, sometime in December you had a final settlement under the agreement, is that correct?

A. Yes.

Q. Can you tell us how the base price of $43 a ton under that contract with the Independents compared with the price at which Sunkist was offering by-product fruit at the same time?

A. If my recollection is correct, I believe Sunkist price was $2 more, was $45 per ton. That is just recollection. But usually the Independents were a couple dollars under the Sunkist price for a very obvious reason. Their fruit did not contain the juice, did not contain the yield of Sunkist. [1492] They segregated the fruit in a more stingy way, let's put it that way, than Sunkist did, and they knew it and that is the reason they made an allowance of about $2 under the Sunkist price. Rather take $45 fruit of the Sunkist quality.

Q. At times were you not able to obtain fruit at more than $2 less than the Sunkist price by dealing with these Independents?

A. Well, the only time that I recall offhand would be the year 1951, and there I couldn't say how much under the Sunkist price we obtained fruit, because we don't know what the Sunkist price really was. If we take the officially published price of $40 a ton based on 120 solids, our dealings with the Independent Fruit Growers during 1951, like on the school lunch program, called for a $35 price, and in that event, counsel, you are right. We obtained the fruit at $5 under the price.

But the $40 price to juice canners, as we know, was a theoretical price, let's put it that way.

Q. Do you remember having reported to your executive committee in June, 1949, that you had succeeded in securing a thousand tons of fruit from the Independent Growers at 10 per cent below the Sunkist price?

A. Well, if there is such a report to the executive committee, then that was probably true.

Q. Now I would like to go into another custom packing [1493] deal that you had with the Independents, which I believe was negotiated with Mr. Morgan Ward, between you and Morgan Ward. It has to do with the processing of frozen concentrate in the fall of 1951. Do you recall that you had that contract? A. Yes, I do.

Q. Will you just tell us briefly what that arrangement was, how much fruit you were to process and how the purchase and the payment was to be arranged?

Mr. Dixon: Was it a written or oral contract, counsel?

Mr. Strachan: Pardon?

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: Was it written or oral?

Mr. Strachan: I don't recall at the moment. Do you happen to recall?

The Court: The question is to you, Mr. Winckler.

The Witness: I think it was in writing.

Mr. Strachan: Isn't that the contract you had, Mr. Dixon? You said you had one.

Mr. Dixon: Presumably you have a copy of whatever it was. I have seen one for 1951 with the Independent Fruit Growers. That is undoubtedly what you are referring to, counsel.

Q. (By Mr. Strachan): In any event, you did have this arrangement with Morgan Ward and the Independents whereby you were to pack frozen concentrate Valencia orange juice in the fall of [1494] 1951?

A. Yes. We packed some frozen Valencias, that is correct.

Q. Did you perform that contract?

A. The contract was not a processing contract. The contract, according to my best recollection, in essence was that we secured a little bit of fruit for approximately $35 per ton from the Independent Fruit Growers and we committed ourselves that that would go into frozen orange concentrate rather than single strength juice. There was no sacrifice to such commitment, because you couldn't use $35 fruit for single strength juice. I think that was the effect of the agreement.

An then the agreement probably provided the

(Testimony of Nicholas J. Winckler.)

fruit had to be paid, if I recall correctly, it had to be paid whenever we got paid for the merchandise sold, but in all these contracts with the Independents, regardless if it was single strength or frozen, we had to invest always our own money to pay for the cans and cartons and labor and overhead, and so on. Nobody paid us for it.

Q. But under this contract——

Mr. Dixon: Counsel, I have the contract here and suggest it be referred to since it is [1495] available.

* * *

The Court: Mark it Exhibit Y for identification. It may be withdrawn by counsel if they want to see it tonight.

The Clerk: I have marked it Defendants' Exhibit Y for identification.

* * *

Q. (By Mr. Strachan): You say that taking this fruit at a $35 price was not a sacrifice—no, you said committing yourself to making frozen rather than single strength juice was not a sacrifice?

A. Because you couldn't use $35 fruit to produce single strength orange juice.

Q. But you could use it for the frozen concentrate, [1496] is that correct?

A. Well, just probably trading dollars, not to make any profit on it, because our volume on frozen concentrate was a small fraction of our plant out-

(Testimony of Nicholas J. Winckler.)

put on single strength juice. It was one-eighth what we could have put out in single strength juice.

Q. Let me see if I follow you. It seems to me that you testified that for three shifts, 24-hour operation, that is, you had a capacity of 50 tons a day for frozen concentrate?

A. Yes, and on single strength juice we had 400 tons a day, so that is what I said. Eight times. So we couldn't make any money on that small tonnage that we run into frozen concentrate, but having been prevented of running in 1951 on regular Valencia single strength orange juice, we felt we are doing better by recovering a small percentage of our overhead than doing nothing. [1497]

Q. Speaking of your capacity, are you able to tell the court and jury what per cent, or what the maximum tonnage was that you ever processed in any month in the year ended with January, 1950, or the year ended January, '51?

A. Not going farther back, just '50 and '51?

Q. Yes. What was the highest daily average you ever reached in a month in those years?

Mr. Dixon: Are you speaking of single strength, counsel, or all juices?

Mr. Strachan: I am talking about total tonnage processed.

Mr. Dixon: I know. But there are several products involved.

The Court: You are talking about total tonnage of all fruit?

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: Yes.

The Witness: Per day or per month?

Q. (By Mr. Strachan): What was the highest average day in any month you ever worked? By that I mean, if you operated 25 days in August, what would be the average tonnage per day, do you know?

A. Well, I could answer the question this way: I know that in 1949 we were running certain days in excess of 300 or 350 tons per day; but how much that amounts as an average per month—— [1498]

Q. No. The average per day in the month.

A. That is what I want to say. The average per day I couldn't say, because that was governed solely on how much fruit you were able to obtain.

We had enough fruit some days to run up to 380 tons, maybe, one week.

Q. That was one day?

A. Or one week. And the next week we didn't get fruit but just to run 200 tons. So I don't know if you are driving at plant capacity or availability of fruit, or from which angle the question is asked.

I can say so much: that in 1949 we had days or weeks where we run at 90 per cent capacity, and there were weeks when we couldn't obtain enough fruit.

You see, every manufacturer is cutting down on overhead by running steady, evenly, and running all month the same quantity. It is better from the angle of help and cost reduction. But we didn't had the good fortune of having contracts like Tree-

(Testimony of Nicholas J. Winckler.)

Sweet had, when they could start out at the height of the Valencia season and know exactly how much fruit they are going to get in next week or next month or the next three months and plan the labor accordingly, and the storage and the supplies and the cans and the sales and everything. We had been not as fortunate. So our fluctuation varied very much. [1499]

Q. Now, getting back to this frozen concentrate, do you know how the price of your finished product or canned frozen concentrate compared with the price of the Sunkist frozen concentrate in the fall of 1951?

A. Yes, sir. I could approximately state.

Q. That is what I want.

A. The price difference between our concentrate and Sunkist frozen concentrate is probably the same as it would be today. There are two kinds of brands, nationally advertised brands and brands which are not nationally advertised.

At that time I recall the Sunkist concentrate sold probably at around $1.80 or $1.85, and ours sold probably around $1.45 or $1.50. Now, that is a close guess.

Q. Is that on single strength or frozen?

A. You asked me on frozen.

Q. Yes. A. Yes.

You have the Anagrams, and I think the price quotations are stated there.

Q. Now, can you tell us what the relationship

(Testimony of Nicholas J. Winckler.)

was between Sunkist single strength Valencia juice and your single strength juice?

A. Pricewise?

Q. Yes.

A. That varied greatly. There were times when Sunkist [1500] sold its single strength juice under the Exchange brand, as you recall, prior to 1951, Sunkist if you recall sold all their single strength juice as Exchange brand. The Sunkist label was really activated only in 1951. There were times when our juice sold for a higher price than Sunkist.

Q. What times were those?

A. Well, sir, I couldn't answer you that. There were price fluctuations weekly up and down. We are going back for seven years. I couldn't answer you that. But looking over the correspondence that you supplied I found a letter where the broker called our attention to it that Exchange is quoting less than we are asking for it. I think that was in '49. And there were times when the Exchange asked more for it and we were less.

The is natural. That is the way business is.

Q. Was there any relationship between your prices on single strength juice and Sunkist prices that you would regard as a normal relationship?

A. What do you mean by a relationship?

Q. I will put it this way: Was it ordinarily true or did you try to see to it that it was true that you got higher prices than Sunkist?

A. I was always trying to see to it that I could

5

(Testimony of Nicholas J. Winckler.)

sell the merchandise at a price which gives us a normal profit and at the same time a price which is fair to our customers, and [1501] of course such a price had to be, due to the law of supply and demand, in proportion to the price of competitors of ours, regardless if their name was Sunkist, Exchange, Silzle, or TreeSweet.

Q. Did you pursue a policy of pricing your products above Sunkist?

A. We did not pursue any other policy than what I just stated.

Q. Well, in pricing your products did you ordinarily find that your prices on single strength Valencia had to be the same, or above, or below Sunkist?

A. In the first place, when you mention Sunkist, are you restricting your question only to 1951 when Sunkist single strength Valencia orange juice was put out already under the Sunkist label, or are you including in your question the years 1949, '50, when the Sunkist juice was put out under the Exchange label?

Q. Well, I didn't think that 1951 was involved, because I seem to recall that your testimony was that you didn't sell juice that year.

Mr. Dixon: Counsel, he testified that he sold Florida juice under the Anagold name.

Mr. Strachan: I will accept that amendment.

Q. (By Mr. Strachan): Did you sell any Florida juice in California under the Anagold [1502] name?

A. Yes, sir, I testified to that before.

Q. When was that? A. In '50 and '51.

Q. What time in '51?

A. Do you mean when I sold Florida juice?

Q. In California.

A. I don't know exactly the time, but my recollection is that it was during the winter months of 1951, before the Valencia season started.

The Court: By that you mean the winter months at the beginning of '51?

The Witness: In the beginning of '51, January, February, March, '51.

The Court: Then if you are going to pursue the question, answer the witness' inquiry, by the word "Sunkist" you did refer to the Exchange label as well?

Mr. Strachan: Yes.

The Court: All right.

Now, what is the question?

The Witness: Is the question still the same, if we pursued a certain policy of being higher or lower than Sunkist?

Q. (By Mr. Strachan): During the years 1949 and 1950, referring only to California Valencia single strength juice, were your prices usually the same as, higher than, or lower [1503] than Sunkist prices?

A. I think the answer could be all three. Sometimes it was higher, sometimes it was the same, and sometimes it was lower. We would have to go into an extensive study of comparing sales bulletins of

(Testimony of Nicholas J. Winckler.)
both Sunkist—rather, Exchange Orange Products and ours, to ascertain when our prices were higher, when they were similar, or when they were lower.

I will say something to clarify that. It still wouldn't give the true picture, because I don't know, I cannot use a better term than that colloquial term, the food business is a big chiseling business, and that goes for seller and buyer alike. When a manufacturer puts out a bulletin, it does not mean that in certain territories he would not agree to certain special temporary allowances, such as an advertising allowance, or a stack allowance, or deals, one case free with ten. I mean there are all kinds of allowances when a manufacturer wants to push distribution in a territory, or is overpacked and wants to get rid of inventory.

And I was told that such allowances were given and granted by products packed under the Exchange label from time to time in various territories.

So you see, counsel, it would be almost impossible to come to a decision, without doing weeks of research work and going through the correspondence of the Sunkist people, as well as ours, to find in the files all the special letters [1504] or allowances which were given in certain territories to brokers to compare which was higher or which was lower.

I would say so much: I think Sunkist had the same honest desire as we did, to get for the merchandise as much as was obtainable, figuring competition and figuring all circumstances. [1505]

* * *

ERNEST A. BROWNE

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as [1512] follows:

* * *

Direct Examination

By Mr. Dixon:

Q. Mr. Browne, will you state your present residence address please?

A. 887 Crenshaw, Los Angeles.

Q. What is your present business or occupation, if any?

A. Nothing. I am retried.

Q. Directing your attention to the year 1950 will you state to the jury what business you were engaged in at that time?

A. Yes; I was manager of the Union Appraisal Company, and also president.

Q. Were you engaged in that type of business in the year '51, also? A. Yes.

Q. Will you state to the jury what the nature of your business is so that they can understand what you did?

A. Yes. We were in the general appraisal business. That is making appraisals of all types of property, land, buildings, machinery and equipment, and also the furnishings of hotels, clubs, and very fine residences. We also made appraisals of cities, counties, utilities, school properties, absolutely everything, every type of property.

Q. How long had you been engaged in that business, [1513] Mr. Browne?

(Testimony of Ernest A. Browne.)

A. We were established in 1926.

Q. And this company that you were connected with and the appraisal work that was being done by that company was known as the Union Appraisal Company, is that correct? A. Yes. [1514]

Q. Now, can you give the jury a little bit more information as to how these appraisals that your company conducted are made?

A. Well, you are referring—we had two or three departments—you are referring to the engineering department covering buildings and machinery and equipment, I presume?

Q. That is correct, Mr. Browne.

A. Well, of course, I made no appraisals myself.

Q. You were the president of the company?

A. Yes. I directed the appraisals.

Q. They were made under your supervision and direction?

A. Yes, but, of course, we had specialists in each department, men who were very competent in making appraisals of all types of structures, and men who were very competent in making appraisals of machinery and equipment.

Q. Did you have during the year 1951, a Mr. Roehr, R-o-e-h-r, and a Mr. Hampsted, H-a-m-p-s-t-e-d, on your staff or on the staff of the Union Appraisal Company?

A. Oh yes. They had been with us for a number of years prior to that time.

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: It is coupled with the year, counsel?

Mr. Strachan: In 1949.

Mr. Dixon: Thank you.

The Witness: According to my recollection, in very exceptional instances, maybe two or three.

Q. (By Mr. Strachan): Did any of the brokers state in that connection that their customers would be nervous about financial conditions unless they could be assured of your financial stability?

Mr. Dixon: I object to that question, your Honor, the form of it. It is dealing, I presume, with oral conversations.

The Court: Objection is overruled. It is a general question. "State" could mean orally or by writing.

You may answer.

Do you want it read?

The Witness: Please.

(Question read by the reporter.)

The Witness: I don't remember. It could be.

Q. (By Mr. Strachan): I show you Exhibit AK and ask you if that refreshes your [1590] recollection?

A. Will you show me where the broker is nervous, please?

Q. I will show you AL and ask you if that refreshes your recollection in that respect?

A. Yes, that does refresh my recollection.

Q. All right. Now, what is your answer to the question whether they stated that the customers

(Testimony of Nicholas J. Winckler.)

would be nervous unless they could be assured of your financial stability?

A. Well, my answer to it is, if I am not confused with all these papers here, that the same broker sold merchandise two or three months later. That letter is dated in June, and then we had some deals or correspondence, at least, at a later date during 1949——

The Court: The question is, still, "Did some broker so advise you that his customer might be nervous about your financial condition?" That is the question.

The Witness: Your Honor, I believe I answered that.

The Court: No, you didn't.

The Witness: Yes.

Q. (By Mr. Strachan): Did some of the brokers after the reorganization advise you that before they could continue it would be necessary to have a statement of the financial condition of the company, because they did not intend to be involved in another deal similar to the one in which California merchandise was shipped into Chicago and spoiled and they [1591] had no recourse?

A. One broker. Not some.

Q. Was that Irwin Tucker of Chicago?

A. It was.

Q. And is the letter AK the letter that you refer to? A. Yes.

Mr. Strachan: On that basis, your Honor, I offer the statements of the witness and the letters in evi-

(Testimony of Nicholas J. Winckler.)

dence, not for impeachment, but for the purpose of showing the attitude of the brokers and the causation.

The Court: Let's just offer AL and AK, and not the evidence. We can take that up later.

Mr. Strachan: All right. I will offer the documents.

The Court: But not for impeachment?

Mr. Strachan: Not for impeachment.

The Court: Your general objection?

Mr. Dixon: The general objection, your Honor.

The Court: They are cumulative, are they not, counsel?

Mr. Strachan: Of his testimony.

The Court: They are cumulative, aren't they?

Mr. Strachan: Of the testimony just given, yes.

The Court: The objection is sustained to AL and AK.

That leaves us with AN. Do you offer AN?

Mr. Strachan: I offer AN.

The Court: For what purpose? [1592]

Mr. Dixon: If the court please, with reference to AK and AL, in line with my previous comments, may it be stipulated for the record that these are the only two exhibits referred to by counsel from the files of the plaintiff corporation, and that the replies thereto, dated May 26, 1949, to Exhibit AK and reply thereto of June 6, 1949, are offered to complete those exhibits. [1593]

The Court: Well, you have got too many things

(Testimony of Nicholas J. Winckler.)

in here. We have attached to AK the reply you refer to of May 26.

Mr. Dixon: Then I withdraw comment on that.

The Court: As to AL, we do not. Hand your letter up and we will mark it AL-1 for identification. Do you have the reply there?

Mr. Dixon: Yes, it is there.

The Court: Let me see it. AL-1 dated June 6, 1949, from Winckler-Smith to Dick Young Brokerage Company is marked for identification.

Is it stipulated it came from the records of the plaintiff company and was a reply to AL for identification, Mr. Strachan?

Mr. Strachan: I beg your pardon?

The Court: It is marked AL-1 for identification. Can it be stipulated it came from the files of the plaintiff company and was a reply to AL for identification?

Mr. Strachan: Yes, sir.

The Court: All right. It is not offered. It is merely marked AL-1. [1594]

* * *

The Court: The last stipulation he asked you for was whether or not these two letters were the only two that were submitted to the plaintiff following the search by the defendants. [1597]

Mr. Dixon: That's all I am asking, your Honor.

Mr. Strachan: Yes, I will stipulate that.

The Court: Let's get gack to AN for identification. [1598]

* * *

(Testimony of Nicholas J. Winckler.)

The Court: Or misfiling, yes. All right. Let's take up AN. What is the purpose of AN?

Mr. Strachan: That bears on the question of whether [1601] there was lack of proof of inability to sell which resulted in the failure——

The Court: Offered as admission against interest?

Mr. Strachan: Yes, sir.

The Court: What is the objection, Mr. Dixon?

Mr. Dixon: Just a moment, your Honor.

The Court: You are referring particularly to paragraph 2, I take it.

Mr. Strachan: Paragraph 2 and the next following paragraph.

Mr. Dixon: I don't see any reason, your Honor, for putting this letter in. The witness is here. If counsel wants to inquire into the substance of this letter, it seems to me that would be the best evidence. The letter is purported to have been written September 19, 1951. I object to it on the ground it is not the best evidence. If he is offering it for the truth of the contents stated therein, the witness is here to testify concerning anything that may be contained in the letter, and it seems to me that is the best evidence. I therefore object to it on that ground. It is not the best evidence of what it purports to deal with.

The Court: It is offered as an admission against interest, not a letter by this plaintiff, but a letter by the company. I take it it is conceded this came from the files of the plaintiff company. [1602]

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: Yes.

The Court: And O'Hanlon was the assistant sales manager.

Mr. Dixon: Yes.

The Court: Objection overruled. Received in evidence. [1603]

* * *

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Winckler, when did the frozen concentrate packing begin to be an important part of the processing of single-strength Valencia juice in California?

A. Well, counsel, that is a question that I won't be able to answer. According to some people it never became important and never will be. According to some other viewpoints it started to become important in 1951.

The Court: I didn't jump because of what the witness said. I looked over and saw a juror missing, but the juror's head was clear down below the rail of the box, and by the time [1605] I got through being startled the juror was back in place.

Go ahead.

Q. (By Mr. Strachen): Now, in 1949 isn't it true that the amount of single-strength juice packed as single strength, and the amount going into frozen concentrate, were about equal, that is about 50 per cent went into single strength and 50 per cent into concentrate?

(Testimony of Nicholas J. Winckler.)

A. Well, I don't have the statistical figures in my head.

Q. Do you know whether that is approximately correct?

A. I have the statistical information here, if I have a moment to look it up, if it is of any importance.

I assume that is correct if counsel has some statistical information.

Q. You don't know anything except that it is correct? Subject to you correcting me if you find it is incorrect, will you?

A. It would take too much time to look it up, so I have to rely on your statement, counsel.

Q. Between 1949 and 1950 the percentage going into frozen as compared to single-strength juice increased, did it not?

Mr. Dixon: Counsel, may I inquire, are you questioning the whole market, or are you dealing only with that produced in California? [1606]

Mr. Strachan: I am talking about the California market.

Mr. Dixon: All right.

The Witness: According to my best recollection the amount going into frozen concentrate in California increased to the year 1951.

Please, you understand, I am talking by memory. I am not looking at any statistics.

But after 1951 the volume going into frozen concentrate declined.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): Between what years?

A. Following the 1951 year. My understanding is that it has declined. And it is according to my best recollection.

Q. Assuming that in 1949 that going into single strength and that going into frozen concentrate was about equal, isn't it a fact that in the year 1950 there was a substantial increase in the percentage that went in frozen as compared with that which went into single-strength juice?

A. If we are talking generally about the industry, the answer is probably yes. On the other hand, if we are talking about individual plants——

The Court: We are talking about the industry in California.

Q. (By Mr. Strachan): The California pack as a whole. And isn't it true——

The Court: Let him finish the answer now that he knows [1607] what we are talking about.

Mr. Strachan: I am sorry.

The Witness: I think, your Honor, I should disqualify myself as a witness to testify to that, because I am not a statistician.

The Court: If you don't know, say so.

The Witness: I don't know.

Q. (By Mr. Strachan): Don't you know, as a matter of fact, that in 1950 pack year the single-strength juice going into frozen concentrate was approximately fourteen million gallons as compared with approximately six and a half million gallons sold as single strength, that is, nearly 65 per cent

(Testimony of Nicholas J. Winckler.)

of the total single strength in that year went into frozen concentrate, isn't that a fact?

Mr. Dixon: Just a moment.

The Witness: I cannot testify that it is a fact or not. I don't know.

Q. (By Mr. Strachan): Well, don't you know, as a matter of fact, that between 1950 and the year 1951 there was a still further increase in the percentage of single-strength juice packed as concentrate, as compared with that packed as single-strength juice?

A. I repeat that according to my best recollection the volume going into frozen concentrate increased up to and including 1951, and thereafter it declined. [1608]

Q. Isn't it true that in 1951 the single-strength juice which was frozen in concentrated form represented about sixteen and three-quarters million gallons as compared with a little less than five and a half million gallons packed as single strength?

Mr. Dixon: Just a moment, counsel.

May I inquire where you are getting these figures from?

You are way off if you are getting the figures from the same place that I am looking at.

Mr. Strachan: They are taken from the United States Department of Agriculture Statistics on the subject.

Mr. Dixon: That is what I thought you were dealing with.

The Court: Can't you gentlemen agree to some

(Testimony of Nicholas J. Winckler.)

stipulation? The witness says he doesn't know. Can't you agree on some stipulation as to what the report shows?

Mr. Stratchan: I should think we could. Facts are facts.

Mr. Dixon: Yes, we will be very glad to stipulate whatever the Government figures are as reported by the various processors.

The Court: Discuss it after Court.

Q. (By Mr. Strachan): Assuming that to be a fact, it would be true, would it not, that in the packing year of 1951, 80 per cent of the single-strength juice was packed in frozen concentrate form and only 20 per cent as single strength [1609] juice?

Mr. Dixon: Counsel, I must say that I think the best evidence on this are the figures, your Honor.

The Court: He has a right to ask this witness. Do you know, Mr. Witness?

The Witness: I don't know, your Honor, but I doubt that these figures are correct.

Q. (By Mr. Strachan): Have you ever made such an analysis yourself?

A. Yes. I would like to explain. We compared statistics a few weeks ago at Mr. Dixon's office, and we have here what is called Supplement, published by Sunkist Growers, and then we have one which is published by the U. S. Department of Agriculture. There is a wide variation of figures between the two publications. Also, we took one, I don't remem-

(Testimony of Nicholas J. Winckler.)

ber which one, which shows the total pack in gallons, and for the same year it shows the total pack in 24 No. 2 cases, I am talking about single strength, and there is a discrepancy between the gallonage statistics and the statistics by cases.

Q. Would you mind reading the title of the document that you are holding in your hand?

A. "1952 Supplement Statistical Information on the Citrus Fruit Industry Oranges, Lemons and Grapefruit." Below, it says: "Sunkist Growers Marketing Research Department, May, 1952."

Q. Thank you. [1610]

The first substantial quantity of frozen concentrate that was produced at the Winckler-Smith plant was in the fall of 1951, was it not?

A. That is correct. [1611]

Q. And that was packed under an arrangement with Morgan Ward? A. No, it was not.

Q. Well, how was it packed?

A. The fruit was obtained under an arrangement with Morgan Ward who is representing the Independent Fruit Growers.

Q. Do you recall what quantity of frozen concentrate you produced under that arrangement?

A. I won't recall it, but I know it was a very small quantity.

Q. About 1700 tons?

A. That could be correct.

Mr. Strachan: I will ask that this document be marked Defendants' Exhibit AO for identification.

The Court: AO marked.

(Testimony of Nicholas J. Winckler.)

The Clerk: AO for identification.

(The document referred to was marked defendants' Exhibit AO for identification.)

Q. (By Mr. Strachan): Mr. Winckler, I show you the document that has been marked AO for identification, which is dated January 24, 1952, and is addressed to Morgan U. Ward and is signed Winckler & Smith Citrus Products Company by J. F. Mesnard, secretary, and ask you if you recognize the signature of Mr. Mesnard.

A. Yes, I do. [1612]

Q. That appears to be a letter in which Winckler-Smith rendered an accounting under the arrangement for the packing of the frozen concentrate for the Independent Citrus Growers and Shippers Association, is that correct?

A. That is correct.

The Court: Do you offer it, counsel?

Mr. Strachan: Let's see if there is anything else I want to ask about in particular.

Q. Now, that accounting, among other things, shows items called "Additional Profit" and shows profit at 5 per cent, $6,887.44. A. Yes.

Q. And profit previously collected at the same amount? Do you see those items?

A. I see these items, and if you desire, I like to explain.

Mr. Strachan: Well, now, just a moment. I will offer the exhibit in evidence.

Mr. Dixon: I have no objection.

The Court: Exhibit AO received in evidence.

(The document referred to was received in evidence and marked as Defendants' Exhibit AO.)

Q. (By Mr. Strachan): Now, Mr. Winckler, I would like to go into the subject of market conditions in the citrus packing industry following your resuming business in the [1613] spring of 1949 after your reorganization proceedings. The year 1949, so far as California processors were concerned, was an abnormally good year, was it not?

A. I wouldn't say so, it was abnormally good.

Q. It was not a normal year, was it, with regard to the competitive position of the California processors?

A. Well, counsel, the only way I could answer that question, if I have to make again a speech as an explanation, because you are trying to get yes and no answers from me on subjects where I cannot give you a yes or no answer.

The Court: Then give us your answer.

The Witness: In any year, and I think I testified to that before, if a year is a good year or a bad year from the angle of the California processor depends on the following circumstances.

First, that there should be fruit available. So except for some years when there was a fruit damage, frost, or anything like that, most years fruit is available.

(Testimony of Nicholas J. Winckler.)

The second thing is that the Florida market shouldn't be overloaded.

And the third and the most important factor is what price Sunkist is setting to processors on fruit prices. Now, when the price is set that way, there is a normal profit margin of 10 per cent allowed to the processor, and we have a good year. [1614]

In 1945 when we started out in business, there was a price set on oranges by the OPA and there was a price set on juice, also by the OPA, and at that time the price by the OPA on both the finished product and the juice was that way that it should allow to the processor for profit and depreciation and so forth, a reasonable amount, so the first year that we were in business, despite that I lacked American business experience, we made $95,000 the first six months.

In 1946 the fruit price at the beginning of the year was in proportion to what you could get for the merchandise, so it was a good year.

The second half of 1946, the price broke and everybody lost money.

In 1947, if my recollection is correct, the fruit price was set too high that we could sell in sufficient volume and make sufficient money. When I mean we, I mean Winckler & Smith.

Other processors, TreeSweet, as Mr. McCracken testified, had a processing contract from 1947 on each and every year for the last nine years, where they could make a substantial amount of merchandise without entering in any risk.

(Testimony of Nicholas J. Winckler.)

So if you ask, counsel, if it was a question whether it was a good year or bad year for Tree-Sweet it was always a good year because they had no risk. On the market they had no risk, how much they had to pay for fruit. They [1615] got it on consignment.

As far as Winckler & Smith is concerned, the situation is different. If the fruit price was set in proportion so we could obtain for the finished merchandise, we had a good year. I think I will stop here.

Q. Getting back to 1949, wasn't that year an abnormally good year for you to enter the competitive market against Florida?

A. Against Florida the market was better in 1949 than in other years. However, with the amount of fruit that we were able to obtain, we could have sold our products without ever going east of the Rocky Mountains. So the only reason that we were looking towards Florida, we could have made more money and we could have sold at less overhead and less sales expense if we could have concentrated our sales, say only for the West Coast. We could have sold in 1949 everything on the West Coast.

But we always try to maintain national distribution for the days to come when such a distribution is going to be valuable in any manufacturer's future business.

Q. Isn't it true in 1949, because of the abnormal conditions, you entered markets that were not normally open to you?

(Testimony of Nicholas J. Winckler.)

A. That is correct as far as the southern states are concerned, and I think our records will show that we sold very [1616] little in the southern states. We just wanted to put our foot in the door.

Mr. Strachan: I will ask that these two letters dated July 29, 1949, be marked for identification.

Mr. Dixon: What are these, counsel?

The Clerk: I have marked them AP.

(The documents referred to were marked Defendant's Exhibit AP for identification.)

The Court: Exhibit AP marked.

The Clerk: One is dated June, counsel, and the other is July. [1617]

* * *

Q. (By Mr. Strachan): I show you these letters and ask you if the first page is a copy of a letter written by you to Mr. Paul Pankey of Birmingham, Alabama? A. Yes, I recognize it.

The Court: You say "written by you"; they are written [1619] by the company, are they not?

Mr. Strachan: Yes, by Mr. Winckler for the company.

The Witness: It is over my signature, your Honor.

The Court: May it be stipulated that these came from the company's records and are records of the plaintiff corporation?

Mr. Dixon: So stipulated, your Honor.

The Court: All right.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: I will offer them in evidence.

Mr. Dixon: I object to them on the ground they are wholly irrelevant and immaterial and do not tend to prove or disprove any of the issues in this lawsuit.

The Court: What do you offer them for? For what purpose, counsel—impeachment?

Mr. Strachan: No. I offer them as admissions of the market condition.

The Court: I read them. I didn't read them in detail, but they sounded to me generally like he testified to. Is it some cumulative matter?

Mr. Strachan: It is an admission, and I think it goes somewhat farther than he testified to.

The Court: That would be a question of fact for the jury. The objection is overruled. Received in evidence as Exhibit AP.

(Defendants' Exhibit AP was received in evidence.)

Mr. Strachan: I am reading from the letter dated June [1620] 29, 1949, addressed to Mr. Paul Pankey at Birmingham, Alabama and signed N. J. Winckler:

"We are familiar with the normal conditions existing in your territory due to the lower rates from Florida, but you will agree that this year conditions are not normal because Florida is practically sold out and also our prices are competitive with Florida's this year."

(Testimony of Nicholas J. Winckler.)

The second letter, July 29, 1949, addressed to Mr. George F. Seewagen:

"We know that under normal conditions California juice is a poor seller throughout your entire territory."

I might say that is Anniston, Alabama.

"However, this year is far from being normal in the citrus picture. Florida's price is very high and their supply has been entirely depleted. * * *

"We have many jobbers located in what is normally Florida territory, who are obtaining and sending us a considerable number of orders right now for Anagold."

Q. (By Mr. Strachan): The condition obtained into the spring of 1950 whereby you were able to sell juice at higher than normal prices, and in territories ordinarily [1621] not reached by California juice, because of the Florida situation, is that not true?

A. Well, the early part of 1950 was still under the same influence, as I testified before, as in 1949, because the Florida pack didn't got under way yet in sufficient quantity to replenish the juice. I think I testified to that extent before.

Q. Do you recall approximately——

The Court: Now, wait.

Finish your answer. That is the early part of '50. The question was about the year of '50. Was there some difference later in the year?

The Witness: I thought that counsel asked only about the early part of '50. Do you want me to carry on with the latter part of '50?

Mr. Stratchan: I would be very glad to have you tell the tendency of the Florida prices against which you were competing during the rest of the year 1950.

The Witness: After the Florida pack got under way and better quality juice was produced in Florida, say after January 1, 1950, the movement of the juice market was rather hectic. In 1950, as well as in 1951, the prices jumped around in Florida up and down many times during the year, and I won't be able to give you, counsel, or the jury, the exact months when it increased and when it decreased, but [1622] this time of the year, and Florida is famous for that, they just changed the price overnight, so that people hardly could catch up.

Q. (By Mr. Strachan): Isn't it true that in general the Florida prices, and I am talking here about unsweetened juice, hit a high in the fall of 1949, along in September or October, of over $4.50 a case, then in 1950 prices started down, so that by June of 1950 the prices were less than $3.50, by September and October and November it had gone down to about $2.39 a case, in the fall of '50—is that correct?

A. Well, yes and no. You see, the $2.35 price doesn't apply to identical merchandise, which was priced at $3.50 or even at $4. The Florida packing season starts in fall, and whenever the Florida packing season starts, the opening prices are

(Testimony of Nicholas J. Winckler.)

usually very low because the first two months the quality of the juice packed in Florida is poor, and it is known to the trade. Certain people want cheap juice and would rather go for price than for quality.

Now, as the maturity of the juice increases in December, January, and February, the price in Florida goes always up and reaches its peak usually at the peak of the season, of the orange harvesting season.

The Court: When is that, the peak?

The Witness: The peak is, I would say, February, March. And then gradually it goes down. So the $2.35 price is not [1623] paid for the identical merchandise which was sold six months before for $3.50.

The Court: That change that takes place, is that because the fruit in Florida matures and gets sweeter?

The Witness: That is correct, your Honor.

The Court: The same situation that occurs here with the California Valencia?

The Witness: With the California Valencia, yes, your Honor.

Q. (By Mr. Strachan): Now, the change in the market was such that by November of 1950 you were advising your broker Bagley here in Los Angeles that conditions were becoming so competitive that California canners have to rely more and more on West Coast business, and business in the Middle West or East, isn't that true?

(Testimony of Nicholas J. Winckler.)

A. That is true, but let me put it this way: If you are quoting from letters written to brokers, there is of course a lot of sales talk. When the May Company advertises unbelievable values in ladies' skirts, that doesn't mean that no other department store ever sold ladies' skirts as cheap as the May Company did.

That is sales talk. That is a sales speech. And every sales manager, of course, tries to influence the brokers that they should buy merchandise for some reason.

The Clerk: I have marked Defendants' [1624] AQ.

(The exhibit referred to was marked Defendants' Exhibit AQ for identification.)

Mr. Strachan: It is stipulated, I take it, that this came from the files of the plaintiff?

Mr. Dixon: Yes, your Honor.

Mr. Strachan: I will offer it in evidence. [1625]

Mr. Dixon: Just a moment. I object on the same grounds as before. I don't think this document in any way tends to throw any light on any of the issues in this case, to either prove or disprove any of them, irrelevant, immaterial to any of the issues in this lawsuit. Objection is made on that ground. Not the best evidence. I don't know for what purpose it is offered.

The Court: That is a question of fact for the jury.

Mr. Dixon: For what purpose is it offered, counsel, may I inquire?

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: It is offered to show in the fall of 1950 the market available to the plaintiff was cracking.

Mr. Dixon: It certainly doesn't show that in my judgment.

The Court: Objection overruled. AQ received in evidence.

> (The document referred to was received in evidence and marked as Defendants' Exhibit AQ.)

Q. (By Mr. Strachan): Mr. Winckler, in the late spring of 1951 you closed down your Florida office that you had established some time previously?

A. I just wanted to come to that, counsel. You didn't mention that we opened it up. I think the jury would be entitled to know about it, that we opened up an office in the fall of 1950, and that is the reason we wanted to sell our [1626] California juice on the West Coast, because there is a very strong connection between the fact, so let's talk about the opening of the Florida office before we close it.

Q. You had a Florida office in the fall of 1949—the fall of 1950 and the spring of 1951?

The Court: You said 1949. Did you mean that?

Mr. Strachan: No, 1950.

Q. When did you open your Florida office?

A. We opened our Florida office, I believe it was September or October, 1950. I think it was in September, 1950, and the purpose of opening that office was that we could supply with Florida juice the southern market mainly where I used the expression that we sold in 1949 to put our foot in the door,

In other words, we tried to do the same thing that our competitior TreeSweet did. They moved down to Florida and leased a plant and we wanted to be able to supply merchandise all year round and supply merchandise to people who are close to Florida so that we can compete with TreeSweet, so we opened up an office and merchandise was packed for us under the Anagold label and under other labels.

The Court: This was Florida juice?

The Witness: Florida juice.

The Court: That you sold out of your Florida office?

The Witness: That is correct.

The Court: All right. [1627]

The Witness: I think I testified—I showed the labels with the shield. We had separate labels printed to comply with Florida regulation.

Q. (By Mr. Strachan): That put you in competition, did it, with TreeSweet?

A. It put us in competition in addition to California juice, also with Florida juice.

Q. In further competition with TreeSweet?

A. Further competition.

Q. When did you withdraw from that further competition, from the Florida plant?

(Testimony of Nicholas J. Winckler.)

A. We withdrew from the Florida operation. I believe, in July, 1951.

Q. You closed that office, did you not?

A. Yes, we did, in July, 1951.

Q. That was because of chaotic conditions of the Florida market?

A. Well, probably I wrote that in one letter. The real reason it was just like speculating on the stock exchange. It was a very hazardous business. There was no logic in it and it was a wild speculation. If we would have kept our juice we would have made a lot of money, but we sold always when—I mean we bought as much juice, as much as we sold, so we never carried a substantial inventory, and we made a very small brokerage only, a very small mark-up. I [1628] think two or three per cent.

Q. So you closed that office? A. Yes.

Mr. Strachan: I ask that this document be marked.

The Clerk: Defendants' Exhibit AR for identification.

(The document referred to was marked Defendants' Exhibit AR for identification.)

Mr. Strachan: Under the stipulation, I offer the exhibit in evidence, your Honor. [1629]

• • •

Mr. Dixon: I have it. It is marked what?

The Clerk: Exhibit AR.

The Court: It has been offered. Any objection?

Mr. Dixon: The same objection, your Honor, as before.

The Court: Overruled. Received in evidence, Exhibit AR. [1630]

* * *

The Court: One other thing. These letters were generally offered for impeachment purposes, and I think I should tell the jury for what purpose they can be used and for what purpose they cannot be used.

Mr. Strachan: There were some that were introduced on the theory of admissions against interest, your Honor. [1646]

The Court: There has to be a segregation. On letters which were written by the company, I think they are in for all purposes. On letters which were written by brokers to the plaintiff, those letters are offered——

Mr. Strachan: They are being received.

The Court: Rather, they are being received under what I called the most common theory yesterday, namely, whether or not the declaration of the third party brought a notice or something to the mind of the person receiving the letter. Namely, the impeachment idea is this: Winckler has said he had no complaints. These were letters of complaints. Now, they are not offered for the truth of the fact that complaints were made, they are offered on the issue whether Winckler had notices of complaints, good or bad. Is that right? That is, that is why they are received?

Mr. Strachan: As I understand it on your

Honor's rulings that is a correct statement of the limited purpose for which they are received.

The Court: I think, maybe, rather than discuss it at great length I ought to give them an absurd example, an example out of all reason. For instance, supposing a man said, "I never had any knowledge that anybody had accused me of killing my mother-in-law," and then a letter was produced where somebody writes and tells the man, "You on such-and-such a date killed your mother-in-law." Now, the evidence is [1647] received for the basis of testing the witness' statement as to what knowledge he had; it is not evidence that at any time he ever killed his mother-in-law.

Is that sufficiently absurd and far enough away from the case to illustrate it?

Mr. Strachan: I don't know what effect that would have on the interpretation of my evidence, your Honor, and I don't want——

The Court: Would that hurt your position?

Mr. Strachan: I think it might.

The Court: What I am trying to do is keep away from——

Mr. Strachan It seems to me that the way you put it before was not an abstruse or technical explanation of the theory on which they are being received, and your instruction to the jury in about the language you used today would be unobjectionable, but I am not sure, if you go on and amplify that by these absurd examples, that it might not have some influence.

The Court: We will leave the mother-in-law out, then.

Mr. Strachan: I think I would prefer that.

The Court: Then I think I will probably do much as I did before.

When any witness takes the witness stand his credibility is put in issue; that the jurors are the sole judges of the credibility of witnesses, and what weight they give to his [1648] testimony; and a general instruction as to their function on this matter. That when evidence is admitted it doesn't mean that the court has one view or another of it, but it is for their consideration on the facts, and that these letters bear upon this problem: That the defendants contend that Winckler claimed that he had no complaints about his products except navel juice, and the defendants contend to the contrary, that he had had notice of complaints of other products; that these letters are then being admitted solely on the question of impeachment as to what notice Winckler had, and therefore on the issue of his credibility as a witness. The jury are the sole judges of his credibility. That the letters are not being admitted for the truth or lack of truth of any statement contained therein.

I would like to give some example to point that up, because it is a little hard—it is hard enough for us lawyers to understand, we didn't agree on our legal argument, and now we are going to have jurors decide it.

Mr. Strachan: Up to this point, your Honor, I think your expression of the ruling is acceptable, but I think beyond that there might be some risk involved. [1649]

The Court: Well, could I take out one particular letter, for instance, to illustrate the point? There is one letter, we will say, which says, for instance, something about—well, I guess that one didn't go into evidence. I was thinking of the one about swollen cans. Let's see the letters.

Mr. Dixon: The first one on top, your Honor, Z.

The Court: Let's see it. Also, on some of these letters, of course, it is still a question for the jury as to what juice was involved. We are not going to comment extensively on that.

I might just take the first paragraph of that Z letter, take that one statement, "None of the brokers liked the quality of this juice for it had an aftertaste that was objectionable," point out that this letter is not being admitted for any proof of that fact, but merely for proof of what the broker wrote to Winckler.

Mr. Strachan: Would you take the whole paragraph?

The Court: I will read the whole first paragraph, say, take one example to try to point out what this ruling means. Is that all right?

Mr. Strachan: Well, would your Honor mind reading the first and the third paragraphs?

The Court: I am not going to read the third, because that is just the type of thing why I excluded these on your general objection, that you offered them for the state of [1650] mind of a broker, but you are trying to get a specific state of mind, in this particular case, a broker giving advice as to what Winckler would have to do.

Mr. Strachan: In order to get acceptance of his juice on the market.

The Court: And that is certainly the type of thing that would require cross-examination. I want to pick out an example of some statement of fact that is put in the letter, and here they have got taste is objectionable.

I proposed a very violent example. You didn't like that. This example is a mild example. Now we have got both extremes and you apparently don't like either suggestion.

Mr. Strachan: I don't like to have the letters fragmented. I will try to find one.

The Court: Well, I think that will do it, Mr. Strachan. You are fragmenting the letter when you read them. You are reading excerpts.

Mr. Strachan: Right. [1651]

* * *

(The following proceedings were had in the hearing and presence of the jury.)

The Court: The record will show the jury present in their proper places.

Ladies and gentlemen of the jury, as the case has progressed, from time to time I have attempted to assist you in indicating for what purpose evidence was offered, where the court admitted it for one purpose and where it was not to be considered for other purposes. We are at one of those places today. I am going to take a few minutes to try to explain to you, if I can, in simple language, what we are talking about.

Generally speaking, if evidence is admissible on any ground, it goes into evidence. It goes into the record or becomes an exhibit, but that doesn't mean you can always consider that evidence for every purpose that you want to consider it for. You have to, therefore, follow the court's instructions as to what purpose evidence is admitted for.

Now, we come today to evidence which has been received generally, evidence offered by the defendants which has been received generally on the question of impeachment.

Impeachment is the attack that is made on the credibility of a witness, how much weight should you give to a witness' testimony. You are going to be instructed in detail about that. In fact, I am going to read you one of the form instructions [1653] this morning on that, because the credibility of every witness that appears before you is for you to decide.

It is just like in your affairs in life when you take care of your own concerns, and you are conducting some business venture, you may believe 90 per cent of what a man tells you, you may believe 100 per cent, you may believe one per cent, or you may believe nothing that he tells you. It is common experience that we use our own heads and sort out, as it were, the credibility of the people we deal with.

Now, you have the same task as jurors to judge the credibility of each witness. Evidence which tends to detract from credibility, if you so find, is what we speak of as impeachment testimony.

A very common example of impeachment testimony is that Joe Doakes said, "I never met Bill Smith in my life." Then they bring Bill Smith on the witness stand and he says, "Yes, I met him on such and such a date."

Well, there may be further testimony later to explain, but head-on, they come on to some question of fact.

The general instruction that the court gives on this matter of credibility is about two paragraphs, but you have to listen to it carefully.

"You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to [1654] speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

"Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more witnesses witnessing an incident or a transaction may see or hear it differently; and innocent misrecollections, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy [1655] results from innocent error or wilful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it [1655-A] deserves."

Now, there have been admitted in evidence the following exhibits while you were not present: Exhibit 52, a plaintiff's exhibit; Exhibit Z, Exhibits AA, AF, AG, AH, AI, AJ, AM and AN.

With reference to these lettered exhibits, they fall into two classes. One class are letters which brokers wrote to Winckler & Smith. The other class are letters which Winckler & Smith company, through the sales manager, or I don't know whether there are any of them personally signed by Mr. Winckler, but they are company letters, and you can see from the letter generally who signed it in behalf of the company and, of course, whoever signed it acted for the company.

Now, in some instances in these exhibits you will find both letters in one exhibit. I think there are one or two instances of that, are there not, where one exhibit has a letter from the broker and maybe attached is a reply from Winckler & Smith?

Mr. Strachan: That is true.

The Court: So I am not going to sort them out by numbers for you, but I will tell you there are two kinds of situations: one, letters Winckler & Smith wrote, and the other letters that brokers wrote to Winckler & Smith, and there is a difference in their application.

The letters that were written by the company may be [1656] considered by you for any purpose, just like you in your business affairs are bound by letters that you write. They can be used against you, and so letters written by Winckler & Smith may be used against Winckler & Smith.

In the case of the letters written by the brokers to Winckler & Smith, they can be admitted for a limited purpose. That purpose is this: Mr. Winckler on cross-examination was asked whether or not—I am not going to read his testimony, you will have to recall it, that is your job, but he was asked whether or not there had been complaints by brokers about his products, and merely to refresh your recollection generally, he said that there had been numerous complaints about navel juice because of the fact that it was more bitter than Valencia, and he disclaimed rather generally that there had been complaints that he recalled about other products. He also talked about brokers phoning who had a complaint, picking up the phone. He talked also about where ultimate consumers had complained how cans of juice had been sent to customers. That is not particularly involved here, but I am just trying to generally refresh your recollection on his testimony.

Now, we have these letters written by brokers to Mr. Winckler. They are offered by the defendants for the purpose of showing that Winckler did have other complaints other than the ones he admitted about the navel juice. [1657]

The fact that the court admits them doesn't mean that I put little weight or lots of weight on them, or that I have any view about them. The mere point is that they are properly in evidence for a limited purpose, and you may therefore consider them. And that limited purpose is to determine whether or not there was notice brought home to Winckler & Smith, and what the notice was. That is, was notice brought home to him of complaints?

They are not admitted for the truthfulness of what they contend. For example, supposing a broker had written a letter that he had a long series of complaints, that he made, about some canned goods, this one, two, three, four, five, six, seven, eight—the letter is not admitted as having any bearing for you to consider on whether those complaints were true or not, it is merely admitted to show that there were letters written to Winckler & Smith about complaints.

To demonstrate what I mean, supposing the broker had for some reason—this is absurd, but I will give it to you—supposing the broker had deliberately lied in a letter, nevertheless he wrote the letter to Winckler & Smith and therefore it is admissible on the question whether there had been complaints made to Winckler & Smith, but it is not admissible for the truth of what is contained in the letter. Because whether he lied or told the truth, there was the letter that was received by Winckler & Smith, which was a [1658] complaint.

Now, that may be a little hard for you to separate in your minds, but I wish you would try to do it.

They are admitted on the issue of credibility of the witness Nicholas Winckler under what we speak of as impeachment. It is your function to decide whether there is impeachment, whether there is an attack on his credibility or there is not, following generally the instruction that I read to you.

They are not admitted for the truth or lack of truth, or anything, about what they contain.

I will just give you one example. In "Z," for instance, a broker wrote, "We received some samples of Anagold brand orange juice and cut these samples with several buyers that were somewhat interested. None of the buyers liked the quality of this orange juice for it has an aftertaste that is objectionable." That letter is not offered for any proof that the man received samples, that he cut the samples, that buyers were interested somewhat or were not, that none of the buyers liked the taste, or that the aftertaste was objectionable.

That is not the point. They are admitted for the question whether some notice was given to Winckler of a complaint generally on the issue of Winckler's credibility.

Let me wind up by saying, again, as I have told you many [1659] times before, you are the sole judges of the facts in this case; I am not. My rulings on evidence indicate only what evidence you may properly consider. You must decide all the facts in this case from all the evidence finally made in the record under the instructions that I give you. You must follow my instructions on law. I don't ever intend to comment on evidence. If anything I ever say looks to you like a comment, ignore it, because you are the sole judges of the facts. And don't try to outguess me as to what I may think one way or the other about the facts in the case.

Mr. Strachan: May it please the court, I think it might be helpful to the jury to understand that while they were excused we took some evidence out of their presence, and that that will be read from the transcript, and I can do that or perhaps your Honor could do it.

The Court: You may do it, Mr. Strachan.

That is what we were doing while you were away yesterday. Now the secret is out.

Proceed, Mr. Strachan.

Mr. Strachan: I have here Volume 14 of the stenographic transcript in which we were offering evidence, getting the judge's rulings on it, and in order that you wouldn't have to go into the technical part of it, we have arrived at certain rulings, and I propose to read, with the court's permission, parts of the testimony that were ruled admissible. [1660]

All of this testimony was testimony given by Mr. Winckler.

The Court: Let me add that the fact that we are reading it to you is to have the same effect as if the witness were here on the witness stand. We are just saving time.

Go ahead.

Mr. Strachan: Shall I identify page and line, your Honor?

The Court: Yes, if you will.

Mr. Strachan: I am now reading from transcript beginning on page 1570, line 4, to line 2 on page 1571.

The Court: Proceed.

(Whereupon Mr. Strachan commenced the reading of the record as follows.) [1671]

• • •

Mr. Strachan: * * * Now, referring to Exhibit AA received in evidence, a letter dated October 12, 1949, addressed to Mr. Charles C. Sisk, of Winckler & Smith Citrus Products Co., by Graves-Chambers Co., Seattle, Washington, I am omitting the first paragraph.

Oh, do you want it read, Mr. Dixon?

Mr. Dixon: Yes, counsel.

Mr. Strachan: All right. I will read it.

"Dear Charlie:

"I am answering your note addressed to Doc because I made the call on Pat McCue and [1672] have followed up today with the samples which you sent us and which were received today.

"Charlie, while I was at National, Pat brought your old friend, George Paquette, in on the tasting and they used a sample of their own Happy Home to compare with. Both of them stood there and swore up and down that your acid content was too high for them. I had the privilege of tasting both juices also and, to me, there was very little difference, but believe that the Happy Home did have a tendency toward more fruit sugar. I pointed out that they would have a hard time getting the same thing every time they purchased orange juice, but this had no effect.

"Pat said, 'I want to do business with Charlie Sisk but, in this particular case, I cannot because of the difference in the quality and the fact that his product does not come up to our standard.' If you get a run of extra sweet juice, please let us have two or three cans of it for this particular customer."

The Court: I want to comment again, following up what I told you, that this evidence which counsel has urged be admitted, and which I have admitted for a limited purpose, is something which you should clearly understand, that that [1673] letter is no evidence at all that Happy Home was a better juice, that whatever this sample was that they said tasted different is not evidence that it did, and it is no evidence about Pat wanting to do business with Sisk, no evidence that some product was not up to standard, no evidence of any of those things. It is merely evidence a broker wrote a letter to Winckler & Smith making some kind of complaint, right or wrong. You have to keep that in mind. This is the type of evidence that is dangerous unless the jury understands the purpose for which it is [1674] admitted.

* * *

The Court: I made my rulings and I am stuck with them.

Again I call the jury's attention to the fact that these last two letters, like the rest, are no evidence whatsoever that this broker was unable to make the carload because he had only 650 cases. It is no evidence that the broker was at a loss to understand their methods of operation. It is no evidence at all of any of the things cited in this letter. The gist of it is, the only reason it is admitted is to show that a broker—it is for you to decide from the letter whether a [1682] broker made some kind of a complaint.

Proceed. [1683]

* * *

NICHOLAS J. WINCKLER

the witness on the stand at the time of recess, having been heretofore duly sworn, was examined and testified further as follows:

Cross-Examination (Resumed)

By Mr. Strachan:

Q. Mr. Winckler, as I recall it, at the conclusion of your testimony yesterday, we were discussing the chaotic conditions of the Florida market—as I remember it, it was in the declining period of spring and summer of 1951. That confusion of the Florida market had its effect on the citrus juice market for California products, did it not?

A. Yes, it did.

Q. You sent an Anagram to your trade, did you not, on that subject?

A. Well, we sent Anagrams regularly.

Mr. Strachan: I might mention to your Honor that in making these photostats, the text is not legible, so I have added a rider which makes legible the part that I am referring to. [1688]

* * *

The Court: Received in evidence, an Anagram.

(The document referred to was received in evidence as Defendant's Exhibit AS.)

Mr. Strachan: I will read this paragraph from the Anagram:

"California News.

"Confusion of the Florida market affects without question business in California. This is regrettable because there is no reason for such symptoms. Citrus processors in California have hardly any stocks to speak of, and stocks in the hands of distributors and chains are lower than usual."

Q. That is a correct statement of the market conditions as of the middle of May, 1951, is it not?

A. That is the way we saw it.

I would like to add that not every manufacturer sees market conditions the same way. Some people think the juice will go up, and other people think

(Testimony of Nicholas J. Winckler.)

that the juice is going to [1689] go down. The same as on the Stock Exchange.

Q. At the close of the Florida season do you recall that there was a supply of approximately 6 million cases being carried over as compared with 2½ million as of the year before?

A. No, I do not recall.

• • •

The Court: AT received in evidence.

> (The document referred to was received in evidence and marked as Defendant's Exhibit AT.)

Mr. Strachan: "Market News. [1690]

"With the close of the Florida season, it is interesting to review the available supply"——

The Court: What was the date of this?

Mr. Strachan: June 23rd.

The Court: '51?

Mr. Strachan: '51, yes, your Honor.

The Court: Start again. I am sorry to interrupt you.

Mr. Strachan: "With the close of the Florida season, it is interesting to review the available supply of citrus juices which is at this time 6 million cases greater than a year ago. Assuming same movement between June and September as last year, the carry-over would run around 8½ million compared to 2½ million a year ago. However, it is anticipated by the trade that the 6 million plus is going to be

(Testimony of Nicholas J. Winckler.)

absorbed, if not by September, by the end of October due to three factors:

"1. Considerable faster movement due to much lower prices than a year ago.

"2. Increased requirements of the armed forces.

"3. Added merchandising effort of the Florida Citrus Commission." [1691]

* * *

Q. (By Mr. Strachan): Who is Pasco?

A. Pardon me. I didn't get the questioning correctly with the bulletin you just read.

The Court: The question is not about the bulletin. He has started something else.

Q. (By Mr. Strachan): Will you identify Pasco?

A. Pasco is regarded as the largest juice canner in the United States, probably in the world.

The Court: What does the name mean? Is it an abbreviation of the name?

The Witness: The name of the corporation.

The Court: Pasco?

The Witness: Pasco. I think it is named after a Florida county. [1692]

Q. Now, Pasco cut prices in July of 1951, did it not?

A. Well, counsel, I couldn't remember. They cut prices many times during the year and increased prices many times during the year. I don't know to which price cut you are referring to.

The Clerk: I have marked Defendant's Exhibit AU for identification, a letter.

The Court: AU marked for identification.

(The exhibit referred to was marked Defendants' Exhibit AU for identification.)

Mr. Strachan: I offer Exhibit AU. [1693]

* * *

(The exhibit referred to, marked Defendants' Exhibit AU, was received in evidence.)

Mr. Strachan: A letter written by Winckler-Smith over the signature of Mr. O'Hanlon, assistant sales manager, to George A. Mendes, New York City:

"We were very sorry to learn from your letter of July 12th that the Florida price quotations of 90c on # 2's and $2.25 on 46 oz. were so greatly below our quotations that Seeman Brothers were not interested any further in our California products.

"We are sorry that for the present it appears that Florida prices as shown in Pasco's quotations of this week are at so great a low that California cannot be competitive on the East Coast. Just how long this condition will continue to exist we do not know. We believe, however, that Pasco's drastic drop to $1.75 on 46 oz. f.o.b. Dade City, Florida, must be on an early pack of juice which they are trying to dispose of quickly at the present time.

"You will note from our recent Anagram that we have withdrawn our price quotations on Orange Juice and will quote on request only. This was done so that we can watch the price situation closely.

We notice the Pasco quotation on Grapefruit Juice has not changed from their previous $1.75 per dozen [1694] on the 46 oz. Pasco is stipulating only 50% of an order can be Orange Juice at the new low price and the balance must be made up of Blended Juice or Grapefruit Juice. From this you can see that Pasco's quotation is an unusual one and we think an adjustment will take place in the not-too-distant future.

"We are attaching a copy of a letter we wrote to your Syracuse office asking for co-operation in forwarding a sample to us of the Lemonade that is in the Syracuse warehouse. We have not heard from you directly since the writer talked with you over the telephone and we are very much interested in knowing whether we can count on your continued co-operation throughout your entire organization."

* * *

(The following proceedings were had outside the hearing and presence of the jury.)

The Court: The record will show the jury absent.

You know, we live and learn. I suppose by the time I get old enough to retire and finish about 20 or 25 years on this [1695] court, I will know how to try a lawsuit. I have been trying to conduct this case fairly. I am not so sure that I haven't done a serious injustice to the plaintiff in permitting these impeachment letters in evidence.

I don't know how else it could have been handled unless to have limited the defendants to a mere showing that a certain letter of a certain date had been sent and received, and the court could inform the jury it contained a complaint. But hearing these letters read full of factual assertions disturbs me very much. Twice I stopped to again call to the attention of the jury that those letters were not evidence of the alleged facts recited. Whether you can instruct a jury so that they will follow it, I don't know.

I feel maybe I have been unjust in this ruling, although it is a difficult problem to handle. You are entitled to impeach. It is a question of how to do it. Maybe it could have been done some other way. However, what harm is done is done.

If this was a criminal case where a man's liberty was involved, I would be very concerned about it, because certainly this business of reading letters, factual dissertations about this, that and the other thing, and having them read one after the other, and then telling the jury those letters are not evidence of those purported facts, I don't know whether it means anything or not. [1696]

I merely pause a moment to indicate my concern. Maybe there is some other way it should be done.

Mr. Dixon: May it please the court, I rise to make this comment. I know that counsel has a wide scope on cross-examination of a witness, but we have been on this cross-examination for several days on things which, many of which seem to me not to move this case forward or make any effort to meet any of the issues that at least the plaintiff feels are the real issues of this lawsuit.

The Court: Well, I will say this. I think most of it at least has some connection. It is not so remote that it has to be kept out. I am, however, of the feeling that we have not progressed very far and that a lot of time has been wasted, that this could have been speeded up. Maybe not.

What suggestion do you have? You just want to register dissatisfaction, too, I take it?

Mr. Dixon: Well, your Honor, it poses a problem to me. I feel an obligation to the plaintiff here to at least try to go into some of these things that are set forth in the letters. Maybe I shouldn't. But I am frankly concerned about counsel reading into the record letter after letter here which, as far as I am concerned and can see, don't seem to deal with, well, possibly on the fringe, maybe, but not the real issues.

The Court: I have a lot of confidence in [1697] juries. I think when I get through instructing the jury, and the arguments are conducted, they will have this case shaken down to what the real issues of the case are.

Well, anyhow, I merely express my concern here. Maybe the better way would have been to require you to have merely used the letters without using the contents of them. Is there any way of doing that? I don't know.

Mr. Dixon: In some instances, Judge, where I have felt it had to deal with documentary evidence, the parts that are clearly irrelevant and immaterial, I submit certainly a lot of that has gone to the jury when he has read the letter in toto, when it could have been expunged from the document. Maybe that is the only way we could deal with the problem.

The Court: That, still, of course, wouldn't answer the problem, because originally I thought there were going to be parts read, but you spoke up and wanted the whole letter read, at least the first one, and Mr. Strachan, to oblige, read the whole letter, but even if you try to take parts of it, suppose it is a complaint and you have a paragraph or two paragraphs of complaint. It is pretty hard to figure out how you could handle it without at least reading that part of the complaint, and the complaint may roam all over the field. The point is he made a complaint.

Mr. Dixon: May I say this, your Honor. Perhaps I misunderstood. Mr. Strachan is not reading the total letters [1698] here or all of the contents of the letters at my request at all. If that is what he is doing it for, he need not do it, because I know you have the privilege of reading any part of it to the jury in argument or any other time, but I am concerned about if we are going to have to go through another hundred or so of these letters. I asked Mr. Strachan yesterday when he thought he would complete his cross-examination and he told me by this noon. I have witnesses here.

The Court: How much longer will you be? Will you finish up this afternoon?

Mr. Strachan: I am quite sure I will.

The Court: If we have any more of these letters that go into the never-never land, we will stop the trial and have a pretrial, because that disturbs me. Maybe by the time I finish my 25 years up here, I will know all the answers and know how to try a lawsuit. But sometimes you feel pretty [1699] inadequate.

* * *

Mr. Strachan: Might I take my turn in stressing my point of view on these letters? I did rise at one time to attract your attention, your Honor, because you had told the jury we had offered those letters for the purpose of impeachment. Actually, our offer goes beyond that.

The Court: I looked over to you.

Mr. Strachan: I know.

The Court: Of course, that is no error. If I made a mistake, if I did inadvertently say offered instead of received, the error, if any, rests in the ruling I made, and not in what I told the jury. In other words, they are not entitled to know whether you offered them for 50 purposes, but they are entitled to know what they went in evidence [1700] for. I misspoke myself. I stopped a time or two, but I don't recall seeing you indicating that you wanted to flag me down, so I went on.

Mr. Strachan: Another thing I want to say. I don't share the misgivings you and Mr. Dixon have on the effect, because I think your Honor has at least gone as far as necessary to limit the probative value in the jury's mind of those letters.

The Court: I think the jury understands. I watched them as I talked to them. When you try to talk to people informally and you see them nodding, and so forth, they are generally understanding. If a person is not so indicating, and begins to get a blank expression on his face, you can generally tell when you talk to a jury whether they are understanding what you say, or whether they are confused. I have noticed that in this trial a time or two, but when I started to say something the jury looked pretty blank, but gradually they began to understand, and it was breaking through. I think the jury understands what I told them. I [1701] hope so.

• • •

NICHOLAS J. WINCKLER

the witness on the stand at the time of the recess, having been heretofore duly sworn, was examined and testified further as follows:

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Winckler, do you recall that in July of 1951, under the date of July 6, 1951, Dickensheets-Potter Company advised you of a new low price at which Case-Swayne was booking orange juice in the Portland, Oregon, district? A. Yes, I do.

Q. And do you remember that advice took you somewhat by surprise, is that correct? [1702]

A. That is correct.

Q. The price which was quoted by—which was reported to you as being quoted, was $2.60 a case, is that not right?

A. I would have to see a letter.

Mr. Strachan: I will have this telegram marked.

(Testimony of Nicholas J. Winckler.)

The Clerk: And the letter attached?

Mr. Strachan: Yes, all as one exhibit.

The Court: Exhibit AV.

The Clerk: Defendants' Exhibit AV for identification.

(The document referred to was marked Defendants' Exhibit AV for identification.)

Mr. Strachan: I offer the exhibit in evidence, your Honor.

Mr. Dixon: Just a moment, counsel. What is the number?

The Court: AV.

Any objection?

Mr. Dixon: No, I guess not, your Honor.

The Court: It may be received in evidence.

The Witness: Yes, I recall now. And it was never verified. They talk about a new process of orange juice, and so on.

Q. (By Mr. Strachan): You were surprised to receive this message, weren't you?

A. I was surprised, but I couldn't verify it.

Mr. Strachan: I will read this [1703] memorandum.

"Winckler-Smith.

"Dear Garry:

"Too late to dictate, but I ran into some real competition when I started working juice. Case-Swayne are booking orange juice here at $2.60 for the balance of 1951 with full protection against decline. The unused portion of any contract may be

(Testimony of Nicholas J. Winckler.)
cancelled or accepted within 30 days after January 1, 1952. This just about covers everything. Have you heard of this elsewhere?" * * *

The Witness: Will you finish?

Mr. Strachan: Shall I read the rest?

The Witness: Yes.

Mr. Strachan: "They also claim to have some new process that duplicates fresh juice. Is there any truth in this? Case-Swayne broker indicates that Sunkist control 85 per cent of acreage, and that Case-Swayne controls the remaining 15 per cent. Give us the real facts. Regards."

Can you read that?

The Court: It is a man's name.

Mr. Strachan: Yes, sir, it is a nickname of some kind.

Q. (By Mr. Strachan): Do you recall you received on July 20th a telegram from Parrott & Company, a broker at San Francisco, saying that Case-Swayne was quoting $2.25 a case for [1704] 46-ounce orange juice? A. What date?

Q. It has the received mark of Winckler-Smith of July 24th, and I can't read the code of the date.

A. That is all right.

Q. Do you recall having received that?

A. Yes. [1705]

The Clerk: I have marked a telegram Defendants' AW for identification.

* * *

Mr. Strachan: I offer it in evidence.

(Testimony of Nicholas J. Winckler.)

The Court: Received in evidence, Exhibit AW.

> (The exhibit referred to, marked Defendants' Exhibit AW, was received in evidence.)

The Court: If counsel doesn't have a copy, supply him with one, Mr. Strachan. [1706]

Mr. Strachan: I shall, your Honor.

The telegram reads:

"Winckler & Smith Citrus Products Co.,
"Anaheim, California.

"O Hanlon, Have Double Checked Case Swayne Quoting 2.25 for 46 oz. Orange Juice with Two's Relatively Priced. Advise.

"PARROTT & CO."

Q. Mr. Winckler, you are aware, are you not, that Case-Swayne & Co. entered into an arrangement for packing single-strength Valencia juice during the 1951 season with the Independent Citrus Growers and Shippers Association through Mr. Morgan Ward?

A. I was not aware of it. If my recollection is correct, I talked to Mr. Ward about that.

Q. When was that?

A. Around the time in question, in 1951.

Q. Can you fix the time in the summer?

A. When this telegram was received. When these communications have been received, inasmuch as the communication indicated that they are controlling the remaining 15 per cent of the fruit—when I mean they, I mean Case-Swayne stated that

(Testimony of Nicholas J. Winckler.)

they are controlling the remaining 15 per cent of the fruit available in California to processors, I got in touch with Mr. Morgan Ward and Mr. Morgan Ward told me that this is [1707] not so, he has nothing to do with the deal. He said that the Independent Fruit Growers are a rather loosely knit association and that certain members of the Independent Fruit Growers probably entered into a limited agreement with Case-Swayne, but he is not aware of the details. That is the information that I got in 1951 at my best recollection, and then later on I was told that the agreement was of very short life, was cancelled with Case-Swayne, so I didn't pay any more attention to it. It was in force for just a couple of weeks or something like that.

Q. Were you aware of the fact that throughout the season Case-Swayne continued to process single-strength juice under the arrangement made with Morgan Ward?

A. I could not check on that. I got contradictory information and I was told by Mr. Ward that Case-Swayne got a very nominal tonnage and they were busy with other products, inasmuch as more than 80 per cent of their products were other products but citrus juices, and later during the season I heard about a few spot quotations, but I could not verify that a large volume of business was done by Case-Swayne during 1951.

Q. Now, in your direct testimony, I believe you said when you went to Mr. Finley to see if you could get oranges from him to process into single

(Testimony of Nicholas J. Winckler.)

strength, he told you to go to Morgan Ward, is that correct? [1708]

A. I don't recall now definitely. It could be, but I have no definite recollection either one way or the other way.

Q. Do you have any recollection of going to the Independent Citrus Growers or Mr. Ward and trying to get——

A. That is what I tried to say. When you say Morgan Ward or Independent Fruit Growers, it means to me the same thing.

Q. Did you ever go to them and try to get an arrangement for a supply of fruit for single-strength processing similar to the arrangement which Case-Swayne had in 1951?

A. Yes, I did. I testified to that extent before.

Mr. Strachan: I ask that this letter be marked.

The Clerk: Defendants' Exhibit AX for identification.

(The exhibit referred to was marked Defendants' Exhibit AX for identification.)

Q. (By Mr. Strachan): Do you recognize Exhibit AX as a copy of a letter that you wrote?

A. Yes, I do. I recall the letter.

Mr. Strachan: This is the last letter in the series, ladies and gentlemen. I offer it in evidence.

The Court: AX received in evidence.

(The exhibit referred to, marked Defendants' Exhibit AX, was received in evidence.)

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: Letter dated August 17, [1709] 1951.

"Independent Citrus Growers & Shippers Association,
"500 South Walnut Street,
"Anaheim, California.
"Attention: Mr. Morgan Ward.
"Dear Mr. Ward:

"We discussed yesterday with Mr. V. W. Borden, chairman of your by-product fruit committee, the uncomfortable situation that we have to face with regard to the supply of Valencia oranges.

"Our discussion was centered around the possibility that we buy from growers fruit which we would put through various packing houses owned and operated by the Independents in order to secure by-product fruit at a price comparable to our competitors.

"Mr. Borden, as well as Mr. Knott, had a full understanding of our problem and suggested that we write this letter.

"The contract of the Case-Swayne Corporation, negotiated a few weeks ago, was discussed and we made the statement that due to this contract the pace was set for canned juice prices for the coming season. These prices were entirely out of line with the fruit prices requested by the packers, which has made it impossible for us to pack canned citrus juices up to this writing. We pointed to the [1710] fact that it would have been more advantageous

(Testimony of Nicholas J. Winckler.)

from the angle of the Independents to offer the same deal to us which was offered to Case-Swayne, and by doing so to create in the interest of the Independents a competitive situation rather than a monopolistic situation. Such competitive situation would have probably have resulted in better return all along the line.

"We are very definitely under the impression that Mr. Borden shared our views. Moreover, when we consider that during the past two years we have purchased close to $1,000,000 worth of fruit from the Independents, we feel that a great injustice was done to us of entering into such a contract without even having had a chance to be consulted, or without any part of such surplus fruit ever being offered to us.

"At Mr. Borden's suggestion we are writing this letter for the purpose that this letter should serve as the basis of a discussion during your next committee meeting with the intention that from here on we should be supplied, for the purpose of single-strength juice canning, with an equal amount of fruit received in the past by Case-Swayne at terms and conditions similar to such contract." [1711]

There is more of the letter if Mr. Dixon wants to read it, but I will not read it at this time. [1712]

* * *

MORGAN U. WARD

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Morgan U. Ward.

Direct Examination

By Mr. Dixon:

Q. Will you state your residence address, Mr. Ward, please?

A. 609 North Drake, Fullerton, California.

Q. I take it you are the Mr. Ward who was just referred to in the letter, in the correspondence, and the testimony of the witness?

A. I am. [1713]

Q. Will you state to the jury, Mr. Ward, what business you are engaged in?

A. I am engaged in several businesses, but do you mean relative to the citrus by-products?

Q. That's right.

A. I am the selling agent for the Independent Growers and Shippers Association, and since a year ago last September I am managing secretary of that association.

Q. Where is your office located, or your place of business?

A. Bank of America Building, Fullerton, California.

The Court: Let me ask you a question. You say

(Testimony of Morgan U. Ward.)

for the Independent Growers and Shippers Association; is that the technical name?

The Witness: That is the technical name.

The Court: We have had testimony here referring to the Independent Citrus Growers; is that the same group?

The Witness: I don't know what they refer to, but I imagine it is. But the technical name is Growers and Shippers Association.

The Court: That is the organization in connection with your name?

The Witness: Yes.

The Court: Are you also referred to as Independent Citrus Growers, sometimes? [1714]

The Witness: I have heard people in this room refer to us as that.

The Court: Or Independent Orange Growers?

The Witness: Independent group, and this, that, and the other.

The Court: All right.

Q. (By Mr. Dixon): Now, the Independent Citrus Growers and Shippers Association is what kind of a corporation, Mr. Ward?

A. It is a non-profit organization. It is put together by different independent shippers to get information industry-wise, have regular meetings, and discuss their problems along with a by-products disposal deal.

Q. Are the growers of oranges members of this association, or just what is their relationship, if any, to the association that you have just described?

(Testimony of Morgan U. Ward.)

A. The growers are not members, unless they just happen to be a shipper. We have most all shipper and packer members, and then we have another type of member that is an affiliate member that sells, like Arena Company. They are not packers, but they belong as an affiliate member. They are in the selling end of it.

Q. You are the managing or selling agent for this association, is that the proper description of your position with that association? [1715]

A. That is right.

Q. Does the association sell what we call fresh fruit? By that I mean oranges in the fresh fruit market, as distinguished from those that are sold for processing purposes? A. They do not.

Q. How long have you been engaged in the business of selling product fruit and oranges, particularly, to processors, Mr. Ward?

A. Well, I imagine about 22 years.

Q. Based upon your experience, and directing your attention particularly to the year 1951, will you state to the jury what the sources of product fruit would be or were during that year to independent processors of Valencia oranges into products?

A. Well, I think that the California Fruit Growers Exchange, it was called at that time——

Q. That is now known as Sunkist?

A. Sunkist, and the Mutual Orange Distributors——

Q. What is Mutual Orange Distributors?

(Testimony of Morgan U. Ward.)

A. It is a co-operative organization of growers.

Q. And——

A. And the American Fruit Growers, which at that time was not a co-operative, but it is now, and the Independent——

Q. Let's take them one at a time. Mutual Orange Distributors, I believe you mentioned as one of the sources of [1716] supply. Can you state to the jury, if you know, whether that company or association was selling or had for sale, to your knowledge, any amount of product oranges for processing purposes in 1951?

A. In 1951 they had a plant, I think they ran most of them. If they sold any outside, it was very little. None to my knowledge.

Q. What was the next one you mentioned apart from M.O.D.? A. American Fruit Growers.

Q. Will you tell the jury what American Fruit Growers is?

A. Well, at that time they were growers, packers and shippers of citrus as independents. Since then they have become a co-operative. At that time, in 1951, I think they were sending—I don't know for sure about the date, but I think they were sending their fruit at that time to the Golden Citrus Juices in Fullerton, California.

Q. Do you know or can you state of your own knowledge how much fruit, approximately, was available for sale or acquisition to independent processors from that company in 1951?

A. I don't know how much they had for sale, but they had a contract with the Golden Citrus Juices, and anything they might have sold would have been over and above what they [1717] could run themselves, which I have no way of knowing how much.

The Court: You say they could run themselves; was Golden Citrus processing this juice for American Fruit Growers?

The Witness: I think the American Fruit Growers and Eadington Fruit Growers owned Golden Citrus. I think the two of them owned it at that time.

The Court: That is what you meant, then, when you said they processed for themselves; is that what you meant?

The Witness: Yes, sir, that is what I mean.

Q. (By Mr. Dixon): What other sources, if any, would be available or were available in 1951 to independent processors of citrus fruits for product oranges during that year?

A. Do you mean besides Exchange, M.O.D., and American?

Q. Yes, those that you have mentioned, if any.

A. Independent Growers and Shippers Association, which I sell their fruit, and there are some independent houses like Paramount Citrus, and maybe one or two others, outside of our group, which are independents but not belonging to the association.

That is about the extent of it that there is or was.

Q. Can you tell the jury whether either of those

(Testimony of Morgan U. Ward.)

latter two companies that you mentioned were disposing or had for sale, or otherwise available, to an independent processor, any substantial amount of oranges during the processing season [1718] 1951?

A. Well, I don't think Paramount sold anything. They were using all theirs and buying. The other ones I mentioned are packing houses. They sold, which wouldn't amount to much. Maybe one or two packing houses sold to independent processors.

Q. That amount from that source was negligible, or substantial, or—— A. It was negligible.

Q. Mr. Ward, in selling the oranges that were made available to you for sale, or otherwise to be disposed of, to processors in 1951, where the oranges were sold will you state to the jury how or what factors, or how you determined or arrived at the offering price of such oranges to such prospective purchasers?

A. I only sold a certain per cent of the available fruit, available for processing purposes, which I think would be approximately at that time, 12, 15 per cent. [1719]

The Court: Do you mean that you sold 12 to 15 per cent of all the product fruit available?

The Witness: In California.

The Court: In the California market?

The Witness: That's right.

The Court: Which would include process fruit from these other companies you have mentioned? Have you given us that as 12 to 15 per cent of that

(Testimony of Morgan U. Ward.)

total or 12 to 15 per cent of the fruit that came to the Independent Association?

The Witness: 12 to 15 per cent of all the fruit in the state.

The Court: No matter which company had it?

The Witness: Including Sunkist, MOD, American, and all of them.

The Court: All right.

The Witness: And naturally, when you are on a market where your competitors set the price, usually we took the California Fruit Growers Exchange price as the price. They at that time, I think, controlled about 70 per cent of the fruit, in that neighborhood, and we usually set our price at that price or at times, if the fruit was inferior, very little under.

I might add I think that any other fruit sold usually tried to get that price, too, outside of what we sold.

Q. (By Mr. Dixon): I am handing you Plaintiff's Exhibit [1720] 5, which is the price list at which Sunkist offered Valencia oranges to outside processors during the 1951 processing season. I will ask you to examine that exhibit, Mr. Ward, and state to the jury as to whether the prices contained therein were the prices, either higher or lower, or approximately the same, at which the oranges that you had for sale or available to processors were offered for sale?

A. Well, this is the price in 1951 that we tried to get, but we couldn't get that price on all our

(Testimony of Morgan U. Ward.)

fruit, or I would say we didn't get that price on about 80 per cent of our fruit.

Q. Are you familiar with the Bireley's, or the General Foods Processing plant here in Southern California?

A. That's right. I have sold them fruit for years.

Q. Did you sell them any fruit in 1951 to the best of your recollection?

A. I don't think we did in that year. That is about the only year we didn't. I think it was either 1950 or 1951. I don't recall, but I think it was 1951.

Q. Directing your attention to Hyland-Stanford, are you familiar with that company and that name?

A. Yes. I have sold them fruit, too.

Q. Will you tell the jury what business they are engaged in?

A. They are processing citrus oranges into concentrate. [1721]

Q. They are buyers, are they, of product fruit?

A. And they buy product fruit for that purpose.

Q. Did you sell that company any product oranges in 1951? A. Very little.

Q. Did you sell that company any product oranges in previous years?

A. Not very much. From year to year we sold them, but not to any extent.

Q. Now, directing your attention to the Mission Company, are you familiar with that name insofar as it relates to the processing business?

A. I am.

Q. Did you sell that company any product

(Testimony of Morgan U. Ward.)

oranges in 1951? A. No, I didn't.

Q. Did you sell that company any product oranges prior to 1951?

A. I have sold them lots of fruit. I bought their fruit for 10 or 11 years until 1946, and then after 1946 I sold fruit to them when I started working with the Independents—up until 1949, I think it was.

Q. You sold products oranges to them after that year? A. Not that I recall.

Q. Did you sell them, to the best of your recollection, [1722] after 1951? A. No.

Q. Now, did you endeavor to sell them any product oranges in 1949? A. Yes, I did.

Q. And do you recall with whom you had been dealing at Mission in making sales of your product oranges to that company in that year or prior to that year?

A. I had been dealing with Harry Crosby, Sr., and Irwin Seal.

Q. In endeavoring to sell that company, Mission Company, some product oranges in 1949, as in previous years, did you have any conversation with either of the parties mentioned with reference to their buying any oranges from you or through you during that year 1949?

A. Yes. Naturally, if you try to sell a man, you have to talk to him.

Q. And what reason, if any, was given to you as to why Mission wasn't buying any oranges from you, or didn't buy any oranges from you in 1949?

(Testimony of Morgan U. Ward.)

Mr. Strachan: I don't believe a proper foundation has been laid, your Honor, and I object for that reason.

The Court: Well, there is a debate about that, whether you have to lay it on direct or whether you should bring it out on cross. Sustain the objection. Lay the foundation. [1723]

Q. (By Mr. Dixon): Can you tell the jury approximately when these conversations or this conversation took place with either of these gentlemen in 1949 in which you endeavored to sell them product oranges in that year?

A. In the beginning of the Valencia season.

Q. And approximately when would that be?

A. May and June.

Q. And where did the conversations which you have mentioned occur? A. Over the telephone.

Q. And with these gentlemen that you have named? A. That's right.

Q. Can you specify which one it was?

A. Harry Crosby, Sr., and Seal, both.

Q. In other words, you had conversations with both of them? A. That's right.

Q. Will you state to the jury the reasons that either of these gentlemen gave you as to why they were not buying any oranges for processing purposes from you in 1949?

Mr. Strachan: Again I object, your Honor, that it hasn't been shown that these conversations are competent.

(Testimony of Morgan U. Ward.)

The Court: Are what?

Mr. Strachan: Are competent. There hasn't been a foundation—— [1724]

The Court: Overruled.

Q. (By Mr. Dixon): Do you understand my question, Mr. Ward?

Mr. Strachan: Specifically, your Honor, it is the hearsay rule I have in mind.

The Court: Specifically, your objection is overruled.

The Witness: In talking to Mr. Crosby and Mr. Seal, they said if they needed any oranges, they would let me know, but they had made arrangements for their supplies. They did not go into detail about it, except that on that basis, and I didn't sell them anything.

Q. (By Mr. Dixon): Did they tell you, if you recall, with whom such arrangements had been made? A. No, they didn't.

Q. Did you make any effort to sell Mission in 1950?

A. I made an effort to sell them every year, and in 1955.

Q. And what response did you get? Did you sell any? A. No, I didn't.

Q. And what reason, if any, was given to you by either of these gentlemen as to the reasons why they were not buying any oranges from you?

The Court: In what year?

Mr. Dixon: In 1950.

The Witness: I called them every year and en-

(Testimony of Morgan U. Ward.)

deavored to sell them, but I got the same answer, that if they need any [1725] fruit, they will let me know, they have their supplies taken care of.

Q. Now, Mr. Ward, you did sell some oranges to Winckler & Smith during the years 1949 and 1950, did you not? A. I did.

Q. Did the Independent Citrus Growers & Shippers Association, to your knowledge, enter into any arrangement with Winckler & Smith Citrus Products Company during the year 1949 pursuant to which oranges were made available to that company for processing purposes?

A. I think we sold them fruit at that time. I don't recall in 1949 on what basis we did work it out, but I know we did business with Winckler. [1726]

* * *

The Clerk: Plaintiff's Exhibit 54 for identification.

The Court: 54 for identification. It is also marked for identification as X, so we will tie it together.

(The exhibit marked Defendants' Exhibit X was marked Plaintiff's Exhibit 54 for identification.)

Q. (By Mr. Dixon): Mr. Ward, I hand you what has been marked Plaintiff's Exhibit 54 and ask you to examine the same, and after you have done so, indicate to the jury what that is, if you can.

A. That is an operating agreement we made with

Winckler & Smith the third day of August, 1949, that is the Independent Growers & Shippers Association, whereby we gave him a certain per cent of our fruit.

Q. Well, that is the agreement, the 1949 agreement, isn't it?

A. That's right, and signed by the managing secretary at that time.

Mr. Dixon: Plaintiff offers Exhibit 54 in evidence.

Mr. Strachan: No objection. [1727]

* * *

Q. (By Mr. Dixon): Mr. Ward, was there any arrangement, to your knowledge, comparable to that of plaintiff's Exhibit 54, entered into with Winckler & Smith in 1950?

A. I don't remember whether there was in '50 or not. There was in '51.

The Clerk: Your Honor, counsel is asking that the document heretofore identified as Defendants' Exhibit Y be given a plaintiff's exhibit number.

The Court: All right. 55 for identification.

The Clerk: Plantiff's Exhibti 55 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 55 for identification.)

Q. (By Mr. Dixon): Mr. Ward, I hand you what has been marked Plaintiff's Exhibit 55 for identification and ask you to examine that document and state to the jury, if you can and will, what it is.

(Testimony of Morgan U. Ward.)

A. That is a contract which we entered into—that [1728] was entered into with Mr. Winckler, Winckler & Smith Products, for concentrate, I think it was.

Q. Frozen concentrate?

A. Yes. And that was also signed by the managing secretary.

Q. And the date of that document is what?

A. The 6th day of August, 1951.

Mr. Dixon: Plaintiff's Exhibit 55 offered in evidence.

Mr. Strachan: No objection.

The Court: Exhibit 55 received in evidence.

* * *

Q. (By Mr. Dixon): Directing your attention to Plaintiff's Exhibit 55, Mr. Ward, can you state to the jury the approximate number of tons of Valencia oranges that were made available to Winckler & Smith under Plaintiff's Exhibit 55?

A. Is that the last one you gave me?

Q. That is the last one. Would you like it before you?

A. I don't recall how many tons there were.

The Court: Here it is.

The Witness: We agreed to make available 60 tons a day suitable for quality grade A frozen concentrate, or 360 tons per week with six operating days.

I don't recall the amount of fruit that we de-

(Testimony of Morgan U. Ward.)

livered on that basis, or how many weeks, but it was for the season that I remember it. [1730]

Q. (By Mr. Dixon): Would it be approximately 1,800 or 2,000 tons?

A. I think there was more than that.

Q. I take it you don't recall at this time?

A. I don't recall exactly. I would have to get my figures.

Q. Did your association make any other oranges, Valencia oranges, available to Winckler & Smith during the year 1951 for processing purposes?

A. We made available oranges for the school lunch program.

Q. Can you tell or do you recall about how many tons were thus made available?

A. I think about 2,300, or something like that, 2,400 tons. But I don't recall the exact number of tons.

Q. Those oranges were made available under the school lunch program?

A. That is right.

Q. That, I think, was previously described, so we won't go into it any further.

The oranges made available under the school lunch program, and Plaintiff's Exhibit 55, then, were substantially all of the oranges made available to Winckler & Smith by your association during the year 1951, is that correct?

A. That is right. [1731]

Q. Do you recall whether any purchases of oranges were made from your association in any

(Testimony of Morgan U. Ward.)

amount by Winckler & Smith in 1951, other than any that might have been made available to Winckler & Smith under Plaintiff's Exhibit 55 and the school lunch program?

A. We sold him some oranges on open account.

Q. Do you recall the approximate tonnage or amount of those oranges?

A. I don't recall the amount.

Mr. Dixon: That is all, counsel. Your witness. Just a moment.

Your witness.

Cross-Examination

By Mr. Strachan:

Q. You mentioned that one organization that sometimes had fruit available was Paramount, but you said in 1951 Paramount was not only using all of the fruit available to it from normal sources, but were buying. Do you recall that?

A. They bought fruit from me in '51. In other words, they didn't produce enough fruit through their packing house for their needs. They bought fruit from me for cash, and we also had a concentrate deal with them where they put up for our account.

Mr. Dixon: I'm sorry, counsel. It just occurred to [1732] me—I don't want to interrupt your cross-examination, but I would like to reopen the direct.

Mr. Strachan: I think it had better be done now, then.

(Testimony of Morgan U. Ward.)

The Court: Yes, I think so.

Mr. Dixon: Thank you, counsel.

The Court: Before we pass, though, let's clear one thing up.

Paramount was a packing association, was it?

The Witness That is right.

The Court: It had some growers that belonged to it?

The Witness: Yes; and they also had a juice plant.

The Court: All right.

Direct Examination
(Resumed)

By Mr. Dixon:

Q. I believe, Mr. Ward, some reference was made to the arrangement that your association had with the E. A. Silzle Company in 1951——

The Court: Silzle or Case-Swayne?

Mr. Dixon: Case-Swayne. I am sorry.

Q. (Continuing): Can you tell the jury what that arrangement was?

A. We entered into a contract with Case-Swayne on single-strength juice. They put up for our account. And the fruit we sold them was fruit we could not sell at the [1733] $40 price, it was surplus fruit we didn't know what to do with, so we made a deal with them for single-strength juice. They put it up, and when all the costs were over and taken care of, plus 5 per cent profit for them, they returned the balance to us.

(Testimony of Morgan U. Ward.)

Q. In other words, the association had an arrangement with Winckler & Smith on the frozen orange concentrate, that is, to process frozen orange concentrate, under Plaintiff's Exhibit 55; is that correct? A. That is right.

Q. And in addition thereto the association had an arrangement with Case-Swayne to process oranges into single-strength juice, is that correct?

A. That is right.

The Court: That was processed for the account of the Independents?

The Witness: Yes.

The Court: Did they put your label on it?

The Witness: No. The used their label.

The Court: What do you mean for your account? Did the canned juice then belong to your association?

The Witness: No. They took the oranges, put them into processed form, sold them, and then returned to us—all costs plus 5 per cent, the difference we received back for the oranges. [1734]

Q. (By Mr. Dixon): Can you state to the jury approximately how many tons of oranges your association made available to Case-Swayne under this arrangement for processing into single-strength juice in 1951?

A. I can't recall exactly, but I think in the neighborhood of four or five thousand tons. [1735]

* * *

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Ward, you have been engaged in various aspects of the citrus fruit industry for some time, have you not? A. That's right.

Q. Since about what time?

A. 1933 or '34.

Q. Now, from about 1947 down through 1951, there was a change, as I understand it, in the demand for processed citrus juice, orange juice, in that there was an increased market for frozen concentrate in relation to single-strength juice, is that correct? A. That is true.

Q. Do you have in mind any particular figures to inditcate to what extent the demand for frozen concentrate increased over the demand for single-strength juice?

A. I wouldn't know exactly, but I imagine—if you want a guess, I would say two to one.

Q. Now, during that period, say from 1947 to 1951, the available supply of oranges for processing into products was affected, was it not, by diminished acreage of orange groves? A. That is true.

Q. Is that a factor which lessened the availability of [1736] by-product oranges?

A. During that time I don't think that—I think that the size of the oranges put more on the market to offset it. I don't think it made too much difference that far back. I don't have the figures, but I know

(Testimony of Morgan U. Ward.)
that our fruit, we had just about as many oranges in 1950, 1951, as we had in 1947, that is in our group, but after that time the subdivisions and things came in, taking out groves, and the demand for concentrate began to go in the direction you are asking about.

Q. Does the Independent Association have any processing facilities of its own?

A. Have none at all.

Q. So it depends entirely on the independent processors for disposing of its by-product fruit?

A. That is true.

Q. Now, you said that in the Valencia season of 1951 Paramount was buying fruit in addition to processing all that it produced itself. At what prices were you selling that fruit to Paramount?

A. I was selling them at the market on what I sold for cash. I don't recall of very much under the market. But I made a concentrate contract with them which paid me quite a bit under the market.

Q. What kind of concentrate contract was that?

A. About the same as the one with Winckler, similar to [1737] that.

Q. And what was the general basis on which the fruit was delivered and accounted for, will you tell the jury briefly what that was?

A. I don't recall the details, but we set up a price on certain size cans. They took the fruit. They paid for the hauling. Then over and above a certain price, after they would take a legitimate profit, we got so much out of a certain pack and so much

(Testimony of Morgan U. Ward.)

out of another pack. I don't remember the details of the deal. [1738]

Q. That is, they sold the product and took what was allowed to them for various packs?

A. Yes, and returned the rest to us.

Q. And returned the rest to you. Whether that was above or below the $40 was your own business?

A. That is right.

Q. During the season of 1951 did you have a supply of fruit that was available for Winckler-Smith's operation at the same prices as it was offered to Paramount and the other independent, processors, the outside processors I will call them?

A. All those contracts were written about the same.

Q. No. I am talking about your quotation on raw fruit, did you have fruit available which could have been delivered to Winckler-Smith on the same terms that you delivered to Paramount when Paramount bought fruit from you?

A. My price was the same price as the California Fruit Growers Exchange, $40 a ton on 120 pounds of solids, and when I couldn't sell it at that, I was forced to go into contracts, such as I did—I should say we did—with Paramount, with Winckler, and with Case-Swayne, which constituted better than 80 per cent of our fruit that season.

We couldn't sell a great percentage of it for $40 a ton because we had no more customers left. We had contracts, like Exchange had with Mission, Hyland-Stanford, [1739] TreeSweet, even Silzle. The

(Testimony of Morgan U. Ward.)

Exchange had deals the same as we did. And I only had three plants, Case-Swayne, Hyland-Stanford—I mean Case-Swayne, Winckler-Smith, and Paramount, that I could even get to run for me. All the rest of the facilities for running were taken up in the state.

Then I sold a little on the outside at the $40, smaller outfits, which amounted to very little.

The Court: You say facilities for running; are you talking about——

The Witness: Processing.

The Court: Processing frozen concentrate?

The Witness: All types.

The Court: Single strength?

The Witness: Yes, anything. There just weren't any plants that weren't running. I don't know of an idle plant during that time.

Q. (By Mr. Strachan): There were some plants that were not running for single-strength juice, weren't there?

A. Yes, there were some running for single strength altogether, there were some running for concentrate altogether.

Q. But there was a surplus of facilities available for single strength and concentrate, was there not?

A. I don't know of anyone else that could have run concentrate or run single strength that wasn't running at [1740] that time.

Q. That is in the summer of 1951?

A. As I recall it, it was in '51.

(Testimony of Morgan U. Ward.)

Q. Were you here in the courtroom when I introduced in evidence a letter which Winckler- Smith wrote to the Independents, to your attention, on August 17, 1951, advising that he would like a contract to process single-strength juice on the same terms that Case-Swayne was then processing?

A. I was. I read the letter.

Q. The Winckler-Smith single strength facilities were available and unused at that time, were they not? A. That is what I understand.

Q. Was that letter, if you know, submitted to the committee of your association?

A. It was read before an open meeting.

Q. Was it acted upon?

A. They left it up to me to deal with, which I did.

Q. You didn't award the contract to Winckler-Smith, did you? A. No, I didn't.

Q. Now, when did you enter into your arrangements with Case-Swayne for processing single-strength juice during the 1951 season?

A. Beginning of the season when the fruit was available. [1741]

Q. Approximately what time was that?

A. I don't recall exactly. I would say in June, some time in June.

Q. Did the arrangement which you worked out in June of 1951, continue throughout the season?

A. I think it did.

Q. About how long would that be?

(Testimony of Morgan U. Ward.)

A. The season usually lasts four to five months.

Q. Perhaps to sometime in November?

A. No. I would say September or October.

Q. But it was in effect throughout, from June to approximately October, is that correct?

A. That is true.

Q. Prior to writing the letter of August 17th, did you have any discussions with Mr. Winckler with respect to his desire to obtain a contract similar to the Case-Swayne contract?

A. Yes, we had a lot of discussion on it.

Q. When did those discussions commence?

A. Prior to that letter. I would say between the time I made the deal with Case-Swayne until that letter was written. I don't know exactly.

Q. That would be—— A. In a month.

Q. I think you said you made your deal with Case-Swayne [1742] in June?

A. Yes. And that letter was written when?

Q. In August.

A. It was from June to August. I don't recall exactly when it was.

Q. But it had been under discussion for six or eight weeks, perhaps, before the letter?

A. Maybe six or eight weeks, maybe three weeks. I don't recall. [1743]

Q. You say that you tried to follow the Sunkist prices. Did you at any time talk with Sam Kelly of the Sunkist organization, or anybody else, at to the level at which prices should be set?

A. Never have since I have been in business.

Mr. Strachan: I think that's all. Thank you.

Redirect Examination

By Mr. Dixon:

Q. Just one or two questions, Mr. Ward. Counsel suggested by his cross-examination that there was some reason why you didn't enter into a contract with Winckler & Smith for processing single-strength juice rather than giving a contract to Case-Swayne for that. Did Case-Swayne have any facilities available for processing frozen concentrate? A. No, they did not.

Q. At that time, in 1951?

A. They didn't then and they still don't.

Q. Will you state to the jury, if you can, how or why you determined to give Case-Swayne the single-strength juice arrangement, and the frozen concentrate arrangement to Winckler & Smith?

A. Well, in 1951 I knew that we would be faced with a lot of fruit, there being no home for it outside of Winckler-Smith, Case-Swayne, Paramount and a few other small plants, a few small plants otherewise. I knew that we were going to [1744] have, in order to get money for the fruit for the growers, we were going to have to enter into participating contracts in processing this fruit, not with one, but several of these. So I wanted to be fair to Mr. Winckler, I wanted to be fair to Mr. Swayne and Paramount, for that matter, so I knew that Case-Swayne had no facilities except straight canned juice, so the first contract we entered into

(Testimony of Morgan U. Ward.)

was with Case-Swayne for single-strength juice, orange juice.

Q. That was early in the season?

A. Early in the year. That was the first reason I gave him that part of it.

The second reason was that if I gave single strength to Winckler and single strength to Case-Swayne, we would have our oranges out in the market competing in canned juice form, competing against each other.

Then in order to be fair again with Winckler, I gave him the concentrate deal. Even though he wanted some single strength, I did not give it to him for that reason.

Q. Directing your attention to——

The Court: I have one question.

Mr. Dixon: I am sorry.

The Court: You say you had to enter into participating contracts. Do I understand from your testimony that the participating contracts returned you generally less per ton?

The Witness: That is true. [1745]

The Court: Then selling your oranges at $40 a ton?

The Witness: That is true.

The Court: You would have preferred to have sold your product oranges at $40 a ton?

The Witness: Absolutely.

The Court: But when you couldn't do that, then you entered into the participating contracts that you have described?

The Witness: That is what I had to do to get rid of them.

Mr. Dixon: You have asked the questions, your Honor, that I intended to ask. Thank you.

The Court: I thought you were going to something else.

Recross-Examination

By Mr. Strachan:

Q. Have these participating contracts been entered into over a long period of years as a means of disposing of surplus by-product oranges?

A. I think that was the first year we ever worked on a participating deal with any processor, because we were faced with a situation—I don't think in the whole history of the citrus business, the by-product situation had been any worse, as far as our standpoint is concerned.

Q. What was unusual about the situation?

A. Too much fruit. Too much fruit and very few [1746] facilities therefore to run it.

Q. Did the market conditions with respect to Florida product have any influence that year?

A. Oh, yes. It does every year. I think it has more effect on citrus products than any one thing.

Q. Would you say it has virtually a controlling effect on the price structure of California citrus products?

A. I think it has a great deal of effect.

Q. You would say that is the most important single influence on the price structure, is that right?

(Testimony of Morgan U. Ward.)

A. Year to year, I would say so.

Q. And it was in 1951, is that correct?

A. I think it had quite a bit to do with it at that time.

Mr. Strachan: Thank you.

Mr. Dixon: Just one more question.

Redirect Examination

By Mr. Dixon:

Q. It didn't have any effect on the amount of oranges that were on the trees and available for distribution in 1951, did it, Mr. Ward?

A. I don't think so.

Mr. Dixon: Thank you.

The Court: One more?

Mr. Strachan: I think there is one everybody has been [1747] wondering about.

Recross-Examination

By Mr. Strachan:

Q. When was the first time that you advised Mr. Winckler that Case-Swayne and you had one of these participating contracts?

A. When was the first time?

Q. Yes.

A. I don't recall the first time, but I know he kept asking me about it, and I didn't want to tell him. I thought it was my business and Case-Swayne's business, until those prices came out that

(Testimony of Morgan U. Ward.)

year referred to, and then I suggested to Mr. Winckler we have a deal, and I gave him the same reason that I just quoted awhile ago why he didn't get one.

Q. You think that was about July 6th when this——

A. It might have been July 30th. I don't remember.

Mr. Strachan: All right. Thank you.

The Witness: I don't remember. It was prior to that letter, because I know Mr. Winckler acts pretty quickly on those things if he thinks he is being left out. [1748]

* * *

(The following proceedings were had outside the hearing of the jury:)

Mr. Strachan: As to the admissibility of the three documents that have been shown me, I want to say this, that they are replies written by the defendant to letters that this morning were read, yesterday were received in evidence, from brokers.

Now, the court's ruling, as I understand it, was that these were admitted for a limited purpose, and you have many times instructed the jury that the letters were not to be regarded as bearing upon the truth of any of the statements made in them. This series of letters Mr. Dixon is proposing to mark will contradict the substance of those letters, but will in no way contradict the fact that the statement was made. So I think they are not admissible in view of the limited purpose for which the brokers' letters, the Defendants' Exhibits, were admitted.

The Court: A similar thought was going though my mind. Do you know what you are doing? Do you want to make an issue out of these things?

Mr. Dixon: No, your Honor. [1749]

The Court: Presently it isn't an issue. If counsel got up on this record to argue that the fruit was inferior, or any of those facts, I would stop him. If you start putting them in, these letters refuting those facts, you are making an issue out of the very thing which you say isn't in issue.

Mr. Dixon: Your point may be well taken, your Honor.

The Court: I think you had better analyze this before you start to offer those letters.

Mr. Dixon: There is nothing in the replies——

The Court: The replies can't in any way contradict the fact that the Winckler-Smith Company got the letters of complaint.

Mr. Dixon: That's right, your Honor.

The Court: That is the only thing they went in for. I suggest you reserve that and think it over and reconsider it. That is your point, isn't it?

Mr. Strachan: Exactly.

The Court: I was thinking about it when I saw these letters being shuffled out.

Mr. Dixon: We have already had, I think, one reply, your Honor, and possible, to be consistent, that exhibit should be withdrawn.

The Court: Exhibit 52?

Mr. Dixon: Yes. I haven't seen it for some time, so I don't know, but if we are going to follow that procedure—— [1750]

The Court: It may be withdrawn.

Mr. Dixon: I am not asking that at this time, but I will look it over. I think probably it should be if it went in under that theory.

The Court: That is the theory it went in on, but that was before we got into this thing. You can withdraw it, if you want.

Mr. Dixon: Yes.

The Court: It is withdrawn. [1751]

* * *

NICHOLAS J. WINCKLER

a witness by and on behalf of the plaintiff, having been heretofore duly sworn, resumed the stand and testified further as follows:

Redirect Examination

By Mr. Dixon:

Q. Mr. Winckler, I believe on your cross-examination by counsel for the defendants, in which he was inquiring into complaints that Winckler-Smith may have received, you stated that you had a complaint from Mr. Finley in 1947, when Winckler & Smith packed for him pasteurized orange concentrate. Quote: "His complaint was that there were black [1752] specks in the orange juice, in the orange concentrate."

Do you remember that testimony?

A. I do.

(Testimony of Nicholas J. Winckler.)

Q. You were also asked on cross-examination, Mr. Winckler, the following question by counsel for the defendant:

"Now, in the event that the product was not gaining, or any product was not gaining public acceptance, and the brokers were dissatisfied with the product, would that dissatisfaction, that lack of acceptance, be brought to your attention?"

And you answer was:

"It definitely would have been, because if a broker is dissatisfied he either would pick up the phone and call me from New York or Chicago, or would write a letter, and there is one thing that I will state, that not single letter was received by our corporation at any time that I wouldn't have read or seen it. If I was on a business trip they kept the letters, the mail, for me, pending my return. But to answer the question completely, I have no knowledge of any broker or customer dissatisfaction at all except on products which contained navel juice or was pure navel juice." [1753]

Now, Mr. Winckler, in stating that you had no knowledge of any broker or consumer dissatisfaction at all, except on products which contained navel juice or was pure navel juice, will you explain to the jury what you meant by that answer, and what you meant in answering counsel for the defendant with reference to the complaint which you referred to in the testimony I mentioned a moment ago?

Mr. Strachan: I don't think there is any am-

(Testimony of Nicholas J. Winckler.)

biguity in his answer that would justify an explanation.

The Court: Overruled.

The Witness: In the first place, we were talking about quality of juice, and any complaint or dissatisfaction, regardless if it would come from the broker or through the broker, would apply strictly to quality and not to other circumstances, like for instance a grocer keeping merchandise on the shelf for years or overpricing the merchandise, which is the grocer's responsiblity, and not the manufacturer's responsibility. So it refers strictly to quality.

The second comment that I want to make, in connection with my statement, is that I still feel, as stated before, that we had no complaints, because we don't regard complaints which are referring to a sample as a complaint. That is simply an indication of preference. Like somebody would say, "I prefer Schlitz beer compared to Budweiser beer," and there was no sale consummated. [1754]

And out of 15 beers, somebody would pick out the first beer, the second beer, and the third beer; that doesn't mean that the other 12 beers are no good.

The broker simply stated in these letters that the one juice has more acid, the other juice has less acid; the one broker wants sweeter juice, the other broker wants cheaper juice. I mean brokers generally speaking are serving the buyers, and they want

(Testimony of Nicholas J. Winckler.)

the top quality of fruit, the top quality of juice, at the lowest possible price.

At the early part of the season we couldn't produce that. Some buyers and some brokers accepted the early juice at the going price.

Secondly, other buyers, when the sample was submitted, they said, "Well, we will wait until the juice becomes of maturity." It was too tart, or too sour, or whatever the objection was.

But I don't regard it as a complaint at all. I regard as a complaint when the juice actually was sold, and then after the juice was sold the buyer would write a letter directly or through the broker that, "I bought from you six weeks ago or 30 days ago 500 cases of juice, and I have about 15 consumers who complained that the juice is no good." That I would regard as a complaint.

One more thing that I would like to add as an example here. Just like somebody goes to the butcher shop and wants [1755] to buy a pot roast, and the butcher takes out a pot roast, and the housewife says, "No, I don't want that pot roast, that is too fat, I want that one."

All right. That isn't a complaint. It is just an expression of preference.

Now, if the consumer takes the pot roast home and goes back the next day to the butcher and says, "Look, I fixed that pot roast, but it was so tough that we couldn't eat it," then that is a complaint.

So that is the light as I made my statement, and I think I still could maintain it. Besides the point

(Testimony of Nicholas J. Winckler.)

that I always made the reservation in my statements that according to my best belief and recollection.

I think in another part of my testimony there is something when I stated that the complaints didn't amount to one-tenth of a per cent. I think if my recollection is correct, there is something to that effect.

But even from the letters that counsel produced here, I still can't see any complaints whatsoever.

Q. You did use the word "complaint" with reference to what Mr. Finley said to you——

A. Oh, yes.

Q. ——in 1947?

A. I regarded it as a closed matter, because it was a very simple case. It came directly through Mr. Finley and [1756] didn't come through a middleman, namely, the broker.

Q. What was that complaint, using that term, that Mr. Finley had? Will you tell the jury again what that was?

A. Well, I think I testified that some black specks were found in the concentrate, and I recall I testified what methods Mr. Finley used in his plant to remove these black specks.

Q. What were these black specks, can you tell the jury what they were?

A. These black specks in our opinion were little residues, or—I don't know what other expression to use—which was collected around the stem of the orange, and which in the packing house could not have been removed or it wasn't possible to remove.

(Testimony of Nicholas J. Winckler.)

and these black residues were resulted from smudging which they used during the cold nights to keep the oranges from freezing, and the stem of the oranges is deeper than the skin, and the brushes don't get inside around the stem and are not able to remove that little left-over smudge. And neither we nor anybody else this particular year had any possibility to remove it. Mr. Finley used a hand operation with a dozen girls who tried to scoop it out with a little vacuum tube, when they were caught with the naked eye a little black speck. They just jumped on it just like catching flies and tried to remove it.

I witnessed that operation myself at the Ontario plant. [1757]

But we haven't been set up, and no one except Mr. Finley, to my knowledge, was set up to do such a costly hand operation.

Q. What was Winckler & Smith doing for Exchange Orange at this time in 1947 when this discussion occurred with Mr. Finley concerning the specks in the concentrate?

A. We were processing concentrate for the Exchange under an agreement, I don't recall exactly the terms of the agreement, but to use the trade expression we were running for the [1758] Exchange.

Q. Did you complete the contract for Exchange Orange?

A. According to my best recollection, we com-

(Testimony of Nicholas J. Winckler.)

pleted the contract and we delivered the merchandise and we have been paid for it in full.

Q. Do you recall when this discussion occurred with reference to the black specks in performing this contract?

A. You mean the year or the month?

Q. Approximately.

A. I am sorry. I don't have a recollection. It must have been during the 1947 Valencia season.

* * *

Mr. Dixon: May the record show that Plaintiff's Exhibit 56 for identification is a letter from Exchange Orange Products Company to Winckler & Smith dated May 23, 1947. Plaintiff's Exhibit 57 is a letter from Exchange Orange Products Company to Mr. Winckler as president of Winckler & Smith Citrus Products Company, Inc., dated August 4, 1947. Both exhibits are offered in evidence.

Mr. Strachan: No objection. [1759]

The Court: 56 and 57 received in evidence.

* * *

Q. (By Mr. Dixon): I hand you Plaintiff's Exhibit 56, Mr. Winckler. Will you tell the jury what that is?

A. This is a processing agreement between Sunkist or Exchange Orange Products, rather, and Winckler & Smith corporation to produce 65 Brix concentrated orange juice from Exchange oranges in our plant. We will process approximately 100 tons—when I mean we, I mean Winckler & Smith—are to process approximately 100 tons of oranges per day, six days a week, into the concentrate. That concentrate is going to be shipped to England, to the British Ministry of Food. It has to be packed in 50-gallon barrles.

Do you want me to read all of it?

Q. No. Does that contain the arrangement under which Winckler & Smith processed oranges for Exchange Orange? A. No.

Q. Into concentrate?

A. Well, then, I should mention that we are paid per gallon of contentrate 85 cents, and so on.

Q. I don't think you have answered my question. Is this the arrangement?

A. That is the arrangement.

Q. After that arrangement was entered into on May 23, [1760] 1947, did you proceed to process oranges into concentrate or pasteurized concentrate? Is that what the product was?

A. That is correct.

Q. For the British Ministry?

A. That is correct.

Q. And in performing that contract or processing agreement, is that the one in which the complaint was made about specks being in the product?

A. I believe so.

Q. I hand you Plaintiff's Exhibit 57 and ask you to state what that was and whether that arrangement was entered into after the processing had been completed by Winckler & Smith under this Plaintiff's Exhibit 56?

A. It seems to me that that was a second process-

(Testimony of Nicholas J. Winckler.)

ing agreement, because the first one was dated in May and the second was dated August 4. Basically speaking, the agreement is similar, but in this agreement our compensation was somewhat different from the first agreement, but in character it is the same.

Now, I don't know in which one the specks occurred, if it was in the first run or on the second run.

Q. Was that arrangement fully carried out insofar as Winckler & Smith is concerned with reference to the processing of all oranges made available to Winckler & Smith by Exchange Orange under Plaintiff's Exhibit 57? [1761]

A. According to my best recollection, it was.

Q. And that occurred in the year 1947?

A. That is correct.

Q. Do you know whether the products so processed thereunder were in fact delivered to the British Ministry?

A. I don't know, because at the same time, like every year, the Exchange processed some other oranges and some other concentrate, and the concentrate was——65 Brix concentrate is a concentrate of standard consistency, let me use that word. In other words, most of the 65 Brix concentrate, part of it went probably to the British Ministry, part of it went probably to school lunch program, other part probably was used by the Exchange for other purposes. I don't think it was identified and earmarked which bottle went where.

Q. Mr. Winckler, state, if you will and if you know, whether Winckler & Smith was paid by Exchange Orange for anything that was due it for processing under that arrangement?

A. Definitely in full.

Q. And there was no dissatisfaction with the processing done by Winckler & Smith for Exchange Orange under those arrangements in 1947?

A. Except for the black specks.

Q. Except for the specks? A. Yes.

Q. Now, directing your attention to 1948, I believe [1762] there has been some testimony that during that year Winckler & Smith was in reorganization under Chapter XI. There has been some testimony as to whether or not at that time you had any conversation or correspondence with Mr. Finley or Exchange Orange with reference to having your—that is the facilities of Winckler & Smith process any oranges for Exchange Orange during that year. What is the fact, if you know, as to whether during that year, 1948, Winckler & Smith processed any oranges for Exchange Orange Products?

Mr. Strachan: Your Honor, I think the record is undisputed that the processing was done under the management of the court's officers. The negotiations leading up to the arrangement would not be admissible, because the whole matter was integrated into a written document, which was a contract between the Exchange people and the receiver, so I object.

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: Are you objecting to the question, counsel?

Mr. Strachan: Yes, sir.

The Court: I got one ground, the court officer ground. Is there a second ground for your objection?

Mr. Strachan: In the prelude to his question, Mr. Dixon referrced to the fact that there had been some discussions between Mr. Winckler and Mr. Finley, but the fact is that the contract is a contract with the receiver, and none of the discussions Mr. Winckler had preliminary to the [1762a] receiver having entered into the contract could be admitted.

Mr. Dixon: The testimony was, your Honor, if you recall, Mr. Winckler had nothing to do with it. We propose by this questioning on redirect to show he directly had and the relations at that time were satisfactory.

The Court: Technically, your objection is the varying of a written document by parol evidence, is that what you are talking about?

Mr. Strachan: Or introducing negotiations leading up to it when there is a written document.

The Court: You contend the parties are the same here?

Mr. Strachan: Yes. I am quite sure they were, because Mr. Winckler, to the extent he was active in business, was an employee of the receiver who was in charge of the business and who was the contracting party.

(Testimony of Nicholas J. Winckler.)

The Court: The rule is that as to a contract between parties to a lawsuit, you can't vary the terms of that agreement by statements which might indicate the contrary sense from that shown in the agreement. However, this contract apparently was between a certain receiver in 1948 and the EOP.

Mr. Strachan: That's right.

The Court: That is not the same receiver or the same trustee that is bringing this lawsuit.

Mr. Strachan: No. This is prior. [1763]

The Court: Therefore, it isn't the same parties, unless you indulge in the fiction that the——

Mr. Strachan: No.

The Court: ——unless you indulge in the fiction that there is some entity that flows through here that means that Walker is sitting there as trustee, and the prior trustee and the corporation are all one and the same people.

Mr. Strachan: No. That is another proposition, your Honor.

The Court: You don't contend for that?

Mr. Strachan: No, sir.

The Court: Then the objection is overruled. However, I don't think we are so much interested in the conversation, what was said, as in what was done. [1764]

* * *

Q. (By Mr. Dixon): I will hand you, Mr. Winckler, what has been marked Plaintiff's Exhibit 58, the same being a letter addressed to you as president of Winckler & Smith Citrus Products, Inc., dated August 19, 1948, signed by James A. Finley, Manager of Exchange Orange Products Company, and ask you if you received that letter from him?

A. Yes. This letter is addressed to me as president of Winckler & Smith, August 19, and I have received the letter.

Mr. Dixon: Plaintiff's Exhibit 58 is offered in evidence.

Mr. Strachan: Object. It isn't material. It is a document leading up to the written contract which was later entered into between the receiver and Exchange.

The Court: Who was the receiver in 1948?

Mr. Irwin: Mr. Lynch.

Mr. Fisher: E. A. Lynch was the receiver.

The Court: I think both of you are straining at something that is of no particular issue here. I don't know what happened in this case, but let's take a stab at it. Receivers are appointed by the court and they are court officers. Receivers don't go down and turn the motors and feed the bins and run the plant. They have people to work for them, and generally the employees and officers of the corporation in reorganization are kept on to assist. I would guess that is what happened in this case.

Mr. Dixon: That's right. [1765]

Mr. Strachan: That's right, but over and beyond that, when the receiver makes a contract, that means the contracting party gets paid for what he is furnishing under the contract as an expense of administration and doesn't depend upon the credit of the corporation in receivership.

Mr. Dixon: If the court please, this document is being offered in evidence to show that during this period Exchange Orange, in spite of the inferences of previous complaints concerning the processing by Winckler & Smith, of the specks incident, so-called, that they were wholly immaterial and insignificant, and this letter clearly indicates that Mr. Finley was dealing with Mr. Winckler and company at this time and willing to do so.

The Court: Certainly it is admissible on the other issue anyway. The objection is overruled. Received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 58, was received in evidence.)

Mr. Dixon: Ladies and gentlemen of the jury, the letter is rather brief and I would like to read it to you. It is addressed to Mr. Winckler as president of Winckler & Smith Citrus Products Company, Inc., 408 South Atchison Street, Anaheim, California. It is dated August 19, 1948.

"Dear Mr. Winckler:

"Confirming our discussion regarding credit arrangements on oranges for your Government Contract [1766] No. A1PM/M/1273, I think satisfactory arrangements can be made if the following points are covered in an agreement:

"1. We furnish to you a maximum of 5,000 tons of juice grade oranges at a price of $30.00 per ton, f.o.b. the packing house, to be taken by you before October 8, 1948, at the rate of not more than 1,000 tons per week.

"2. The merchandise to be protected by Lawrence Warehouse receipts and finished products to be examined by the AMA every other operating day and AMA certificates obtained.

"3. The proceeds from the Government to be assigned to The Exchange Orange Products Company or to the bank and the bank to pay us up to the full amount advanced before any other creditors.

"If a court order is satisfactory to us, I will have our attorneys write up an agreement." [1767]

Q. (By Mr. Dixon): Mr. Winckler, you were still at the plant of Winckler & Smith at the time this letter was written and received?

A. Yes, I was. I was working under the Receiver.

Q. Do you know whether in fact oranges were processed under any arrangement for Exchange Products pursuant to and subsequent to this letter, Plaintiff's Exhibit 57?

A. I recall that approximately 4,700 tons of oranges have been processed by the same technical staff under my supervision than in previous years.

Q. Mr. Winckler, there has been some reference in your cross-examination to navel juice. I am not sure that you have testified or informed the jury as to the approximately percentage of your total production of citrus juices that was in that category.

(Testimony of Nicholas J. Winckler.)

namely, navel juice. Can you tell the jury what it was in 1950?

A. I think I did testify as an average the percentage of navel juice that we processed, either as navel juice or as blended juice, was very small compared to Valencia.

Q. On cross-examination, Mr. Winckler, counsel suggested, I think, that there may have been two sets of books kept by Winckler & Smith, because there were apparently two valuations that were placed upon the property of Winckler & Smith after the reorganization.

Mr. Strachan: I would like to see a record reference to [1768] that. I don't recall it.

I will object unless the record reference be shown.

I don't think I made the suggestion that counsel's question assumes that I did.

Mr. Dixon: I said it was suggested that there were two sets of valuations kept by this company.

The Court: I don't think there was any reference to two sets of books made. What inferences you might have drawn or what inferences the jury might draw, I don't know.

Mr. Dixon: That is the inference that I drew. It was my inference.

The Court: If this is material to clear up some issue, you may proceed. The jury will have to recall what was said. I personally recall no reference to two sets of books.

Mr. Strachan: There was none, your Honor, and I think Mr. Dixon should rephrase the question without that assumption.

Mr. Dixon: Will you read the question, Mr. Reporter?

The Court: Rephrase it without having it read.

Mr. Dixon: Let's mark this, first.

Mr. Strachan: That question is withdrawn, I take it, or the objection sustained, one or the other?

Mr. Dixon: I will restate the question.

The Court: Strike the question out, and I instruct the jury to disregard it. [1769]

The difficulty is that you said too much. You may have drawn an inference. I don't know. Maybe somebody else drew an inference. But you certainly can ask the witness if he kept two sets of books, or if he had two or three sets of valuations. So reframe you question and proceed.

Q. (By Mr. Dixon): During the cross-examination, Mr. Winckler, I think you referred, or reference was made to the fact that there were two different valuations placed upon the property of Winckler & Smith; do you recall that? I don't have the record before me, counsel.

A. My recollection is that that matter was brought up in the manner that we kept two inventory values.

If my recollection is correct, these values applied only to years after the first reorganization where the plant was sold and repurchased from a certain group of stockholders. But we never kept two sets of books, or anything of that nature.

(Testimony of Nicholas J. Winckler.)

Q. Let's forget the two sets of books. I am talking about two valuations, Mr. Winckler.

The Clerk: I have just marked Exhibit 59 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit No. 59 for identification.)

Q. (By Mr. Dixon): I am handing you what has been marked for identification as Plaintiff's Exhibit 59, the same [1770] purporting to be a United States Corporation Income Tax Return for Winckler & Smith Citrus Products Company for the year 1949.

The Court: Is that the year ending January, '49?

Mr. Dixon: No; the year ending January 31, 1950, but it is a 1949 return, as far as the government is concerned on its form.

Q. (By Mr. Dixon): I direct your attention, Mr. Winckler, to a third sheet, namely, Schedule D, relating to the sale of property other than capital assets, April 3, 1949. Will you tell the jury, if you can, what the date August 3, 1949, means, if you know, on this return?

A. The date April 3, 1949——

The Court: Wait a minute. Somebody said August and somebody said April. Which is it?

Mr. Dixon: It is April.

The Court: All right.

The Witness (Continuing): ——is the date when the plant was sold, under an option to repurchase.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Dixon): Does that Schedule D contain two columns, one headed "Cost Values" and the other "Appraisal"?

A. That is correct.

Q. And the total amounts under the items contained therein differ, do they not?

A. They do. [1771]

Q. Do you know the purpose, or can you tell the jury why these two items, Cost Value differs from the Appraisal Value, as set forth in this exhibit and Schedule D therein? A. Yes.

Q. Will you state to the jury why they differ?

A. Prior to the date we had our fixed assets, machinery, furniture, fixtures, land, buildings, equipment, and so on, on our books at the value of the periodical appraisal value, and we took our depreciation permitted under the law on that value. On the other hand, when the plant was sold for substantially a lower price under that lease-option agreement, we had to show, to conform with the tax laws, both evaluations.

Q. All right.

Now, directing your attention to item 12, subsection (c), it provides net gain or loss from sale or exchange of property other than capital assets from Schedule D, I notice the figures $46,867.81; is that the loss taken in this return by the corporation on the sale of such assets? A. That is correct.

Q. In other words, that is the difference between the cost value and the appraisal value?

A. That is the difference between the depreci-

(Testimony of Nicholas J. Winckler.)

ated value as carried on the books for tax purposes, under which we had to pay our taxes, and the actual return on the plant, [1772] sold under the lease-purchase arrangement.

Mr. Dixon: Plaintiff's Exhibit 59 offered in evidence.

The Court: Exhibit 59 received in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 59)

Q. (By Mr. Dixon): It has just been directed to my attention, Mr. Winckler, that you may have misunderstood my question, or used the wrong description for it. The first column is the cost value or book value, and not the appraisal value. Will you state whether that is or is not the fact, and if so whether you wish to correct it?

A. That is correct. I have no recollection that I mixed up the two columns.

The Court: Well, the exhibit says "Cost Value" in one column, and "Appraisal Value" in the other column.

Mr. Strachan: I think that is the way the witness testified to it.

Mr. Dixon: I thought so, too.

Q. (By Mr. Dixon): Mr. Winckler, were the Lawrence Warehouse facilities available to Winckler & Smith all during the period 1949, '50, '51?

A. Yes, they were. [1773]

* * *

ROBERT HODGE

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: My name is Robert Hodge.

The Court: H-o-d-g-e?

The Witness: Yes.

Direct Examination

By Mr. Dixon:

Q. What is your residence address, Mr. Hodge?

A. I live at 349 North Ridgewood Place, Los Angeles.

Q. What is your business or profession?

A. My business is certified public accountant.

Q. This may be a rather long examination, Mr. Hodge, so if you will just keep your voice up so that the farthest [1782] one in the jury box can hear your answers to my questions, I think it will be helpful.

I believe you stated you are a certified public accountant? A. I did.

Q. That is, you are licensed by the State of California to practice public accounting as a CPA?

A. I am.

Q. When were you so licensed, Mr. Hodge?

A. 1932.

Q. And what business or profession have you been engaged in since that time?

(Testimony of Robert Hodge.)

A. I worked with Price Waterhouse & Company for approximately 10 years, and I——

Q. Will you tell the jury who Price Waterhouse are?

A. Price Waterhouse & Company are probably the largest firm of certified public accountants in the country.

Q. What did you do when you left Price Waterhouse?

A. I went in business with another CPA as a partnership. That lasted until about 1945.

Then I practiced under my own name until a few years ago when I took in one of the members of my staff as a partner.

The Court: Keep your voice up.

The Witness: I'm sorry. [1783]

Q. (By Mr. Dixon): Mr. Hodge, again, if you will try to throw your voice out into the room, possibly by opening up your mouth a little wider, it may throw your voice a little further.

How long have you had your own accounting firm, Mr. Hodge?

A. You mean in association with other CPA's as partners and——

Q. Yes. A. About 15 years.

Q. And during that period of time have you become familiar with or had occasion to do any accounting work for Winckler & Smith Citrus Products, Inc.?

A. Yes. When the partnership was terminated and the corporation was formed, I took over the accounting from my then partner, Mr. [1784] Moore.

Q. And you have handled the books of that company, that is to say, you have made the operating statements and balance sheets and tax returns for that company since that period of time?

A. I have prepared financial statements, except during the period of reorganization under Chapter XI, since that time, yes.

Q. Now, Mr. Hodge, in our examination we are going to have occasion to refer to certain terms, and so that the jury may understand what you are going to talk about I am going to ask you to, in as brief a statement as possible, to try to indicate what some of these terms are, what they mean.

Now, I am first going to refer to the term income account as it will be used on some of the documents and exhibits that will be hereafter referred to. Will you state to the jury what in accounting practice, and particularly with reference to the statements of Winckler & Smith Citrus Products Company, that term "income account" means?

A. The income account is the summary of all of the operating accounts that a firm keeps in its various accounting records, particularly the general ledger, which we summarize to put on a little statement so that it is clearly understandable, I hope, to show what the net results of the operations of the company are for that particular period under review. Is that clear enough? [1785]

(Testimony of Robert Hodge.)

Q. That is, the net results of the operations of the company for a particular period of time?

A. That's right.

Q. By net results what do you mean, whether there was profit or loss during the period covered?

A. The final figure shows the net profit or loss for the period under review.

Q. Were these income accounts, so-called, prepared by you on an annual or semi-annual basis for Winckler & Smith?

A. Except during Chapter XI, and up to the time of the Chapter X, I believe in '49, I prepared semi-annual reports on the operations of Winckler & Smith.

Q. Now, can you tell the jury what is meant by a fiscal year?

A. A fiscal year is a year of operations that is adopted by a firm, corporation, partnership, or otherwise, other than a calendar year. That is, it could terminate any time.

Movie companies, for instance, terminate their fiscal year on a weekly basis. However, most firms terminate their years at the end of a calendar month.

The Court: Here the fiscal year of Winckler & Smith terminated January 31st?

The Witness: That is right.

The Court: So it ran from February 1st of one year to [1786] January 31st of the following year?

The Witness: That is right.

Q. (By Mr. Dixon): And the annual operat-

(Testimony of Robert Hodge.)

ing statements of the company, and the tax returns of the company, were prepared on that fiscal year basis, insofar as Winckler & Smith is concerned; is that correct? A. That is right.

Q. What items are generally contained in the income account statement which you prepared on a semi-annual basis?

A. For Winckler & Smith?

Q. Yes. From now on we are talking entirely about Winckler & Smith unless it is indicated otherwise.

A. The normal form of the income account for Winckler & Smith would start out with the sales, less cost of sales, less selling expenses and administrative expenses; then there might be some miscellaneous income expense—— [1787]

The Court: Keep your voice up a little bit. It is hard to hear in this room.

The Witness: I am sorry, Judge. Normally your income account would start out with your sales, less your cost of sales.

The Court: Less your selling expenses and less your administrative expenses?

The Witness: And there might be some sundry items not normally considered operating expenses or income, and the final figure would be the net profit or loss for the period.

Q. (By Mr. Dixon): Will you explain to the jury what would be included in sales? That may be almost self-explanatory, but I will ask you to tell the jury what that item is.

(Testimony of Robert Hodge.)

A. Sales would be amounts received from customers from the sales of their products. Well, I should straighten that out a little bit. It would be the amount charged to customers during the period under review for products sold to them.

Q. In other words, as I understand it——

The Court: Just a minute. These books were kept on an accrual basis?

The Witness: That's right.

The Court: And not upon a cash basis?

The Witness: That's right. [1788]

The Court: There are two distinct methods by which books are kept?

The Witness: That's right, Judge.

The Court: If you keep a set of books on a cash basis, you would list in sales the money as the company received it.

The Witness: That's right.

The Court: If the books are kept on an accrual basis, then you would list the sales as soon as they are made or charged regardless of when the money came in?

The Witness: As they are invoiced and delivered.

The Court: Accrual, by the same token, on a set of books that was kept on an accrual basis, everything else would be kept on a basis of when the obligation was incurred and not when the money came in or was paid?

The Witness: That's right.

The Court: So if you bought a thousand dollars

(Testimony of Robert Hodge.)

worth of insurance, it would be charged on the books as of the day the obligation was incurred?

The Witness: That's right.

The Court: Even though you might pay for it next month or next year.

The Witness: That's right.

The Court: There are two standard methods of keeping books, the cash method and the accrual method, and these were kept on the accrual [1789] method?

The Witness: That's right.

Mr. Dixon: Thank you, your Honor. That will save some time.

Q. Now, Mr. Hodge, will you indicate to the jury what is meant by the term balance sheet?

A. The balance sheet is a term used to show the assets and liabilities at a given time. It differs from an income account in that it is at a certain time, whereas your income account goes from the beginning of the period to the end of the period. It tries to show a picture of all the company owns and owes as of that date.

The Court: Well, let's stop again. There are also two methods of bookkeeping. One would be called the single-entry method, and the other would be the double-entry method. At least there are those two, are there not?

The Witness: There are two, Judge.

The Court: In a single-entry method of bookkeeping, to take a crude example, I might keep a list on a sheet of paper of the money I paid out

(Testimony of Robert Hodge.)

and of the money that came in, and a few little notes on a scrap of paper. There would be no way——

The Witness: To balance.

The Court: To keep a balance.

The Witness: That's right.

The Court: But in a set of double-entry books, each [1790] time there is a charge on a ledger or account, there has to be a credit somewhere to some account.

The Witness: That is true.

The Court: So that eventually in a double-entry set of books, when you get a balance sheet out, then all the things that are listed as credits equal all the things that are listed as charges.

The Witness: With the income account taken into consideration, too. I mean the two of them dovetail.

The Court: Yes, but eventually you get a balance.

The Witness: That's right.

The Court: In which the two columns are alike.

The Witness: That's right. Total assets and total liabilities and net worth equal each other.

The Court: So if, for insance, a company had a net worth of $10,000, and then during a certain period they make money, when that balance sheet was balanced out and the two totals were the same, there would probably be a bigger figure for the net worth, other things being equal, than there was before.

The Witness: That is true.

(Testimony of Robert Hodge.)

The Court: But still the totals would balance, the total assets and total liabilities.

The Witness: Yes.

The Court: Is that right, generally? [1791]

The Witness: Plus the net worth, the liabilities plus the net worth will always equal your assets.

The Court: So if a firm lost money, on your balance sheet the total of assets and liabilities would still equal, but the net worth might decrease during that period?

The Witness: Would be reduced by the amount of your loss.

The Court: This was a double-entry set of books, where the——

The Witness: Yes, this was the standard double-entry set of books where every debit has to have a credit.

Mr. Dixon: I am not sure, Mr. Hodge, if Juror No. 1 can hear your answer.

Juror Daiker: Yes, I can hear.

The Witness: This was the normal double-entry set of books where every debit had a credit.

The Court: Before we go any further, let's go back to what is meant by the operating statement or the balance sheet. How many of you jurors have had any experience in bookkeeping? Raise your hands.

Well, how many have not? How many don't know anything about books?

All right. Let's take one simple little thing. When a company operates, Mr. Witness, you say you start out with a figure of their sales. [1792]

(Testimony of Robert Hodge.)

The Witness: On the operating statement, yes, sir.

The Court: So you get a figure which represents all the sales that they made, in this case on the accrual basis, that is, for instance, the sale is made and whether the money has come in yet or not, that was a sale.

The Witness: That is true.

The Court: Then you deduct from sales the cost of making these goods that were sold.

The Witness: That is true.

The Court: In other words, if you sold a million dollars worth of goods and it cost you a half million dollars to make those goods, you start out, and to begin with it looks like you might have a half million dollars profit.

The Witness: That is true.

The Court: Then you would next have to deduct, after the cost of making these goods, there would be labor and materials that went into them, then you would have to deduct, also, other expenses which you would call your administrative expenses—or do you have some other term for it?

The Witness: The next common form is to take out the selling expense, in other words, it cost you so much to sell the goods.

The Court: So you might pay commission to salesmen?

The Witness: Sales, salaries, and so forth.

The Court: Where would you take out the cost of shipping the goods? [1793]

(Testimony of Robert Hodge.)

The Witness: That would be normally in your cost of sales.

The Court: Now, what would you include under the administrative expense that you would have to deduct to see what profit you make?

The Witness: Your administrative expense would include your executive expenses, your office expenses, and financing expenses, and things of that nature.

The Court: Now, you would have expenses, such as taxes or rent, if you rented a building, or you would have——

The Witness: The rent could be for the most part up in cost of sales. In other words, the cost of the factory portions. Whereas the rent of your offices would be down in administration.

The Court: But they come off one place or another?

The Witness: That is right.

The Court: Suppose you had vehicles and trucks and had to buy gasoline and repair them, that would be taken off, too, wouldn't it?

The Witness: That would be in one place or the other. Trucks for the shipping of the fruit, and so forth, would be under your cost of sales; whereas your salesmen's cars would be under selling expenses. Your executive cars would be under your administration expenses.

The Court: So all legitimate expenses that a company would have would then also be deducted so

(Testimony of Robert Hodge.)

that from this gross figure what you got for your goods you would deduct [1794] your cost of sales and all your expenses?

The Witness: That is true.

The Court: When you got done with that, then you would have your net operating profit?

The Witness: That is true.

The Court: That is not the end of the story, yet, is it, in the set of books?

The Witness: No. That is merely the figure that is carried forward to your balance sheet as you increase or decrease your net worth.

The Court: Talk to the jury. Say that again.

The Witness: The net results from operations during your period of audit is then carried forward to your balance sheet, which presumably balances your balance sheet by increasing or decreasing your net worth.

The Court: So this figure of net worth, then, that is in this balance sheet, which the totals are always equal, either increases, if you make money, or it decreases if you lose money?

The Witness: That is true.

The Court: So with this operating statement you are able, then, to take your balance sheet and draw your two totals, which balance as to assets and liabilities?

The Witness: That is true.

The Court: If you have a situation, after you have gone [1795] that far—you still have many other accounting problems, I take it, or may have other problems? Supposing the corporation—let's take one example; it may be pertinent here or may not; I haven't seen the statement; but under the tax laws a corporation has the right in certain instances to carry a loss forward or carry a loss back?

The Witness: That is true. Under the Revenue Act of 1954 a corporation, and individuals have the same right, have the right to carry a loss back to the previous years' operations, and if the corporation has made money and paid an income tax, they have a right to a refund of the portion that can be carried back from the present year's loss; if that income is not large enough to absorb this loss, they have the right to carry that forward for five succeeding years.

The Court: Let's just take that a little further so we will see what you mean.

A certain corporation, we will say, in a certain year sustained a loss, it has filed its income tax returns with the Federal Government, and since it sustained a loss it didn't pay any tax?

The Witness: That is true.

The Court: Now, the next year it made a lot of money——

The Witness: Let's take the loss back to the previous year, first. [1786]

The Court: Just a minute, now. We have got a case where it lost money in a certain year, but in the previous year, we will say it made some money and paid a tax, it would then file, would it not, an amended return——

(Testimony of Robert Hodge.)

The Witness: No, sir.

The Court: A new return?

The Witness: No. The present procedure is to carry—is to prepare a carry-back form——

The Court: Return?

The Witness: No. Just a form, which allows you to carry the loss back to the previous year.

The Court: What I am getting at is—I don't care what you call it——

The Witness: I am sorry if I am a little too precise.

The Court: I am not using the proper terms. Actually to carry the loss back to the year before when you made money there have to be some computations made so you carry that loss, or a part of it, back and then you recompute it and find out what tax would be paid on that basis, and then maybe you get the tax back that you paid?

The Witness: That is true.

The Court: If the company makes money a certain year, you say there are provisions where it can carry—loses money a certain year, there are provisions so that you can carry those losses forward to other years? [1797]

The Witness: That is true.

The Court: What would you do in the second year, if the second year you made a pot of money and the year before you lost money, you would have a loss carry forward, how would you handle that?

The Witness: In the preparation of the income tax return for the now third year, you would carry forward this loss and offset that loss against the profit made in that year for the purposes of computing the income tax due for the third year.

The Court: So in the third year, on your operating statements, you might have made money?

The Witness: That is right.

The Court: When you got ready to file with the Federal Government you might have enough loss to absorb, cancel off that profit?

The Witness: That is right.

The Court: Now, this loss that you would carry forward or back, it or a part of it can only be used once? I mean if you use a part of that loss to carry back, then you never can use that part of the loss any more?

The Witness: No, that is right.

The Court: Or if you use a part of that loss to carry forward, supposing you use 50,000 of that loss, after you once use it it is gone? [1798]

The Witness: It is gone for this purpose.

The Court: All right.

I don't know whether that helps any.

The Witness: To make it a little clearer, assume a profit of 25,000 in your first year of operations, a loss of 100,000 in your second year, you then carry this 100,000 loss back to your first year, you absorb 25,000 of it; now you can carry 75,000 forward for the next succeeding five years. If your profits are 75,000 in your third year, then you wipe out—rather, you use up that whole carry-forward and

(Testimony of Robert Hodge.)

do not pay any tax. Then you start off your fourth year and it is on its own.

The Court: This is part of the Federal tax laws?

The Witness: That is part of the Federal tax laws.

The Court: This business of taking into account any carry-forward or carry-back, that is done after you have made your operating statement for a particular year?

The Witness: That is right.

The Court: It has nothing to do with the operating statement for the particular year in question?

The Witness: No; this carry-forward and carry-back is only for income tax computations.

The Court: All right. Go ahead.

The Witness: Wait a minute.

However, it might affect your operating statement, because [1799] the operating statement—you come down to your net profit, then you usually take off your Federal income tax due, and carry the net figure to the balance sheet. It would affect your operating statement in that way, because there may or may not be a tax due. You could conceivably have an operating statement with $100,000 profit, but no income tax due for that period, because of the carry-forward or carry—yes, carry-forward.

Am I confusing it?

The Court: All right. Go ahead, Mr. Dixon.

Q. (By Mr. Dixon): Now, Mr. Hodge, I believe you have already indicated what was meant by the term "current assets" on the balance sheet. I don't

(Testimony of Robert Hodge.)

think we discussed what is meant by "deferred charges" as an asset. Will you indicate to the jury what is meant by that term?

The Witness: I am sorry, I don't believe we discussed current assets.

The Court: You didn't ask him, Mr. Dixon.

Q. (By Mr. Dixon): Then tell the jury what is meant by the term "current assets."

A. A current asset is a quick asset, it is an asset that should be converted into cash normally in a period of, say, six months.

The Court: What are they? What do they consist of ordinarily? [1800]

The Witness: Normally, cash, accounts receivable, inventories, items of that nature.

The Court: What are fixed assets?

The Witness: Fixed assets are investments in plant, leasehold improvements, things of that nature, which will not be converted into cash, which are normally used in the operations of the business.

The Court: Go ahead.

Q. (By Mr. Dixon): Fixed assets constituted machinery, equipment, and if owned the plant of the company involved; is that correct, Mr. Hodge?

A. That is right.

Q. If the company merely leased a building, however, that would not be carried as a fixed asset, only the machinery and equipment contained in the buildings?

A. Only assets owned would be carried as a fixed asset.

(Testimony of Robert Hodge.)

Q. What is meant by "deferred charges" as an asset?

A. Deferred charges are expenditures made for future periods. In other words, if you had an insurance policy which cost $100, and half of it related to your period and half to the succeeding period, you would defer $50 of that expense to the following period.

The Court: Let's take a problem that every juror here who owns a house would know about.

You buy a fire insurance policy and it runs for three [1801] years and you pay $150 for the fire insurance policy; you could only take $50 of that for the year that you bought the policy, and the other $100 that you would pay would be deferred and could be used in those years ahead as they came along.

Is that what you mean?

The Witness: That is exactly it.

Q. (By Mr. Dixon): What is meant by the term "current liabilities"?

A. Current liabilities are items that normally would be paid in six months, such as your current trade accounts, notes payable within six months or less, taxes due within six months, any other expense items similar to that nature.

Q. Then on most balance sheets where you have a capital stock or a stock company, there is generally a capital account, is there not, called a stock account?

A. Normally in a corporation you have a capital

(Testimony of Robert Hodge.)

stock account which represents either the amount paid in for the capital stock or the par value of the stock that has been issued. It depends on the charter of the company as to how the stock has been issued and set up on the books.

Q. If there is a deficit in the operations of the company at any time during its existence, that is generally charged against the capital account, is it not, first?

A. On the balance sheet it is deducted from the capital [1802] account.

Q. I mean it is deducted.

A. If the assets exceed the earnings at that particular point. [1803]

The Clerk: This will be Plaintiff's Exhibit 60, your Honor. I will mark the copies 1 to 14, inclusive.

The Court: The original will be Exhibit 60 for identification, and the copies will be marked 1 to 14, inclusive.

(The exhibit referred to was marked Plaintiff's Exhibit No. 60 for identification.)

The Court: These are only marked now for identification. Do you want the exhibit identified before the copies are handed to the jury, or may they be handed to them and the questioning go ahead? It will save some time the latter way.

Mr. Strachan: Yes. I have no objection.

The Court: You are going to be handed, ladies and gentlemen of the jury, copies of this Exhibit

60 for identification. It is apparently an income account and a balance sheet of Winckler & Smith. It is not yet in evidence. Ordinarily it wouldn't be handed to you until it is in evidence, but it will be identified by the witness and you will have these copies before you to follow the testimony of the witness. These are to be handed back at the close of each session. They are not to be taken with you to the jury room, nor are they to be taken home with you at night. You may look at them here in the court room just as if there had been a large chart put up in front of you which the witness would point to, but it will be easier to let you each have a copy to look at. The bailiff will collect them at the end of the [1804] session.

Q. (By Mr. Dixon): Mr. Hodge, I direct your attention to what has been marked for identification as Plaintiff's Exhibit 60. Will you state to the jury what that exhibit relates to?

A. You mean the income account?

Q. The whole exhibit. It covers the income account, the heading is for the six months ended July 31, 1949, and the balance sheet showing the assets, or with the words Assets and Liabilities as of July 31, 1949.

A. I am sorry. This is for the year ended January 31, 1950, the one I have.

The Court: Well, let's have everybody look at the same sheet. Which one do you have?

Does everyone have one that says 1949 on the jury?

(Testimony of Robert Hodge.)

The Jurors: Yes.

The Witness: Well, I have my own copy here of the other one.

Mr. Dixon: I would rather you have the exhibit.

The Court: He can use mine. Don't you have an extra copy?

The Witness: I have a work sheet here.

Q. (By Mr. Dixon): Now that we are all straightened around, do you have, Mr. Hodge, what has been marked for identification Plaintiff's Exhibit 60, the same being an [1805] income account statement for the period ended July 31, 1949, and the balance sheet as of July 31, 1949?

A. I do.

The Court: Keep your voice up.

Q. (By Mr. Dixon): Now, will you state to the jury what period of time in fact this statement covered, this income account statement covered? In other words, it is my understanding it does not cover the full six-months period.

A. The actual operations did not start until June of 1949. The actual processing of juice or fruits, rather, did not start until about—I don't remember exactly the date, but it was early June. There however, are operations of the company from the termination of the Chapter 11 proceedings, a month or two before that.

Q. The point I want to determine, Mr. Hodge, is as to whether or not the Plaintiff's Exhibit 60 for identification relates to any operations under or by the receiver for the company.

(Testimony of Robert Hodge.)

A. It does not. It is the operations of Winckler & Smith Citrus Products Company only.

The Court: When did the receivership end? Some time in 1949, didn't it?

The Witness: My recollection is in April, but I am not positive. I would have to look at my papers.

The Court: So this is after the end of the receivership [1806] under the Chapter 11 proceedings.

The Witness: That's right.

Q. (By Mr. Dixon): And carried through to the period ending July 31, 1949?

A. That's right.

Q. Now, the item Sales on the income account covered the sales made by Winckler & Smith on its own operations during that period of time?

A. That's right.

Q. Following termination of the Chapter 11 proceedings.

A. Following termination of the Chapter 11 proceedings.

Q. The Cost of Sales item is as set forth therein, being $199,000 plus.

A. All of the items in here relate only to the operations of Winckler & Smith Citrus Products.

The Court: Let's save some time here.

Mr. Dixon: Yes.

The Court: This sheet, Exhibit 60 for identification, is a copy of the financial records of Winckler & Smith, as you kept them.

The Witness: As I prepared them at that date, that is true.

(Testimony of Robert Hodge.)

The Court: And the first sheet is the income account [1807] for the period you have described.

The Witness: That's right.

The Court: The second sheet is the statement of assets, and the third sheet is the statement of liabilities, and the two together are called the balance sheet.

The Witness: That's right.

The Court: And at the bottom of the second sheet, the figure $206,000 equals the liabilities shown on the third sheet, $206,000?

The Witness: That's right.

The Court: These records were kept in the regular bookkeeping practice?

The Witness: They were.

The Court: Standard method?

The Witness: Standard double-entry set of books.

The Court: So that we can start, then, with sales and subtract your cost of sales, giving you $39,000. Then you have a subtotal of your selling expenses, some $14,000, and administrative expenses of $11,000, almost $12,000, and the two of those total 26. Substracting the 26 from the 39, it gives you 13,000. You have some additional miscellaneous income, $1,000, and the final figure of 14 thousand some odd dollars is the profit from the income account for that period?

The Witness: That's right.

Q. (By Mr. Dixon): Now, directing your at-

(Testimony of Robert Hodge.)

tention to the [1808] balance sheet part of this exhibit, Mr. Hodge, particularly the assets part thereof, under Deferred Charges, there is an item Leasehold Improvements in the amount of about $9,600. Will you state to the jury what that was?

A. That represents the unamortized amount of expenditures for improving the building, which at that time Winckler & Smith were renting. They went in and spent several thousand dollars to put the building in shape to process the fruit. Normally that is written off over the period of the lease. That is, it is amortized into expenses and taken into the income account during the period of the lease, and that represents the unamortized balance of those expenditures at that time.

The Court: By amortize, you mean divide up.

The Witness: Divide up.

The Court: A certain part applied to one year and others came out over the succeeding years.

The Witness: That's right.

The Court: That is what you meant by amortize?

The Witness: That's right.

Q. (By Mr. Dixon): What is meant by the item Unabsorbed Pre-season Expenses in the amount of $18,000 plus?

A. In the citrus processing business, it is normal to spend a great deal of money to get ready for a particular fruit season, which is written off over that particular [1809] season. The normal Valencia season is from, say, June through October, and

(Testimony of Robert Hodge.)

there is quite a bit of money spent in May and June getting ready for that season, which is amortized over that particular season, and that is what that represents, that is the unamortized balance of those expenditures.

The Court: You mean, then, part of what your total pre-season expenses were have already been taken into account?

The Witness: That's right.

The Court: And this is the remaining portion that you haven't taken into account for this six-months period, but you are going to take into account for the next six months?

The Witness: During the rest of the Valencia season that would be taken into account.

Q. (By Mr. Dixon): Now, directing your attention to the liabilities part of the balance sheet, Mr. Hodge, I notice an item Notes Payable, due December 15, 1950. Will you explain to the jury what that item is?

A. I am going to have to get my papers out, because I do not remember.

The Court: Wasn't that the note to the RFC?

The Witness: No, sir.

The Court: That isn't?

The Witness: That is not the note to the RFC.

The Court: All right. [1610]

The Witness: That makes up several items. There were various loans to stockholders, due to stockholders at that time, the largest of which——

The Court: Loans from stockholders?

(Testimony of Robert Hodge.)

The Witness: Loans from stockholders. Pardon me. The largest of which was a note to Mr. Rubin for $31,500. There are several others. Do you want the details?

Q. (By Mr. Dixon): In other words, that was for money advanced to the company as loans by the stockholders? A. That is true.

Q. As of this date. A. As of that date.

The Court: What are the other ones?

The Witness: There was the note to Mr. Parvin of $13,500.

There was a note to Mr. Winckler for $6,612.34.

The Court: $6,612.34?

The Witness: Yes. There was another note to Mr. Winckler for $3,000.

The Court: That makes almost 54.

The Witness: It should make it exactly.

The Court: All right.

Q. (By Mr. Dixon): Now, directing your attention to the capital stock and deficit headings of Exhibit 60, will you state to the jury what the item of $240,000 plus under [1811] capital stock refers to?

A. That is the stated value of the stock as determined by the board of directors back in 1946. Do you want me to go into that? I am not too sure, but it has been carried forward from 1946.

Q. From previous statements of the company? A. That's right.

Q. The deficit item dated January 31, 1949, of

(Testimony of Robert Hodge.)

224,000 plus, will you state to the jury what that item is?

A. You mean the component parts, as to how it arose?

Q. Well, just the——

A. That is the net result of operations from the inception of the company to the date. It is the accumulated results of operations to that date.

Q. Is that this carry-over loss item that you have previously described?

A. No. There are a good many more items in there than that. It is a very complex figure. There are the results of the reorganization reflected in that. There is a good many things. In other words, it is the net—not net. Let's see.

Q. Well, Mr. Hodge, there has been some testimony in this case by, I think, Mr. Winckler, to the effect that in one year the company suffered a substantial inventory loss of approximately a half million dollars. Is any part of that [1812] loss, assuming it to be one, contained in this item of $224,000?

A. All of the loss on that inventory is reflected in that $224,000.

Q. And what happened to the balance of that inventory loss of a half million dollars?

A. It was charged to surplus in previous years.

Q. During previous years? A. Yes.

Q. That was before the Chapter 11 proceedings?

A. I am not sure that all of the inventory was gone before the company went into Chapter 11, but certainly it is reflected in this figure.

The Court: Well, this capital stock and deficit could also be the equivalent of the net worth of stock?

The Witness: That is the book net value of the stock at that date.

The Court: So, in other words, you start out with a $240,000 worth of stock, subtracted from that would ordinarily be the $224,000 of deficit, but since there was a profit from the operating statement, 14,000 is subtracted from the 224, which reduced the deficit then to 210.

The Witness: That's right.

The Court: Then you take the 210 from the 240 and the $30,000 would be probably the net worth of the stock on book [1813] value.

The Witness: Yes.

The Court: As of this date.

The Witness: July 31, 1949.

Mr. Dixon: I now ask that——

The Court: Do you offer Exhibit 60 in evidence?

Mr. Dixon: Yes, 60 is offered in evidence, your Honor.

The Court: 60 received in evidence. [1814]

* * *

The Court: All right.

Let me see if I can save some time.

Mr. Witness: Exhibit 61 is three sheets; the first one is the income account for the year ending January 31st, '50, and therefore it was technically the year beginning January 31st, '49, to January

(Testimony of Robert Hodge.)

31st, '50, except that it picks up after the receivership in April of '49?

The Witness: Technically the first year starts February 1st, '49.

The Court: But this picked up after the receivership?

The Witness: That is right.

The Court: So this, then, includes the six months or the portion shown in Exhibit 60, and the next six months?

The Witness: That is right. [1815]

The Court: This is, then, the full year statement?

The Witness: Yes.

The Court: While the other was the first six months?

The Witness: That is right.

The Court: And page 2, is again, assets, page 3 is liabilities?

The Witness: That is right.

The Court: Going back to page 1, the income account for the year, then showed a profit of $121,000?

The Witness: That is true.

The Court: Figured on the same basis as the last statement?

The Witness: Yes.

The Court: Now, turning to the capital stock and deficit, you again carried over the figure for the shares of two hundred forty thousand as in the previous statement?

(Testimony of Robert Hodge.)

The Witness: That is right.

The Court: And then you took the deficit as of January 13th, '49, 224,000, is that right?

The Witness: Right.

The Court: From that you took the profit from the operating statement for the year, 121,000?

The Witness: That is right.

The Court: This being a year figure it included within it the 14,000 that you had for the first six-months' period? [1816]

The Witness: That is right.

The Court: Then you subtracted that from the deficit, and that gave you 103,000 deficit, which you subtracted, then, from the stock, and that gave you a figure of 137,000, which would be the net worth value of the stock on book value?

The Witness: That is right.

The Court: Now, these records were kept in the regular course of business?

The Witness: They were kept in the regular course of business.

The Court: And by standard bookkeeping methods?

The Witness: Standard double-entry bookkeeping methods.

The Court: Is there anything else you want to talk about, Mr. Dixon?

Mr. Dixon: Just one or two items, your Honor. Thank you very much.

Q. (By Mr. Dixon): Directing your attention to the assets side of the balance sheet, Plaintiff's

(Testimony of Robert Hodge.)

Exhibit 61, I notice an item there $1 lease and option to repurchase. There has been some testimony in this case, Mr. Hodge, with reference to an option to repurchase the plant and physical assets of Winckler & Smith under the option being contained in the lease; is that the option referred to in the balance sheet, to the best of your knowledge?

A. That is the option referred to in the balance sheet. [1817]

Q. Now, with reference to the fixed assets' part of the balance sheet, I notice machinery and equipment is carried at forty-three thousand dollars plus; would you state to the jury what the source of that item is? In other words, is that the new machinery and equipment?

A. That is the expenditure for new machinery and equipment from the termination of the Chapter XI proceedings to January 31, 1950.

Q. And that item was not contained in the previous balance sheet?

A. No. Do you mean by the previous balance——

The Court: Exhibit 60.

The Witness: 60?

Mr. Dixon: Yes. In that amount?

The Witness: No, there was no expenditures at that date for machinery and equipment. That is new expenditures by the corporation for machinery and equipment.

Q. (By Mr. Dixon): Can you state whether that item was paid for out of operating income during the period in question?

A. That is a little difficult to answer in this way: It might have been paid out of the proceeds from the borrowings from the stockholders. It would come—at this date the stockholders had been paid back, substantially, so it would have to come out of operating income, yes.

Q. In other words, by referring—— [1818]

A. I couldn't identify the particular dollars that paid for that.

Q. I understand that.

By referring back to Plaintiff's Exhibit 60, there is no item "fixed assets" on Exhibit 60, is there?

A. That is right.

Q. So that this item of fixed assets on 61 represents new expenditures or improvements, or additions, to the capital equipment listed therein during the period in question; is that a fair statement?

A. With the exception of the $9,657.83, which is listed as leasehold improvements in the July 31st, '49 balance sheet.

The Court: It was there listed as a deferred charge?

The Witness: That is right.

The Court: So on Exhibit 61 nothing appears there for leasehold improvements, you have taken that item out of there and put it up under fixed assets, and there with apparently additional items it makes the sixteen thousand?

The Witness: That is right. [1819]

Q. I believe the other items have already been gone into, namely, the capital stock and deficit item, and you explained the reduction in that account and how and under what procedure that reduction was effected, is that correct? A. That's right.

Q. And the notes payable item in Exhibit 61 has been reduced in amount, is that correct, from 54,060?

A. From a total of about 63,000, July 31, to a total of 15,000 at January 31.

The Court: In other words, the 63,000 on Exhibit 60 you get by taking up the notes payable figure and current liabilities of 9,000 and adding it to the general notes payable of 54,000?

The Witness: That is true.

The Court: That makes 63,000.

The Witness: Yes.

The Court: And in Exhibit 61, there is only the one item, notes payable, 15,000.

The Witness: That's right.

Q. (By Mr. Dixon): So there has been a reduction during that period of from 63,000 to the 15,000 by payments of notes during that period, is that correct? A. There has been.

The Court: Was that all payments of notes, or was that the forgiveness of indebtedness that Winckler owed the [1820] corporation? We had some testimony——

The Witness: Your Honor, the indebtedness Winckler owed the corporation would have been an asset. It would not have been a notes payable.

(Testimony of Robert Hodge.)

The Court: That's right. It would be on the other side of the ledger.

The Witness: That's right.

The Court: And what he owed the corporation would have been the asset.

The Witness: That's right.

Mr. Dixon: Plaintiff's Exhibit 61 is offered in evidence.

The Court: 61 received in evidence. [1821]

* * *

Q. (By Mr. Dixon): Directing your attention first, Mr. Hodge, to the income account headed Plaintiff's Exhibit 62, under Sales, there has been some testimony in this case concerning some Florida operations. State to the jury, if you know, whether any sales made by any Florida office of Winckler & Smith are contained in this item of $708,000 plus sales less discounts and allowances.

A. There were not sales during that period from the Florida operations. The 708,000 sales figures is all California operation.

Q. In other words, that represents the sales of products [1822] processed by Winckler & Smith in its Anaheim plant in California?

A. That is true.

Q. And the income account for this period shows a profit of $10,000 plus, is that correct?

A. That is correct.

Q. Now, directing your attention to the assets side of the balance sheet, Plaintiff's Exhibit 62, I

(Testimony of Robert Hodge.)

notice under Inventories something, Pledged Under Warehouse Receipts Collateral Agreement, $65,000 plus. Will you state to the jury, if you can, what is meant by pledged under warehouse receipts collateral agreement?

A. A warehouse collateral agreement is—pardon me. A loan under a warehouse collateral agreement is secured by merchandise in a public warehouse. In other words, there is inventory items in this warehouse which are collateral for this loan.

The Court: On the assets side is $65,000 following the pledged inventory. That is the value on the books of that inventory?

The Witness: That is true.

The Court: The liability for the loan that would be against those goods is shown over on the liabilities side?

The Witness: $48,000.

The Court: Secured under warehouse receipts, $48,000? [1823]

The Witness: That is true.

The Court: So you list the goods as an asset on the inventory side and you list the loan that is due for which they are pledged as security under the liabilities account?

The Witness: That's right.

Q. (By Mr. Dixon): Now, directing your attention to the fixed assets part of the balance sheet, Plaintiff's Exhibit 62, there is an increase in the item there, is there not, to $87,000 plus as against 62,000 in the Plaintiff's Exhibit 61. Will you state to the jury what item in your fixed assets part of the balance sheet accounted for that increase?

A. Well, with the exception of tools, they all account for that increase, that is the machinery and equipment accounts for some 17,000, the furniture and fixtures some 4,000, the leasehold improvements some 4,000.

Q. In other words, that represented additional acquisitions of machinery and equipment and the other items contained under fixed assets during this period, is that correct? A. That's right.

Q. By Winckler & Smith?

A. By Winckler & Smith. [1824]

Q. The lease and option to purchase arrangement is still carried on the assets side of the balance sheet at $1? A. That is true.

Q. Now, directing your attention to the liabilities part of Plaintiff's Exhibit 62, I notice an item, this $48,000 plus item under loans payable, "secured under warehouse receipt collateral agreements," is is that the item previously referred to as an asset, I mean in the assets part of the balance sheet?

A. That is true, that is the amount that has been advanced against the sixty-five thousand odd dollars in inventory.

Q. In other words, state, if you know, whether or not during this intervening period, Winckler & Smith had occasion to borrow money against whatever inventories they had?

A. That is evidenced by the fact that there is a loan payable on the books. They had to borrow

(Testimony of Robert Hodge.)

money or there wouldn't have been that loan there.

Q. And that was borrowed against inventories, or whatever inventories were pledged, is that correct? A. That is true.

Q. I notice an item "unsecured" under the liabilities column of 62, $25,000; can you state what that represents? It is under "loans payable," "unsecured" $25,000. [1825]

A. I believe there was an unsecured loan to the Bank of America, but just a minute and I will make sure.

That was an unsecured loan to the Bank of America.

Q. In other words, that represented a loan made by the Bank of America to Winckler & Smith in that amount; is that correct? A. That is right.

Q. During the period? A. That is right.

Q. That was unsecured?

A. That was unsecured.

Q. Directing your attention to the liabilities section, can you state to the jury what change, if any, there was in the "capital stock and deficit" account in 62 as against 61?

A. There is no change in the capital stock account. However, the deficit has been reduced from $103,000 to $92,000 by the profit for the six months.

The Court: Are you through with 62?

Mr. Dixon: Plaintiff's Exhibit 62 offered in evidence.

The Court: 62 received in evidence.

(Testimony of Robert Hodge.)

(The exhibit referred to, marked Plaintiff's Exhibit 62, was received in evidence.)

The Clerk: I have marked Plaintiff's Exhibit 63, your Honor, for identification, 14 duplicate copies.

The Court: All right. [1826]

(The exhibit referred to was marked Plaintiff's Exhibit 63 for identification.)

The Court: Mr. Witness, these reports were taken from the books of Winckler & Smith and represent the income account and balance sheet for the year ending January 31, 1951?

The Witness: They do.

The Court: And the books were kept in the regular course of business?

The Witness: The books were kept in the regular course of business.

The Court: The same procedures, computations, were made as you stated as to the previous account?

The Witness: The accounting was consistent with that of the previous period; yes.

The Court: Operating profit for the year shown as $40,000, includes within it the $10,000 in 62 for the first six months?

The Witness: That is true.

The Court: And then on the liabilities, on the "capital stock and deficit" the stock is still carried at the same amount?

The Witness: That is right.

(Testimony of Robert Hodge.)

The Court: And the deficit figure of $103,000 is picked up, the same as, from——

The Witness: Picked up from the year ended January 31, [1827] 1950.

The Court: And then the resultant figure $178,000 would represent the net worth of the stock, the book value of the stock?

The Witness: The book value of the stock.

The Court: All right.

Q. (By Mr. Dixon): Directing your attention to the item sales on Plaintiff's Exhibit 63, Mr. Hodge, in the amount of $1,715,000 plus, will you state to the jury whether that amount includes any sales from Florida operations of Winckler & Smith?

A. That includes a gross sale of approximately two hundred thirty-six dollars from Florida operations.

The Court: How much?

The Witness: $236,000, approximately.

Q. (By Mr. Dixon): Now, directing your attention to the heading "Selling expenses," Mr. Hodge, during the fiscal year ending January 31, 1951, state to the jury, if you will, whether any items contained under that heading represent, shall we say, an amortization of any promotional expenses or advertising expenses that were actually incurred and paid out by Winckler & Smith during the fiscal year ending January 31st, '51?

A. During the year ended January 31, 1951, Winckler & Smith Citrus Products expended ap-

(Testimony of Robert Hodge.)

proximately $50,000 for an [1828] advertising campaign to promote new products.

Q. What products were those that were contained in that expenditure, if you know?

A. The new products were chiefly—pardon me. I misunderstood your question.

Q. No; that's right.

A. Did you ask for the products or the amounts, the nature of the expenditure?

Q. What products, if you know?

A. Chiefly lemonade and orangeade, and citrus punch, frozen juices, they were the chief items of the new ones.

Q. Will you state to the jury why, from an accounting point of view, the entire amount of that expenditure for the promotion of these new products was not carried under the item "selling expenses" in the income account, Plaintiff's 63?

A. At that time we determined that the $50,000 expenditure would carry the program for two years, even though it had all been spent in the year ended January 31, 1951, it was determined that the program had sufficient merit to advertise the product for two years, so only half of the approximately $50,000 was charged to expense in this year. [1829]

The Court: That is the item Advertising, under selling expense, 24,000?

The Witness: Well, it is in two or three items, your Honor. It is in advertising, sales and traffic salaries and travel.

The Court: All right.

(Testimony of Robert Hodge.)

The Witness: There are three different items.

The Court: The deferred items appearing, then, under Assets, Other Assets——

The Witness: That's right.

The Court: At the bottom of page 2.

The Witness: Yes.

The Court: Where does it appear there?

The Witness: Deferred promotion expense, $24,910.66.

The Court: That is the only item it appears under?

The Witness: That is the only item it appears under in the balance sheet.

The Court: All right.

Q. (By Mr. Dixon): Now, the operating statement or income account, Plaintiff's Exhibit 63, showed a profit for the year of $40,000, plus; correct? A. That is correct.

Q. And if this item had been fully charged off during the year, there would still have been a profit; is that correct? [1830]

A. That is correct. There would have been a profit of approximately $15,000.

Q. Now, directing your attention to the assets part of the balance sheet of Plaintiff's Exhibit 63, I notice an item of $104,000 plus marked Advances by Finance Company. Will you explain to the jury what that item represents?

A. As goods were sold, the invoices were forwarded to a finance company who advanced Winckler & Smith Citrus Products money against these

(Testimony of Robert Hodge.)

billings to their customers. When the amounts were collected, they were remitted directly to the finance company in repayment of these advances.

Q. Can you tell the jury, Mr. Hodge, approximately what the expenses or cost of these financing operations were to Winckler & Smith?

A. In this particular year?

Q. Well, yes, let's takes this particular item or year.

The Court: Before you go into that, let's clear this one matter up. Under assets there is a total there on page 2, current assets, total under accounts receivable, 121,000. Then there is deducted the advances of 104,000, and there is carried over as an asset 16,000, the difference.

The Witness: Yes, sir.

The Court: Now, therefore, since you have subtracted the 104,000 advanced, you have not shown it as a liability under current liabilities; is that [1831] correct?

The Witness: That is true.

The Court: But it could have——

The Witness: It could have been shown as an asset of 121,000 on the assets side, and the current liabilities of 104,000 would be on the other side.

The Court: But since you took it off here, actually the assets you are carrying forward is the differential of 16,000?

The Witness: That is correct.

The Court: You therefore don't show any liabilities for the finance company advances?

(Testimony of Robert Hodge.)

The Witness: That is done because the money collected from customers does not come to the company. It goes direct to the financing company. There wouldn't be anything wrong with showing it the other way. It was just my method of showing it at that time.

The Court: All right, Mr. Dixon.

Mr. Dixon: I believe, Mr. Reporter, I had a question pending.

(Record read.)

The Witness: The financing for the accounts receivable cost the company in the year ended January 31, 1951, $15,412.59.

Mr. Strachan: Mr. Reporter, may I have that, please?

(Record read.)

The Witness: The difference between the finance charges shown on the statement of some 16,000 and the 15,000 figure I [1832] just gave you is represented by interest on notes payable of some 900 odd dollars.

Q. (By Mr. Dixon): Is that what is referred to as factoring of accounts?

A. That is normally called factoring of accounts receivable.

Q. Is that customary, to your knowledge and experience, in companies of this character where the products manufactured are generally seasonal in nature?

(Testimony of Robert Hodge.)

A. I am not familiar with the accounting of any other processor.

Q. All right.

A. Citrus fruit processor.

Q. Now, directing your attention to the fixed assets part of this balance sheet, I notice there is an increase in machinery and equipment from approximately 60,000 plus to 70,000 plus. Does that represent the acquisition of any further new equipment by Winckler & Smith during the fiscal year?

A. That represents the expenditures by Winckler & Smith Citrus Products Company for fixed assets during the fiscal year ended January 31, 1951.

Q. I notice that the lease and option to purchase is still carried on the balance sheet at $1.00.

A. That is true. [1833]

Q. I am not sure we have referred to the unabsorbed preseason expenses carried as an asset of $22,000 plus. Will you state to the jury what that is?

A. That represents the expenditures which would normally be amortized over the full season. The season at this time for navels had just started and the company had expended this amount which had not been expense because the season had not been completed at that time.

Q. I believe you already testified that half of this promotional expense for new products is carried as a deferred promotional expense in the amount of 24,000 plus.

A. That is true.

(Testimony of Robert Hodge.)

Q. As an asset?

A. That has been carried forward.

Q. Now, directing your attention to the liabilities part of the Plaintiff's Exhibit 63, I notice loans payable, secured, $10,000. Is that secured through the finance company for factoring of these accounts that we have referred to previously?

A. No. This is secured under warehouse collateral.

Q. I mean what is that for, can you tell the jury what that loan payable item is and what it represents? A. The $10,000 item?

Q. Yes.

A. The $10,000 item is an advance made by a finance [1834] company which is secured by a collateral agreement on inventories which are stored in public warehouses. It is merely a security of that $10,000 loan. That's all it represents.

Q. I notice an item of $41,000 plus in the unsecured loans payable account. Will you tell the jury, if you can, to whom that amount was owed by Winckler & Smith?

A. There was an unsecured loan of $25,000 to the Bank of America. The balance was an unsecured balance by the company that did the factoring for the company, Merchants Acceptance Company.

The Court: The balance would be what?

The Witness: The balance was $16,190.42.

Q. (By Mr. Dixon): That item, Unsecured Loans Payable, represents the amounts due the Bank of America, an unsecured loan?

(Testimony of Robert Hodge.)

A. That is correct.

Q. And the Merchants Acceptance Corporation on an unsecured loan? A. That is true.

Q. Now, coming to the capital stock and deficit account, will you state to the jury whether there was any increase in the value of the net worth of the corporation as reflected by this item of your statement over the balance sheet for the previous fiscal year ended January 31, 1950?

A. At January 31, 1950, the book value of the stock [1835] was $137,204.87, and January 31, 1951, it was $178,050.40.

The Court: Shouldn't this date be different on the last page there? You say deficit January 31—that should be 1950, should it not?

The Witness: Yes, sir.

Mr. Strachan: Then may we all change those on the face, your Honor?

The Court: Will everybody change that? Do you see what we are looking at on Exhibit 63? That is the last page down there, where it says "Deficit." The first date is January 31, 1951. That should be 1950. The second date is correct, 1950, where it appears the second time, but the first date should be 1950.

Mr. Dixon: Thank you, your Honor.

The Court: We will check the reports later to see that that has been corrected. In other words, that deficit was carried over from the end of the previous year.

The Witness: That's right. [1836]

Mr. Dixon: Plaintiff's Exhibit 63 offered in evidence, your Honor. [1837]

* * *

The Court: All right. Mark the exhibit for identification as 63-A, Mr. Dixon, which will be the notes. They will be marked for identification, and we will have them available if they become material.

Is that satisfactory to everbody?

Mr. Dixon: That is agreeable to me; yes.

Mr. Strachan: That suits me.

As I understand it, your Honor, the document that has been handed by Mr. Dixon to the clerk consists of a complete financial statement prepared by Mr. Hodge's firm, and it contains as exhibits the income account and balance sheet that have been referred to.

Is that correct?

The Witness: That is true. [1838]

Mr. Dixon: That are already in evidence; yes.

Mr. Strachan: And then there is a covering letter, which I suppose are the notes that you refer to?

The Witness: They are the notes.

Mr. Strachan: So my suggestion would be that the complete document be marked 63-A.

The Court: Correct.

You say it contains a financial statement. Which one is it?

Mr. Dixon: The same one. It contains all of 63.

The Court: All of them, or just 63?

The Witness: Just 63.

(Testimony of Robert Hodge.)

Mr. Dixon: Just 63.

The Court: Then 63-A will be the identification number for this document.

(The exhibit referred to was marked Plaintiff's Exhibit 63-A for identification.)

Mr. Strachan: Were there like notes qualifying any of the other balance sheets and income accounts that have been marked, Mr. Hodge?

The Witness: No. These notes referred simply to this particular audit.

Mr. Strachan: I was talking about your Exhibit 60, which was for six months ended July of '49——

The Witness: I am sorry. I misunderstood your question. [1839]

Yes; there were notes at every one of these examinations. There just wasn't the annotation—pardon me, I don't know whether that is the right word—anyway, this qualification was not put on the statement until this year.

The Court: What you mean by that is on the bottom of 63, which is a copy of this financial report that you rendered, there was typed on it "subject to notes," and so forth?

The Witness: That is right.

The Court: And that is why that appears on 63?

The Witness: That is right.

The Court: When you submitted 62 and 61 and 60, on the financial statement there was not typed on the bottom that reference to notes?

The Witness: That is right.

The Court: But there were notes actually——

The Witness: There were notes.

The Court: ——for 60, 61 and 62?

The Witness: Yes; there were.

The Court: You were just making a true copy by putting the word "notes" on 63?

The Witness: There was a reason for it. We wished to call attention to the appraisal that had been made during the course of this audit. [1840]

* * *

The Court: Well, first, we didn't finish up with 63. Is it offered in evidence?

Mr. Dixon: Yes, your Honor.

The Court: 63 received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 63.)

The Court: Now, 64 has been marked for identification.

The Clerk: Yes, your Honor; with 14 duplicate copies.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 64 for identification.)

The Clerk: Shall I pass these out to the jury, your Honor?

The Court: Yes.

ROBERT HODGE

the witness on the stand at the time of recess, having been previously duly sworn, was examined and testified further as follows:

The Court: Mr. Witness, 64 is a copy of the financial report rendered for Winckler & [1842] Smith?

The Witness: It is, your Honor.

The Court: The books were kept in the ordinary course of business?

The Witness: Books in the ordinary course of business; yes, sir.

The Court: Standard accounting practices?

The Witness: Yes, sir.

The Court: Same situation? This is another six months report?

The Witness: Yes, sir.

The Court: Page 1 is the income account, pages 2 and 3 are the assets and liabilities?

The Witness: Yes, sir.

The Court: All right, Mr. Dixon.

Direct Examination
(Resumed)

By Mr. Dixon:

Q. Mr. Hodge, first directing your attention to the item Sales on the income account, Plaintiff's Exhibit 64, I believe the volume of sales contained therein was $367,000 plus for the six months period ending July 31, 1951, is that correct?

A. That is correct.

(Testimony of Robert Hodge.)

Q. Will you state to the jury whether that figure includes any sales on any of the Florida operations of Winckler [1843] & Smith?

A. It does. It includes 156,000 odd dollars in sales of Florida operations.

Mr. Strachan: What was the figure, please?

The Witness: 156,000, approximately.

Q. (By Mr. Dixon): And the balance of approximately 210,000 represents the sales on products processed by Winckler & Smith during that period and sold; is that correct?

A. In California; yes, sir.

Q. You don't mean sold in California?

A. No. I mean processed in California.

Q. By the Winckler & Smith plant at Anaheim.

A. Yes, sir.

Q. The previous figure of the Plaintiff's exhibit for sales which did not include any Florida sales was what amount, Mr. Hodge?

A. You mean for the year ended——

Q. No; for the six months period ending July 31, 1950, Exhibit 62.

A. 708,000.

Q. And that did not include any Florida sales; is that correct? A. That did not. [1844]

Q. Will you tell the jury what the difference is, then, in sales of products processed at the Winckler & Smith plant and sold during the period ending in Exhibit 64 as against the amount processed and sold during the period set forth in Plaintiff's Exhibit 62?

(Testimony of Robert Hodge.)

A. In Exhibit 62 the sales from the Anaheim processing plant operations were $708,000 odd, in the six months ending July 31, 1951, the sales from the Anaheim processing operations were approximately $210,000, a difference of $498,000.

Q. I notice in the Cost of Sales item that you have a figure of $41,000 in brackets; will you explain to the jury what that figure represents?

A. That is the excess of the cost to manufacture the goods over the net amount of sales for the same goods.

The Court: If you were using red and blue ink, that would be a red-ink figure?

The Witness: That would be a red-ink figure.

The Court: It is just that you can't use red ink so you put it in brackets?

The Witness: That is true.

The Court: All right.

Q. (By Mr. Dixon): Directing your attention next to the selling expenses item, you have previously referred in your testimony to an item of some $24,000, which was carried over as a deferred promotional expense in Plaintiff's Exhibit [1845] 63; is that item reflected in any of the items under Selling Expenses in Plaintiff's Exhibit 64?

A. Yes, sir; that $24,000 odd has been charged to selling expenses in the six months ended July 31, 1951.

Q. And is included in what item set forth in Exhibit 64?

(Testimony of Robert Hodge.)

A. It is included in the sales salaries, the advertising and the travel.

Q. And the total amount of $63,000 plus under selling expenses, then, includes that $24,910.66 item carried as a deferred promotional expense asset in Plaintiff's Exhibit 63; is that correct?

A. It does.

Q. Directing your attention to the item $152,000 plus in brackets, will you state to the jury what that is on the income account, Plaintiff's Exhibit 64?

A. That is the net loss from operations during the six months ended July 31, 1951.

Q. Mr. Hodge, based upon your knowledge of the operations of the business of Winckler & Smith, do you have any opinion as to the reason for this loss of $152,000 based upon the operating statement, Plaintiff's Exhibit 64, that you have just discussed?

Mr. Strachan: I will object. I don't think a foundation for his opinion as to the reason for loss has been laid. [1846]

The Court: The question was asked whether he has an opinion based upon the records, the document. Is that the question?

Mr. Dixon: Correct, your Honor.

The Court: The objection is——

Mr. Strachan: Based upon his knowledge of the business. Knowledge of the business, other than what he found in the books, hasn't been disclosed.

The Court: Let's rephrase the question. The objection is sustained. [1847]

Q. (By Mr. Dixon): Based upon the knowledge

(Testimony of Robert Hodge.)

of the operations of Winckler & Smith as determined from the books of that company from which this income account, Plaintiff's Exhibit 64, was prepared and taken, Mr. Hodge, do you have any opinion as to the reason for the $152,000 plus loss for the operating period?

A. Well, the records clearly indicate——

Q. You can answer that yes or no.

A. Yes.

Q. Will you state what that opinion is?

A. The reason is very obvious. There is a decrease of approximately $500,000 worth of sales in the California operations as compared to the same period in the year previous.

Q. What is the comparison—withdraw that.

A. Do you want me to finish?

Q. Yes. I thought you had finished.

A. In the meanwhile the overhead continues on and you do not have any way of absorbing your overhead. I mean you keep your plant open. You have maintenance labor, you have certain salaries that must be paid in order to keep the plant open, and they all continue on and you have no way of absorbing them. So your loss keeps mounting until it gets to some tremendous figure, such as this one.

Q. Directing your attention, Mr. Hodge, to the assets [1848] part of the balance sheet for this period, Plaintiff's Exhibit 64, is there any new item contained therein under fixed assets that was not contained in Plaintiff's Exhibit 63?

A. Yes; there is a very large change. The plant

(Testimony of Robert Hodge.)

has been reacquired under the option that the company formerly held to repurchase it, and the plant was appraised and the appraised value was set up in the books some time prior to the date of this balance sheet.

Q. Referring back for a moment to 63, Plaintiff's Exhibit 63, I believe under fixed assets there the total amount under that description, after providing for depreciation and amortization, was $91,000 plus, whereas the amount now contained in Plaintiff's Exhibit 64 is $721,000 plus. Will you—well, withdraw that.

Now, directing your attention to the liabilities part of Plaintiff's Exhibit 64, can you explain to the jury what this item of 721,000—on the assets side of the balance sheet, and where, if there is any corresponding liabilities provision, that is contained in the liabilities part of the balance sheet of Plaintiff's Exhibit-64?

A. Directly the capital surplus of some 243,000 arose principally from this setting up the assets at an appraised value, and the part of the capital stock issued was issued in payment of the plant, some $150,000—well, that is not quite [1849] right.

Q. I'm sorry. Have you finished?

A. Just a minute. The company issued $150,000 of its preferred—no; it didn't, either. The company issued 26,535 shares of its preferred stock plus $17,325 in cash, and assumed an unpaid balance on the mortgage of $50,499.04, to reacquire these assets,

(Testimony of Robert Hodge.)

so those amounts are all reflected in the liabilities side of the July 31, 1951, balance sheet.

Q. Directing your attention back to 63 and the assets side of the balance sheet for that period ending January 31, 1951, I believe there is an item of Lease and Option to Purchase carried as an asset of $1.00; is that correct? A. True.

Q. That item does not appear on the assets side of the balance sheet for the period ending July 31, 1951, Plaintiff's Exhibit 64, does it?

A. It does not.

Q. Will you state to the jury why that item does not appear on the assets side of the balance sheet for this period, Plaintiff's Exhibit 64?

A. On April 16, 1951, the company exercised this option so that the option no longer was in existence, and that is why it does not appear on the balance sheet of July 31, 1951. [1850]

Q. There is set up, then, on the liabilities side of the balance sheet, Plaintiff's Exhibit 64, this preferred stock which did not appear, did it, in the Plaintiff's Exhibit 63? A. It did not.

Q. And also an increase in the common stock item on the liabilities side of Plaintiff's Exhibit 64, which was not on Plaintiff's Exhibit 63, the liabilities side; is that correct? A. That is true.

Q. Can you state to the jury briefly whether any additional stock had been issued by Winckler & Smith during this period from the statement, Plaintiff's Exhibit 63, for the period ending January 31, 1951, and the period ending July 31, 1951, Plaintif's Exhibit 64?

A. You are speaking of common stock or the preferred?

Q. Both.

A. The common stock, the company was issued 315,110 shares of its $1.00 par value common stock in exchange for the 1,000 shares no par value common stock which was carried in the balance sheet of January 31, 1951. It did issue 32,995 shares of preferred stock during the six months ended July 31, 1951. [1851]

Q. I hand you Plaintiff's Exhibit 39, the same being a prospectus and permit of the Department of Investment, Division of Corporations of the State of California, in the matter of the application of Winckler & Smith, whereby Winckler & Smith was authorized to issue some additional stock; can you state to the jury whether the stock that you have just referred to as being the preferred stock and some of the common stock carried in the capital stock and surplus account, under the liabilities section of Plaintiff's Exhibit 64, represents some of the stock issued pursuant to the permit I have just mentioned?

A. Pardon me a moment.

I am not certain that the common stock and the preferred stock were authorized to be issued under the same permit. The permit covering the sale of the preferred stock is certainly——

Q. In any event——

(Testimony of Robert Hodge.)

A. There may have been two permits I don't remember, and I can't quite gather from my notes whether there were.

Q. Now, I notice the item capital surplus down there of $343,000 plus, on the liabilities part of Plaintiff's 64; did that item appear in the previous balance sheet or in the comparable amount Plaintiff's Exhibit 63? A. It did not.

Q. Will you explain to the jury how this item appears [1852] in this statement and how it happens to be there, if it didn't appear in the previous statement, Plaintiff's Exhibit 63?

A. Well, the capital surplus arose chiefly from putting the fixed assets on the books at an appraised value.

Q. Is that the appraisal, if you recall, made by the Union Appraisal Company in 1950 and '51?

A. This was based on the appraisal made as of January 12, 1951, by the Union Appraisal Company. I believe there was a previous appraisal which was referred to in this appraisal.

Q. The appraisal that you are referring to, Mr. Hodge, is Plaintiff's Exhibit 51, is it?

I am handing you Plaintiff's Exhibit 51 and will ask you to examine the same and then answer the question if you can.

A. Yes, sir; it is.

Q. Now, Mr. Hodge, directing your attention to the item under the liabilities part of 64, "Unsecured loans payable," an item of some $30,000 plus, would

(Testimony of Robert Hodge.)

you state to the jury to whom that amount was owing or owed to by Winckler & Smith?

A. $25,000 was an unsecured loan payable to the Bank of America.

Q. Is that the loan you previously referred to or discussed, I believe, in Exhibit 63?

A. It was a renewal thereof; yes. The balance was—$2125.02 was due to the Fiberboard Products on an unsecured note, and $2,892.28 was due to the Lehman Printing Company [1853] on two unsecured notes.

Q. Now, I also notice an item that appears for the first time in the liabilities in any of the balance sheets we have previously referred to, namely, a mortgage which has been secured by a lien on fixed assets, $50,000 plus. Will you state to the jury what that item is and to whom it was owed?

A. That item represents the unpaid balance on the RFC mortgage which was assumed at the time the company exercised its option to repurchase the plant.

Q. Can you state to the jury why that is carried as an account under the current liabilities of Winckler & Smith?

A. The loan matured on February 1, 1952, which is less than a year, and customary accounting practice requires any liability maturing in less than a year to be classified as a current liability.

Q. Now, state to the jury, if you will, Mr. Hodge, whether there is any increase in the operating deficit of Winckler & Smith as appears from the liabilities

(Testimony of Robert Hodge.)

section of Plaintiff's Exhibit 64 as compared with the liabilities section of Plaintiff's Exhibit 63?

A. In my report there was another statement which you do not have in this exhibit called Operating Deficit. It was the statement of the operating deficit. Do you wish me to read that? [1854]

Q. Yes. I am asking you to explain the increase in——

Mr. Strachan: Before the document is read, which hasn't been identified, I would like to see what it is, your Honor.

The Court: Yes; you may. I take it you have had all these reports, but you want to refresh your recollection on which one he was referring to?

Mr. Strachan: I don't think we have ever seen this particular one.

The Witness: This page is not in the exhibit, your Honor, of the report.

Mr. Strachan: I should think it should go in, but I think it should go in as a documentary exhibit so it could be interpreted in relation to the others.

Mr. Dixon: I have no objection to it going in, your Honor, but if this witness can explain it, I don't think it is necessary to further encumber the record, but if counsel wants it in we can put it in.

The Court: If you ask the witness to read from it, we will put it in. If the witness answers the question without reading, then anybody can put it in that wants to. It will be marked, however. We will mark it 64-A for identification. Are you going to

(Testimony of Robert Hodge.)

read from it or do you want to give an explanation without reading from it?

The Witness: I will do anything that is wanted, either [1855] way. I am not familiar with the processes of law.

Q. (By Mr. Dixon): Can you answer the question?

A. I can answer it briefly without referring to this.

Q. All right.

A. We started out with, say, a $62,000 deficit. There was a slight transfer of some $70,000 of this deficit to the capital surplus for items that had been in the operating deficit before, but which were now transferred over to the capital surplus item, and the difference of some $140,000 arose from the loss during the period, $148,000 loss during the period, which brought the deficit from 62,000 to [1856] 201,000.

* * *

The Court: 64 received in evidence. [1857]

* * *

The Court: Mr. Witness, Exhibit 65 is a copy of the report made by you?

The Witness: I don't have a copy yet.

The Court: Do you have one for the witness?

(Document handed to the witness.)

The Court: This is a copy of the report made by you to the company?

The Witness: It is not a complete copy in that it doesn't have the summary of the operating deficit.

(Testimony of Robert Hodge.)

The Court: It is a copy of the income account and the assets and liabilities?

The Witness: It is.

The Court: Kept in the regular course of business?

The Witness: Kept in the regular course of business.

The Court: Go ahead, Mr. Dixon.

Q. (By Mr. Dixon): Directing your attention, Mr. Hodge, to the amount or the item, Sales, on Plaintiff's 65 for the year ending January 31, 1952, in the amount of $670,000 plus, will you state to the jury whether that includes any sales on the Florida operations during that year ending January 31st, '52? A. It does.

Q. Can you tell the jury what the approximate amount of those sales were?

A. It includes $156,000 plus worth of sales [1858] from Florida operations.

Q. Based upon those figures for Florida sales, what were the total sales of Winckler & Smith for the fiscal year ending January 31st, '52, on products processed by it during that fiscal year at its Anaheim plant, and sold?

A. I have a figure here of 14,000 odd for sales allowances, which I cannot readily segregate between California and Florida. Ignoring that, there was $528,735.91 of sales from the California operations.

Q. By referring to Plaintiff's 63, and the operating statement therein, particularly the sales item on

(Testimony of Robert Hodge.)

the income account for that fiscal year ending January 31st, 1951, can you state to the jury what the difference is in dollar volume of sales, as indicated by Plaintiff's Exhibit 65 for the year ending January 31, 1952, and Plaintiff's Exhibit 63 for the fiscal year ending January 31, 1951, with reference to those products processed and sold at the Winckler & Smith Anaheim plant here in California?

That is a long question.

A. The sales from the Anaheim plant processing in the year ended January 31, 1952, were substantially one million dollars less than they were in the previous year.

Q. Now, directing your attention to the item, Selling Expenses, on Plaintiff's 65, you have previously referred to a deferred asset carry-over from the previous year for [1859] sales promotion of special products or new products of Winckler & Smith; is that item reflected in any way in the selling expenses item on Plaintiff's 65?

A. It is.

Q. Where is that item referred to or included, Mr. Hodge?

A. That item is included in the sales, advertising and travel expenses for the year ended January 31, 1592.

The Court: By that you mean it doesn't make up the total of those items as shown, but it is part of those items?

The Witness: It is part of those three items.

(Testimony of Robert Hodge.)

The Court: What it is, about a $24,000 figure?

The Witness: Practically a $25,000 figure.

The Court: And makes up part——

The Witness: Part of these three figures.

The Court: Shown on 65?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Dixon): Under administrative expenses, Mr. Hodge, I notice one item of 13,000 plus for professional fees; will you state to the jury what that item includes?

A. Yes. That is the expense for the year for legal and accounting fees, primarily.

Q. Going back to the sales item, I notice there is a figure in brackets of $10,000 plus under the income statement 65; will you state what that figure represents? [1860]

A. I am sorry. I didn't catch the first part of your question.

The Court: The figure in brackets between Sales and Cost of Sales.

The Witness: The amount of $10,144.46 represents the excess of the cost of manufacturing and packaging the sales that were made to customers in the year ended January 31, 1952.

Q. (By Mr. Dixon): And the income account on Plaintiff's 65 indicates what, with reference to the profit or loss of operations by Winckler & Smith during the fiscal year ending January 31, 1952?

A. The income account for the year ended January 31, 1952, shows a loss for the period of $184,523.20.

(Testimony of Robert Hodge.)

Q. Now, based upon your knowledge of the books and items reflected therein, and from which this statement, Plaintiff's Exhibit 65, an income account statement showing such loss of $184,000 plus was prepared, do you have an opinion, Mr. Hodge, as to the reason for that loss?

Mr. Strachan: I make the same objection that I made to the similar question that was asked with respect to Exhibit 64, on the same ground.

The Court: Overruled. It is limited to the financial records.

You may answer yes or no, do you have an opinion?

The Witness: Yes, sir; I have an opinion. [1861]

Q. (By Mr. Dixon): Will you state to the jury what that opinion is?

A. The reason is that there is a million dollars in less sales in the California operations in the year ended January 31, 1952, over the previous year. Without sales, your plant keeps on going. You have operating expenses to pay. Even if you don't produce any fruit at all, you have operating expenses to pay, and it just gets to some very large figures if you don't have the sales to absorb these overhead items.

Q. Now, directing your attention to the liabilities part of the balance sheet, Plaintiff's Exhibit 65, Mr. Hodge, I notice that there is a new item which appears, apparently for the first time, on the liabilities side of the balance sheet in the amount of $57,000 plus.

(Testimony of Robert Hodge.)

The Court: Under notes payable secured by second trust deed on fixed assets is that what you are referring to?

Mr. Dixon: Yes, your Honor.

Q. Will you explain to the jury what that item represents?

A. That item represents the amount owed on funds that were raised which were secured by a lien, a second lien on the fixed assets of the company.

The Court: Who was that loan from, do you know?

The Witness: That was from Mr. Parvin, one of the [1862] stockholders.

Q. (By Mr. Dixon): I am not sure that the jury heard your answer. Will you tell the jury who Mr. Parvin was?

A. Mr. Parvin was one of the stockholders.

Q. And the second trust deed referred to under the liabilities section of 65, will you explain to the jury what relation that bore to the first trust deed, so-called, to the RFC in the amount of $50,000 plus, which also appears on Plaintiff's Exhibit 65 in the liabilities part thereof? A. Well, any——

The Court: Keep your voice up.

The Witness: Any second trust deed is secondary to the first trust deed in that if the property were sold and there were insufficient proceeds to satisfy the holder of the first trust deed, the second trust deed holder would realize nothing on his loan on the property.

(Testimony of Robert Hodge.)

The Court: Well, was that second on the land and buildings, for one thing?

The Witness: Yes. It was on all fixed assets.

The Court: Was it on the same fixed assets that the RFC first trust deed was on?

The Witness: Yes; it was.

Mr. Dixon: I offer 65 in evidence, your Honor.

The Court: 65 received in evidence. [1863]

* * *

Q. (By Mr. Dixon): Mr. Hodge, have you examined at my request the agreement between Silzle and Exchange Orange dated September 10, 1951, Plaintiff's Exhibit 25? A. I have.

Q. And you are familiar with the various figures and items contained therein with reference to certain prices and other allowances referred to in said contract? A. I am.

Q. Have you also examined certain statistical information and other data contained in Plaintiff's Exhibit 11 covering the amounts of oranges delivered under this contract to Silzle, the amounts processed, the gallonage of single-strength juice processed, the total cases of single-strength juice processed, the amount in actual dollars paid—Silzle paid Exchange Orange for fruit supplied and processed, the amounts allowed for manufacturing costs to Silzle, the amounts made available to Silzle under label allowances under the contract, and computed the amounts allowed for various other items referred to on Plaintiff's Exhibit 66—have you done that, Mr. Hodge? A. I am, and I have.

Q. By referring to Plaintiff's 66 and considering

(Testimony of Robert Hodge.)

those items referred to therein as contained in Plaintiff's Exhibit 11, and the other items and provisions of Plaintiff's Exhibit [1866] 25, Plaintiff's Exhibit 25 being the Silzle-Exchange Orange contract before referred to, can you state to the jury the actual amount per ton paid by Silzle to Exchange Orange or Sunkist for the total number of cases processed of single-strength juice—processed by Silzle—from the tons of Valencia oranges delivered to Silzle by Exchange Orange under that contract?

A. Do you want to read that back to me?

Mr. Strachan: Your Honor, it seems to me that he is calling for a conclusion.

The Court: You are making it unduly complicated. And, secondly, you didn't mention the fact that the witness, as I read the exhibits, is also taking into account oral testimony of Finley. It seems to me that all you need do is to lay a foundation and allow cross-examination on the balance of it.

Wouldn't that be satisfactory?

Mr. Strachan: Whether it would or not, I rather expected when I first saw this, that he would take it step by step through this.

It may be clear to some what he has done, but it wasn't entirely clear to me.

The Court: Well, Mr. Witness, by Exhibit 66 for identification were you trying to make a calculation, shown as the very last item on the exhibit, page 3, namely, what in your opinion, based upon the factors that you have available, was [1867] the amount actually paid by Silzle per ton for the oranges it got under the contract and processed?

The Witness: Yes, sir.

The Court: That is what you are trying to do?

The Witness: Yes, sir.

The Court: And the last figure $12.59 a ton was the figure you arrived at?

The Witness: That is the amount paid for fruit. Now, there is another figure at the bottom of page 2, which also has to be taken into consideration, because that is the amount per ton Sunkist obtained for oil and peel. So the sum of the two figures, $12.59 a ton, plus $3.76 a ton, would be the total amount that Sunkist or Exchange Orange Products received for the fruit from Silzle under this contract.

The Court: That is what Sunkist received?

The Witness: Yes.

The Court: What is the figure that Silzle paid? Is it the $12.59, or is it the total of the two figures?

The Witness: Well, they paid them so much for the fruit, and they also gave them the peel and oil, so you have to take the two together to say what was actually paid for the fruit itself. In other words, they paid so much in cash and then also turned the oil and peel over under the contract.

The Court: Do we understand the same thing? Two things [1868] are being asked. One, what Sunkist got for their oranges that went to Silzle under the processing contract. They got the total of——

(Testimony of Robert Hodge.)

The Witness: $12.59 in cash, plus the oil and the peel.

The Court: $3.76?

The Witness: Which I have valued at $3.76.

The Court: Is that the same figure that Silzle, according to your computations, paid for the oranges—that Silzle was out of pocket for the oranges?

The Witness: That is the figure, according to my computations, Silzle would have paid for the fruit under the contract.

The Court: In making 66, are all the items that you have in there based upon some part of the record of this case, either an exhibit that has been received in evidence, or the testimony of a witness that appears in the transcript as written up?

The Witness: I have not seen any of the testimony, your Honor. This is based on these two exhibits, Exhibit 25 and Exhibit 11. [1869]

The Court: Well, you have a reference to Finley's testimony?

The Witness: Well, that is merely a note that was put in there.

The Court: You have been informed——

The Witness: I have been informed.

The Court: ——that Finley so testified in the transcript.

The Witness: That's right, but I didn't——

The Court: But you didn't read it yourself?

The Witness: That's right.

The Court: I don't think it makes a lot of difference who does it, but certainly this jury is entitled to have somebody go through this and explain how this was done step by step. It can be done either on direct or it can be done on cross. I don't care who does it, but somebody will have to do it, or the court will, before we get through.

Mr. Strachan: I would rather have the court or Mr. Dixon do it, because I think Mr. Dixon was in on the planning of the thing and he is probably in better position than I am.

The Court: Do you want to go through this, Mr. Dixon?

Mr. Dixon: I think in the interest of time, your Honor, the court can do it, if you care to do so. I can ask questions and am glad to do so, except obviously I would have——

Mr. Strachan: It seems to me you could just ask the witness [1870] to tell us what he did.

The Court: Let's follow along rather rapidly and see if we can get to some point. Start on the first page.

Item 1, Net Tons of Valencia Oranges Processed by Silzle. That figure is quoted from Exhibit 11.

The Witness: From Exhibit 11, that's right, sir.

The Court: Then in gallons, that comes from subdivision "f" of Exhibit 11.

The Witness: That's right, sir.

The Court: And cases, converting it to cases, comes from subdivision "b"?

The Witness: Yes, sir.

(Testimony of Robert Hodge.)

The Court: So those three figures mean the same thing, stated different ways.

The Witness: That's right.

The Court: Stated in tons, in gallons and cases.

The Witness: That's right.

The Court: Now, then, the next is dollars Silzle paid to seller, Exchange Orange, for the fruit. That comes from subdivision "g"?

The Witness: Yes, sir.

The Court: Now, 5 is the manufacturing cost specified in this Silzle agreement at the rate set forth therein. This 5 is the amount under the contract that Silzle was paid for processing these oranges? [1871]

The Witness: Yes, sir.

The Court: I think to understand this you have to remember, ladies and gentlemen, that the Silzle contract first provided that Silzle would process these oranges for—was it Exchange Orange or Sunkist?

Mr. Fisher: Exchange Orange.

The Court: Exchange Orange, at a certain cost plus some reasonable profit. Title to the oranges and title to the cases of goods, of canned juice, remained in Exchange Orange. The agreement also had a provision whereby Silzle could then buy the cases from Exchange Orange at a certain figure.

And then I take it, Mr. Witness, that 5 is your computation as to the total allowance to Silzle for processing these goods?

The Witness: Yes, sir.

The Court: Well, 6, then, is the total, I take it?

(Testimony of Robert Hodge.)

The Witness: Is the total, that's right.

The Court: The total of 4 and 5?

The Witness: That's right.

The Court: Then in 7 you computed the various allowances, label, advertising, and the trucking?

The Witness: Yes, sir.

The Court: And arrived at a $26,000 figure?

The Witness: Yes, sir. [1872]

The Court: Now, over on the next page, you then have added together what came out of 4, 5 and 7. 6 is merely a total of 4 and 5.

The Witness: Yes, sir.

The Court: So you took the items from 4, 5 and 7, and added them together to make this total of $333,000?

The Witness: Yes, sir.

The Court: Why did you add them together?

The Witness: Because we knew that item, we knew that that item was 87½ per cent of the total sales price for the canned juices. Silzle was to be allowed 12½ per cent for sales, brokerage and profit. So we knew that the $333,000 represented 87½ per cent of the sales prices of the juices.

The Court: Well, so, therefore, you figured that is still part of 8 down there where it says Total Sales Price for Canned Juices is the 380,000?

The Witness: Yes, sir.

The Court: And the figure above it of 333,000 is the total sales price less the 12½ per cent.

The Witness: That is the amount of allowances, the amount of processing costs and the amount to

(Testimony of Robert Hodge.)

be paid under item 4, which we took from the agreement. We knew those figures and we knew that figure represented 87½ per cent of the total sales price, so from that figure we make the [1873] computation and arrive at the total sales price of some $380,000.

The Court: The 12½ per cent is item 9, which equals 47,000?

The Witness: Yes.

The Court: If you added the 333 to the 47, you would get 380?

The Witness: That's right, sir.

The Court: Then in 10 you computed oil and peel produced by Silzle from these oranges?

The Witness: Right.

The Court: This oil and peel belonged to Sunkist, is that right?

The Witness: Yes, sir.

The Court: Then your computation down at the bottom of 10 is the net amount Sunkist obtained for oil and peel?

The Witness: Yes, sir.

The Court: 27,000.

The Witness: Yes, sir.

The Court: Then based on Finley's testimony you computed the average amount per ton that Sunkist obtained for the oil and peel?

The Witness: That's right, sir.

The Court: $3.76?

The Witness: No. The average amount per ton is based [1874] on the $27,110.06 divided by 7,000

(Testimony of Robert Hodge.)

odd tons. That Finley note is just a note in there for the part of the testimony. It has nothing to do with the computation.

The Court: Then actually your computation was based on the 27,000 figure, $27,110.06 divided by 7,000 some tons, which was the total number of tons shown in the very beginning of the exhibit?

The Witness: Yes, sir.

The Court: Then in 11 you took the total tons processed under the contract, right?

The Witness: Yes, sir. Divided the total sales price by the number of tons and arrived at the sales price per ton.

The Court: Which figured $52.85 per ton?

The Witness: Yes, sir.

The Court: Then you took certain deductions which are listed as (b), (c) and (d)?

The Witness: Yes, sir.

The Court: You say under (b) manufacturing cost (item 5) per ton to allow—it must be to be allowed to Silzle.

The Witness: It was allowed. The "to" shouldn't be there.

The Court: "but not paid."

The Witness: Yes.

The Court: At certain rates and you get $29.93 a ton? [1875]

The Witness: Yes, sir.

The Court: When you say allowed and not paid, you mean that there was a bookkeeping transaction between Silzle and Exchange Orange on this matter?

(Testimony of Robert Hodge.)

The Witness: According to the excerpt I have from the agreement—I call it agreement—the compilations and tables, this amount was not paid. It was merely allowed to them. [1876]

The Court: In other words, Silzle originally, under the contract, one part of the contract, was to be paid a certain amount for processing the goods?

The Witness: That's right.

The Court: Which would have meant that Silzle had money coming?

The Witness: Right.

The Court: Then when Silzle bought the cases, Silzle owed money back to Exchange Orange?

The Witness: That is right.

The Court: So instead of sending their checks back and forth, they crossed off the items?

The Witness: They merely allowed—offset one against the other.

The Court: So the $29.93 then is your computation of what Silzle was entitled to per ton for doing this processing?

The Witness: That is right, sir.

The Court: Now, what is (c)?

The Witness: (c) are the allowances set forth under 7 for label allowance, advertising allowance, and trucking allowance under the purchasing agreement.

The Court: Which were deductions that Silzle then got from the price he paid for the goods?

The Witness: That's right, they were allowed over and above the processing charge. [1877]

(Testimony of Robert Hodge.)

The Court: Then (d) are the sales expenses and so forth, the 12½ per cent item?

The Witness: Yes.

The Court: Figured out per ton?

The Witness: Per ton.

The Court: Then your total that appears, "Total Manufacturing Cost, Allowances and Sales Expense, Brokerage and Profit," was what you computed to be the credit that Silzle had per ton, against the $52.85 per ton sales price?

The Witness: $52.85, that is right, sir.

The Court: Then you finally arrive at (e), which would be the additional amount paid by Silzle to, you say Sunkist—Exchange Orange, I suppose?

The Witness: Yes.

The Court: ——per ton over and above his credit?

The Witness: Over and above his credit, which represents the price of the fruit paid per ton.

Mr. Strachan: May I ask a preliminary question there, your Honor?

The Court: Yes.

Mr. Strachan: You have that $12.59, which you just said was the price paid for the fruit. I thought earlier you said what Sunkist got in total for the fruit was that $12.59, plus the peel and peel products, which was $3.76?

The Witness: Yes, under the contract Silzle was to pay [1878] so much for the fruit and turn over the oil and the peel. So you should add the $3.76 to

(Testimony of Robert Hodge.)

the $12.59 for the total amount that Sunkist got for the fruit.

Mr. Strachan: Would it be correct to say that the $12.59 alone is not the price for the fruit, but is the price that was realized by Sunkist for the juice portion of the fruit, which was retained by Silzle?

The Witness: Yes, I think that would be correct to state it that way.

The Court: I think I can straighten out what the witness means on this.

As Mr. Strachan has pointed out, the $12.59 under this witness' computations is what Silzle would have been paying, and what Exchange Orange would have been getting for the juice.

Mr. Strachan: That is right.

The Court: But if Silzle had gone out and bought oranges on the market, Silzle would also have had a peel and an oil, is that right?

The Witness: That is true.

The Court: And, therefore, you must calculate the peel and the oil, which Silzle didn't get—it gave back this peel and oil to Sunkist—therefore you have to calculate the peel and the oil to show what Sunkist was getting——

Mr. Strachan: For the whole orange.

The Court: ——for the whole orange. [1879]

Mr. Strachan: Right.

The Court: All right.

We will work on this a while.

Let me point out another issue as we go along. The defendants have a contention here that should be called to your attention. I have called attention to these contentions. The defendants say that you can't make this kind of a comparison. The defendants say that the selling of product fruit at so much per ton is one thing, the processing contract is another, and that you should not make this kind of a comparison between what you pay for processing fruit and what you might calculate would be the result from a processing contract.

Is that right?

Mr. Strachan: Yes, sir.

The Court: So when Mr. Strachan sits here and is agreeable, that doesn't mean that he is agreeing that he thinks this is the way you can compute this.

Does that state your position?

Mr. Strachan: I think it does, your Honor, yes. [1880]

* * *

Q. (By Mr. Dixon): Mr. Hodge, directing your attention to Plaintiff's Exhibit 66, by referring thereto can you state to the jury, based upon the computations referred to in 66, what the actual amount paid by Silzle to Sunkist or Exchange Orange per ton for the number of cases processed by Silzle from the tonnage delivered to Silzle by Exchange Orange under the contract would be per ton?

A. Paid for what? I don't quite follow you. I'm sorry.

The Court: Per ton of oranges.

The Witness: For the fruit?

(Testimony of Robert Hodge.)

Q. (By Mr. Dixon): Yes, based upon the number of cases actually processed under the contract, converted into tons, without taking into consideration the peel and oil.

Mr. Strachan: I don't think that's a fair question in the light of the witness' previous testimony, that it was a combination of the two that paid for the fruit, and that the one paid only for the juice component and the peel was paid for in kind.

The Court: The question is only part of the problem. [1881]

Mr. Dixon: That's right.

The Court: The objection is overruled.

Mr. Dixon: That's the first question.

The Witness: They would have paid the amount actually paid—well, no, it isn't actually paid, either, because there are bookkeeping transactions there.

The Jury: We can't hear.

The Witness: I am sorry, The amount actually paid for the whole fruit, according to my computations, would have been $16.35 a ton. Is that your question?

The Court: And they have been permitted to keep the peel and oil?

The Witness: That's right.

Q. (By Mr. Dixon): Now, can you state to the jury what the amount received by Exchange Orange for the peel and oil under this contract with Silzle was per ton?

A. Sunkist or Exchange Orange, rather, received $3.76 a ton for the oil and peel under this contract.

(Testimony of Robert Hodge.)

Q. And the amount remaining, or $12.59, then, would represent what?

A. Would be the amount paid for the juice part of the fruit.

Mr. Dixon: The plaintiff offers 66 in evidence, your Honor, for the sole and only purpose of indicating the basis of the computations contained therein as determined by the [1882] testimony of this witness, and not as any other evidence, or not as evidence.

The Court: Well, it will be received for that purpose, but I think there should be added to it, after the last item, if this doesn't violate the witness' computations, for juice $12.59, and then on another line, received by Exchange Orange, oil and peel, $3.76, and then total the two together. Would that violate you——

The Witness: No, and then the total paid for the whole fruit.

The Court: Whole fruit.

The Witness: $16.35, yes, sir.

The Court: That can be done later. 66 is received in evidence for a limited purpose.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 66.)

The Court: 66 is not like another exhibit. It is not like the Silzle contract. It is not like the exhibits you heard about of the permit from the Corporation

Commissioner, or not like books or records or copies of them. This is illustrative only.

All right. [1883]

* * *

The Court: Pass out Exhibit 67.

Exhibit 67, ladies and gentlemen of the jury, if and when offered and received, is another one of these illustrative exhibits.

Mr. Witness, have you done the same thing and made a computation based on the TreeSweet contract, which was Plaintiff's Exhibit 20, and on the compilation and tables, Plaintiff's Exhibit 11?

The Witness: I have.

The Court: You have done it in much the same fashion as you did 66?

The Witness: Yes, they follow along.

The Court: So that items 1, 2 and 3 are items which in your opinion reflect the same thing, expressed in different terms, the first item being tons, the second item being gallons, and the third item being cases?

The Witness: Yes.

The Court: Then you followed through with the amount [1884] that would be paid for the processing, if it had actually been paid by check, but which was also handled as a bookkeeping entry in the final windup?

The Witness: Yes, sir.

The Court: And you went ahead with the label allowances. I notice one big difference, and that is the amount at the bottom of page 2 which Sunkist

(Testimony of Robert Hodge.)

obtained for oil and peel. By Sunkist there, I suppose you mean Exchange Orange?

The Witness: Yes, sir.

The Court: It was a larger amount per ton than in the Silzle matter.

The Witness: The oil had a much greater yield from the fruit that TreeSweet was furnished over the fruit that was furnished to Silzle. The yield per ton was much greater.

The Court: I think we have had testimony on something like that, have we not?

Mr. Dixon: Yes.

The Court: That the TreeSweet plant was more efficient in the oil recovered?

Mr. Strachan: It was more effective in recovering the oil, yes, sir.

The Court: Than the Silzle plant was?

Mr. Strachan: Yes, sir.

The Court: Then you have done the same thing in your final computation on item 12. The first item would be the [1885] gross per ton for oranges that TreeSweet would have had to pay if they hadn't had some credits, but they had credits for processing, labeling, advertising, a 15 per cent discount, and you arrived then, finally, at the $14.29 figure, which is the amount that it would have cost TreeSweet, and the amount obtainable by Exchange Orange for the juice?

The Witness: Right.

The Court: And since if TreeSweet had gone out

(Testimony of Robert Hodge.)

and bought oranges to do their processing, Tree-Sweet would then have owned the oil and the peel?

The Witness: That is right, sir.

The Court: So there should be added, then, for purpose of comparison, the $10.81 at the bottom of page 2 to the $14.29?

The Witness: Yes, sir.

The Court: And the total figure would be what you would think would be a comparison figure for the proceeds from the whole fruit, oil, peel and juice?

The Witness: Yes, sir.

The Court: Will you also correct 67 in the same manner that I indicated to correct 66?

Mr. Dixon: Yes, sir.

The Court: Again, all the items in here are based upon matters in the record of this case, the exhibits that have been received in evidence? [1886]

The Witness: Yes, sir.

The Court: I don't notice here, even, any note——

The Witness: Yes, at the top of page 3 there is a note that I have not read or know anything about.

The Court: There is a note there, again, as to Finley's testimony, which you obtained by representations of counsel that that is in the record?

The Witness: Yes, sir.

The Court: But you didn't include those in your computations?

The Witness: No, sir. That is merely a memo.

The Court: You made your computations on the other figures?

The Witness: Yes, sir.

Mr. Dixon: Your Honor, we offer Plaintiff's Exhibit 67 in evidence as an exhibit for the sole and only purpose of indicating the manner and method by which this witness arrived at the figure of $14.29 per ton, as reflected in item 12(f), and the figure of $10.81 per ton as reflected in item 11, the total items adding up to $25.10 per ton as being the cost that would have been paid for the fruit processed by TreeSweet under its contract, had it been purchased from Exchange Orange.

The Court: Received in evidence, but for the limited illustrative purpose, and not evidence in itself. [1887]

* * *

The Court: Before the question, let me also say that Mr. Strachan's position as to 67 is the same as to 66; that he does not concede that this type of comparison may be made, and by his silence he is not conceding this.

He can't argue his case now, he has to wait until the evidence is all in, but I think that is his position, the same as to both contracts.

Mr. Strachan: That is correct, your Honor.

The Court: Now go ahead.

Q. (By Mr. Dixon): Mr. Hodge, based upon your knowledge of the operations of Winckler & Smith for the years '49 and '50, and the records made available to you by Winckler & Smith con-

(Testimony of Robert Hodge.)

cerning the cost to Winckler & Smith for processing a ton of Valencia oranges into single-strength Valencia juice, and assuming for the purpose of my question that 15,000 tons of Valencia oranges would have been available or made available to Winckler & Smith for processing into single-strength juice under the same terms and provisions as are contained in the TreeSweet-Exchange Orange contract referred to in Plaintiff's 67, do you have an opinion as to the profit, if any, which Winckler & Smith would have made on such an [1888] operation?

A. I do.

Q. Will you state what the profit, if any, would have been under those circumstances that I have just stated?

Mr. Strachan: Your Honor, I think in order to test the adequacy of the basis for the opinion it might be well to have him tell us what data he used and how he made his computations, so that on an objection you could determine the admissibility of the opinion.

The Court: Yes. I am going to instruct you later as to opinion testimony, a formal instruction, that any witness who is skilled in a trade or art or craft may give an opinion, and he may give reasons upon which he bases his opinion, and the opinion is only as good as the reasons.

If you think the reasons aren't good, you may disregard the opinion or give it such weight as you may think it is entitled to.

In other words, the opinion of a witness is admissible in evidence, but it is to be tested by the basis of the opinion.

To give you a crude example: Supposing a man got up here and was asked his opinion, he had been qualified as an expert—this man, of course, has been qualified as a CPA—and he gave an opinion on some matter, and then he was asked what his reason was, and he said, "I went home last [1889] night and looked in the crystal ball, and that is the answer I got"—well, I would probably apprehend that that could go in evidence, but I would likewise apprehend that most of you would chuck that opinion out the window as having no basis, except the crystal ball on which it was based.

I want to hear this question again, Mr. Dixon, before it is answered.

Mr. Dixon: My first question is if he has an opinion, then if he has I will ask for his opinion and have him explain it.

The Court: But the long question you asked. I was making a note on another matter and I don't know whether I got it all.

Read it, Mr. Reporter.

(The following portion of the question referred to was read by the reporter: "Mr. Hodge, based upon your knowledge of the operations of Winckler & Smith for the years '49 and '50, and the records made available to you by Winckler & Smith concerning the cost to Winckler & Smith for processing a ton of

Valencia oranges into single-strength Valencia juice"——)

The Court: The first part of your question, "upon your knowledge of the operations"; this question has to be based upon the books, and maybe that is what you meant. [1890]

Mr. Dixon: Yes, that is what I did mean.

The Court: But not anything else.

This witness has not been qualified about knowing anything about making juice out of fruit. So I think you had better ask the question again. [1891]

Q. (By Mr. Dixon): Based upon the figures and any other data available to you from the books of Winckler & Smith for the years 1949 and 1950 concerning and relating to the cost to Winckler & Smith of processing a ton of Valencia oranges into single-strength Valencia juice, and assuming, Mr. Hodge, that in 1951, based upon the records of Winckler & Smith for the years 1949 and 1950 that I have just referred to, that Winckler & Smith would have had made available to it, let us say, 12,000 tons of Valencia oranges for processing into single-strength juice under the same terms and conditions and arrangements as are set forth in the TreeSweet contract referred to in Plaintiff's Exhibit 67—taking all of those things into consideration, do you have an opinion as to whether Winckler & Smith would have processed or operated through processing the 12,000 tons of Valencia oranges on the same basis at a profit during the year 1951?

(Testimony of Robert Hodge.)

Mr. Strachan: May it please the court, on the substance of the matter I object on the ground that there is in the record no legal or factual basis to support the assumption there was any obligation on the part of the defendants here to enter into an arrangement with Winckler & Smith or any other person to furnish oranges on the same terms they furnished to TreeSweet.

Furthermore, I don't think that the question—well, this is just a question of whether he has an opinion, and I [1892] think whether he has an opinion one way or the other is immaterial.

The Court: Objection overruled. The question is now worded so it didn't tie down where the 12,000 tons would come from, and that is an issue in the case. Your objection as to whether there was an obligation raises an issue in the case which can be solved only by the court's instructions.

Mr. Strachan: That is correct.

The Court: And considerable argument by counsel.

Mr. Strachan: That's right.

The Court: But the particular question didn't tie the 12,000 tons to any supplier. I am still worried about the last part of the question, whether you said processing those 12,000 tons at a profit, whether Winckler & Smith would process those at a profit, or whether the question was whether Winckler & Smith on the basis of their books and records, after processing the 12,000 tons, would have made a profit instead of a loss.

(Testimony of Robert Hodge.)

Mr. Dixon: That was my question, your Honor. Thank you for the suggestion.

The Court: I was confused on it. The question relates to which?

Mr. Dixon: To the availability of the 12,000 tons under the same arrangement and as to whether or not, assuming that they were available under the same arrangement, whether Winckler & [1893] Smith would have, during the year 1951, the fiscal year ending January 31, 1952, have operated or shown a profit for that fiscal year.

Q. Do you understand the question, Mr. Hodge?

A. Yes, I understand the question.

The Court: All right. We will assume the same objection went to this question as amended, and the objection is overruled. Do you have an opinion?

The Witness: I have an opinion, yes, sir.

Q. (By Mr. Dixon): Now, will you state to the jury what that opinion is?

Mr. Strachan: I make the same objection, lack of foundation.

The Court: Same ruling. Objection overruled.

The Witness: My opinion is Winckler & Smith, if they had had 12,000 tons available to them for processing, had processed it and sold it, would have had a profit of approximately $10,000 in the year ending January 31, 1952.

Q. (By Mr. Dixon): Now, will you tell the jury how in stating that opinion you arrived at the $10,000 profit figure?

The Court: By the $10,000 profit figure, before

(Testimony of Robert Hodge.)

you answer counsel's question, you mean instead of having the loss shown on the financial report that you prepared, instead of an operating loss for that, you would have shown a profit? [1894]

The Witness: Would have shown a profit of some $10,000, your Honor.

The Court: All right.

The Witness: My computation was arrived at in this way. TreeSweet was paid 35.57 per ton for processing. Winckler & Smith's processing cost for the 1949 season, which I have used because that was the true Valencia season—1950 had many other products in it and was not a true Valencia season, so I used the 1949 processing cost—their costs total $34.06 a ton. That was made up as follows:

Ingredients, $2.14; cans, $15.17; cartons, $2.01; labels, $1.17; drums, 25 cents; sacks, 38 cents; plant expenses, $11.10.

The inventory increased during this period to the extent of $1.23 a ton, so I subtract that from all these costs.

To these costs I also add general administrative expenses of $3.07 a ton, which makes a grand total of $34.06 a ton.

Taking that from the amount paid TreeSweet for processing gives Winckler & Smith a profit of $1.51 per ton, or a total of $18,120 profit on processing.

TreeSweet was allowed $1.59 a ton for a label allowance, times 12,000 tons would have meant $19,080.

(Testimony of Robert Hodge.)

They were allowed $1.88 a ton for advertising, which [1895] would have meant $22,560.

The 15 per cent discount they were allowed was $9.41 a ton, or a total of $112,920.

This totals to $172,680.

From that I deduct Winckler & Smith's actual selling cost in the year 1952, as shown in my report, of $87,652.40.

Now, inasmuch as they would have had these additional sales, they would have had to pay additional brokerage, so I deducted another $37,500 from that, which makes a total of $125,152.44 to be deducted from the $172,680, which gives me a figure of $47,527.56.

From that figure, I also take the excess of general administrative expenses for the year 1952 over the year 1950 of—the general adminstrative expense for 1952 was $93,713.49. The general administrative expense for 1950 was $56,417.38, or a difference of $37,296.11.

Taking that from the $47,527.56, I arrived at a net profit for the year's operation of $10,231.45.

Q. (By Mr. Dixon): In other words, if I understand your answer clearly, the $184,000 loss covered in Plaintiff's Exhibit 65 for the operating year ending January 31, 1952, would have been recovered, and in addition to the recovery of that item, there would have been this operating profit for the year from these operations, is that correct?

A. That is true. [1896]

Q. Now, Mr. Hodge, can you indicate to what

(Testimony of Robert Hodge.)

extent, if any, that profit would have been increased had the amount of tonnage been increased to 15,000 tons instead of 12,000?

A. Computed on the same basis as I computed the 12,000 tons, the profit would have amounted to $54,026.45, instead of $10,231.45 for the 12,000 tons.

* * *

Cross-Examination

By Mr. Strachan:

Q. In that exhibit, as I understand it, Mr. Hodge, your computation was based upon 7,203 and a fraction tons of fruit processed during the season.

A. That is true, processed under this particular contract.

Q. Yes. Now, did you know at the time you made that [1897] computation that that 7,000 some odd tons of fruit included about 528 tons that were not accounted for on the basis referred to in Exhibit 66, but were accounted for as whole fruit, and that Sunkist received from Silzle on account of that 528 tons of fruit $11,878.87, and that that was calculated at the rate of, I think it was $22.50 a ton, which income is not included under the proceeds of the Silzle contract reflected in Exhibit 66?

If you don't know, I wish you would check it over overnight and tell us if that is a fact in the morning.

The Court: For the benefit of the jury, to refresh your recollection, you recall that there was testimony that when Exchange Orange first began to supply Silzle, it was done upon a tonnage basis, a

(Testimony of Robert Hodge.)

certain amount of tonnage was supplied, and then later a contract was entered into and later that tonnage was paid for on some other arrangement?

Mr. Strachan: That's right.

The Court: Is that the testimony you are referring to?

Mr. Strachan: That's right. That tonnage is dealt with in the 7,200 and some tons processed under the Silzle contract, but the income from that has not been included in the computation, I believe. I would like to have the witness check on that overnight.

The Court: Now, let's see if we can agree on this. Is the 528 tons included within the— [1898]

Mr. Dixon: Yes, your Honor, it is, according to the answer set forth in Exhibit 11, from which that figure was taken.

Mr. Fisher: It is.

The Court: Overnight, then, you may have to make another computation for us of computing 528 tons at $22.50 per ton.

Mr. Strachan: Well, I think the adjustment could most easily be made by simply including it in the proceeds realized by Sunkist at $11,878.87.

The Court: That would, I think, throw you off because you have already a charge here on the basis of this computation for 528 tons. It would seem to me that to make it accurate you would have to take that into account. You would have to make two computations. One a tonnage of 7,203 less 528, based upon the computation in 66, and add to that another

(Testimony of Robert Hodge.)

computation of 528 tons based on the computation at $22 a ton, isn't that true?

Mr. Strachan: Well, I think that is one way of doing it. The way I had in mind was just to take the tonnage he has dealt with here——

The Court: Maybe it would come out the same way. I don't know.

Mr. Strachan: I don't know.

The Witness: May I ask a question?

The Court: Yes. [1899]

The Witness: From the EOP subpoena to produce documents, it is not clear what the $215,602.10 was paid for, whether it is the whole 7200 tons or the 7200 tons less the 528 tons. That is the reason this was done this way. It cannot be determined. I do not know from the information——

Mr. Dixon: I might say for the record, your Honor, that since they have reported in the return the 7,203 tons, we have gone on the assumption that these other figures, namely, the amount paid, represented the 10 or $11,000 counsel has referred to.

The Court: Now you both have something to do overnight. You better check into that, Mr. Strachan. I haven't seen the subpoena, the return to the subpoena, but you understand the point counsel is making?

Mr. Strachan: I do.

Mr. Dixon: If that is true, then there is no need to go into it, because it is already included, your Honor, that is my point.

Mr. Strachan: I think that before we leave the court room, we may as well get together and clarify that.

The Court: Yes. Do you have any other questions?

Mr. Strachan: That's all on the preliminary.

The Court: Then you have got your work cut out for you tonight. [1900]

* * *

The Witness: Judge, before we start, may I correct a statement I made yesterday. [1906]

* * *

Now, Mr. Witness.

The Witness: In making a statement yesterday as to the profits that would have been made by Winckler & Smith had there been made available to them 12,000 tons of Valencias, which they could have processed and sold, I stated that the profit would have been $10,000. I find that in my computations I allowed a 5 per cent brokerage fee, when the company never paid more than 3. So, therefore, my estimate of the profit should be revised to $25,231.45 for the 12,000 tons, and $72,776.45 for 15,000 tons.

I also notice an error on 66, on item 11(d). It speaks of $380,690.24——

The Court: Wait a minute. Exhibit what?

The Witness: Exhibit 66.

The Court: Which page?

The Witness: Item 12(d), page 3. Rather, 11(d), page 3.

The Court: Yes? [1908]

(Testimony of Robert Hodge.)

The Witness: It speaks of a figure of $380,690.24. That should be $47,586.28.

The Court: All right.

Now, do each of you have 66 in front of you?

A Juror: Yes.

The Court: Turn to the last page which starts with the numeral 11. Do you find that? Under the numeral 11 there is (a), (b), (c), (d). When you get down to (d) there is a computation there that results in a figure of 6.61.

The resulting figure is right?

The Witness: The resulting figure is correct.

The Court: Don't correct it yourselves; we will have it corrected later for you, but the line immediately preceding that speaks of 380 thousand some odd thousand dollars, divided by 7,000 some odd tons, the 380,000 figure is wrong, it should be 47,000 some odd dollars divided by the 7,000 tons. The resulting computation of 6.61 is correct, but there was——

The Witness: An error entered in typing it.

Mr. Fisher: May the witness state the exact amount?

The Witness: $47,586.28.

It is the same figure as shown under item 9.

The Court: We will make the corrections later.

Mr. Dixon: May it please the court, I think in view of the inquiry made by counsel last night to this witness on Exhibit 66, we have been informed by counsel that the 7,203 [1909] ton figure is not the amount processed. In other words, it did not include the 537 odd tons.

(Testimony of Robert Hodge.)

The Court: 528 tons.

Mr. Dixon: Yes.

The Court: Is that correct, now?

Mr. Strachan: That is my understanding, your Honor, yes, sir.

The Court: In other words, the factual situation —and where there is no dispute as to these facts, we ought not quibble about them, but just get them out of the way—the factual situation is that there was processed by Silzle 528 tons, and in addition 7,203 tons?

Mr. Fisher: No, your Honor.

Mr. Strachan: The 7,200 is inclusive of the 528 tons.

The Court: That isn't what you said, Mr. Dixon.

Mr. Dixon: That is what I intended to say.

On the basis of the return that we had, we were informed by the defendants that under the contract the net tons processed was 7,203 tons .195, which included the 527.95 tons that were covered in the contract at $22.50 a ton as having been paid for on that basis. We, therefore, on that statement took the 7,203.195 tons as being the total processed under the contract, according to the return. We are informed, however, that the figures on which Exhibit 66 is computed or determined must be limited to 6,675.245 tons, in [1910] view of the fact that the difference, the 527 tons were paid for at $22.50 a ton, and therefore the peel and the juice items would not be included in any of these computations, because they would belong to Silzle.

The Court: What does that mean? Are you going to revise 66?

Mr. Dixon: Yes, your Honor. It would mean, and the witness is prepared to revise the figures, and he can do so, that where the figure 7,203.195 tons appears on 66, it should be changed now to 6675.245 tons, and that would make some difference in the figures which this witness is ready to change.

The Court: Then I suggest this: Rather than do this here, you take a copy of 66 and at the noon hour let the witness make his revision of it.

Mr. Dixon: He has already done so, your Honor, and we can prepare, perhaps, a new one on this, which would be in accord with what now appears to be the fact, and withdraw this one.

The Court: What do you suggest?

Mr. Strachan: In the first place, I don't agree that the tonnage should be reduced. You will recall that a total of 7200 was what was delivered under the arrangement made between Finley and Mrs. Silzle, and that arrangement was not reduced to writing until many months after the arrangement was put in effect. Now, the only difference between the 528 [1911] tons and the balance of the 7200 was this: Originally Silzle returned, made a return in cash for the fruit on a cash basis for the 528 and kept or disposed of the peel and by-products. Now, after that——

The Court: I forget, now, did he actually make those payments, or was that later on picked up in the contract?

(Testimony of Robert Hodge.)

Mr. Strachan: No. What happened was this: That they hadn't worked out the basis for accounting, and the peel, I believe, had been disposed of and you couldn't go back and say, "Give us so much peel and so much oil," so they shortcut the thing and the return for the whole fruit was computed under the arrangement with Finley, and they just settled for fruit and peel and the whole tonnage at the yield per ton. Now——

The Court: You mean the 528 tons were settled for on that basis?

Mr. Strachan: That is right.

The Court: And the remaining tons on the other basis?

Mr. Strachan: The remaining tonnage was settled for by returning the peel and oil in kind, and then accounting for the juice component in cash, but it was all a part of the same arrangement.

The Court: With that statement, can you spend some time this noon hour on working over this exhibit?

The Witness: I don't believe it will change the computations, [1912] your Honor. If the figures are for 66 point——

Mr. Strachan: If he says it wouldn't change it——

The Court: He means they would change——

The Witness: From the revised figures.

Mr. Strachan: We haven't seen the revised figures.

The Court: I suggest that you put it over. You have other work to do?

(Testimony of Robert Hodge.)

Mr. Strachan: Yes.

The Court: Put it over to the noon hour and discuss it a little between you.

Mr. Strachan: Yes. [1913]

Cross-Examination

By Mr. Strachan:

Q. Mr. Hodge, will you state briefly what preparation and education and study you pursued to qualify for your accounting position?

A. When I was in high school, my folks had a very serious automobile accident which depleted their funds, so it took all the cash of the family, so I wasn't allowed—couldn't go to college, so I went to work in a bank for about five years, and during that time and for about four more years I attended night school and got my accounting knowledge at night school.

I went to USC, and what was then the branch out on Vermont, which is now UCLA, and also Southwestern University during those nine years.

Q. Since the time you commenced practicing accounting, what in general would you say have been the fields of experience in which you have been active?

A. During my experience with Price-Waterhouse I worked on very large audits. I mean I had charge of audits like Western Union, Bethlehem Steel, very large concerns like that, while I was in New York.

Locally, I had charge of audits like Richfield Oil

(Testimony of Robert Hodge.)

and Union Oil, so I have had very diversified experience in some 25 years of public accounting [1914] work.

Q. Have you had occasion to specialize in cost analysis and cost accounting?

A. I did not make a specialty of cost accounting. I naturally studied it. It is necessary to get your CPA degree that you have a good ground of cost accounting. I have worked on many cost problems for firms like Bethlehem Steel and organizations of that nature.

The Court: Just throw that voice out a little.

The Witness: I am sorry, Judge.

The Court: It will make it easier for everybody to hear you.

Q (By Mr. Strachan): I suppose you belong to professional associations and organizations?

A. Yes, sir. I am a member of the American Institute of Accountants and the California Society of Certified Public Accountants.

Q. When did you first come in contact with the Winckler-Smith organization?

A. My partner, the man I was associated with then, a Mr. Moore, had met Mr. Winckler and had done the accounting during the partnership. At that time Mr. Moore decided to not be quite so active, so he turned the accounting of Winckler & Smith, that is the auditing of Winckler & Smith over to me about the time of the incorporation in 1946.

Q. Did you have a staff of accountants working for [1915] you at that time, or did you do the work yourself?

(Testimony of Robert Hodge.)

A. We had one, two or three men working for us at that time.

Q. What was your own personal contact with the accounting for Winckler & Smith?

A. I supervised the auditing and the general problems that came up. Mr. Winckler would call me when he had a problem and I would go down and discuss it with him.

Q. Who set up and arranged to install the accounting records kept by the Winckler-Smith Corporation?

A. They were set up by my partner, Mr. Moore, in 1945. The original records were set up at that time.

Q. Were those same records and methods carried through with later?

A. No. We changed our accounting methods from time to time, particularly as to cost and inventory control, and things of that nature.

Q. You did set up a cost accounting system?

A. We set up a cost accounting system, yes, sir.

Q. Was that cost accounting system maintained regularly throughout the corporate operations?

A. From time to time the accountant in charge would revise it to take care of changing conditions.

Q. What was the purpose of that cost accounting system? Was it for the purpose of pricing products that were put in [1916] inventory?

A. That was one purpose of it. The other purpose was to enable the sales department to determine at what price the products could be sold.

(Testimony of Robert Hodge.)

Q. Do you know Arthur D. Pedlar?

A. Yes, sir, I know Mr. Pedlar.

Q. Was he from time to time connected with Hodge Moore, or Hodge & Company?

A. Yes, sir. Mr. Pedlar worked for me for several years.

Q. During what period did he work for you?

A. He left in 1945. I believe he was with me probably three or four years before that. I wouldn't pin it right down, but it would be three to four years he was with me prior to that time, so he must have been in my employ for some time in 1942 to '45.

Q. Did he ever do any work on the accounting problems of Winckler-Smith?

A. Yes, sir. Mr. Winckler—Mr. Pedlar had more or less charge of the auditing. He went down and did all the preliminary work and I came down and supervised the final report.

Q. Well, if Mr. Pedlar left you in 1945, he didn't have anything to do with the audit except for one year, did he?

A. I am not certain of that. I could go through the [1917] papers and find, if you wish, but I wouldn't—it seems to me he was down there two or three times, but I am not certain of it.

Q. When Mr. Pedlar left your employ, did you know where he went? A. Yes, sir, I do.

Q. Where?

A. He went to Winckler & Smith. He worked for Winckler & Smith.

(Testimony of Robert Hodge.)

Q. In what capacity?

A Juror: Can't hear you.

The Witness: Mr. Pedlar left my employ to work for Winckler & Smith. He went there in the capacity of a comptroller. He was in charge of their accounting. [1918]

* * *

Q. (By Mr. Strachan): Now, when you made these semi-annual audits and the annual or semi-annual audit reports, did you preserve the working papers which underlay those audits and reports?

A. They are preserved in the main. Due to storage problem—our office is not a large one—we cannot keep papers forever, so it is our practice after three or four years to go through and take out what we consider the unnecessary papers. However, I have the main papers of all of our audits.

Q. Will you tell us how many audit reports you made for Winckler-Smith, identifying each period covered? A. The corporation?

Q. You made one for the partnership, did you not?

A. I believe there was one made for the partnership. I am not certain.

Q. Will you tell us the period covered by your successive audits of Winckler-Smith Corporation?

A. May I put it this way? Except for the period during which they were operating under Chapter XI and until the time they went into receivership—is that the correct term?—under Chapter X, we made a semi-annual audit. In other words, we made

(Testimony of Robert Hodge.)

an audit every six months during all [1919] the time the corporation was operated by its own officers.

Q. Well, then, as far as year end audits are concerned, you made none for the year ending January 31, 1949, because the operation was then in the Chapter XI reorganization, is that correct?

A.—I believe that is correct. There was no audit made by us from July 31, 1949, to—the next audit was as of January—wait a minute. I do not have all of my papers here, counsel, but to the best of my recollection we did not make an audit as of January 31, 1949. The first audit that I have here a record with me is the audit as of July 31, 1949, so we did not make one for January 31, 1949.

Q. Will you give us a general definition of what is meant by the term working capital?

A. In accounting the term working capital, broadly speaking, would be the excess of your current assets over your current liabilities. That would be a broad definition of the term.

Q. Are you able to say, based upon your experience, what is normally regarded as a safe working capital position?

A. That varies considerably in the various types of industry. What might be very safe for one industry would be very unsafe for another.

Q. Well, can you give us an illustration as to types of industry? [1920]

A. I do not have the surveys in front of me. Broadly speaking, in normal businesses, I would say

(Testimony of Robert Hodge.)

a ratio of about two to one would be very safe, but I could not give you specific examples of various industries from memory.

Q. So that the court and the jury and I can understand what you mean by two to one ratio, you mean that your current assets would be twice as much as your current liabilities?

A. That is true.

Q. So that if you paid all of your current liabilities immediately, you would still have left an amount that would be half of your current assets before you paid your current liabilities? A. That is true.

Q. Can you think of any line of business or occupation in which you would say it would be safe to have a condition in which the current liabilities were in excess of the current assets? I am talking about a going business.

A. By current liabilities you mean any liability that is paid within 12 months of the date of the balance sheet I assume. Well, there could be circumstances that that would not be unsafe. Assuming a corporation had spent a tremendous outlay to get in operating status, and the expenditures for that outlay were classified, say, as deferred charges and not as current assets, that could conceivably arise.

Normally, it would be very unsafe for a firm to have [1921] its current liabilities in excess of its current assets, I would say.

Q. Ordinarily, you wouldn't expect creditors to extend credit or advance money to an operating

(Testimony of Robert Hodge.)
business that had its current liabilities exceeding its current assets, is that correct?

A. I would say the normal creditor would not. A creditor who knew the industry very well might. I mean if he knew the special circumstances and anticipated the company making profits sufficient to repay his advances, he might.

Q. I would like to refer, if you please, to Plaintiff's Exhibit 60, which is the income account for the six months ended July 31, 1949. Have you a copy of that before you? A. I have.

Q. Now, in keeping an income account for a given period in ordinary accounting practice you would reflect in that profit and loss statement, as it is sometimes called, all items of profit and all items of loss that occurred within the period under review, is that correct?

A. All operating items of income and profit would normally be in the income account, yes, sir.

Q. Now, if in addition to the gain or loss on operations, the business had a gain or loss on, say, property, say on an automobile, would that, if it happened or was recorded within the period, not be taken into the profit and loss? [1922]

A. Yes, sir. That would be normally shown on the income account. That is a normal occurrence in business, which relates to the particular period.

Q. For example, in the income account which you prepared for Winckler & Smith for January 31, 1947—do you happen to have that with you?

A. Yes, sir, I do.

(Testimony of Robert Hodge.)

The Court: That is not one of the exhibits?

The Witness: No, sir.

Mr. Strachan: They don't have that, but that is Defendants' Exhibit A-3.

The Court: All right.

Q. (By Mr. Strachan): That shows on the income account—do you have it? A. Yes, sir.

Q. That shows, does it not, on the income account a loss on the disposition of assets?

A. It shows a loss of capital assets dismantled of $7,709.91.

Q. That is on the profit and loss or income account, is it not? A. Yes, sir.

Q. And again in the income account which you prepared for January 31, 1948——

A. I do not have that statement with me. [1923]

Mr. Strachan: Mr. Figg, might we have Defendants' Exhibit A-5?

The Clerk: Yes, sir.

Q. (By Mr. Strachan): On the income account as of the end of the fiscal year 1948, you have taken into the loss for the period an item of $3,256.01, which is part of the loss for that year, is that not right? A. That's right.

Q. That was the loss from the sale of an automobile?

A. No, sir, that is not right. The loss from the sale of the automobile is $333.34.

Q. That's right.

A. The $3,256.01 is not a loss. It is income.

Q. That is income, but that is net after you have reflected the loss on the sale of the automobile?

(Testimony of Robert Hodge.)

A. That is true.

Q. Now, in the six months' period ending July 31, 1949——

The Court: That is 60?

Mr. Strachan: That is Exhibit 60.

Q. During that period, isn't it a fact that the Winckler-Smith Corporation fixed assets were sold as of March, 1949, at a loss of $169,000, which loss is not reflected on the income account?

A. That is true. The assets were sold at a net loss of $169,377.32. [1924]

Q. As of what date?

A. As of March 1, 1949. These fixed assets were sold in connection with the reorganization of the company and were not sold in the normal course of business.

Q. But they were sold within the six months ended there, were they not?

A. That is true. But they were not sold under any normal operating business procedure.

Q. But, after all, when you are dealing with that six months period between January 31, '49, and July 31, '49, there was a bookkeeping loss recorded in March of $169,000?

A. That loss occurred during the operations of the—pardon me. What is the man, technically, a trustee or receiver, under Chapter 11? I am not familiar with it.

Mr. Fisher: Trustee.

The Witness: Well, whoever was operating the

(Testimony of Robert Hodge.)

business at that time, it was during his operations that this loss arose.

This did not arise during the operations of Winckler & Smith Citrus Products, themselves.

Q. (By Mr. Strachan): Well, that $169,000 loss was not an operating loss, was it? A. No, sir.

Q. It was a loss on the sale of property, was it not?

A. Yes, sir. And it was made during the operation of [1925] the trustee.

Q. Now, if you had set up total losses, and the total profits for the six months ended July 31, 1949, on this income account, that would have showed instead of a $14,000 profit, a loss, regardless of cause, but a loss nonetheless, of $155,000 in that six months, would it not?

A. The records of the trustee were not made available to me to set up the operations for the period from January or February 1, 1949, to the termination of the Chapter 11 proceedings.

We have only reflected in our accounts the actual operations of Winckler & Smith Citrus Products Company. We have not reflected any of the transactions in this report of the trustee.

Q. In the notes and the report which accompanied this income account of Exhibit 60, you did mention, did you not, that there had been a loss?

A. We did.

Q. Now, will you just read what you wrote with regard to that loss?

A. These notes were written to explain the lease

(Testimony of Robert Hodge.)

and option which is carried on the report at $1.00. It was the purpose for putting this in. In other words, this was some very valuable asset that the corporation had. So to make a complete explanation of it, I put these notes in, which counsel [1926] wishes me to read.

Q. What was the date of this report?

A. The date of this report is August 22, 1949. Do you wish me to start on March 1st?

Q. Yes. A. Page 2.

"On March 1, 1949, the Corporation sold all of its fixed assets, subject to the mortgage payable thereon, for the sum of $50,000.00 which resulted in a loss of $169,377.32, which is summarized as follows:

"Book value of fixed assets at March 1, 1949:

"Land	$ 5,816.11
"Building	135,457.32
"Machinery and equipment	214,767.33
"Furniture and fixtures	9,638.72
"Tools	2,450.47
	$368,129.95
"Less reserves for depreciation	68,085.98"

Net total—this is not in the notes. The total is $300,043.97.

"Uncollected balance on conditional sales agreements which are secured by liens on automotive equipment	$ 9,164.00
	$309,207.97

(Testimony of Robert Hodge.)

"Deduct:

Unpaid balance of mortgage	$89,830.65	
Cash Received	50,000.00	139,830.65
"Loss		$169,377.32

"The fixed assets were sold under a lease and option to repurchase agreement which provides for the leasing of the assets until March 1, 1952, with an option to extend until March 1, 1954, and gives the Corporation the right to repurchase such assets, subject to the then unpaid balance payable on the mortgage, as follows:

"1. Option can only be exercised after September 2, 1949.

"2. If option is exercised between September 2, 1949, and March 1, 1950, the cash consideration shall be $100,000.00.

"3. If option is exercised between March 1, 1950, and March 1, 1951, the cash consideration shall be $125,000.00."

Q. (By Mr. Strachan): Unless, Mr. Witness, you think some of the rest of that pertains to this subject——

A. It all pertains to the subject, counsel.

Q. All right.

A. "4. If option is exercised between March 1, 1951, and March 1, 1952, the cash consideration shall be $150,000.00; lessee also has the privilege of repurchase from March 1, 1952, to March 1, 1954, for a

(Testimony of Robert Hodge.)

cash consideration of $150,000.00 if lease is [1928] extended.

"This lease and option agreement is carried on the books at a nominal value of $1.00."

Q. Thank you. So if you deal with the period of six months as a whole and combine the results of operation with the results of their taking a loss on the book value of their fixed assets, the net result is that from the beginning to the end of the period there was a loss of $155,000 net, is that correct?

A. No, sir, that is not correct. You are trying to deal with two separate entities, which cannot be commingled.

In other words, if the U. S. Steel operated for three months, and Bethlehem Steel operated for three months, you wouldn't combine the two operations into one statement under any accounting procedure.

Q. But of course the $169,000 wasn't an operating loss, was it?

A. No, it was not an operating loss.

Q. It was the disposition of the capital assets at less than the books showed they were worth, isn't that right?

A. It was. It was done under a court order.

Q. Now, returning again to Exhibit 60, on the last page of the exhibit you show capital stock and deficit. I would like to talk first about the capital stock which is shown there to be a thousand shares of no par stock, carried on the books as having a stated capital of 240 some thousand [1929] dollars. Hodge and Company or Hodge-Moore were the accountants at the time that that thousand shares was issued, is that not true? A. That is true.

Mr. Strachan: I would like to have these copies of Exhibit A-1 distributed to the jurors.

The Court: All right. Distribute them to the jury, Mr. Bailiff.

Can I tell the jury something about par or no par stock? Are you going to go into that?

Mr. Strachan: I would like to have you tell me, too, Judge.

The Court: In corporate set-ups, and some of you jurors may be stockholders, shares of stock generally fall in various categories, such as common and preferred, and par and no par. There is no big mystery about it. In three or four sentences I will see if I can tell you the general difference.

First as to common and preferred. The word "preferred" means just what it says. In other words, those preferred shares have some preference, a preferential position in the set-up of the company. Sometimes preferred shares are preferred in the sense that they get, first, a fixed dividend. If there is anything left over, it goes to the common shares. The dividend rate might be fixed at 5 per cent on preferred. The common shares might get nothing or they might get 20 per [1930] cent, depending on what the corporation makes. Sometimes shares are preferred in the sense that they can be retired. A

(Testimony of Robert Hodge.)

corporation has the right to pay off the preferred shares at a certain figure.

Then we speak of par and no par value. You could have a share that says on it Par Value $100 a share.

That has just been arbitrarily fixed by the corporation as the value of the share. It might be $1.00, $100, $1,000. Par value.

Formerly, years back, most corporations had shares with par value. In recent years there has been a tendency to have, often, shares that say they have no par value.

Let's take an example. Suppose you had a number of shares that a corporation issued, and they said they had a par value of $1,000 a share. Actually, the value of those shares is what the worth of that corporation is, divided by the number of shares. So that the share might say it had a par value of $1,000, but the book value might be a dollar a share.

You have to figure out what the corporation had to back up the shares.

Or you might have a situation where par value was $50, and the book value, or the value as shown on the books might be a different figure entirely.

I suppose there is another value, aside from book value, [1931] and that is, in fact, actual value, and that might be different from what the books said and might be different from what the par said.

I think it was partly because of the fact that this term "par value" of shares may have misled some people that there was a tendency to have shares with no par value, just say there is no par value on the

(Testimony of Robert Hodge.)

share. The share was, therefore, either worth what the books showed, or it was worth what you could trade it for across the counter. Or if it was listed on an exchange, what you could sell it for on the exchange. So the shares with no par value are just what they mean, there is no par value fixed.

What is the value of the share?

Well, if you are going to buy or sell it, it is what you can get for it on an exchange or across the counter. Or you might, in some situations, look to a book value, what do the books show the assets of the corporation are worth, divided by the number of shares, to show what each share is worth.

Then you have got problems, when you look at book value, of what are the actual values.

Maybe they have got a trade-mark in there set up at $1.00, which you wouldn't need to worry about. But if they have a trade-mark set up at one million dollars, then you have got to stop and see whether the trade-mark is worth that. [1932]

Good will is another thing that on the books might take shares up or down, depending on how it was set up.

That is generally, without reference to this case, what we mean by par value shares and no par value shares.

Is there any objection to that general statement?

Mr. Strachan: I have none.

The Court: All right. Go ahead, Mr. Strachan.

Mr. Strachan: We gave you a copy of these when they were marked, Mr. Dixon.

(Testimony of Robert Hodge.)

The Court: No. When these were marked, they were marked out of a book, counsel.

Mr. Strachan: We thought they were furnished with a copy.

Q. (By Mr. Strachan): Along the line that his Honor was discussing, you agree, do you not, that the book value of a share may be quite different from its actual value?

A. It could be very much different.

Q. The actual value might be higher or it might be lower? A. That is true.

Q. Now, if a corporation were to add, by writing up, an assigned value to its assets on its books, simply changing that assigned value on the books between yesterday and today, it would change the book value, would it not?

A. It certainly would. [1933]

Q. But it would not change the actual value, would it?

A. It might give recognition to a change in actual value which had taken place.

Q. But it wouldn't change the actual value of the stock, would it?

A. No, it would not change the actual value of the stock.

Q. Now, referring to this Exhibit A-1, which is——

The Court: For identification.

Mr. Strachan: I would just as soon offer it in evidence, your Honor, if I haven't already done so.

The Court: A-1 received in evidence.

I just want to keep the record straight.

Mr. Strachan: It would simplify it to offer it in evidence.

The Court: A-1 in evidence.

The Clerk: Shall I mark all the copies in evidence?

The Court: All the copies.

The Clerk: That will be 15 copies.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit A-1.)

Q. (By Mr. Strachan): Do you recognize Exhibit A-1 as a copy of a balance sheet, and other data, prepared by your firm as of the date of the transfer of the business from the partnership to the corporation? [1934]

A. Yes, sir, I believe it is. I don't have any papers with which to compare it, but it certainly looks like our style of preparation of a balance sheet. It has our watermark on the left-hand side. I would say it is probably a copy of a report or part of a report that we rendered at that time.

Q. I think you will find 240 dollars——

The Court: $240,000.

Q. (By Mr. Strachan, continuing): $240,697.22 as the next to the last figure on A-1, do you see that?

A. Yes.

Q. That is identical with the figure that is shown as the stated value of the thousand shares of stock on Exhibit 60, is that not correct?

A. That is correct.

(Testimony of Robert Hodge.)

Q. So that A-1 shows the origin or derivation of the capital stock stated value in the balance sheet Exhibit 60?

A. It shows the basis for the valuation of the thousand shares of no par stock, which were issued by the corporation. [1935]

Q. Now, referring to the assets side of Exhibit A-1, the assets, it shows cash on hand $100 and other current assets bringing total of current assets up to $48,710.93. Do you notice that? A. Yes, sir.

Q. And on the liabilities side, the current liabilities side, you have $77,678.96. A. Yes, sir.

Q. So that there was a deficiency in current assets of the business at the time the corporation took over. I believe you said normally that was not a satisfactory condition? A. Yes, sir.

Q. Under the fixed assets on the left-hand side of the balance sheet, you have land, buildings, and so on, coming down to a total figure, and then extended out after depreciation, and there are two columns there, one cost and the other appraised value. Will you tell us what is the difference between the cost column and the appraised value column?

A. The cost column would represent the actual amount of cash and/or indebtedness incurred in the acquisition of these assets.

The appraised value would be the value that was set on these assets as of a certain date by some appraiser—in this case probably it was Union Appraisal—as to their [1936] best judgment as to the sound value of these assets.

(Testimony of Robert Hodge.)

Q. In setting up the books and records of Winckler-Smith company, you put on the books the appraised value and disregarded the cost value of those assets, did you not? A. That is true.

Q. You show at the foot of the assets column total value of three hundred thirty-two thousand some odd dollars as the total assets.

Of those total assets, isn't it a fact that they are represented by $29,000 approximately of partnership undistributed earnings, and only $62,000 paid in cash by the partners, and $91,000 represented by assets bought on credit for which the creditors hadn't been paid? A. Have you finished, counsel?

Q. Yes, sir.

A. I don't think that is a fair statement. How would $330,000 assets be represented by a liability? I don't follow your line of reasoning.

Assets are represented by fixed items you can get your hands on, like your buildings, your cash in the bank, your inventory, and your deferred items. They are not represented by a liability.

Q. Well, let's put it this way. How much had been contributed in cash?

A. As the statement shows, the three partners had [1997] contributed a total of $62,000.

Q. In addition to that, there was contributed some undistributed earnings of the partnership, is that a fact?

A. That is true, of approximately $28,000 or $29,000.

(Testimony of Robert Hodge.)

Q. And $150,000 was represented by this write-up of the assets by $150,000, is that correct?

A. I am sorry, but what do you mean by represented by?

Q. 150,000 of the total stated assets of 332,000 resulted from the write-up—— A. That is true.

Q. ——of $150,000 above cost.

A. That is true.

Q. All right. Now, down at the lower right-hand corner is a tabulation which shows the manner in which the $150,000 was apportioned among the three partners, Goodland, Smith and Winckler, is that correct? A. That is true.

Q. As to Goodland, it shows Goodland made an original investment of $12,000. Do you know in what form that was made? A. No, sir, I do not.

Q. In the write-up Goodland was given only $720, is that not correct? A. That is correct

Q. So that Goodland, who had put in nearly one-fifth [1938] of the total original capital, was given the benefit of only something less than one per cent, about one-half of one per cent of the appraisal write-up? A. That's right.

Q. Now, as to Smith, Smith put in 40,000 to begin with, is that correct?

A. The figures show that. I don't know. I didn't have anything to do with the books at this time. I started after this balance sheet.

Q. You don't doubt that the——

A. No, I don't doubt the figures. But you asked me, did he put in 40,000 in cash? I don't know.

(Testimony of Robert Hodge.)

Q. You say that because this statement that appears down there was prepared by Mr. Moore, rather than yourself? A. That is true, sir.

Q. Presumably Mr. Moore——

A. Mr. Moore doesn't say invested cash at all.

Q. What's that?

A. He doesn't say these figures are all cash, at least from this balance sheet.

Q. At least Mr. Smith was credited with $40,000 of original contribution? A. That is true.

Mr. Dixon: I rise to object to any further questioning along this line by counsel. I don't know what the purpose or [1939] object of it is. It seems to me that it clearly has no relevance to any of the issues of this lawsuit and will not tend to prove or disprove any of them.

I might say I don't see how it can possibly make any difference what the arrangement was between the partners and other persons when this corporation was formed, what the stock arrangement was between them. It is a matter of their own discretion. There wasn't any public offering.

The Court: I think it is pretty remote, but I am not going to cut counsel off from some reasonable cross-examination. However, we will not have a lot on this matter, because it is very remote to the issue.

Let me ask one question, if you know. These different amounts that were credited to the three partners or to the men who had been the partners and who now became the shareholders, in the three varying amounts, was that by agreement between them?

(Testimony of Robert Hodge.)

The Witness: I would assume so, your Honor.

The Court: You don't know?

The Witness: I don't know, no, sir.

The Court: You don't know, then, why Goodland got 720 and Smith got 39,000?

The Witness: No. I don't know. It was simply a matter of agreement among them.

The Court: If they would agree in setting up the corporation, [1940] then the accountant would set up the books on the basis on which they agreed?

The Witness: That's right.

The Court: Go ahead, Mr. Strachan.

Q. (By Mr. Strachan): You don't know in what form the contributions by Smith were made?

A. No, I do not, sir.

Q. But it does show, does it not, that Smith, having contributed what was apparently 65 per cent of the original capital, was credited with only 26 per cent?

Mr. Dixon: Now, if the court please, I certainly object to this question and any further examination along this line. I can't possibly see how it would have any relevancy to any issue in this case in any respect.

Mr. Strachan: I have four more questions, your Honor.

The Court: I have indicated I think it is remote, but I am going to let him complete what he is doing here. The objection is overruled.

Q. (By Mr. Strachan): So that his investment

(Testimony of Robert Hodge.)

of $40,000 by the write-up was made to appear about 80,000, is that correct?

A. It was not made to appear, counsel. It was actually done.

Q. Yes. A. According to the books. [1941]

Q. Through the write-up?

A. Through the write-up.

Q. Yes.

The Court: By the write-up, you mean the appraisal that was made of the fixed assets and carried into the books?

Mr. Strachan: The addition on the books of $150,000.

The Court: As a result of an appraisal.

Mr. Strachan: On the basis of the appraisal, that is correct.

Q. Now, as far as Winckler is concerned, his original investment was 10,000, as shown on the tabulation, which was increased by $109,000 through the write-up we have mentioned, which resulted in his having a credit on the books of the corporation for capital contribution of over 140,000, is that correct.

A. No, sir. The books show that for capital contribution he only made 10,000. He was credited with 109,000 some odd dollars by the increase in the value of the assets due to setting up the appraised values. He also had accumulated some 16,000 odd dollars in excess of earnings over withdrawals.

Q. That is correct.

A. It is not a capital contribution, though, counsel.

(Testimony of Robert Hodge.)

The Court: It was used, however, as the basis for the issuance of shares to him? [1942]

The Witness: That is true.

Q. (By Mr. Strachan): So that for his $10,000 and his 21,000—his 10,000 original contribution and his 21,000 of undistributed earnings, he was given 140,000—— A. 135,000.

Q. ——135,000, and that made him over 50 per cent holder of the common stock, is that correct?

A. That is true. That is the basis on which the stock was issued.

The Court: We will take our recess, but before we do, I think I should orient you as to the materiality of counsel's questioning.

Plaintiff claims it was hurt, damaged by wrongful acts.

The defendant contends, first, we committed no wrongful acts and, secondly, we didn't damage you, and, thirdly, if there was any damage, we want to show what the corporation was that we damaged.

Is that right, generally?

Mr. Strachan: I think that is a good summary.

The Court: Therefore, this line of questioning, which probably will be carried on through various of these statements, has nothing to do with whether Winckler made a good deal or a bad deal with Smith. That is not an issue in this case. We don't care whether he robbed Smith or whether Smith gave him more than his share, or whether he

(Testimony of Robert Hodge.)

earned [1943] this amount that he got in shares. That is not in issue.

The materiality of this goes eventually to the question, and all of this should be kept in mind, in connection with the ultimate question, what was this corporation doing and what was it like in 1951? That is when the corporation claimed it was damaged.

Therefore, just as the plaintiff has been entitled to show sales the corporation made that year in introducing statements, so the defendant will be entitled to show that they didn't make the sales, they didn't have the assets they claimed that they had, or that they were already broke and couldn't have gone on anyhow. In other words, inferences from facts that might or might not be drawn from the various situations.

So in this line of questioning that will go on, we are largely concerned, and I am not going to close the door, that there might not be some other admissibility of all this, but we are largely concerned in ultimately deciding, trying to find facts as to what was this corporation like in 1951, the year it claims it was injured.

Do you accept that statement?

Mr. Strachan: I think it is a correct statement, yes, sir.

The Court: So while counsel is entitled to go into some of these things, I don't want you diverted from the main issue in the case. We are not concerned with how these three men agreed among themselves.

That is not in issue. It may have [1944] some bearing in deciding the later issues, but that is not the question to be decided.

If you would decide all the little fringe issues in this case, you would be here until next Christmas.

Remember the admonition of the court. You will be excused for a short recess.

(Recess.)

The Court: The record will show the jury present. Proceed.

Q. (By Mr. Strachan): Mr. Hodge, was there a covering letter or report prepared that accompanied Defendants' Exhibit A-1, which is the balance sheet of January 31, 1946?

A. I do not know, sir. I have not the papers that far back with me and I couldn't say. I would assume normally there would be notes with a report. It is not always done, but it is normally done.

Q. Is there any way in which you can fix from your files what the date of the preparation of this balance sheet was?

A. Certainly not with what I have in the courtroom, not the papers I have in the courtroom.

The Court: Here is a letter in the file, counsel, that immediately precedes. This is your file marked A for identification.

Mr. Strachan: Yes, sir. [1945]

The Court: It immediately precedes the balance sheet.

Mr. Strachan: How can I have this marked?

The Clerk: It would be A-7, your Honor. We have marked 6 already.

The Court: A-7 for identification.

(The exhibit referred to was marked Defendants' Exhibit A-7 for identification.)

Q. (By Mr. Strachan): I show you the letter that has been marked A-7 and ask you if you can tell us whether or not that is the letter which accompanied the document marked A-1?

A. Yes, sir, that is a copy of the letter which accompanied the balance sheet, your Exhibit A-1.

Q. That is a letter dated February 22, 1946?

A. No, sir. It is dated February 25, 1946.

Q. That's right. Thank you. It is not Washington's birthday.

Do you know whether that balance sheet was prepared before or after the appraisal report by Union Appraisal Company? A. I do not know, sir.

Q. Now, referring again to Exhibit A-1, fixed assets, the land, buildings, machinery and equipment, being the first three items in the cost column, total approximately $106,000, is that correct?

A. That is correct, sir. [1946]

Q. Mr. Winckler testified that he bought the land, buildings and machinery for a total cost of $64,000; you are aware of that, are you not?

A. I am not aware of that, sir.

Q. Well, assuming that he did pay $64,000 for it, for those three items, to what would you attribute the increase from $64,000 to $106,000?

(Testimony of Robert Hodge.)

A. During the time from the date of the purchase of the plant by Mr. Winckler, I would assume that the difference had been expended for the items shown on the balance sheet.

Q. That would be roughly 42,000?

A. Approximately, yes, sir.

Q. Would you be able to tell us whether that was on land, buildings, or machinery and equipment?

A. I would not be able to tell you, no, sir.

Q. Mr. Winckler testified that of the $64,000 he spent on land, buildings and machinery, approximately $7,000 was the value of the machinery and equipment which he said, I think, was a stainless steel tank and a shell of a boiler.

The Court: This is equipment, you say, that he purchased originally?

Mr. Strachan: Yes. He thought that the equipment he originally bought, included in that $64,000 purchase, had a value of about $7,000. [1947]

Mr. Dixon: Counsel, I don't recall that testimony. You may be right.

The Court: There was some testimony to that effect.

Counsel, this is very remote, unless you want to tie it in with 1951.

I think your recollection is correct that when Winckler bought this plant there was a bunch of equipment which he says he had to, as I recall, junk or get rid of, except the two items you mentioned; and whether he testified they were worth that or not,

(Testimony of Robert Hodge.)

I am not sure, but they were set up with that value.

Mr. Strachan: $7,000.

The Court: Something like that, yes.

Q. (By Mr. Strachan): Now, assuming that the machinery and equipment originally purchased was set up for $7,000, then the cost column here would indicate that there had been in a seven-month period of partnership operation an increase in the machinery and equipment of about $82,000, is that correct?

Mr. Dixon: If the court please, I don't think there is any evidence in here to support that assumption.

What does counsel mean, assume that it was set up at $7,000?

Is there a particular figure here on this Exhibit A-1 that relates to that, counsel? [1948]

The Court: The objection is sustained.

This witness doesn't know. It is speculating on his part.

Q. (By Mr. Strachan): Well, assuming that the machinery and equipment that was originally purchased was set up for $7,000, and that seven months later the cost was reflected on the books and records as $89,000, would that not indicate that during the seven months period there had been new equipment purchased in the approximate amount of $82,000?

Mr. Dixon: If the court please, I am going to register an objection at this time on the same grounds that I made it before. I fail to see where these questions, and particularly the assumption that counsel makes, which is so far wholly unsup-

(Testimony of Robert Hodge.)

ported, to my knowledge, with any books or records —that this line of questioning is wholly irrelevant and immaterial and remote to any of the issues in this lawsuit. It does not tend to prove or disprove any of them.

The Court: Objection sustained.

Q. (By Mr. Strachan): Can you explain, Mr. Hodge, why it is that on this statement the land and buildings are set up for less than $18,000 when the original cost was approximately $64,000?

A. No, sir, I cannot.

The Court: Counsel, this is the trouble with being remote. As I recall the testimony, the $64,000 was what he [1949] paid for land, buildings and machinery. Is that your recollection? And your question said land and buildings.

Now, here is a witness who doesn't know about this, and you give him a supposition which I don't think is correct.

As I recall—and this is subject to correction—he said originally $64,000 is what he paid for land, buildings, and this equipment, most of which he didn't keep.

Mr. Strachan: I believe that is right.

The Court: Then your question was improper.

Mr. Strachan: May I look at the record for just a moment?

The Court: Yes.

Mr. Strachan: Your Honor, I just wanted to say that when Mr. Winckler was on the stand your Honor put a question to him, which I thought was very appropriate, and I didn't think we got an answer, and that is why I put the question to this witness.

Your Honor said: Then why is it that the land and buildings are set up for less than $18,000 in your cost column when you testified that you paid $64,000 for it?

I think perhaps both you and I omitted to take into account, then——

The Court: We fell into the same error.

Mr. Strachan: Yes, sir.

The Court: Don't misunderstand me, counsel, I am not [1950] critical; I just want to move this case along, and here is an issue that is pretty remote, and I sustained a previous objection. This one was not objected to.

Any colloquy between counsel is no concern of yours. The Judge is just another lawyer who by the grace of God sits on the bench. He doesn't know any more than these counsel know. And as you have seen around here, he sometimes knows a little less. So he has to struggle along with our problems.

Mr. Strachan: I do want to say on the question of remoteness, your Honor, that I don't see it just that way, because in my view of the case, to the extent that the books were made to show values which were non-existent, I think we are dealing with a very real issue in this case.

The Court: I am not going to limit you——

Mr. Strachan: This is a matter of tracing out what the real value, realistic value of the assets is.

(Testimony of Robert Hodge.)

The Court: I am not going to limit you on a statement of 1951, to go down and see what assets there were.

Mr. Strachan: Of course the assets as they eventually showed up at three-quarters of a million dollars in 1951, were based upon successive appraisals and reappraisals and alterations of book value, without changing the real value, and that is what I am trying to show.

I am trying to go back to the beginning and trace what [1951] the real value of these is, to show how little of the three-quarters of a million dollars was the real value.

The Court: Your question had nothing to do with the value of anything. This witness didn't know. You were making some comparison about this $7,000 tank, or something, plus the fact that this report shows other machinery and equipment apparently purchased. This witness doesn't know whether it was purchased or not.

There are inventories that are available from this company's records of its physical assets.

You can have unlimited right to show what the assets of this company were in '51. And if it becomes material to ascertain, I certainly will permit you. I permitted you to go back to show the original basis of the $300,000 stock value, because it was carried over. We are just quarreling about a particular question that I think both of us realize isn't the heart of this case.

(Testimony of Robert Hodge.)

Mr. Strachan: I would like to clear up the question which the court put and I put, by amending the question that you put and I put to take into account that $7,000.

The Court: How much time are you going to spend on this? Is this about the end of it?

Mr. Strachan: This is the end of that write-up at that point, yes.

The Court: Put your question. [1952]

Q. (By Mr. Strachan): Can you tell us why, Mr. Hodge, when $64,000 was paid for the plant, the buildings, and about $7,000 worth of machinery——

The Court: Now, counsel, wait a minute. That doesn't reflect what is in this record.

Again, your recollection and mine—you say about $7,000 worth of machinery. $64,000 was paid for a lot of machinery, which——

Mr. Strachan: Had a value.

The Court: It may have had a value to somebody, but it didn't have a value to Winckler. How much of that $64,000 was paid for that machinery we don't know, but we do know that when Winckler got done he said he kept the tank.

Mr. Strachan: He said he set up $7,000 for the tank and the boiler.

The Court: Something like that.

Mr. Dixon: If the court please, in view of this line of questioning, counsel knows that there is an appraisal of all of the equipment here, which lists it piece by piece, as of March 18, 1946, which shows

(Testimony of Robert Hodge.)

the basis of this statement, and counsel has had this and it has been available to him.

We did not put it in the record because we put the appraisal of 1949 in the record.

It seems to me that this line of questioning is wholly irrelevant and immaterial to the issues of this lawsuit. [1953]

The Court: We will mark for identification this appraisal, give it a number so we will know what we are talking about. It will be a plaintiff's number.

The Clerk: Plaintiff's Exhibit 68 for identification.

Mr. Dixon: All right. 68 for identification.

The Court: All right.

(The exhibit referred to was marked Plaintiff's Exhibit No. 68 for identification.)

Mr. Dixon: The reason for this, your Honor, is this is the record, and counsel is assuming that there wasn't anything here but a shell, in his question to this witness, just a few tanks.

The Court: All right, now. We will argue the case later.

Mr. Strachan: Is this in evidence?

Mr. Dixon: No.

The Court: It has just been marked, counsel.

Mr. Dixon: I am informing you that it is available.

The Court: Since Mr. Dixon brought it up, we gave it a plaintiff's number. If you want to put it in evidence, we will give it a defendants' number, or if you want to study it over, you may make up your mind later.

Mr. Dixon: If you have no objection to it, I will offer it in evidence, counsel.

Mr. Strachan: I think that is the easier way to do it. [1954]

The Clerk: Plaintiff's Exhibit 68 received in evidence.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No. 68.)

The Court: What is the date?

Mr. Strachan: Appraisal dated March 18, 1946, stamped received April 8, 1946, by Winckler & Smith Citrus Products Company, and it is entitled Appraisal Land, Buildings, Machinery and Equipment, Union Appraisal Company.

The Court: All right. Let me look at it.

(Exhibit handed to the court.) [1955]

Q. (By Mr. Strachan): Mr. Hodge, it is a fact, isn't it, that the balance sheet showing the $150,000 write-up of physical assets which was furnished to Winckler-Smith on February 25, 1946, showed those write-ups prior to the date of the Union Appraisal Company appraisal on March 18, 1946, received April 8, 1946, by the company?

A. I do not know, sir.

Q. Now, if you will refer again to the Exhibit 60, just below—withdraw that.

Of the capital stock shown on the third page of

(Testimony of Robert Hodge.)

Exhibit 60 as $240,697.22, $150,000 of that amount was based upon the appraisal write-up of $150,000, is that correct?

A. No, sir. This value is set up on the basis of the declared value of a board of directors' meeting which declared the value of the stock to be so many dollars, some $240,000. The basis for setting this up has nothing to do with the partnership books. It was probably arrived at from the amount carried forward, but the basis for the entry is based on the board of directors' meeting and authorization.

Q. They authorized it, but the authorization took into account $150,000 of value in excess of the values at which the same assets were carried on the books of the partnership?

A. I do not know that, sir. The only thing I know is that the board of directors authorized the capital stock to be set up at this particular value. What they took into [1956] account, I don't know.

Q. And you don't know, beyond what the board of directors said was the value of the assets, what the value of those assets was, then?

A. No, sir. The corporation books were set up on the basis of a board of directors' meeting, minutes of stockholders' meetings, too. Pardon me for my oversight.

Q. On Exhibit 60, you show that as of January 31, 1949, there was a capital deficit of $224,852.56, which you said had various components and was a net figure? A. That is true, sir.

Q. Have you with you records from which you can tell us the components that entered into that net figure, how the deficit as of that date occurred, that is?

A. No, sir, I cannot readily give you the component parts of that deficit. The reason for that is that the records during the Chapter XI proceedings were not made available to us. We had to build them up as best as we could from the trustee's report and documents like that. I am sorry, but they are just not in shape to read them off.

Q. With the exception of this period, do you have the date upon which the deficit was aggregated? A. It is a very complex figure.

Q. I don't want to make this any more complex than it is. I would like to keep it simple. Could you tell us [1957] for the first year operation, that is the year ended January 31, 1947, whether there were any——

A. In the year ended January 31, 1947, there was a deficit of $11,771.34.

Q. What was that deficit due to?

A. That was the loss from operations during the year ended January 31, 1947.

Q. Now, for the year 1948, were there any items that entered into the——

A. I do not have the reports here. [1958]

* * *

Mr. Strachan: I will offer Exhibit A-4 in evidence then.

(Testimony of Robert Hodge.)

The Court: Exhibit A-4 received in evidence.

* * *

Q. (By Mr. Strachan): Can you, by referring to Exhibit A-4 or A-5, tell us what items entered into the capital deficit?

A. Reading it from the balance sheet as of January [1959] 31, 1948, the deficit comprised the following: Deficit at January 31, 1947, $11,771.34; loss for the year ending January 31, 1948, $72,221.88, a total of $83,992.62.

There were some surplus adjustments, reduction in the market value of inventory, of $47,849.12. A reserve for damaged merchandise, $5,000. There was a decrease in the reserve for doubtful accounts of $1,500. Which made a total deficit of $135,341.74.

Q. Mr. Winckler testified with respect to the year ended January 31, 1948, he understood that the inventory write-down, $48,000, was included in the operating loss of $72,000. If he so testified, he was in error in that respect, was he not?

A. He was.

Q. So that the total loss due to damage and inventory write-down and operation for this year was about $125,000, is that correct?

A. The total increase in the deficit was about $124,000, that is correct.

Q. So that gave a total of how much deficit as of the end of 1947?

A. The deficit, January 31, 1948, was $135,341.74.

Q. On your Exhibit 60, you show a deficit at

January 31, 1949, of $224,852.56, that is near the bottom of the page. A. Yes, sir. [1960]

Q. That would indicate an increase in the deficit between the year ended at that time and the year ended the year before of about $105,000, would it not? A. About $109,000, did you say?

Q. I think I said 105. Which would be right?

A. Approximately $109,000. That is in the year and a half period from January 31, 1948, to July 31, 1949.

Q. I am not talking about July of 1949. I am talking about January 31, 1949.

A. I beg your pardon.

Q. Deficit of January 31, 1949. A. Yes.

Q. So that is an increase of about $109,000 in that period? A. Yes, sir.

The Court: It would be about 90, wouldn't it?

The Witness: That's right, 90,000. Well, wait a minute. Let me get this straight.

The Court: 135 to 224.

The Witness: Right. It would be about 88,000.

Q. (By Mr. Strachan): Are you able to explain $88,000 increase in the deficit in that period?

A. Well, we were not furnished the records of the trustee and we simply went in with Mr. Winckler and his staff's assistance and took an inventory of all assets there [1961] were at the termination of Chapter XI proceedings, and set our records from there. Well, this 224 is approximately—not approximately, that is a poor word—it is the difference between the assets that we had and what we

(Testimony of Robert Hodge.)
wound up with after Chapter XI to balance the books, in effect.

The Court: When you came out of that receivership, the corporation no longer actually owned the real estate?

The Witness: They owned very little. There was a few inventory items, wooden platforms, I forget the correct name for them, and a few inventory things like that, and that was all that was there for them to start business with again. [1962]

The Court: Plus the option to repurchase?

The Witness: Plus the option to repurchase.

The Court: At $1.00?

The Witness: That is true.

The Court: Did that have anything to do with the increase in deficit?

The Witness: Yes. At January 31st, '48, we had certain assets. Those assets were liquidated——

Q. (By Mr. Strachan): I thought the assets were liquidated in March of 1949, and you showed the deficit here at January as $224,000, which is three months prior—two and a half months prior, I should say, to the loss sustained on the sale of the plant.

A. As I pointed out to you earlier, counsel, this statement purported to be a statement of the company only. It did not purport to take into account any transactions that the trustee had made prior to the termination of Chapter 11 proceedings.

Q. Now, January 31, 1949, the company owned its property, didn't it?

(Testimony of Robert Hodge.)

A. That is a technical question.

The Court: That is a legal question.

Wasn't that the period of reorganization?

Mr. Strachan: It was during the reorganization, yes. The assets hadn't been sold. [1963]

The Court: Well, go ahead.

Q. (By Mr. Strachan): Mr. Hodge, am I to understand that the $224,000 deficit, stated as of January 31, 1949, included as one of the components the $169,000 loss which was involved in the sale in March of 1949, of the plant?

A. It would, yes, sir.

Q. And you included it in the January 31st statement, although the transaction had not then occurred?

Mr. Dixon: Counsel, I think that is a wholly misleading question, your Honor, and I object to it on that basis. This witness has already testified that this statement was made up——

The Court: All right. Overruled. Let him explain it again.

Read the question.

(Question read by the reporter.)

The Witness: That is true.

The Court: In other words, you were having to reconstruct what went on during the period of time when you weren't keeping the books, when someone else was in charge of the corporation?

The Witness: That is true.

The Court: And from that period of time there

(Testimony of Robert Hodge.)

floats up certain results. You were able to find out what some of the results were and then you arbitrarily went back and reconstructed [1964] something for that period?

The Witness: We reconstructed the books.

Q. (By Mr. Strachan): Can you tell us whether there were any items—I will back up a little bit.

If at the end of January 31, 1948, you had a capital deficit of $135,000, then you recorded as of a year later a loss of $169,000, that would have shown debit items of about $304,000 or a total of $304,000, after reflecting the $69,000 loss; isn't that correct?

A. $169,000.

Q. Isn't that correct?

A. Well, in this $224,000 figure is our reconstruction of all of the transactions that went on during the period of trusteeship.

Q. That is what I am trying to get at. You had a 135 deficit item and there was an additional deficit item of 169,000 loss? A. That is true.

Q. So those two standing by themselves would have indicated a $304,000 deficit before any credit items were entered, is that correct?

A. Before any other transactions that we picked up during the Chapter 11 proceedings, that we picked up from their reports and other sources of information that were made available to us. [1965]

The Court: Which might influence the final figure?

The Witness: It certainly would, sir.

(Testimony of Robert Hodge.)

Q. (By Mr. Strachan): Can you name any such transaction that you picked up?

A. Yes, sir. The trustee's report showed an operating profit of approximately $50,000. That was one of the items.

Q. Were they any other items that you can recall?

A. There would be all of the items that were reflected in the trustee proceedings. In other words, we had debt cancellations.

Q. How did you deal with that debt cancellation?

A. As I explained to you earlier, counsel, we had so many assets and so many liabilities at the last balance sheet, which was the January 31st, '48. We now are finished, or the termination of the trustee proceedings, we have so many assets, we balance out our balance sheet by the operating deficit as the balancing figure.

Q. In that Chapter 11 proceedings——

The Court: I am going to sustain an objection on the court's own motion to any further inquiry into that matter.

If you want to go into what assets the corporation had when it came out of this Chapter 11, you can go into it in detail. I am not going to go into how a CPA reconstructed from what he could find out what went on during that period. [1966]

It has no bearing on the issues of this case whatsoever. If you want to start in with what the corporation had when it came out, you can do that, Mr. Strachan.

What happened or what might have happened in the bankruptcy reorganization has nothing to do with the matter, except the final result, what did the corporation come out with, what did it have?

* * *

The Court: The record will show the jury absent.

I think the defendants have a perfect right to show what the corporation had in assets, describe its condition in 1951. To a limited extent I will permit cross-examination or other inquiry to go back where, as in the case of capital stock, you have a figure carried over and it is necessary to show what it was.

Now, this corporation comes out of reorganization, it lost certain assets in reorganization, it got some credits, it occurs to me that I probably can understand what went on, [1967] but it is not material. There were some debts paid in full, other debts were scaled down, they only paid part of their debts. Obviously, their accounts payable would be decreased, which would affect this situation. There was a loss on the land, which would affect it. The receiver made some money, which hasn't anything to do with this. You, yourself, would take the position that the fact that the receiver made money didn't have anything to do with whether this corporation could make money. So, then, the question really comes down, logically, to what did they have when they came out of reorganization.

Where it is necessary to go back, as in the case of stock, to explain it, it will be proper. I am not going

(Testimony of Robert Hodge.)

to spend a lot of time and have this jury mixed up over what went on in this reorganization proceedings.

It sort of makes me think about—not the three goats, but about the fellow who comes into court and says, "You hit me on the nose," and the defendant comes in and says, "Well, I don't want to talk about that right now, but you were a very sick man when I hit you, your legs weren't very good when I socked you, you toppled over awfully easy."

I take it the defendants have other positions and contentions besides the condition of this plaintiff. You have certainly a right to show what this corporation was. Your defense is multiple. We didn't damage you, we didn't conspire. Even if we did damage you, what were you at the time [[illegible]] we damaged you?

Well, that is essentially, what were you in 1951?

We are only concerned with previous matters in order to explain what this corporation was in '51.

Mr. Strachan: Of course, your Honor, their end balance sheet showed quite a lot of value there, after they write those assets up several times, and you have got to show that included in that were not only the write-ups due to appraisals of property, but you also have to show that they added in, to get that net worth, forgivenesses of indebtedness, and that sort of thing.

That is what I was trying to do.

The Court: You have covered, in part, that, and you will be entitled to go in and show the items that changed it. But let's not spend any more time on what went on in the reorganization, because obviously——

Mr. Strachan: I would like to show what the liquidation of their liabilities, without payment—how that affected their balance sheet position. I was just getting to that with this witness.

The Court: How would that affect it? It affects the net result, but what difference does it make——

Mr. Strachan: I want to show that forgiveness of indebtedness as it was reflected on the books directly increased the net worth, just as if there had been some added [1969] capital, and there was no added capital.

The Court: Most of my concern about this is the length of time it takes.

Can't this be done? For instance, you have established a figure of one hundred thirty-five, January 1st, '48, a year later it is two hundred twenty-four. We have got $88,000 difference. You had a loss of one hundred sixty-nine in the sale of the land, the trustee made $50,000 in operating, there was——

Mr. Strachan: I don't see how that $50,000 that the trustee made in operating gets into the corporate books, myself.

The Court: It would get into the books in figuring the deficit.

Witness Hodge: It does in this way: that there were funds left to the corporation which wouldn't have been otherwise left to it.

Mr. Strachan: As I understood it, the money

(Testimony of Robert Hodge.)
made by the trustee, together with what was realised on the liquidation of assets, was applied to the pro rata payment of creditors that weren't paid in full.

I don't see how the 50,000 ever gets into the corporate income.

Witness Hodge: It would in this way: Supposing under the plan—— [1970]

The Court: Just a minute. You say it does?

Witness Hodge: It could.

The Court: Do you know whether or not it did?

Witness Hodge: I know there was some cash turned over to the corporation after the trustee procedings were terminated.

The Court: The inquiry would not be whether the accountant did it rightfully or wrongfully. He could have made the most colossal mistake in the world. The question is what did they take into account in arriving at the two twenty-four, if you are right that you can even go into this. It isn't whether it is right or wrong. The question is did they take it into account. It seems to me this is an issue that you could almost—— [1971]

Mr. Strachan: If Mr. Hodge took into account $50,000 of operating profit that the receiver had and credited that to the corporation, it seems to me he ought to say that, because I can't understand how that could properly be done, because the income to the receiver together with what results from the liquidation of assets goes to meet the costs and meet the pro rata distribution through the receivership. I don't see how in the world he can take 50,000 of the receiver's operating profit into effect in his capital surplus.

The Court: Well, let's analyze that a minute. The receiver, as I remember the testimony, made a gross of more than 50,000, because he paid operating expenses as he went along, right? And he wound up with some kind of profit. Is that what the testimony shows?

Mr. Walker: That is correct.

The Court: Where the receiver has made a profit, this is not a bankruptcy, and that is why I stopped and said nothing more when you were talking about whether this corporation still had this property, I was thinking of it as a bankruptcy, where it would be another entity owning it, but actually it still owned its property, although it was under control of the court. If the receiver makes $50,000, what is to be done with the $50,000?

Because the receiver made it, he can't stick it in his pocket. He was acting for the corporation. It therefore was [1972] eventually to become corporation property and it would therefore be used to pay off debts or obligations of the corporation or for such purposes as the corporation might want to use it. If you can convince me the receiver made $50,000 and he can stick that in his pocket apart from the business affairs of the corporation, I might go along with you.

Mr. Strachan: I don't say he did that, but I do say until the expenses and debts of the corporation

(Testimony of Robert Hodge.)

were paid in full through that receivership, that the trustee couldn't turn $50,000 profit or any other sum of profit over to the corporation. He had to apply that to pay the expenses and the debts. If he paid less than 100 cents on the dollar, if he turned it over to the corporation so Mr. Hodge could put it in the income account, I would say he was wrong. I don't think he did it.

The Court: I am no expert in accounting, but I would guess that is the way it would have to be reflected.

Mr. Strachan: We have Mr. Walker here. Why don't we ask him? Did you turn over the $50,000?

The Court: He was not the receiver.

Mr. Walker: I will give you a short and quick answer to that. I was not the trustee. I would suggest that this is a matter we could discuss over the noon hour. I think there is a very simple explanation .

The Court: If we can get an explanation of this deficit [1973] and what was done, we will let you go into it. A company goes into receivership, not bankruptcy, and it contemplates coming out. This one did. You have to adjust the books afterwards to take account of this situation.

Mr. Strachan: Basically, what is wrong here is that they didn't set up the corporation books as of the date that they came out of the bankruptcy. They set up the corporate books to show ex post facto, that is on January 31, 1949, when they were

(Testimony of Robert Hodge.)

in bankruptcy, that the loss was sustained, that the debts were liquidated for less than their face amount, and it didn't happen that way at all. That is what is wrong with those balance sheets and income accounts.

If they had set those up as of the date of the conclusion of the bankruptcy, instead of setting up a hypothetical situation and assuming that the year before these transactions happened, we wouldn't be in this state.

The Court: I think the receiver or trustee in reorganization is acting for the owner of the property. He is the custodian while it is being reorganized. Therefore, if a piece of property is sold and a loss is taken, it has got to be set up. If he made money, it has got to be considered income in the final adjustment of the matter. If he paid off debts at less than 100 cents on the dollar, then proportionately there was an increase in the value of the corporation, because it was able to pay its debts at less than 100 [1974] cents, and where it had 100,000 of accounts payable, maybe now it has only 75,000.

I don't know how else you can do it, unless you come out of the bankruptcy and have a reappraisal and set up a new set of books and start fresh.

Mr. Strachan: That is what is ordinarily done.

The Court: I doubt that. Richfield was in reorganization here for years, and I doubt if that is the way that was handled.

Mr. Dixon: May it please the court, counsel is

(Testimony of Robert Hodge.)

mistaken and is completely in error. This Exhibit 60 does not purport to represent anything except the operations of the company after the termination of the trusteeship and, of course, while it necessarily must—being a continuing corporation—show the stock setup, it seems to me that——

The Court: Counsel is just talking about this one matter here, the deficit at January 31. The witness admits that was an arbitrary date picked because he didn't have access to the books.

Mr. Dixon: That was the end of the fiscal year, if you recall, your Honor. The fiscal year of the company ends on that date.

The Court: See if you can find out about this and agree between yourselves how the deficit was arrived at and what factors were taken into account. It oughtn't to be a matter [1975] of dispute. It has been done. The records must show how it was done.

Mr. Strachan: What I was trying to get was the debits and credits that show the end result.

Witness Hodge: Counsel, as I told you, there was no definite tie-down of certain debits and certain credit, because there weren't complete records kept or made available during the period of the trusteeship. We certainly took the credits and the liabilities as they existed and set up the books and made a balancing figure for the deficit, and that was it. [1976]

* * *

The Court: The record will show the jury present in their proper places.

I will read into the record a note I received from the jury. You think about it, and we will discuss it in their absence.

"January 11th.
"The Honorable Judge James M. Carter:

"The jury would like to know if it is possible for them to visit one of the orange plants in order to gain some knowledge of the manufacture of fruit juice and its components.

"Signed: The Jury."

We will consider it later. And thank you for the communication.

Mr. Clerk, you file this.

ROBERT HODGE

the witness on the stand at the time of the recess, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Hodge, this morning I believe you said that as [1978] you recalled it during the Chapter 11 receivership the receiver earned a profit of 40 or 50 thousand dollars; do you recall that?

A. His report stated that there was a profit in excess of $50,000.

(Testimony of Robert Hodge.)

Q. Was that profit under the receivership something that you entered into the books of account of the corporation as a profit or loss to the corporation? A. Not as that particular item.

Q. As a matter of fact, as I understand it, the profit from operation, together with the proceeds from the sale of the fixed assets under this lease-back arrangement went into a pool from which the expenses of the receivership were paid, other prior claims were paid, and the remainder was disbursed pro rata among the remaining creditors?

A. That is what happened, yes, sir.

Q. Do you recall whether for the year ended January 31, 1949, you reported a profit or loss?

A. For the year ended January 31, '49? That was still under the trustee operations.

Q. Do you remember whether for income tax purposes you prepared a return showing for the corporate operation a profit or a loss for the year ended January 31, 1949?

A. The tax return prepared for the fiscal year ended January 31, 1949, showed a loss for that period for tax purposes. [1979]

Q. What was the amount of that loss?

A. The amount of the loss for that period was $100,503.15.

Q. In the course of the winding up of the Chapter 11 proceeding, the indebtedness of the corporation before the bankruptcy proceeding was discharged by payment of less than the full amount due, is that correct?

(Testimony of Robert Hodge.)

A. Yes, sir, that is correct.

The Court: Well, as an over-all picture, certain bills were paid in full, and certain bills pro rata?

Mr. Strachan: That is right.

The Court: All right.

Q. (By Mr. Strachan): But the effect of all those adjustments was that the debts were settled for about $205,000 less than their full face amount; is that about correct?

A. I am not quite sure of the amount. [1980]

The Court: I don't think your question is quite accurate. What the question means is when the corporation came out of reorganization proceedings, it had a decrease in debts of $205,000. Is that what you had in mind?

Mr. Strachan: Well, I think that is the same thing. I had in mind that there was about 205,000 of indebtedness unpaid which was released at the close of bankruptcy.

Mr. Dixon: Well, I object, your Honor, to any further questions of this kind. I think the records of the trustee themselves are the best evidence for this kind of thing, if it is material to the issues of this lawsuit. I have no objection to it insofar as the question relates to any item on the balance sheet.

The Court: Well, counsel assured me that there was going to be just a few questions on this and then we were going to something else.

Mr. Strachan: That I would tie it in.

The Court: If the witness knows, he may answer. Objection overruled. I think the trustee's records

(Testimony of Robert Hodge.)

are the best evidence. This man attempted to reconstruct something after the period of receivership.

The Witness: From the figures obtained from the trustee's report, your figure is approximately correct.

Q. (By Mr. Strachan): In Exhibit 60, will you tell us where that gain to the corporation and loss to the creditors [1981] was reflected?

A. As I have previously testified, all of the reorganization transactions and the operating deficit up to the point of the commencement of Chapter XI proceedings are reflected in this deficit figure of $224,852.56 as nearly as we could reconstruct it.

Q. To be more specific, how was that $205,000 of savings on indebtedness applied to the capital deficit?

A. As I have previously told you, I cannot break this $224,000 deficit down to dollars any place. It is simply a balanced figure that was set up when the corporation commenced operations after the termination of Chapter XI proceedings. That is why I could not answer your earlier question as to what made that figure up.

Q. If the reduction in indebtedness through the reorganization proceeding was $205,000, just assuming that that is a fact, if it had not been for that scaling down of debts, the deficit shown on Exhibit 60 would have been increased by that amount, would it not? It would have been about $429,000?

A. I don't believe you can make that statement.

(Testimony of Robert Hodge.)

counsel. If the debts had not been settled under the Chapter XI proceedings, this company would never have commenced business again and, therefore, there would never have been any such statement prepared. So to say that I would have done [1982] that——

Q. Why wouldn't it have resumed business if that $205,000 hadn't been wiped out?

Mr. Dixon: If the court please, I object to any further questioning on this. We have been through this and it seems to me——

The Court: Sustained. It is obvious if it had not been reorganized it would have gone into bankruptcy and that would have been the end of the corporation. It was reorganized and it came out. The witness has testified the figure was the result of various transactions in the reorganization.

Q. (By Mr. Strachan): You are aware of the fact, are you not, during the first six months of 1949, that is during the period ending July 31, 1949, the first six months of the fiscal year, Winckler owed the corporation some $38,000 that by action of the board of directors was forgiven?

Mr. Dixon: Now, if the court please, I am going to object to going into this question. I think we are not here to try any question of that kind. It is agreed that——

The Court: I am going to permit inquiry. Overruled. We are not going to try that issue. That isn't a question before the court. The question before the court and the jury is what was the status of the

(Testimony of Robert Hodge.)

corporation in 1951. Anything that bears on that would be material. I say frankly I think you are going at it backwards. You have information available in 1951 and if you want to proceed this way, you may. [1983]

Mr. Strachan: I think I should, your Honor.

The Court: I may take the liberty, then, from time to time to tell the jury that these particular things aren't in issue except as they wind up having some reflection on the situation in 1951.

Mr. Strachan: I think they have a bearing, also, your Honor, on the propriety of the statement of income here as to whether there was a gain or loss, net income or net loss in that period. It has a bearing on that as well as the capital surplus and deficit.

The Court: It might have some bearing. When you make a broad general statement as the court did, it is true it might have some other bearing. I am not trying to cover the whole field in the statement. The evidence may be admissible for various purposes. I have overruled the objection. You may inquire into that.

The Witness: Would you read the question, please? [1984]

* * *

(The question was reread.)

The Witness: As I recall the accounts on the books at that time, there was some 11,000 of that amount charged to Mr. Smith for checks made out to his order. The balance was in one or two other ac-

(Testimony of Robert Hodge.)

counts. I am not quite clear on it. These amounts were advanced to Mr.—several of these advances were to Mrs. Campbell and to Mr. Smith. Some of them were charged to Mr. Winckler and some of them were charged to Mr. Smith. Certainly the board of directors took action to forgive the total debt, whoever's debt it was. [1985]

Q. Now, when by board action or otherwise a debt is written off as a bad debt, or is forgiven, released for any reason at all, during an accounting period, do you not ordinarily show the loss on that write-off during the accounting period?

A. Judge, may I go further on this and tell my story of the whole thing?

The Court: Yes.

The Witness: As I recall——

The Court: First, when witnesses are asked a question, I would like to have you first try to answer the question, if you can. All questions aren't susceptible of yes or no answers. But first try to answer the question, and then make whatever explanation is necessary to understand the problem.

The Witness: The writing off of this debt I considered as a part of the reorganization proceedings and not a part of the corporate operations, even though the board of directors actually passed a resolution to forgive this debt subsequent to the termination of the trustee proceedings.

The Court: Now, your answer would be that ordinarily if you wrote a debt off during an account-

(Testimony of Robert Hodge.)

ing period, that would be reflected in your operations statement?

The Witness: That is true.

The Court: But you didn't do it this time because this was tied in with the reorganization? [1986]

The Witness: With the reorganization; yes.

The Court: And although the resolution came later, you related it back to the reorganization?

The Witness: That is true.

Now, may I explain the whole situation as I recall it?

The Court: Yes.

The Witness: Mr. Winchler called me to come down to the plant some time in May after he had commenced operations and the trustee proceedings had been terminated, and he told me about this debt on the books that had been forgiven.

I said, "Mr. Winchler, the corporate action should be taken to record this debt, this forgiveness of this debt, in order to get the records clear," because if there is no specific authorization for charging off of this debt, I would not sign the accounts.

Well, the next visit I had with the corporation was at the time of this audit, which was in August, at that time I had access to all of the minutes of the board of directors, during the trustee proceedings the attorney for the trustee had written up minutes, and I found at that time it was not necessary for me to have requested Mr. Winchler to have had this corporate action taken by the board of directors

(Testimony of Robert Hodge.)

in forgiving this debt, because in the minutes of January some time——

The Court: During the reorganization? [1987]

The Witness: During the reorganization, there had been passed resolutions which would have permitted this write-off under the terms of the reorganization, and there were mutual agreements signed prior to the termination of the trusteeship to do so.

Q. (By Mr. Strachan): You know, do you not, at a meeting of the board of directors of January 24, 1949, this was at least three months after the conclusion of the reorganization proceedings, Mr. Winckler explained that he was then indebted to the corporation in the amount of $38,140.33; don't you know that is true?

A. That is true. And that is——

Q. Let me ask another question. Isn't it true, also——

Mr. Dixon: Let the witness answer.

Q. (By Mr. Strachan): ——that the books of the corporation, as of that date, showed Mr. Winckler to be indebted to the extent of thirty-eight thousand plus dollars?

A. That is true. But the books had not been as yet finally closed as of the termination of the trustee proceedings.

Q. But in June of 1949 the corporation was operating, was it not?

A. That is true. But I had not completed this audit, or there had been no good accounting supervision at that time until I came in to finish this audit

(Testimony of Robert Hodge.)

to adjust the books [1988] properly as of the termination of the trustee proceedings.

Q. Isn't it a fact that the 38,000 of indebtedness from Winckler had been on the books for a long time prior to June?

A. A good part of it dated back to '46.

Q. Some of it dated to '47, isn't that a fact?

A. I believe so.

Q. Some of it to '49? A. That is true.

Q. All right. And it was still on the books in June of '49?

The Court: You have asked that. It was on the books and the witness has given you the explanation. Go on to something else.

Q. (By Mr. Strachan): Now, will you tell us how in your accounting procedures you eliminated that $38,000 asset from the books of the corporation, and where it appears on Exhibit 60, which is the income account for the six months period and the balance sheet as of the end of the period?

Mr. Dixon: If the court please, I object to this question. I believe it has been asked in two or three different ways and answered two or three different times.

The Court: I think it has substantially as to how it was eliminated, that part of the question. Now, where it might appear, the latter part of the question probably hasn't. [1989] But you may answer the first part, again, if you want to, and the latter part.

Do you want the question read?

(Testimony of Robert Hodge.)

The Witness: Yes, please.

The Court: Read it, Mr. Reporter.

(Question read by the reporter.)

The Witness: As I have previously explained, the assets and liabilities after the termination of the trustee proceedings were set up on the books and we started off fresh. Anything prior to that time is reflected, maybe not specifically, but certainly in the $224,000 deficit that we start out with. Anything I considered as part of the reorganization is in that figure.

Q. (By Mr. Strachan: Then you mean that you reflected the effect of the write-off of Winckler's 38,000 by adjusting the deficit figure as of the end of the prior year, that is the $224,000 figure?

A. The minutes of the board of directors were dated prior to that date, prior to January 31, '49, which effectively forgave this indebtedness in conjunction with the rest of the reorganization proceeding.

The Court: Now, wait. You have told us about two sets of minutes. One set of minutes while the reorganization was going on, and then a subsequent set after the reorganization. Which one are you referring to? [1990]

The Witness: I am referring to the January, '49, minutes.

The Court: While it was in reorganization?

The Witness: While it was in reorganization.

The Court: All right.

(Testimony of Robert Hodge.)

Mr. Strachan: I wonder if I can show him a set of minutes and ask him if he can identify the particular minutes?

The Court: Yes.

Juror Johnstone: Have we ever been told what that debt was for, that $38,000? I don't remember.

The Court: Yes; you were told by Mr. Winckler, but we have had a lot of evidence and you may have forgotten.

I am not going to try to repeat the testimony, but what I say may refresh your recollection.

Mr. Winckler testified something about advances; he also told about an agreement he had to pick up Smith's stock, and that was tied in with the picking up of Smith's stock, at the time when the corporation was attempting to make the arrangement with the party who put up the additional money and took the deed to the property, and when the corporation, in substance, in the reorganization, sold its interest in the property subject to the buy-back arrangement in the lease, some connection between that and picking up the Smith stock was part of it.

Do you remember something about that?

Juror Johnstone: Yes. [1991]

The Court: We are not trying out what that was for. It could have been a trip to Las Vegas, it wouldn't make any difference, if it were set up on the books of the corporation as an asset, a debt due from Winckler, it wouldn't make any difference. Winckler could have gone out and gambled $38,000.

Mr. Strachan is merely trying to trace back the back history leading up to the question of the status of the corporation in 1951.

He also informs me that he is directing your attention to the accuracy of Exhibit 60.

I think those are the two particular grounds you indicated, Mr. Strachan? [1992]

Mr. Strachan: Yes, sir.

The Court: All right.

Mr. Strachan: I would like to have the witness identify in this minute book, if he can, the earlier minutes he referred to.

The Witness: These are the later minutes. These are the June 24, 1949, minutes.

Q. (By Mr. Strachan): The book also includes prior minutes going back some time—I don't know how far.

A. All right. Would you mind marking your place?

Q. No. That's all right.

Mr. Dixon: If the court please, I frankly don't see how this can in any way relate to any of the issues of this lawsuit. I object to it for that reason.

The Court: This particular question would only relate to the credibility of the witness.

Mr. Dixon: That is correct.

The Court: He said he relied upon certain minutes and he was informed about certain contracts, and that's all this would relate to.

Mr. Dixon: The minutes may not be in there, as far as that is concerned.

(Testimony of Robert Hodge.)

The Witness: Are you referring to the minutes of January 18, 1949?

Q. (By Mr. Strachan): I am just asking you to identify [1993] the minutes you had in mind.

The Witness: Oh. That is in the minutes that I am talking about, yes, sir.

The Court: Well, let those be marked for identification Defendants' exhibit next in order.

The Clerk: Defendants' Exhibit AY for identification. Do you have a loose copy you could use, or do you want the one in the book marked?

Mr. Dixon: What is this?

Mr. Strachan: I don't know.

Mr. Dixon: Well, what is the date of it?

The Court: They can be photostated if you want to offer them in evidence. We will put a flag on them and mark this for identification AY at this time. If they are photostated, then prepare copies for counsel.

The Clerk: I have marked the minutes dated January 18, 1949, as Defendants' Exhibit AY.

(The exhibit referred to was marked Defendants' Exhibit AY for identification.)

The Witness: The two minutes I refer to were dated January 18, 1949, and June 24, 1949, that I identified for you.

The Court: But the ones you talk about, those occurred during the receivership.

The Witness: Well, January 18. 1949.

(Testimony of Robert Hodge.)

The Court: And they have been marked [1994] AY.

Q. (By Mr. Strachan): What was the other?

A. June 24, 1949.

Q. That is the one that contained a statement by Winckler that he owed the corporation and there was a resolution forgiving the indebtedness.

The Witness: That is true. There are also some mutual releases dated March 7, 1949, between Nicholas J. Winckler, Bernard J. Smith, and Winckler & Smith Citrus Products Company mutually releasing each other, which are part of the writing-off of this $38,000 amount.

Q. (By Mr. Strachan): Where do those appear?

A. I examined them at the time. I don't know where they appear now.

The Court: What was the date that the corporation went out of receivership?

The Witness: Some time in April. I have forgotten the exact date.

The Court: April?

Mr. Strachan: April 1, I believe it was, wasn't it?

The Witness: I am not sure. I have forgotten.

Q. (By Mr. Strachan): Calling your attention to Exhibit AY, being minutes dated January 18, 1949, I would like to have you point particularly to the passage there that relates to the $38,000 forgiveness.

A. There is no passage in here that directly re-

(Testimony of Robert Hodge.)

lates [1995] to any $38,000. The passage that I based my authority to write this amount off reads:

Be it resolved that should the above transaction with Maxwell L. Rubin fail of consummation for any reason whatsoever, then in that event should any other offer be made to this corporation to purchase the aforesaid assets for a consideration of $50,000 or more, provided Bernard J. Smith receives $10,000 from the said sale of this capital stock and mutual releases are executed by Bernard J. Smith, Nicholas J. Winckler and the corporation in favor of each other, and in that event the president and secretary are authorized to accept said offer on behalf of the corporation and execute any and all instruments or deeds and bills of sale and agreements that shall be required or necessary to consummate such other sale. This authority shall be effective for a period 90 days from date.

Q. That is what you relied on?

A. Yes, that, together with the mutual releases and agreements which were signed by Winckler & Smith Citrus Products Company and Nicholas J. Winckler and Bernard J. Smith.

Q. If the books and records had been kept in accordance [1996] with the resolution of June 24, 1949, forgiving the indebtedness, then the books would have shown that during the six months ended July 31, 1949, there would have been a loss on that forgiveness, is that not a fact?

The Court: We have been all over this, counsel. It is a repetitious question.

(Testimony of Robert Hodge.)

Mr. Strachan: I don't think I have had an answer to it.

Mr. Dixon: If the court please, I object again to any further questioning on this. It is not in dispute that the amount was charged off before these books were opened, and we start with these books and the balance sheets as set forth in Exhibit 60 as far as the plaintiff is concerned.

The Court: Objection sustained.

Mr. Strachan: I offer to show, if allowed to proceed with that line of examination, that had the books——

Mr. Dixon: Just a moment.

Mr. Strachan: ——been kept and the exhibit prepared in accordance with the resolution——

Mr. Dixon: Just a moment, counsel.

The Court: Just a moment. Make your offer of proof out of the presence of the jury.

Mr. Strachan: I will do it at the next recess.

The Court: All right.

Q. (By Mr. Strachan): Now, with reference to Exhibit 61, in the capital stock and deficit account you carried forward [1997] that same deficit as of January 31, 1949, of 224,800 some dollars, is that correct? A. That's right.

Q. For that fiscal year you deducted depreciation on the fixed assets, did you not, for the months of February and March, 1949?

A. I don't see how I could have since they didn't have any, but I will certainly check to make sure.

Q. I think you testified this morning you wrote

(Testimony of Robert Hodge.)

off the fixed assets as of the end of the prior year, isn't that right?

A. For tax purposes the assets sold as of April 3, 1949, were depreciated to that date.

Q. So that, according to the income tax return, as late as April 3, 1949, the assets were being carried on the books of the corporation, is that correct?

Mr. Dixon: The witness has testified, your Honor.

The Court: Well, he may answer.

The Witness: It is, your Honor—I mean I can explain it, but to give him a yes or no answer, I cannot.

The Court: Then explain it.

The Witness: As I have told you, counsel, we were called in to audit these books July 30, 1949. At that time we put a great many entries on the books to try to take care of all the transactions that had happened prior to the termination [1998] of the trusteeship. All of those entries were put on the books and the books were closed as best we could. We opened a new set of books to start off with the new operations of the company after the termination of those proceedings. Now you ask me if they are on the books at such and such a date. Actually, they probably were. Effectively, they were not.

Do I make myself clear?

The Court: Well, for tax purposes——

The Witness: For tax purposes, I owe it to my client to get as much of a deduction for tax purposes as I can, so I do that.

(Testimony of Robert Hodge.)

The Court: So you took a depreciation of——

The Witness: Right up to the actual date that they were transferred from the trusteeship to the new owners.

The Court: I still don't know for what period you took depreciation as shown in 61.

The Witness: From February 1 to April 3, 1949, we took depreciation on the tax return for tax purposes.

The Court: On the real property—I mean the buildings and machinery?

The Witness: The buildings and machinery that were sold under the trustee proceedings.

The Court: And that was proper for tax purposes?

The Witness: That was proper for tax purposes.

Q. (By Mr. Strachan): And it was proper for tax purposes [1999] because as of April 3, down to April 3, the corporation showed on its books that it was the owner of those fixed assets, isn't that a fact?

A. The corporation showed on its books that they owned those assets until I came in and adjusted them in July or August, 1949. [2000]

Q. All right. And you adjusted them to show that at least until April 3rd the corporation owned those assets, isn't that correct?

A. I don't recall what the effect—you are getting technical. For tax purposes I did the best I could for my client; I took depreciation up until the last possible minute, I wanted him to have all the benefit of the tax laws that he possibly could have.

(Testimony of Robert Hodge.)

Q. You couldn't honestly give your client the benefit of a tax loss on depreciation on assets that it didn't own, could you?

A. They were under the jurisdiction of the trustee up to that date.

Q. But you couldn't for tax purposes depreciate assets that the books showed you client didn't own, could you?

A. I just told you the books showed that they owned them up until I went in to adjust the books.

Q. And after you made the adjustments you so adjusted them, as I understand it, that they showed that down to at least April 3rd your client owned fixed assets which you depreciated in your tax return; is that correct or not?

A. No, that is not correct. I adjusted the books of the corporation, to eliminate all of the transactions prior to the termination of the trusteeship. Now, your tax return is something else. The books of the corporation were adjusted [2001] as far as we could, as best we could, upon the records and information we had up to the point of the termination of the trusteeship. Then we started out with a fresh set of books for the operations of the corporation.

We do not commingle the operations of the trustee or the operations of the company.

Q. What was the date of this fresh set of books you started for the corporation?

A. Some time after April 3rd.

(Testimony of Robert Hodge.)

The Court: That is the date——

The Witness: The termination date of the trusteeship, whenever that was, subsequent to that date.

The Court: Counsel asked the date of the books, which is uncertain.

You started to set them up, I understand, some time after July?

The Witness: The books were not effectively set up until—were not effectively adjusted until some time in July, or, rather, in August.

The Court: But you adjusted them as of the——

The Witness: As of the effective dates.

The Court: The early part of April?

The Witness: That is right, your Honor.

Q. (By Mr. Strachan): For the purposes of the income account and balance sheets shown in Exhibits 61 and 60—— [2002]

Mr. Dixon: Which one, counsel, are you talking about?

Mr. Strachan: Both.

Mr. Dixon: Let's have it confined to one.

Mr. Strachan: I can combine the two in this one question, if Mr. Dixon will let me complete it.

The Court: Go ahead.

Q. (By Mr. Strachan): In both 60 and 61, you reflected the loss on the sale of the physical assets as having occurred on or prior to January 31, 1949, is that correct? A. That is correct.

Q. For the purpose of income tax, your income tax records showed continued ownership of those fixed assets until some time in April of 1949, is that correct? A. That is correct.

Q. The loss which was sustained on the sale of those fixed assets for income tax purposes was taken for the year ended January 31, 1950, is that not correct? A. That is true.

Q. Will you tell us what the amount of that loss for income tax purposes was?

A. I thought I had already testified to that. I am sorry. Or was it January 31, '49, that I testified to? For the year ended January 31, 1950, the net income for—net income, not a loss, for tax purposes was $72,320.60.

Q. What was the loss on the liquidation of the capital [2003] assets? A. For tax purposes?

Q. For tax purposes.

A. Your Honor, before I answer that question, may I explain to the jury that you do not necessarily keep your accounting records on the same basis that you do your tax computations?

The Court: Yes.

The Witness: On the books of Winckler & Smith they had the assets set up on an appraised value, and the assets were so carried and so depreciated all through their books. However, the tax laws will not allow you to take depreciation on appraised values in your tax computations. So your tax computation must be based on your cost values.

Now may I have your question again, sir?

Mr. Strachan: Read it, please.

(The question referred to was read by the reporter, as follows: "What was the loss on the liquidation of the capital assets for tax purposes?")

Mr. Dixon: I object to the question as being wholly irrelevant and immaterial and having nothing to do with the issues in this lawsuit. This is not a tax case. We are dealing with balance sheets as they have been marked and are in evidence. [2004]

The Court: Overruled.

The Witness: The tax loss on the sale of the property as of April 3, 1949, was $46,867.81.

Q. (By Mr. Strachan): And for tax purposes that was put one year later than it was for balance sheet purposes, isn't that correct?

A. Pardon me. I have already explained to you for the balance sheet we have one base——

Q. I am not talking about bases, Mr. Hodge.

A. Well, you certainly are. You are asking me the basis for my statements, and you are trying to put them on a similar basis for the tax return.

The Court: Let me see if I can straighten this out.

When a person buys property which is used in a business, he has to keep records as to his cost of it, and if he later sells it or loses it, the cost and other improvements he has put on is the base, is it not, that you use for tax purposes?

The Witness: That is right, your Honor.

The Court: Therefore, if I had bought a service station 20 years ago and paid a couple of thousand dollars for it, and now it was worth $50,000, my base is what I paid for it to start with?

(Testimony of Robert Hodge.)

The Witness: Less depreciation.

The Court: Now, meanwhile I might be in business, I would have the station set up on my books at an appraised [2005] value of what I thought it was worth, and for the purpose of my books, if I lost that service station or sold it, I would have to have adjustments to go through on my books to reflect the loss of that asset; is that right?

The Witness: Yes.

The Court: Therefore, the two computations would be entirely different, the income tax computation would start on a cost basis, to make my income tax records correct, the removal of that asset from my books, where it was on an appraised value would be on an entirely different basis and take different computations?

The Witness: That is correct, your Honor.

The Court: Is that what happened here?

The Witness: That is exactly what happened here.

The Court: For income tax purposes the loss was some——

The Witness: $46,000.

The Court: For the purpose of the books set up on an appraised value, the loss was——

The Witness: $169,000 odd.

Q. (By Mr. Strachan): As to the year in which these losses were taken for the two different purposes, loss on the sale of fixed assets for your ordinary balance sheet purposes was reflected as having occurred in the year ended January 31, 1949,

(Testimony of Robert Hodge.)

is that correct, that is, $169,000 computed loss from the books? [2006]

A. No, it is not reflected in my balance sheet at all, because I considered that loss as transpiring during the trusteeship proceedings. I do not attempt to reflect what happened——

Q. But the effect of that loss is reflected, is it not, in the deficit stated as of January 31, 1949?

A. That is true. That, plus all other transactions during the reorganization and the carry-over from the previous years' deficit.

The Court: All right.

Now, just a minute. As far as income tax purposes were concerned, you took the loss, the 46,000 loss, in the year ending January 31, '49?

The Witness: '50.

The Court: January 31st, '50?

The Witness: Yes, sir.

The Court: On the ground that the loss occurred when?

The Witness: April 3, 1949.

The Court: And for the purpose of the books and records of the company you say it is reflected in the year ending what?

The Witness: It is not reflected in the statements as such, but——

The Court: But it has an effect on the deficit in what year? [2007]

The Witness: It has an effect on the deficit as of July 31, 1950—January 31, 1950.

(Testimony of Robert Hodge.)

The Court: Well, that is the same year you gave me as for income tax purposes.

The Witness: That is right. It affects the same year. It affects the deficit of the company books in the same year that it affects the loss on the tax computation.

Q. (By Mr. Strachan): Mr. Hodge, I thought you said that the effect of these reorganization operations had entered into and affected the net results shown as the deficit of January 31, 1949, of $224,800. A. That is right.

Q. So that the reorganization adjustments, reduction of debt, loss on sale of assets, is reflected there as of the deficit balance at the end of the fiscal year 1949, is that correct?

A. That is true.

Q. But for income tax purposes you showed that loss on the sale of physical assets as having occurred in the year ended January 31, 1950?

A. That is true.

Mr. Strachan: I see it is near adjournment time, your Honor. That finishes that phase of the examination.

The Court: And that is because you had to go back and reconstruct what happened in the receivership? [2008]

The Witness: That is right.

The Court: As far as you were concerned, that was proper bookkeeping practice?

(Testimony of Robert Hodge.)

The Witness: That was proper bookkeeping practice.

I merely tried to show in this statement the operations of the company itself; not the reorganization proceedings whatsoever, because I did not have the full data or information to properly show such entries. [2009]

* * *

(Whereupon the jury left the courtroom and the following proceedings were had in the absence of the jury:)

The Court: The record will show the jury now absent. What matter are you going into next, Mr. Strachan?

Mr. Strachan: Well, I was going into the balance sheet for the year ended, I think it is 1951. I was going to inquire about some of these other assets that were set up.

The Court: Well, at least we are getting closer to the year in question.

Mr. Strachan; Really, your Honor, the direct examination, which I thought was quite a streamlined examination, consumed a full day. I think it left a lot of questions unanswered.

The Court: I hurried Mr. Dixon, too. As a matter of fact, I tried to lay the general foundation on each of the documents to save time, if you will recall.

Mr. Strachan: Yes.

The Court: I tried to encourage him to proceed a little faster, and you don't mind if I encourage you now and then.

Mr. Strachan: You might even apply the lash, if you want. [2010]

* * *

(The following proceedings were had in the hearing and presence of the jury:)

The Court: The record will show the jury present in their proper places.

Q. (By Mr. Strachan): Mr. Hodge, I would like to refer now to Exhibit 63, the income account, the balance sheet, for the year ended January 31, 1951. A. Yes, sir.

Q. At the foot of the second page, which is statement [2011] of assets, there is an item of deferred promotion expense of $25,000. From your work papers, will you tell us what is included in that? A. You mean the exact dollar amounts?

Q. What items are the basis of the expenditures?

A. There were some $36,000 of items which were proratable over the—I am sorry. It is more than that. There was a total of about fifty-nine odd thousand dollars of items which could be applied to this sales campaign that Winckler & Smith Citrus Products put on for these new products. Of this amount $10,000 we allocated to normal operations and the balance we considered to be for this promotional campaign. Do you want every dollar?

(Testimony of Robert Hodge.)

The Court: Before you go further, then you in substance divided the $49,000 into——

The Witness: There was $59,000.

The Court: To start with?

The Witness: To start with, and of that we said 10 would be applicable to normal advertising operations, and then we divided the remainder of $49,000 into the year ending January 31, 1951, and then the following year.

Q. (By Mr. Strachan): Between what dates were those expenditures you were prorating made?

A. I do not have them in my papers, counsel. I do not have the dates in my papers. I would say from what I do [2012] have that they were made in October, November and December, approximately, of 1950.

Q. And those expenditures, I think you said, were made principally for the purpose of publicizing and getting market acceptance for lemonade, orangeade and blends, is that correct?

A. I don't believe I said blends. I believe I just said the orangeade, lemonade and the new products. The blend was not a new product.

Q. What other new product did you have in mind?

A. Well, they had a product they called One Plus Five, which was a product that they shipped out and you added five parts of water to it. In other words, if there was a can of juice, you added five parts of water to this can to make your beverage.

(Testimony of Robert Hodge.)

A Juror: A concentrate?

The Witness: It is not quite a [2013] concentrate.

Q. (By Mr. Strachan): The next item is called Unabsorbed—what is it, Unabsorbed Preseasonal Expenses? A. Yes, sir.

Q. What did that item of $22,500 consist of?

A. As I previously explained, our audit papers are not kept intact. We take out all but the skeleton information. I do not have the nature—the exact items that make up that amount. However, I know from my audits of Winckler & Smith Citrus Products and it was expenses which were absorbed over a whole season, and they would be prepaid at any one balance sheet date; that is, there would be something. Because at January 31st you are getting ready for the navel season, and July 31st your Valencia season has not yet been finished, completed.

Q. You say the Valencia season hasn't been finished at July——

A. At the July audit. In the two audits there was always some unabsorbed preseasonal expenses.

Q. Isn't it a fact that something over $19,000 of that $22,000 total was ordinary plant expense that had been paid during the course of the year?

A. Well, just what does counsel mean by ordinary plant expense, now?

Q. Do you have an item there of about $19,000——

(Testimony of Robert Hodge.)

A. I do not have any breakdown of this figure in my [2014] papers, I am sorry.

Q. Where was it that you reclassified these expenditures made during the year and charged to expense, so as to remove them from expense and set them up as assets, do you have a schedule in your working papers that shows how that was done?

A. No, I do not.

At that time we had what was called a standard cost basis of pricing out inventory. In other words, you would take your expenses from one season to the next—I mean for a complete season, and estimate that you were going to sell so many cases of orange juice, and then as the orange juice was sold, you would take from your accumulated overhead the per case estimate as overhead from this preseasonal expense, and that left this amount at January 31, 1951.

In other words, if the Valencia season ended, say, October 31st, then your expenses for November, December, and January would be thrown into an account called preseasonal expenses. This account would then be credited at a predetermined rate for standard cost for every case of orange juice or other product sold.

Q. Do you have before you the amount of unabsorbed plant expense?

A. No, sir; except as shown in the balance sheet, the unabsorbed plant expenses of $22,443.84. [2015]

Q. Isn't it a fact that $19,268.42 of that item was charged to plant expense, and for income tax purposes it was deducted during the fiscal year ended January 31, 1951, as operating expense, although for balance sheet purposes it was reclassified and set up as an asset at the end of the year?

A. As I recall, in 1951 the income tax laws did not allow you to set up reserve for estimated expenses or defer your expenses. The income tax laws at that time, if my memory is correct, you must take these expenses as you incur them.

The Court: So——

The Witness: So this was done for tax purposes.

Q. (By Mr. Strachan): So that that item of 19,000, which appears as an asset at the year end was deducted as an operating expense for tax purposes, is that correct?

A. The item is 22,000, counsel, in the balance sheet.

Q. Well, now, isn't it——

The Court: In other words, the entire $22,443.84, page 2 of Exhibit 63?

The Witness: Yes.

Q. (By Mr. Strachan): That is not accrued expense, is it; it was expense that was actually paid out for expenditures actually paid during the fiscal year of 1951?

A Or incurred, or set up as depreciation, or however [2016] you want to express it, yes, sir.

Q. And those were taken as deductions for business expense for the income tax of that year, isn't that correct? A. That is correct.

(Testimony of Robert Hodge.)

Q. Now, isn't it true, as a matter of fact, that you also, for the year ended—that was deducted for the year ended 1950 and '51, both, was it not?

A. In the tax return?

Q. Yes, sir.

A. No, sir; that is not true.

Q. Are you sure of that? Will you examine the tax returns?

The Court: Do you mean he took the same figure each year, or took the same expenses deducted?

Mr. Strachan: The same expenses were deducted in two successive years.

The Court: I still don't understand you. Do you mean there was a double deduction of the same items, or the same type of expense was deducted in '50 and the same type in '51?

Mr. Strachan: It is my understanding that the same item was deducted two successive [2017] years.

Mr. Dixon: I don't see the purpose of the question, your Honor. I don't know how long it will take the witness ever to answer it. It seems to me it is wholly irrelevant, what was in the tax return, as far as this case is concerned. The plaintiff stands upon the exhibit covering the balance sheet for the year ending January, 1952.

The Court: Your question related entirely to the tax returns?

Mr. Strachan: No.

The Court: I think it did, as you asked it.

The Witness: It certainly does.

Mr. Dixon: Yes, it does.

Mr. Strachan: No. I am asking him this, whether he didn't for balance sheet purposes in the year ended January 31, 1951, set up as an asset this item of $19,000, which had actually been a business expense of that year, set it up as an asset.

The Court: That isn't what you asked, counsel.

Mr. Strachan: But you have to take the succession of events. Then he took that, as I understand it, that 19,000 as expense, rather than acquisition of an asset, for tax purposes in 1951. Then in the following year, which was the year ended January 31, 1952, in which on his books he carried this 19,000 as an asset, he also deducted it again in the 1952 return. So he didn't treat it consistently in either [2018] the return or the balance sheet showing.

The Court: I will sustain the objection to the questions about the income tax. They are worked out on a different basis, as you and I both know, in many cases. If you want to show inconsistencies between successive statements of the corporation, you may inquire.

Mr. Strachan: Your Honor, that is something different. I propose to show that he deducted the same item for income tax purposes in two successive years. I don't think anybody will contend that is proper.

The Court: And what does that prove? If

(Testimony of Robert Hodge.)

proves, No. 1, maybe he made a mistake in his income tax return, or, No. 2, the company filed a crooked return. What has that got to do with it? Objection sustained.

Make your offer of proof out of the presence of the jury. We are going to try the issues of this case and not an income tax violation or the accuracy of some other work that was done. This is not one of the issues here.

Mr. Strachan: I think it goes to the credibility of the witness as well, your Honor.

The Court: Limit it as to Exhibit 63 or successive statements of the company, Mr. Strachan.

Q. (By Mr. Strachan): Now, I would like to refer to Exhibit 64. On the income account you show a loss for the six months' period ended July 31, 1951, of nearly [2019] $150,000. Isn't it true that in the first six months of that fiscal year Winckler-Smith Company had sustained a loss in every month? A. I do not know.

Q. I think you expressed an opinion yesterday, did you not, as to why it was that there was a loss for the first six months of that fiscal year as compared with a profit for the first six months ended July, 1950?

A. I did express an opinion, yes, sir.

Q. Would you repeat that opinion?

A. As nearly as I can remember, I said that the loss was substantially due to a reduction in sales from California operations of approximately a half million dollars.

(Testimony of Robert Hodge.)

Q. Do you know why there was a reduction in the sale of products of a half million dollars in the two years, the first six months of the two years?

A. No. I just know that the books showed that there was a loss of some half million dollars in sales.

Q. And did you know that Mr. Winckler had stated that the reason for the difference in profit and loss as between the two years was because the year 1950 had a very unusual situation due to the inadequate Florida stocks, which permitted us, Winckler, to run a large volume during the winter months, and this had never happened before and it is not anticipated in the future? [2020]

A. I did not know that, sir.

Q. If Mr. Winckler is correct in that, it would explain, would it not, why the volume of sales fell off as between the two years?

Mr. Dixon: I object to that, your Honor. I think that is for the jury to decide.

The Court: Sustained.

Q. (By Mr. Strachan): Now, referring to the balance sheet——

The Court: Exhibit 64?

Mr. Strachan: Yes, Exhibit 64. Thank you, your Honor.

Q. The current assets there are less than half the amount of current liabilities, is that correct?

A. That is correct, sir.

Q. That is not normally an acceptable working cash position, is it?

(Testimony of Robert Hedge.)

A. No, sir; that is not.

Q. You mentioned yesterday in referring to the current liabilities that the unsecured loan mentioned there of some $30,000 was inclusive of a $25,000 loan, note, held by the Bank of America, is that correct? A. Yes, sir; I did.

Q. And I think you said the same with respect to the unsecured note that was shown on the previous balance sheet at the end of January 31, 1951? [2021] A. Yes, sir.

Q. You meant by that the corporation had not pledged any of its own assets to secure that loan? Is that not what you refer to in that classification of unsecured?

A. It certainly was unsecured as far as the records of the corporation showed.

Q. But the bank was secured, was it not, by a continuing guarantee of the loan by Maxwell L. Rubin?

A. Of that I have not any knowledge, sir.

Q. Didn't you observe, when you examined the minute books of this corporation, that in the minutes of the meeting held on July 11, 1949——

A. The bank confirmation that I received direct from the bank stated that it was unsecured. [2022]

Q. Isn't it a fact that it was a loan guaranteed by Max Rubin?

A. I do not have any recollection of it.

The Court: There is a difference between guaranteed and secured, counsel.

Mr. Strachan: That's right.

(Testimony of Robert Hodge.)

The Court: The report shows it listed as unsecured. The witness has said that he had a confirmation that he had a confirmation from the bank that it was unsecured. It may well have been a guaranteed loan.

Mr. Strachan: Perhaps Mr. Dixon will stipulate that it was a guaranteed loan.

Mr. Dixon: I will not, counsel, so stipulate, because I don't know whether it was or not.

I know that as far as the records available from the accountant, Mr. Hodge, that the bank informed him that it was an unsecured loan as far as this corporation was concerned.

The Court: Let's go ahead.

Q. (By Mr. Strachan): Do you recall from the minutes of the meeting of July 11, 1949, that Mr. Winckler explained that the Bank of America had refused to grant a line of credit unless it was secured from Rubin?

Mr. Dixon: If the court please, I object to this line of questioning.

The Court: Sustained. The report shows an unsecured [2023] loan. The words "secured" and and "guaranteed" are two different words entirely.

You are not impeaching the report by this other showing.

If you want to show it was a guaranteed loan, you will be permitted to do so. This witness says he doesn't know.

(Testimony of Robert Hodge.)

Q. (By Mr. Strachan): This balance sheet, Exhibit 64, is the first of your semi-annual balance sheets following the reacquisition of the fixed assets from the stockholders who acquired them during the first reorganization, is that correct?

A. That is correct.

Q. Those assets at the time they were sold, subject to the lease-back, were carried on the books at three hundred thousand, more or less, dollars; is that correct?

A. No, sir; that is not correct.

Q. What was it?

A. These assets have been added to materially in the intervening period.

Q. The reacquired assets, I say.

A. Oh. That would be right. The reacquired assets were the ones, right.

Q. That is, the reacquired assets carried on the books at a little over $300,000 were sold for $50,000 cash in this option to take back?

A. Do you mind if I check that figure [2024] again?

Q. Sure. I don't mind, I mean.

A. That $300,000 figure doesn't sound right.

(Witness looking at papers.)

The gross asset value was $309,207.97, that is right, sir.

The Court: As of what date?

The Witness: This is as of the date of sale on April 3, 1949.

(Testimony of Robert Hodge.)

Q. (By Mr. Strachan): And in exchange fo those, transferred subject to the RFC mortgage, th corporation received $50,000?

A. That is correct.

Q. Now, when it reacquired those assets, th corporation paid Rubin $17,325 cash, is that cor rect?

A. No, sir. I believe that amount was paid t Mr. Wallenstein.

Q. Wallenstein?

A. I believe so. Just a minute and I can ge my notes on that.

Q. Forget who the person was, but to the selle of the assets they paid that amount?

A. $17,325 was paid in cash.

Q. Yes. In addition to that the corporation is sued preferred stock, and that was a par valu stock, wasn't it?

A. Yes, sir; that was a preferred stock a 26,535 [2025] shares.

Q. And that in par value represented $132,675

A. Right, yes, sir.

Q. The corporation did not, then, set up thos reacquired assets as having the value of their the cost, $150,000, did it?

A. Their then cost was not $150,000, counsel They also assumed the liability under the RF mortgage, in addition to that.

Q. Well, now, as to that, I understand that th sale was made of the corporation's right, title an interest, subject to the RFC mortgage, and re

(Testimony of Robert Hodge.)

conveyance back was the seller's right, title and interest, subject to the mortgage; isn't that correct?

A. I don't know. You are getting technical now. I know that they paid $17,325 plus 26,535 shares of preferred stock, plus an assumption of an unpaid balance on a mortgage of $50,499.04.

Q. All right. Now, that $50,499 appears in the liabilities, does it not? A. As of——

Q. As of July 31, 1951? A. Yes, sir.

Q. So that it wasn't paid; that just became a liability? [2026]

A. They assumed the liability for that.

Q. But for the value of the assets in excess of the mortgage, the stated purchase price was $150,000, wasn't it? A. Yes, sir.

Q. Now, those assets were combined, were they not, with some assets that had been acquired, plant equipment that had been acquired during the leasehold period of about 97,000; is that correct?

A. I believe the cost value on those assets was more than that.

The gross asset value was—let me see. The net book asset value after depreciation allowance to date was $91,849.23.

Q. All right. Then you add that to the $150,000 that was paid for Wallenstein and Rubin's interest, and it gives you a total cost of what?

A. Plus the unpaid balance on the mortgage assumed.

Q. That unpaid balance on the mortgage was reflected in the liabilities?

(Testimony of Robert Hodge.)

A. Yes, but it still has to be added in your asset values. You assume that liability in connection with the repurchase of the assets.

Q. Actually they never paid that liability, did they?

A. No; but they assumed the obligation therefor.

Q. They were liable for it all the time, weren't they? [2027]

Mr. Dixon: If the court please, that is argumentative.

The Court: It is argumentative. Proceed. The objection is sustained.

Ask the witness the question you want to about these figures. [2028]

Q. What do you find the cost at the time of reacquisition was, including not only reacquired assets, but the depreciated value of the additional plant equipment?

The Court: By cost you mean cost as of the date of reacquisition? You are not talking about the earlier cost?

Mr. Strachan: I am talking about the cost as of the date of reacquisition, through the reacquisition.

The Court: All right.

The Witness: About $250,000 approximately.

Q. (By Mr. Strachan): Now, the books were then set up so that they did not reflect the $250,000 cost, is that correct? A. That is correct.

Q. What was the valuation which you wrote into the books for those fixed assets?

(Testimony of Robert Hodge.)

A. The valuation was an appraisal valuation based upon an appraisal dated January 12, 1951.

The Court: We are not talking about lands, but buildings and machinery?

The Witness: Talking about everything, your Honor.

Mr. Strachan: Land, buildings and machinery.

The Witness: Land, buildings and machinery.

The Court: Tools, automobiles, everything?

The Witness: Everything that was on hand at that date was valued. [2029]

Q. (By Mr. Strachan): What was the amount of that—— A. The amount of write-up?

Q. Yes, sir.

The Court: The appraisal is seven hundred and ten thousand.

The Witness: 732,000, your Honor.

The Court: 732?

The Witness: Yes. Approximately $442,000.

Q. (By Mr. Strachan): So that by that write-up the capital surplus was increased, is that correct? A. Capital surplus was set up, yes, sir.

Q. By that amount.

The Court: You said four hundred and some odd. Page 3 shows 343,000. Were you off a hundred thousand in that rapid computation you made?

The Witness: No, sir. The assets were roughly—that had been acquired from the time of receivership were roughly valued at 80,000, then $150,000 paid out in stock and cash, plus the assumption of the mortgage, would make it roughly $280,000. The

(Testimony of Robert Hodge.)

appraised value was $732,000. So roughly there is an increase of $442,000 in the write-up.

The Court: I was trying to square it with the bottom of page 3 where it says capital surplus arising from an appraisal of fixed assets and reorganization of the company, 343. [2030]

The Witness: There were some charges against that account.

The Court: I see.

The Witness: To reduce it to this figure.

The Court: All right.

Mr. Strachan: I wonder if the jury heard that.

The Witness: I am sorry. There were some charges made against this capital surplus account which was set up as a result of this appraisal for various reorganization expenses of the company.

The Court: Ask another question, Mr. Strachan.

Mr. Strachan: I thought the witness was doing some computing, your Honor.

The Witness: I think I am lost. What were you asking me?

Q. (By Mr. Strachan): Had you completed your calculation there?

A. I would say roughly——

Mr. Dixon: What was the last question? Maybe that would help, to have the last question read.

The Court: Reach it. I don't think there is one pending anyhow. I asked a question and he answered me.

Q. (By Mr. Strachan): My last question was.

(Testimony of Robert Hodge.)

what was the amount that was added to the capital stock and surplus account through this write-up?

A. There were adjustments back and forth, counsel. [2031] My net figure comes out approximately 436,000 after adjustments back and forth. In other words, this appraisal gave us certain figures, but there were adjustments for adding machines that were traded in and stuff like that back and forth, so instead of 343,000, it was approximately 436,000.

Q. And that 436,000 is included in the stated net worth appearing on the third page of Exhibit 64 amounting in the aggregate to 722,000 some odd dollars? A. As of what date, counsel?

Q. July 31, 1951.

A. I have a net worth of $622,194.65.

The Court: You must be looking at the wrong figure. Exhibit 64, page 3, shows the figure the witness gave.

Mr. Strachan: 622,000. That's right.

Q. That includes the 436,000 of appraisal write-up? A. That is correct.

Q. Do you have an opinion, Mr. Hodge, as to whether the appraisal write-up actually reflected the real value or the commercial value of the assets to which that write-up was applied?

A. I do not have any such opinion.

Q. You simply took the appraisal as an appraisal and translated it into——

A. I relied on a professional man's judgment, yes, sir, who is skilled in that business. [2032]

(Testimony of Robert Hodge.)

Q. You didn't know whether that appraisal was made for the purpose of ascertaining economic or commercial value or ascertaining some other standard of value?

A. No, sir. I took the appraisal as rendered by the Union Appraisal Company.

Q. Now we come to Exhibit 65. A comparison of the two income accounts and the losses shown thereon would indicate that the largest part of the loss for the full year ended January 31, 1952, occurred in the first six months of the fiscal year, did it not?

A. The statement would so indicate. There are a few items which are unusual which are in the first six months ending July 31, 1951.

Q. Would you care to mention some of those?

A. Yes, sir. The 25,000 odd deferred promotional expenses which were deferred in the previous year and were carried over and charged off in the first six months.

Q. Part of that selling expense?

A. Yes, sir.

Q. Were there any expenses incurred in the first six months that were carried over as assets for a later period?

A. Nothing other than the normal course of operations.

Q. Now, turning to the liabilities as of January 31, 1952, there is a note payable secured by the first deed of trust. That is the RFC loan, is that [2083] right?

(Testimony of Robert Hodge.)

A. That is the unpaid balance on the RFC loan, yes, sir.

Q. That was a loan that called for payment in monthly installments, is that correct?

A. That is correct.

Q. If you refer back to the liabilities shown as of July 31, 1951, it appears that the RFC loan was the same in amount at January 31 as it was at July 31, 1951. I will put that again.

It appears that the balance due on the RFC loan at January 31, 1952, was the same as at July 31, 1951. A. It is.

Q. It is true, is it not, that after the properties were reacquired, I believe in April of 1951, the company never made any of the monthly payments on the RFC loan, is that correct?

A. That is correct.

Q. Can you tell us the date of the last monthly payment that was made on the mortgage?

A. By the corporation?

Q. The corporation was making payments on the mortgage during the leasehold period, was it not?

A. It was making them as a part of the rent due to the then owners.

Q. Yes? A. Yes, sir. [2084]

Q. Can you tell us when the last such payment was made?

A. No, sir; I cannot. It was sometime prior to the acquisition of the property by the corporation. I can make that statement, but I do not know the

(Testimony of Robert Hodge.)

exact date.

Q. Can you tell us how many installments of the mortgage were in default after July 31, 1951, that is what I am trying to get at.

A. No, sir; I cannot.

Q. Do you have the date of the reacquisition?

A. By the corporation?

Q. Yes, sir.

A. On April 16, 1951, the company exercised the option under the agreement dated February 21, 1949. [2035]

Q. It would appear, would it not, that the mortgage installments for April, May, June and July were in default as of July 31, 1951?

Mr. Dixon: Appear from what, counsel?

Mr. Strachan: From his testimony.

Mr. Dixon: I don't think that appears from his testimony at all.

If the witness knows, he can so testify, but I don't think there is any basis for the question.

The Court: Overruled. If you know.

The Witness: I do not know exactly, or how many installments were in default at that time. The confirmation from the RFC does not so state.

The interest was paid to July, 1951, at the time we made our July 31, 1951, audit. [2036]

• • •

The Court: Wait, wait.

Do you have any information when the loan was due?

The Witness: The final balance was due on February 5, 1952.

(Testimony of Robert Hodge.)

The Court: All right.

The Witness: The payments of $1,500 a month from April, assuming they were delinquent from that date on, April, 1951, to February 2, 1952, would not amount to the unpaid balance at that time.

Q. (By Mr. Strachan): So there was a balloon payment?

A. There was a balloon payment, yes, sir; there must have been.

Q. And that mortgage provided, did it not, that upon a default in the payment of any installment the RFC could declare the entire loan due and payable? A. I do not have that knowledge, sir.

The Court: Well, that can be stipulated, can it not? [2037] That is the customary provision.

Mr. Strachan: I think we can also stipulate, can we not, that in September of 1951 the loan was declared due in its entirety under the acceleration provision?

Mr. Dixon: Well, that may be so, counsel. I don't know. I would have to ascertain that. If it is a fact, we will so stipulate.

Mr. Strachan: Let's stipulate to it subject to check, and if we find we are in error we will change the stipulation.

Mr. Dixon: We will check it, your Honor.

The Court: All right. Check it tonight and get that point cleared up.

Q. (By Mr. Strachan): Now, your balance sheet as of July 31, 1952, the last page of Exhibit

65, states the net worth as of that date to be $570,000? A. That is correct.

Q. The current assets as of that date were $55,000, the current liabilities $199,000. That would indicate an unsafe financial condition, would it not, in spite of the stated net worth of $570,000?

Mr. Dixon: If the court please, I object to the word "unsafe." The facts will speak for themselves and the jury may determine the situation.

The Court: Overruled. [2038]

The Witness: A very poor financial condition.

Q. (By Mr. Strachan): Do you have in your records there the date on which your balance sheet of Exhibit 65 was prepared and submitted?

A. I do.

Q. What was that date?

A. It was submitted on March 18, 1952.

Q. And that was the day before the petition for Chapter 10 reorganization was filed by the company, was it not? A. I do not know, sir.

The Court: We have had the date stipulated heretofore. It was in March some time, was it not?

Mr. Fisher: It was March 19th that the petition was filed.

The Court: Of '52, that the reorganization proceedings under Chapter 10, which are still pending, in which Mr. Walker is the trustee, was filed.

The Witness: I will add that I had no knowledge of such proceedings, as of the date this statement was prepared. Otherwise, it would have been mentioned in my report.

(Testimony of Robert Hodge.)

Q. (By Mr. Strachan): Otherwise what?

A. It would have been mentioned in my report.

Q. Was it your practice, when you were making these annual audits, to examine the minutes of the corporate proceedings? [2039]

A. It was.

Q. Down to the date of your report?

A. No. We would probably have examined at least through January 31, '52.

Q. Wouldn't you have examined them through February?

A. If they were made available to us, and if we had any knowledge of them, we certainly would have.

Q. Well, isn't it a fact that on February 13, 1952, over a month before your report was prepared, that a resolution was adopted by the corporation resolving that resort be had to Chapter 11—Chapter 10, of the Bankruptcy Act by the filing of the petition?

A. I am sorry. The last minutes that I had access to were dated January 8, 1952.

Q. Then you weren't aware of the minutes of February 13th which authorized the filing of the petition? A. No, sir. [2040]

* * *

The Court: The record will show the jury now absent. [2043]

* * *

The Court: All right. One other thing. I have been [2044] going over some of these instructions. I merely throw this out because if we get this behind us it may save some problems.

There is a requested instruction by the defendants that the defendants, Sunkist, Exchange and Lemon, could not conspire among themselves. I am tentatively of a frame of mind to give that.

Mr. Dixon: We would definitely oppose that, your Honor.

The Court: That is why I wanted you to think about it. Here is my theory about it. Under the exemptions, these people could monopolize 100 per cent of the orange industry if they stuck to their knitting among themselves.

Mr. Dixon: That's right.

The Court: And if they could monopolize 100 per cent, I suppose they could conspire to that 100 per cent of it.

Mr. Dixon: I think there is a difference, your Honor.

The Court: I am talking about conspiring between themselves alone, without any other conspirator being involved.

Mr. Dixon: That's right.

The Court: I will think it over further.

Mr. Dixon: Pardon me, your Honor.

The Court: Well, let's have your point.

Mr. Dixon: The charge relates to restraining of trade and commerce in citrus juices, which is a byproduct, and is not directly related to the product handled by the defendants.

The Court: I know, but being logical, let's follow [2045] through. If the exemptions would give co-operatives, and they are all tied in together with one organization here, a right to monopolize 100 per cent of the orange industry, Valencia oranges, a fortiori, you could monopolize 100 per cent of the single-strength Valencia juice. It is pretty hard for me to see how you could ever complain about that as long as they stuck to their business. When they get out and contract with TreeSweet and Silzle, in my opinion, and I am going to rule as I have indicated, that it is a question of fact to a certain extent, but you let down the bars, and I am inclined, as far as dealing between themselves, to think they are still protected.

Mr. Dixon: Your Honor, I think particularly under the Section 2 count, it is important.

The Court: Monopoly?

Mr. Dixon: Assuming a monopoly, that they have a monopoly, and conspire to use the monopoly power that they have for the purpose of eliminating or restraining competition, which is technically a violation of Section 1, perhaps, the restraint of trade section, but Sections 1 and 2 under the cases do not make any distinction provided you assume the existence of the monopoly power or the power to exclude.

In other words, you may have a legal monopoly, no dispute about that. I wouldn't question the fact that Sunkist could have a legal monopoly and have all of the product. There [2046] would be nothing wrong about it.

But the question comes, assuming the existence of the monopoly, and your Honor may wish to instruct on that question, I think the law is clear they cannot conspire together with any other co-op, for example.

The Court: I agree with you.

Mr. Dixon: Or with a subsidiary. The general law, in other words, applies to a co-op. If they are doing it for the purpose of violating the law. I think they can conspire together to do that, just the same as they can conspire with TreeSweet and Silzle if you assume the existence of monopoly power.

The Court: Well, I thought we would be able to dispose of that one in a hurry, but maybe not.

Mr. Strachan: It is all right with me. I think you should.

The Court: That's a nice little question there.

Mr. Dixon: It is, your Honor.

The Court: Your point is they might have a legal monopoly power, period, and it is all right?

Mr. Dixon: That is correct.

The Court: But if you try to misuse the power—well, give me an example in some other field. Let's take a patent. Can you draw an analogy there?

Mr. Dixon: In a sense that is analogous. In other [2947] words, they go beyond the scope of the legal authority.

The Court: Let's see if I can state it. If a man has three or four patents and he has a complete monopoly, and then he ties in sales with things that are not in the patent——

Mr. Dixon: Then he has exceeded the monopoly power granted to him.

The Court: I had better go back and look at something I wrote.

Mr. Strachan: But the distinction between that and the point of view your Honor has just expressed to me is this: a fortiori, our monopoly extends to the Valencia juice and we are not——

Mr. Dixon: No; it does not.

Mr. Strachan: We have a monopoly of the fruit. A fortiori, we have a monopoly of the juice and we are not trying by our monopoly of the fruit to tie in any other control or exercise any control over what is beyond the scope of our lawful monopoly.

The Court: It occurs to me it might be the same situation. It is possible to have a legal monopoly of the fruit. It might also be possible for them to have a legal monopoly of single-strength orange juice.

Mr. Strachan: That's right.

The Court: Then again we might run onto the question, have you misused it? [2048]

Mr. Dixon: That is correct. In other words, your Honor, so I make our position clear here, the plaintiff does not contend that the defendant or defendants cannot legally and properly enter into processing contracts, so-called.

The Court: I understand. I think the defendants understand that, too, by now.

Mr. Dixon: They certainly do.

The Court: And if they did it again, it might be done differently.

Mr. Dixon: TreeSweet does not necessarily have to be a party to this combination. I think they are, and our position will be by entering into the contract, they are.

Silzle does not necessarily have to be a party to the combination and conspiracy, but they are by reason of the contract.

But going directly to the question that your Honor raised as to whether a co-op or two co-ops, or a co-op and a subsidiary can conspire together to violate the law, I think the fact that they are immunized, or put it this way, the fact that they are permitted to organize does not mean that they are permitted to organize to violate the law and the question is, of course, whether this constitutes a violation.

The Court: Perhaps you want to make some law on appeal?

Mr. Fisher: Should we have to appeal.

Mr. Strachan: I would rather make it in a nisi prius [2049] court.

The Court: All right. Let me see counsel in chambers for just a minute.

Adjourn until tomorrow morning.

(Whereupon, a recess was taken until 10:00 o'clock a.m. of the following day, Thursday, January 12, 1956.) [2050]

January 12, 1956—10:00 A.M.

The Clerk: No. 13788-C Civil, Winckler & Smith vs. Sunkist, further jury trial.

The Court: The record will show the jury in their proper places.

Mr. Dixon: May it please the court, yesterday we were asked to determine what the situation was with reference to the RFC obligation. We are willing to stipulate that, based on the letter of August 2 from the Reconstruction Finance Corporation——

The Court: August 2 of what year?

Mr. Dixon: 1951, that the loan was technically in default in September of 1951, and that the open account, unsecured loan, payable to the Bank of America, was guaranteed by Mr. Maxwell Rubin.

The Court: Satisfactory?

Mr. Strachan: The stipulation in regard to the guarantee of the unsecured loan is satisfactory.

I would like to have a little time to check on the status of the RFC loan.

The Court: All right. If you don't call it to my attention or to the jury's attention, we will assume that the stipulation is satisfactory in both parts.

Mr. Strachan: I think that is fair, yes. [2054]

The Court: All right. You may proceed.

Mr. Strachan: I was up to the point of taking up the witness' computations. There will be some changes.

The Court: That's right. Have you made some recomputations on 66, Mr. Dixon?

Mr. Dixon: Yes, your Honor, the recomputations have been made and changes made in Plaintiff's Exhibit 66, and also the changes suggested by the court or, rather, the additions suggested by the court upon 67 have been made.

The Court: All right. Now, which do you want to hand to the jury, Mr. Strachan?

Mr. Strachan: I didn't hear you.

The Court: Which one do you want to start with?

Mr. Strachan: I want to start with Silzle. I wonder if the revised copies of the exhibit are here.

The Court: Yes. All the copies have been made to correspond?

Mr. Irwin: Yes.

The Court: Come forward, Mr. Hodge.

The Clerk: Do you want the whole series given to the jury, or just 66 and 67? [2055]

ROBERT HODGE

the witness on the stand at the time of adjournment, having been heretofore duly sworn, was examined and testified further as follows:

The Court: Mr. Hodge, referring to Exhibit 66, where you made computations on the Silzle contract, which is in evidence as Plaintiff's Exhibit 25, you had originally taken a tonnage of 7,203 tons plus.

The Witness: That is correct, your Honor.

The Court: Now, it developed that some 527 or 528——

The Witness: Approximately 528 tons.

The Court: 528 tons were delivered prior to the contract and that the oranges processed under the contract was the difference in tons, namely, 6,675 plus.

The Witness: Yes, sir.

The Court: Have you made recomputations?

The Witness: I have recomputed the per ton figures on the corrected tonnage, your Honor.

(Testimony of Robert Hodge.)

The Court: And where the change resulted, you put it in in ink?

The Witness: You will have to ask Mr. Irwin. I haven't seen them.

Mr. Irwin: The changes were made by me personally from the notes Mr. Hodge gave me.

The Court: The changes appear to be in ink on my copy. [2056] Mr. Hodge made the changes and you made the copies correspond?

Mr. Irwin: Yes, sir.

The Court: And they have been placed in ink on the copies?

Mr. Irwin: I made the copies correspond to the changes that Mr. Hodge gave me. [2057]

The Court: Pass 66 out to the jury.

Mr. Strachan: I don't have a revised copy. I have a retyping of it, but I don't have the one copy that shows the difference.

The Court: You use mine. Those pencil notations are mine. I just scratched on the front of it.

Mr. Strachan: I might say, your Honor, that we don't agree with the proposition factually that there were only 6675 tons processed under this arrangement. It is our position that the total processed under the arrangement, and that the basis for settlement, was changed after the first 528 tons processed. The arrangement was not reduced to writing until September. It is our position that the only difference between the 528 tons and the remainder is whether the peel and oil component would be accounted for in cash or would be accounted for in kind. But the whole thing was under the processing arrangement.

The Court: You paid for the 527 tons on a different basis, didn't you?

Mr. Strachan: The basis of computing the return was changed after the 528, but it is our position that the entire quantity, whatever it is, 7,203, was under the processing arrangement.

The Court: All right. That will be a question of fact for the jury. [2058]

Mr. Strachan: Yes, sir.

The Court: You use my copy and let me have the copy that you had that was typed, Mr. Strachan.

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Hodge, when you prepared Exhibit 66, a computation from the Silzle processing arrangement, and 67, a computation from the TreeSweet arrangement, did you notice that the allowances for processing, for selling costs, for advertising, and other items were different as between those two arrangements? A. I did, sir.

Q. In general, I believe the allowances to Silzle were lower than the allowances for the same items to TreeSweet, is that correct?

A. As to the processing I can so state. As to the others, it is not comparable, because the two are not expressed the same.

(Testimony of Robert Hodge.)

Q. As to the processing what is the——

A. As to the processing. TreeSweet was to be paid under the contract $35.57 a ton. Assuming that the figures contained in the EOP subpoena for processing, and so forth, apply only to the 6,675 tons, not to the 7,203 tons, the processing cost would be $32.30.

The Court: For Silzle? [2059]

The Witness: For Silzle.

Q. (By Mr. Strachan): As compared to what?

A. $35.57 for TreeSweet.

Q. Now, combining all other allowances provided for, you say you can't do them item by item, can you tell us what the total allowances, in addition to processing allowances, were under the Silzle, as compared with the TreeSweet contract?

A. Your Honor, has it been established that these figures that are rendered under the EOP-contract—subpoena, are for the 6,675 tons or are they for the 7,203 tons? I am not sure. The subpoena does not specifically state, and we have made computations both ways.

Q. Will you tell us what your computation is, assuming that the allowance applies to the 7,200, and compare that with TreeSweet, and then give us your computations as to what those allowances are on the other assumption, and compare those?

Mr. Dixon: Just a moment. I want the record to be clear, your Honor. It is my understanding that after discussion on the matter the defendants have stipulated that the 500 some odd tons were

(Testimony of Robert Hodge.)

paid for at the rate of $22.50 a ton, that the remaining 6,675 tons plus were covered under the particular provisions of this agreement.

If that is in dispute I would like to know.

The Court: There is no dispute, is there, as to the [2060] amounts paid? Your contention, Mr. Strachan, is that actually the whole tonnage was covered and was——

Mr. Strachan: By a processing arrangement.

The Court: ——and was subject to the contract?

Mr. Strachan: Right.

The Court: So there is no dispute that the 527 tons were paid for at so much a ton, at least credited in the books on that basis?

Mr. Strachan: That is right.

The Court: And that the remaining tonnage was put on the books in dollar amounts under the contract?

Mr. Strachan: That is right. [2061]

The Court: Now, the contention you make is that the whole transaction was in substance affected by or covered by the contract. It was all part of this one contract. That is what you mean, isn't it?

Mr. Strachan: That's right. Now, the witness has just said that he has made this computation assuming, first, that it was under the contract and, second, that it was not under the contract, and he has apparently got both figures available.

The Court: Well, that's all right, but I want to see what your contention is. I think I understand it. Your contention is that there was not a separate

(Testimony of Robert Hodge.)

sale to Silzle of 527 tons at $22.50, and then another transaction where there was a contract for processing. That what had happened was that the matter had started out on an oral agreement and some tonnage was delivered at $22.50, and later a contract was entered into, which contract was to make this all one transaction, although the original tonnage was put on the books at a certain figure and the remaining tonnage handled through the contract. Is that it?

Mr. Strachan: That is substantially it, with this slight modification, your Honor. The original 528 tons, as I understand it, was delivered and was not billed for as a separate sale. Finley and Silzle worked out an arrangement that there would be some fruit processed under this sort of [2062] an arrangement. They started in on the thing, and they processed the 528 tons before they had decided how they were going to render the accounting. They decided after the 528 tons was processed that they would have the oil and peel returned in kind and the juice component returned in cash. But by that time the 528 tons had been processed and disposed of. You couldn't allocate precisely what the peel and the oil component was, so they just got an aggregate figure that covered both, but it was all a part of a continuous transaction.

The Court: Now, let's go a bit further. Then is it your contention that after the contract was entered into then they went back and for the bookkeeping entries on the two sides of the ledger, that is what Silzle had coming for processing and what EOP or Sunkist had coming when Silzle took the canned goods, they went back and applied the contract to the whole 7,000 tons, or did they go and say no, the 527 tons is $22.50 and the balance of the tonnage is figured out on the yardstick of the contract?

Mr. Strachan: Of course, this contract wasn't reduced to writing until some time in September. It is my understanding, so to speak, 528 tons represented eggs that were scrambled and you couldn't unscramble them, so the best you could do is reach an aggregate figure that would be the return for the entire fruit.

The Court: I know that, but I want to understand this [[illegible]] other part. I think I see your legal position. In other words, if you are going to have to resist the Silzle contract, you want to resist one contract and not a sale of fruit at $22.50 and a contract for the difference, so you are going to contend this was all one transaction, and from your standpoint handle it in a bundle.

Mr. Strachan: That's right.

The Court: That is your legal position?

Mr. Strachan: Yes.

The Court: Now I am asking you about the factual position, which there oughtn't to be any dispute on. When they got ready to set this up on the books, and I think we ought to know this, there oughtn't to be any dispute about it, did they run the 527 tons through at $22.50, and make the necessary charges, and put the balance of the tonnage through on the other yardstick of the contract as it was written finally? Or did they go back and apply the accounting yardstick of the contract, the written contract, to the 527 tons, and end it up in that manner?

Mr. Strachan: Well, as I understand it, the yardstick, as you call it, was not applied by segregating definitely the yield of oil and peel from the juice. The $22.50 was used as the return from both of those elements.

The Court: For the first 527 tons?

Mr. Strachan: That's right. [2064]

The Court: All right. Now we are agreed on that, and that is without prejudice to your right to contend this was all one package.

Mr. Strachan: Yes, sir.

The Court: We are just trying to find out what was done by the bookkeepers in adding it up. If that is true, then is it necessary to go into the two alternate methods of computation? The second computation, then, is the one we are concerned with as far as computations are concerned.

Mr. Strachan: No, I don't think so. It seems to me there are two different bases on which you can make a computation, the allowances and the returns, the allowances to Silsle and the return to EOP. One is that you deal with 7,203 tons as the total quantity, and you include the return on the 528 tons at $22.50 a ton in the income.

Under the other hypothesis, which we don't agree

(Testimony of Robert Hodge.)

with, you deal with the net after deducting the 528 as the tonnage, and use only the income from that lesser quantity.

I thought for the purpose of examining this witness, we could cover both hypotheses, so we could show what the allowances were on the one theory, and the allowances were on the other.

The Court: I can see the two theories. Maybe I don't see the same two you do. I want to let you test the witness' opinion. Maybe if we can figure out what the two [2065] theories are, then we can know what you are going at.

Mr. Strachan: Maybe we could get at it this way. The witness has said he computed it on two bases. Why don't we find out what the computations are that he made?

The Court: Let me inquire. When you took the first computation, you took the tonnage of 7,203 tons, disregarding the decimals, right?

The Witness: Yes, sir.

The Court: And you ran that all through under the provisions of the written contract?

The Witness: Based on the information furnished in the EOP subpoena.

The Court: That involved the tonnage?

The Witness: It gave the yields and the prices paid and all the various factors.

The Court: All right. Now, when you made the second computation based upon 6,675 tons, which would result after you deducted the 527 tons, on what basis did you make that?

(Testimony of Robert Hodge.)

The Witness: Well, I assumed that the figures that are furnished to us under the EOP subpoena, under the various subsections, applied only to the 6,675 tons, because in section K of the subpoena, it indicates to me that the $11.878.87 paid was paid by Silzle to EOP for the 528 tons. Therefore, I then assumed that these figures must not contain anything relating to the 528 tons. [2066]

The Court: So then you eliminated the 528 tons entirely and made a computation, then, based entirely on 6,675 tons?

The Witness: That is right, your Honor.

The Court: Without any reference at all to the 528 tons?

The Witness: That is right.

The Court: Now, there is a third alternative. I don't know how much time we are going to spend on this, but there is a third alternative. See if I can demonstrate it. Namely, this contract, of course, provided for original processing by Silzle, and then the option to buy the canned goods by Silzle. It had various parts to it. The third alternative, as I see it, is this: Starting out on the processing end of it, here is one pile of oranges that factually we admit was paid for at twenty-two dollars some odd cents a ton, as far as the credits were concerned, and there is the other pile of oranges that went strictly under the contract. That is as far as the oranges coming in. But when the oranges were made into juice and the cans were bought by Silzle, the cans were then purchased under the written contract. So

(Testimony of Robert Hodge.)

the second half of the contract concerned both piles of oranges.

Is that right?

Mr. Strachan: That's right.

The Court: So we have got three alternatives.

Does that fairly state the three situations? [2067]

Mr. Strachan: I think it does. And to cover the third alternative it seems to me that you should deal with the 7,200 tons, and the income received from the 7,200, which is the income from the 6,000 some plus the $11,000.

The Court: Well, then, let's do it this way, if it is agreeable: Let's see if the jury understands the three different ways of computing. Two of them are set forth in 66, and if you want to make a third computation on this third theory you may do so, or you may have the witness do it for you. Will that be all right?

Mr. Strachan: Yes. I think it might be a little laborious to have the witness do it, unless he can do it readily from the stand.

The Court: I mean during some recess.

The Witness: Judge, it could not be done.

Mr. Strachan: What did you say, Mr. Witness?

The Witness: It could not be done from the information that I have at hand.

Q. (By Mr. Strachan): You are not in position to make the third computation?

A. No, sir, I am not. I do not have the information to make that third computation.

The Court: Let's see if the jury understands

(Testimony of Robert Hodge.)
what we have all been talking about. Let me see if I can state Mr. Strachan's position, too, so we will know what he is [2068] getting at.

In a lawsuit one side offers proof, and another side offers proof. One side offers proof and makes certain contentions as to what it means; the other side has certain contentions as to what they think it means. Now, the plaintiff has offered the Silzle contract and they are relying on it as part of their case. Mr. Strachan, one of his positions is that this entire transaction with Silzle was one transaction. It started out under an oral agreement to buy some oranges for $22.50. Eventually the oral contract was written up and it became one transaction.

I don't know whether the plaintiff is going to contend that there were two, or not.

Mr. Strachan is going to contend, in any event, that there was only one transaction.

The plaintiff is going to contend, No. 1, that there was a sale of oranges to Silzle at $22.50 a ton, and a processing contract?

Mr. Dixon: If it please the court, I will be very glad to try to answer that question. I tried to get it from Mr. Finley, and all I can say is that I will leave that question to the jury to determine. It is our contention, to specifically answer your question, that the contract provides that as to the five hundred some odd tons delivered, they should be paid for at the rate of $22.50 a ton, and that they were paid for [2069] on that basis; that the balance apparently were covered by this other arrangement.

(Testimony of Robert Hodge.)

Whether the five hundred some odd tons were to be treated differently than the twenty-two fifty, I don't know.

The Court: Then we have that issue in the case. So that the plaintiff at least has kept the door open that it is going to argue that there was a sale of 527 tons at twenty-two fifty, and a processing contract. The defendant is going to contend that because this contract came along later, and because it referred back to certain things, and because all the goods manufactured for all the oranges came under the contract, as far as the repurchase of them were concerned by Silzle, that this was one transaction. Is that right?

Mr. Strachan: That is right.

The Court: This is going to be a matter for you to decide. It depends somewhat on the contentions that are made during argument, but on these computations there ought not to be any confusion between us.

The first computation that was made, as the witness told you, based upon the way he read the subpoena, he took the total tons, 7,000 tons, and ran it through on that basis. Now, he has made a second computation in which he subtracted the 527 tons and left 6,675, and he ran it completely through on that computation, and he put at the very last line of [2070] the amended——

Mr. Irwin: If your Honor please, you are using a mimeographed copy and the last line is not on the exhibits which the jury is using.

(Testimony of Robert Hodge.)

The Court: All right. Strike the last out, then. So he ran the tonnage through at 6,675 and he got a result. Now, there is this third alternative that we talked about, which the witness says maybe can't be computed, but the third alternative involves the fact that this contract was a two-sided contract. First of all, the contract provided that Silzle would process goods, oranges into juice in cans, and the oranges and the canned juice were to be the property of Exchange Orange. But there was a second part of the contract that said Silzle could buy that canned goods at a certain price. Since both piles of oranges went into cans, and since all these cans were bought by Silzle under the part of the contract providing for purchasing canned orange juice—that is right, isn't it, all was purchased?

Mr. Strachan: That is right.

Mr. Dixon: It was all purchased, yes.

The Court: Then you have a situation—whether it can be computed, or not, I don't know, but you have a situation as far as the oranges flowing to Silzle, you had some going at a certain price, some going under the strict yardstick of the contract, but you had the purchase of the canned goods [2071] all under the contract by Silzle. Because Silzle exercised its option to buy all this canned goods. Whether you could make a computation on that to take those factors into account, I don't know, but that is what we speak of as this third theory.

Does that fairly state it?

Mr. Strachan: I believe it does, your Honor.

(Testimony of Robert Hodge.)

The Court: Whether we can help you or not I don't know. You are going to have to decide these facts.

Go ahead, Mr. Strachan.

Q. (By Mr. Strachan): Mr. Hodge, what were the total allowances for processing, for sales expense, for brokerage and everything, to Silzle under the Silzle agreement, according to your first computation?

A. According to my first computation the total allowances were $40.26 per ton.

Q. And when you revised the quotation to reflect the effect of the 528 tons, what was the result you got with respect to the total allowances?

A. The total allowances, including the processing costs, sir?

Q. Yes.

A. The total allowances, including processing cost, and the various allowances under the contract, were $43.45.

Q. What were the processing costs alone according to— [2072] allowances, alone, according to the two computations?

A. Under the computation of 7,203 tons being under the contract the processing allowance was $29.73 a ton; and under the computation at 6,675 tons that were processed under the contract the processing cost would be $32.30 a ton.

Q. All right. Now, will you tell us what your computations showed with respect to the processing allowance under the TreeSweet?

(Testimony of Robert Hodge.)

The Court: Does the jury have TreeSweet, too?

Mr. Strachan: I don't know. I think they should have.

The Court: Then give Exhibit 67 to the jury.

It has added to it only a couple of lines which the court directed be put on.

(Question read by the reporter.)

The Witness: My computations under the TreeSweet contract for the allowance for processing cost was $35.57 a ton.

Q. (By Mr. Strachan): That is how much higher than the Silzle allowances for that item?

A. On which basis, counsel?

Q. What? A. On which basis?

Q. On each basis. [2073]

A. The difference on the basis that there were 7,203 tons processed on the Silzle agreement is $29.93, and the processing allowance under the TreeSweet contract of $35.57 is $5.64 a ton.

Q. That is, the processing allowance of TreeSweet is that amount higher than the processing allowance of Silzle on that basis?

A. That is correct.

Q. Now, the other basis?

A. On the other basis the difference is $3.27 a ton higher than—may I restate that? Under the second computation the allowance was $303.27 greater under the TreeSweet contract than it was under the Silzle contract.

Q. On a per ton basis?

(Testimony of Robert Hodge.)

A. On a per ton basis.

Q. Now, as to the total allowances, will you state how much higher TreeSweet was than Silzle on each of the bases?

A. On the basis that there were processed under the Silzle contract the amount of 7,203 tons, the allowances—the total processing cost and allowances under the contract to TreeSweet were $8.19 more than they were under the Silzle contract.

Under the second computation, they were $5.00 more than they were under the contract with Silzle.

Q. Now, you testified at the conclusion of your direct [2074] examination that based on the terms of the TreeSweet processing agreement, the allowances and other items provided for therein, you had made a computation which indicated that had Winckler & Smith had such an arrangement there would have been a profit for the year ended January 31, 1952, of $25,000. Do you recall that testimony? A. Yes, sir, I recall that testimony.

Q. Did you make a like computation to show what the profit or loss, if any, would have been had Winckler & Smith had a processing contract similar to the Silzle agreement? A. I did not, sir.

Q. Well, now, on the one basis of figuring the return from the Silzle processing agreement, it would have produced about $8.00 per ton less in allowances than would the TreeSweet contract, is that correct?

A. In allowances, processing cost, and so forth, yes, sir.

(Testimony of Robert Hodge.)

Q. If you apply the $8.00 lower allowances of Silzle's contract to the 12,000 tons of fruit, that would mean that the allowances to Winckler & Smith under the Silzle contract would have been approximately $96,000 less than you computed them under the TreeSweet contract. Is that a fact?

A. No, sir. You cannot do that. There are too many—there are other factors that enter into the computation, because in the Silzle contract provision there is included three [2075] items, 12½ per cent for sales expenses, brokerage, and profit. I haven't any way of determining how much of this allowance is for each item for comparing such items to Winckler & Smith's operations.

Q. Could you make the computation to show the profit or loss for processing under the Silzle arrangement?

A. Not with the information I have available now.

Q. What information did you have with respect to the allowances of TreeSweet over and above the information you have with respect to the allowances to Silzle? A. The items are stated differently.

Q. But you know what the total allowances were, do you not?

A. Yes, sir. I also know what the total sales prices were per ton. They are different, too.

Q. What is the difference in that respect?

A. Based on the computation that the contract, the Silzle contract covers 7,203 tons, the sales price

(Testimony of Robert Hodge.)

as computed by me per ton is $9.89 greater for TreeSweet than it is for Silzle.

Based on the computation that the Silzle contract is for 6,675 tons, the TreeSweet sales price per ton as computed by me is $5.71 per ton higher than the Silzle computation made by me.

Q. As I understand it, basing your computations on the [2076] TreeSweet agreement, you took the agreement which indicated the highest selling price and also the highest return of allowances.

A. That is true, sir.

Q. Are you able to explain why it was that the allowances made under the TreeSweet contract were different from and higher than those allowances under the Silzle contract? A. I am not, sir.

The Court: Let me ask a question that comes to me immediately while we are discussing this. The Silzle oil and peel recovery was considerably less than the TreeSweet oil and peel recovery?

The Witness: Very much so, sir.

The Court: One was $10.81 and the other was $4.08 on your revised computation on 6,700 tons, right?

The Witness: Yes, sir.

The Court: Therefore, would you have an intangible there unless you know the efficiency of the Winckler & Smith oil and peel recovery?

The Witness: You certainly would sir. I mean that would be quite a factor as shown by the difference in the Silzle recovery and the TreeSweet recovery.

(Testimony of Robert Hodge.)

The Court: So that if Winckler & Smith had as efficient oil and peel recovery as TreeSweet, that would be one thing, and if they had one that was inefficient and wouldn't recover [2077] as much, such as Silzle, that would be another factor?

The Witness: That would be. A great deal would also depend on the quality of the fruit.

Mr. Strachan: As I recall the testimony on that subject, your Honor, Mr. Winckler testified to a figure on efficiency with respect to oil and peel recovery that was approximately the same as Silzle. It was down around $4.00 a ton. It was nowhere near the $10 a ton TreeSweet realized.

Mr. Dixon: I don't recall the figures. I don't mean to interrupt, counsel.

Mr. Strachan: That's all right.

Mr. Dixon: I think the peel and oil figures were taken into consideration and allowances made for that in these computations as stated in the exhibits.

The Court; Well, I don't recall, either, what the testimony was on that subject. All right. Go ahead.

Q. (By Mr. Strachan): Mr. Hodge, were you aware of the fact that various allowances under the Silzle contract and under the TreeSweet contract were arrived at from a determination with respect to the actual expenditures and costs of processing based on their method of operation?

A. No, sir. I merely took my figures from the contracts and the EOP subpoena.

Q. You weren't aware of the fact that the Silzle allowances were based, their allowances for manu-

(Testimony of Robert Hodge.)

facturing and [2078] for advertising and production and those things, were based on representations as to what the Silzle costs were, and that the allowances for TreeSweet were likewise based on an ascertainment of what their costs were, which were higher for certain of these items? Did you know that? A. I was not aware of that, sir.

Mr. Dixon: If the court please, I don't think there was any evidence on that with reference to Silzle. I think there was some with reference to TreeSweet.

The Court: That will be a matter for the jury to recall the testimony.

Mr. Dixon: All right.

Q. (By Mr. Strachan): Your computation as to the results which might have been obtained by Winckler & Smith if it had operated under the arrangement such as TreeSweet operated under, a part of your computation depends on the fact that you used Winckler's operating costs as being something under the operating costs allowed by the TreeSweet contract, is that correct?

A. That is correct, sir.

Q. Now, I would like to go over with you, Mr. Hodge, the manner in which your computation arrived at the $25,000 profit. That $25,000 profit was arrived at through deducting, making deductions from gross profit for—one item was general administration, is that correct? [2079]

A. The excess of the 1952 general administrative

(Testimony of Robert Hodge.)

expenses over those in 1950 was part of the computation, yes, sir.

Q. Specifically, as I recall it, you allowed $3.07 per ton as one of the items, is that correct?

A. That is part of the computation of the processing cost which I used in this computation and represents the per ton cost of the general administrative expenses during the year ended January 31 —I am a little confused because you talk of one season whereas I am accustomed to dealing with fiscal years. The fiscal year ended January 31, 1950.

Q. Now, that was about $37,000, wasn't it?

A. It was a $37,000 difference between the two years, yes, sir.

Q. And then there was an item in there of $3.07 per ton on 12,000 tons, roughly another $37,000 for administrative costs, is that correct?

A. No, sir. That is in the amount of $56,417.38 in that year for administrative costs.

Q. Let's see if we can get at it another way. As I understand it, you had total selling and administrative expenses in your computation of $184,000 roughly, is that correct?

A. Will you repeat the question? I didn't quite understand it.

(Question read by reporter.)

The Witness: In the computation for what, counsel? [2080]

Q. (By Mr. Strachan): In the computation that brought you down to the $25,000 of profit per year.

(Testimony of Robert Hodge.)

A. I have a total figure in this computation, according to my papers, of general administration expenses of $93,713.49 and selling expenses of $87,652.44, a total of $181,365.93.

The Court: That is not for '49?

The Witness: That is for '52. I adjusted the computation to take into consideration the increase in the selling expenses and the increase in the general administrative expenses.

Q. (By Mr. Strachan): In arriving at your $25,000 of profit, you subtracted that one hundred eighty some thousand dollars from what figure?

A. $56,417.38 is represented in Winckler & Smith Citrus Products Company's processing cost in the year ended January 31, 1950, and is in the $34.06 figure that I have used as Winckler & Smith Citrus Products Company's processing cost for the year ended January 31, 1950. The balance is deducted later on in the computation as actual selling expenses for the year were $87,652.40, the excess of general administrative expenses for the year 1952 over 1950 of some $37,296.11.

Q. You said your total selling and administrative expenses was how much, one hundred eighty some thousand? A. For the year 1952?

Q. As used in your computations. [2081]

A. Yes, I used the figure of $181,365.93 in making this computation for general administrative expenses and selling costs.

Q. When you deduct that general administration and total selling costs from what we might call gross profit, is that the way you arrive at the $25,000 profit for the year?

A. No, sir. My computation is merely to show what could have happened had Winckler & Smith have had the 12,000 tons available to them under the same terms as TreeSweet did under their contract. It is not subtracted or added to any profit made by the company. It would have changed the results, had they been allowed the 12,000 tons for processing as TreeSweet was under their [2082] contract.

* * *

A. Before we commence, Judge, my attention has been directed to a question that I must have misunderstood. Counsel asked me if my computation of the TreeSweet sales price per ton was based on the highest sales price.

It was not. It was based on my computation obtained from the figures furnished in Exhibit 11.

Q. I don't think I said "highest." I said in selecting the TreeSweet arrangement for the purpose of your computation you selected the arrangement under which the price was higher than the price under the Silzle contract. And that is what you did, didn't you? A. The sales price?

Q. The price at which the processor was to buy, and presumably to sell the finished product.

A. As I understand the question, you asked sales price, counsel.

The Court: Your question was, that you asked. Mr. Strachan, as the witness recited. You asked him

(Testimony of Robert Hodge.)

if he hadn't taken the highest price in the TreeSweet contract. And I was trying to think what that possibly meant, so I was confused.

Let's straighten the thing out now.

Q. (By Mr. Strachan): What was the price of the finished goods to be under the TreeSweet contract?

Mr. Dixon: What do you mean "the price," counsel? Price [2083] paid by TreeSweet?

It was actually the amount paid, as I understand it, counsel, the total amount. Is that your question?

The Court: What did you take in figuring the TreeSweet computation?

The Witness: In figuring the TreeSweet computation of the Sunkist price as shown under item 8, on Exhibit 67, the figures are those obtained from Exhibit 11, and the computation is made therefrom.

Q. (By Mr. Strachan): And what is that price?

A. And that price per ton as shown on page 3, item 12, is $62.74 a ton.

The Court: What did you do—take the figure at which TreeSweet exercised its option and actually bought the canned goods?

The Witness: No, sir. We took the figures as shown in Exhibit 11 as to what Sunkist had paid for the canned juice, which represented 85 per cent of the sales price——

Mr. Dixon: You mean TreeSweet?

The Court: You said "Sunkist had paid."

The Witness: Sunkist received, then.

The Court: From TreeSweet?

(Testimony of Robert Hodge.)

The Witness: Was to have received from TreeSweet under the contract, and what they did. I am balled up. May I start over again? [2084]

The Court: Yes.

The Witness: The amount as shown under item 4 in Exhibit 67 is the amount TreeSweet paid Sunkist for the canned juice. This amount—may I start again?

As shown under item 8 the total allowances and amount paid by TreeSweet was $1,287,792.16, which represented 85 per cent of the selling price that TreeSweet sold the canned juice for. So the total sales price must have been, according to my computations, $1,515,049.65. That divided by the number of tons as shown under item 12 gives us a computed per tonnage price of $62.74. [2085]

The Court: Well, you took from Exhibit 11, which was the response to the subpoena, the actual amount of money that, by the bookkeeping entries, was charged to TreeSweet by Sunkist when TreeSweet took the goods?

The Witness: Yes, sir.

The Court: Then you made a computation.

The Witness: Made the computation from the amound paid—TreeSweet actually paid to Sunkist for the canned juice, plus the amount that Exchange was to have paid TreeSweet for the processing. In other words, the figure actually paid to Sunkist for the canned juice by TreeSweet was net of the credit for the amount due them under the processing end of the agreement.

(Testimony of Robert Hodge.)

The Court: Is that what you are getting at now?

Q. (By Mr. Strachan): Now I would like to get the comparable figure under the Silzle contract.

A. The comparable per ton price under the Silzle contract under the 6,675 ton computation would be $57.03. Under the 7,203 computation, it would be $52.85.

Q. The price of the canned juice under the TreeSweet contract was higher than Silzle's per ton basis, is that not correct?

Mr. Dixon: If the court please, the price paid under this contract, actually paid, the record will show that, by TreeSweet to Sunkist was a total amount of X dollars as set [2086] forth in the exhibit. That amount was not, however, the actual selling price or the price at which the goods were sold by Sunkist to TreeSweet, because the amount represented in there, being the amount paid by TreeSweet, did not take into consideration the 15 per cent discount off the actual sales price of Sunkist, so that you have to take the figure that was given in Exhibit 11 as being 85 per cent of the selling price to compute the selling price at which the goods were actually sold. I think that is where the confusion comes in.

The Court: The objection is sustained to the form of the question. You are trying to compare, I think, Mr. Strachan, the first figure—let's see if I am right.

On Exhibit 66, page 3, which involves Silzle, you have under 11 (a) at the top of the page a gross

(Testimony of Robert Hodge.)

figure per ton before certain deductions, which on the modification is $57.03, and on the original computation is 52——

The Witness: $52.85, sir.

The Court: You are going to compare that with Exhibit 67, third page, Section 12 (a), where the price per ton before the deductions is $62.74. Is that the comparison you want to make?

Mr. Strachan: Right.

The Court: You used the word paid, and that is why your question was defective, being very technical about it, because this is just one step in the proceedings. If you [2087] want to have a comparison made between those figures, it is entirely all right. Don't use the word "paid."

Q. (By Mr. Strachan): The Sunkist sale price per ton under the TreeSweet contract was approximately $10 higher than the Sunkist sale price under the Silzle contract, is that correct?

The Court: If you add to it "before deductions were made as shown on the exhibit."

Mr. Strachan: Yes.

The Witness: As computed.

Q. (By Mr. Strachan): As computed by you?

A. As computed under the computation that there were 7,203 tons processed under this agreement; and as computed under the processing of 6,675 tons, that is not correct.

Q. So when you elected to make your computation under the TreeSweet contract rather than the Silzle contract, you made that computation on the

(Testimony of Robert Hodge.)

basis of the contract that had the higher Sunkist sale price, is that correct?

A. As compared between the two contracts?

Q. Yes, sir. A. That is correct.

Q. And in electing to make your computation under the TreeSweet contract rather than the Silzle contract, you chose the TreeSweet contract which had the higher allowances than the Silzle [2088] contract? A. That is correct.

Q. Do you know whether the Winckler-Smith business is more nearly comparable to TreeSweet or to Silzle? A. I do not know, sir.

Q. Do you know that with respect to the volume of operations?

A. I am not familiar with the TreeSweet operations or the Silzle operations.

Q. You don't know anything about the cost of sales as between the two? A. No, sir.

Q. You don't know anything about the character of market on which the two sold? A. No, sir.

Q. Whether one had private label business as compared with the other one that sold under its own name? A. No, sir.

Q. In your computation you used as the brokerage expense the amount of approximately $37,500—I'm sorry.

A. No, sir. I revised that to $22,500.

Q. Originally you had $37,500?

A. That's right, sir. [2089]

Q. How did you arrive at that brokerage?

A. That was approximately three per cent of

(Testimony of Robert Hodge.)

the selling price that would have been received for the 12,000 tons had it been made available to Winckler & Smith Citrus Products.

Q. That is on the basis of your computation the selling price of the product, of the 12,000 tons, would be roughly $750,000? A. That is correct, sir.

Q. All right. Now, that we will call the gross sales from the 12,000 tons, is that correct?

A. That is correct.

Q. Now, will you tell us what you deducted from the $750,000 gross sales as representing the cost of sales of that 12,000 tons?

A. As my testimony on Tuesday, I did not approach the problem in that manner.

Q. Well, approaching it in that manner will you compute what the cost of sales would be from the data before you?

A. I do not have sufficient information to do that, sir.

Q. What is lacking?

A. It just wasn't done that way, sir.

Q. I know, but can you now from the data before you tell us what would be the cost of sales?

Mr. Dixon: Do you mean of the $750,000 estimated sales, [2090] counsel?

Mr. Strachan: That is right.

Mr. Dixon: All right.

Do you understand the question?

The Witness: I understand the question.

It would take considerable study, counsel, in order to arrive at this figure that you have asked for. It

(Testimony of Robert Hodge.)

could be done. I don't know how soon or how much time it would take, but it could possibly be done.

Q. (By Mr. Strachan): Well, ordinarily when you set up an income account you set it up showing sales, less cost of sales, don't you?

A. This was not an attempt to set up an income account. This was a computation——

Q. But you could do that, could you not?

Mr. Dixon: Let him finish his answer, counsel.

The Court: Yes, finish your answer.

The Witness: This was a computation to estimate the profit that would have been made by Winckler & Smith Citrus Products for the year ended January 31, 1952, had they been provided with 12,000 tons of fruit under the same terms and conditions as TreeSweet were provided under their contract.

Q. (By Mr. Strachan): Now, wouldn't it be possible, Mr. Hodge, starting out with your gross sales of this 12,000 tons of fruit, $750,000, to compute for the [2091] jury what the cost of sales of those sales would be?

A. It could be done. It would take some time, as I stated before.

Q. Then, after you had computed the cost of sales, if you were to deduct that from the $750,000, you would get what is sometimes called a gross profit, wouldn't you, before selling and brokerage and that sort of thing?

A. On this particular transaction, yes, sir, it could be done.

(Testimony of Robert Hodge.)

Q. You didn't do that? A. No, sir.

The Court: As I understand, there were available alternate methods of making this computation?

The Witness: Judge, there would be as many different methods of making this computation, probably, as there are accountants.

The Court: You took one method?

The Witness: I took a method, that is right, sir.

Q. (By Mr. Strachan): If you were to proceed along the lines that I am suggesting, you would take from the gross profit what is called selling expense, would you not? A. That is correct.

Q. You didn't ascertain selling expense?

A. I made allowance in my computation for the selling expense in the year ended January 31, 1952. [2092]

Q. You didn't make a computation for the selling expense for the 12,000 hypothetical tons of fruit that would have been sold for $750,000, did you?

A. Yes, sir, I did. I computed the brokerage thereon and added to the actual selling expenses of the company during that period.

Q. You didn't subtract that from the gross profit, did you?

A. I subtracted it from the $25,000 estimated profit, yes, sir.

Q. You subtracted what from the $25,000 estimated profit?

A. In making the computation of the $25,000 profit, which I testified to——

(Testimony of Robert Hodge.)

Q. You said from that 25,000 profit you subtracted what? A. Please let me finish.

The Court: He is trying to explain. I think he misstated. Go ahead.

Mr. Strachan: I think he did too.

The Witness: I was trying to explain how it was arrived at.

The $25,000 estimate that I made was after deducting the actual selling cost for the year ended January 31, 1952, plus an estimated additional amount that would have been paid for brokerage for selling this additional fruit.

The Court: But you didn't subtract that from the end [2093] result of the profit you got; you subtracted it before you got the end result?

The Witness: That is true.

The Court: That is where you misstated.

Q. (By Mr. Strachan): What selling expense did you say you took into account in your computations?

A. I took the actual selling expenses for the year ended January 31, 1952, plus an estimated amount of brokerage that would have been paid on these additional sales, had they been made.

Mr. Strachan: I would like to have copies of Exhibit 65 distributed to the jury.

The Court: Can the jury pass in these other sheets that they have, Mr. Strachan?

Mr. Strachan: I should think so, yes, sir.

The Court: Let's pass those in, and then you won't have too many to shuffle.

(Testimony of Robert Hodge.)

Q. (By Mr. Strachan): Do you have a copy of the income account for the year ended January 31, 1952, before you? A. Yes, sir, I do.

Q. As I understood your last answer, you said with respect to this computation your selling expense was $87,000, the actual selling expense as shown on that exhibit, plus brokerage on the $750,000 of added sales; is that correct?

A. That is correct, sir. [2094]

Q. The 87,000 was sales expense attributable to a gross sales of 670,700 actually made during the year, is that correct?

A. No, that is not exactly correct, counsel. The selling expenses are more or less fixed. You have men that are going to be in your employ, key employees that you keep whether you sell anything or not.

Q. But taking your income account for the year ended January 31, 1952, Mr. Hodge, at face value, it shows, does it not, that on sales of $671,000 you had selling expense of nearly $88,000, is that correct?

A. The selling expenses are not based on your sales.

Q. But isn't that the selling——

A. The only item in that selling expense that is directly based on the amount of the sales you make is the brokerage commission.

Q. Yes, but there were other sales expenses recorded in the books, were there not?

A. There certainly were.

(Testimony of Robert Hodge.)

Q. About 88,000, less the brokerage?

A. That is correct.

Q. Those sales expenses were incurred in the year in which the actual sales were $671,000?

A. No, ~~sir.~~ Some 24,000 of them, if you will recall previous testimony, were carried forward from a promotional [2095] program that was carried on in the previous year.

Q. In your computation you didn't, except for brokerage, allow for any increase in selling expense due to the addition of the 12,000 tons?

A. That's right, sir.

Q. You made no such allowance in the computation?

A. I estimated that there would be little or no increase in other selling expenses other than brokerage.

Q. In your computation, what did you allow for administration expenses?

A. I allowed the actual amount expended in the year ended January 31, 1952.

Q. How much was that? A. $93,713.49.

Q. I believe your testimony on that was that as to administrative expense you took the excess of general administrative expense for the year 1952 over the year 1950. The general administrative expense in 1952 was $93,700. The general administrative expense for 1950 was 56,000, or a difference of 37,000.

Will you tell us precisely what you did in that regard?

(Testimony of Robert Hodge.)

A. The general administrative expenses for the year ending January 31, 1950, were included in the computation of the processing costs for that [2096] year.

Q. Processing costs?

A. In the processing costs as comparable to the processing costs under the TreeSweet terminology. That was my conception of it.

So those expenses were included in Winckler & Smith's processing costs under my computation, because I used the year 1949 to estimate their processing costs on a per ton basis, because that was the year that they did have a Valencia season. In order to be as conservative as I could in my computation, I then deducted the excess of such expenses, general administrative expenses, in the year ending January 31, 1952, later on in my computation. So the whole $93,000 worth of expenses in the year ended January 31, 1952, for administration expenses have been reflected in my computation.

Q. Then for the purpose of your computation you assumed that, without additional administration expenses in the year 1952, you could have processed and sold the $750,000 of juice from 12,000 tons of oranges, is that correct?

A. That is correct, sir.

The Court: Let's see if I understand you. You took the position that under the TreeSweet contract where TreeSweet was paid for processing the juice, its administrative expense was covered within that allowance made it for processing, right?

(Testimony of Robert Hodge.)

The Witness: Yes, sir.

The Court: And so in making the comparison you had to [2097] assume that the same thing was done by Winckler & Smith?

The Witness: That is true, sir.

The Court: But Winckler & Smith's financial statement, of course, had showed all these administrative expenses as expenses which were deducted from the gross profit, if any?

The Witness: That is true, sir.

The Court: So you had to make allowance for the fact that under this kind of contract, if you are making a comparison, a substantial portion of this administrative expense would have been covered in the contract?

The Witness: That is true, sir, under the processing costs to be recovered.

The Court: All right.

Juror Weiner: Under what administration was the Winckler & Smith——

The Court: I can't hear you.

Juror Weiner: Under what administration was the Winckler-Smith Company? Was Mr. Winckler running it or Mr. Walker, the trustee, running it?

The Court: When?

Juror Weiner: In 1952.

The Court: Mr. Winckler was president on up until some time in 1952 when the petition for reorganization was filed, and then Walker came in in 1952, after January 31 of 1952. We are not con-

(Testimony of Robert Hodge.)

cerned with the trustee's operations here at [2098] all.

Juror Weiner: Thank you.

The Court: This involved the year in 1951 from February, up to February 1, 1952, when the corporation was operated under its own officers.

Juror Weiner: Thank you.

The Court: Go ahead.

Q. (By Mr. Strachan): As I understood your direct testimony, you were adding up the costs involved, and you said at one point that to the cost you also added general administrative expense, $3.07 a ton, is that correct? A. That is true, sir.

Q. That would amount to how much on the 12,000 tons, roughly?

A. That was not computed on the 12,000 tons. In my attempt to compare the processing costs allowed TreeSweet under the contract, I was merely trying to bring Winckler & Smith's costs, as best I could, into the same basis as allowed under the TreeSweet contract.

Q. Well, one of the costs——

A. This $3.07 was not computed on 12,000 tons. It was computed on the actual tonnage processed by Winckler & Smith during the year ending January 31, 1950, on which these average costs were based.

The Court: Let's see if I understand you there. In [2099] 1950 you took the total tonnage and you worked out an average cost per ton for processing?

The Witness: That's right, sir.

The Court: When you had to compare with this situation in the year ending 1952, the canning year of 1951, when you were going to compare with the TreeSweet contract, you had two situations. You had work processed under this contract, supposedly like TreeSweet, and you had other canning done by the company.

The Witness: That is true, sir.

The Court: The work done by TreeSweet, the administrative costs were recovered in the cost of processing.

The Witness: Yes, sir.

The Court: You then had to arrive at what was the cost of processing the other products done by the company apart from the suppositious contract.

The Witness: That is true, sir.

The Court: So then you went back to the year ending January of 1950, where there had been sales of $1,367,000, and that is where you got the figure of $3.07 a ton processing costs?

The Witness: For general administrative expenses.

The Court: For general administrative expenses.

The Witness: Yes, sir.

The Court: So you applied the $3.07 against that part [2100] of the production that the company was doing on its own, and then you used a system similar to the TreeSweet contract for the administrative costs?

The Witness: In the processing.

The Court: In the suppositious contract?

The Witness: Yes.

The Court: So that was included?

The Witness: That is true.

Q. (By Mr. Strachan): You say you didn't multiply that $3.07 by 12?

A. No, sir. That $3.07 is arrived at by dividing the total administrative expenses for that year by the tons processed that year.

The Court: By that year you mean the year ended 1950?

The Witness: 1950, right, sir.

The Court: I thought I made it clear. The witness has just explained that the $3.07 was not applied to the 12,000 tons, but was the figure from the year before, or two years before, which was applied to the excess product other than under the suppositious contract. [2101]

Mr. Strachan: Well, if that be the fact, I was misled, I think, by this passage or these passages in the direct testimony.

On page 1895 the witness, after having said that he took the ingredients cost and the cans and the cartons and the labels and the goods, got a total there, plant expense, he said,

"To these costs I also add general administrative expenses of $3.07 a ton, which makes a grand total of $34.06 a ton.

"Taking that from the amount paid TreeSweet for processing give Winckler & Smith a profit of $1.51 per ton, or a total of $18,120."

(Testimony of Robert Hodge.)

There, I say, he clearly multiplied a number in which that $3.07 per ton was a factor by the 12,000.

The Court: Let's see if the witness can straighten us out on it.

I see justification for your position, and I have in mind the explanation.

The Witness: I don't recall exactly what I said, but I certainly took the processing cost for the year ended January 31, 1950, divided each and every item by the tons processed in that year to arrive at what I computed to be a processing cost comparable to the processing cost set forth in the TreeSweet contract. [2102]

The Court: And applied that figure?

The Witness: And compared that figure with the amount allowed TreeSweet under the processing agreement.

The Court: In addition to comparing it what did you do? Did you multiply it times the number of tons that the company, Winckler & Smith, under this suppositious year was processing on its own?

The Witness: No, sir. I am trying to compare the processing costs of TreeSweet as computed under the contract, with a figure that Winckler & Smith could have processed the fruit, the same as TreeSweet did. What is TreeSweet's processing cost I have determined under the contract, and I am trying to compute a similar figure for Winckler & Smith. To get that figure I went back to the year 1949, because it was a true Valencia season, computed the various items that go into the processing cost, and arrived at a total of $34.06.

Does that clear it up?

The Court: Go ahead.

Q. (By Mr. Strachan): Now, I would like to ask you if this is a correct statement of what you did in your computations, and I will read from page 1895:

"My computation was arrived at in this way"——

Mr. Dixon: Counsel, may we first determine what computation you are referring to? The $34.06, or what is the computation figure so we start with something that we all understand? [2103]

Mr. Strachan: I am just asking if this is a correct statement of what he did.

Mr. Dixon: Well, I object to it on the ground that it is wholly irrelevant and immaterial unless it is made understandable.

The Court: Sustained and overruled, both.

I think we should identify what particular computation this is, because he made a series of computations.

Mr. Dixon: That is right.

The Court: But the objection is overruled on the ground——

Mr. Dixon: I withdraw my objection on the other basis, your Honor.

Q. (By Mr. Strachan): Is this a correct statement of the computation which you made for the purpose of showing the profit or loss which Winck-

(Testimony of Robert Hodge.)

ler & Smith would have received or realized on the processing of 12,000 tons——

The Court: Then you will have to read the whole testimony on that subject.

Mr. Strachan: It is down to there (indicating), a little less than a page.

The Court: Is that all the testimony that he made on his computations?

Mr. Strachan: On that item.

The Court: That is the final result, [2104] counsel.

Mr. Strachan: It is not the final result.

The Court: Read the question, Mr. Reporter.

(Question read by the reporter.)

Mr. Strachan: This is processing profit.

The Court: On 12,000 tons?

Mr. Strachan: Yes.

The Court: I don't know that he gave a profit on 12,000 tons. He gave a profit of what would have happened if they would have had 12,000 tons added to what they already had, and the figure was—are you talking about the $25,000 figure?

Mr. Strachan: Here is what the witness said (indicating). I will show you the transcript, your Honor (handing document to the court).

The Court: The witness talked about a profit of $1.51 per ton, but in context he was talking about a differential, clearly. That is what it means, as I read it, over TreeSweet in producing.

If you want to frame your question in that way.

(Testimony of Robert Hodge.)

all right. But as your question is now framed it sounds as if it was the total computation that he was making.

Mr. Dixon: That is what I thought he was referring to.

The Court: If you want to you may ask that question, but if you do so you have to read all his testimony, you have to include the other things he testified to besides this one page. [2105]

Mr. Strachan: Rather than put my characterization or anybody's on it, may I not ask him if the testimony from there to there (indicating) is a correct statement of a part of his computation?

The Court: You may do that.

Mr. Strachan: Fine.

The Court: I am not trying to be technical, Mr. Strachan, but your question, which I had read by the reporter, you heard and the jury heard, sounded to me as if it was the end result that he finally testified to.

This matter concerns something in the middle. You may read it to him, you may ask him to explain it, anything.

Q. (By Mr. Strachan): Is the following a correct statement of a part of your computation:

"My computation was arrived at in this way. TreeSweet was paid $35.27 per ton for processing. Winckler & Smith's processing cost for the 1949 season, which I have used because that was the true Valencia season—1950 had many other products in it and was not a true Valencia season, so I used the

(Testimony of Robert Hodge.)

1949 processing cost—their costs total $34.06 a ton. That was made up as follows:

"Ingredients, $2.14; cans, $15.17; cartons, $2.01; labels, $1.17; drums, 25 cents; sacks, 38 cents; plant expenses, $11.10. [2106]

"The inventory increased during this period to the extent of $1.23 a ton, so I subtract that from all these costs.

"To these costs I also add general administrative expenses of $3.07 a ton, which makes a grand total of $34.06 a ton.

"Taking that from the amount paid TreeSweet for processing gives Winckler & Smith a profit of $1.51 a ton or a total of $18,120 profit on processing."

Is that a correct statement of that part of your computation?

A. That is a correct statement of part of my computation.

Q. Then the effect of that is, with respect to general and administrative expense, that you multiplied——

The Court: Are you reading or asking a question?

Mr. Strachan: I am asking a question.

The Court: I thought you were reading, counsel. You are holding the paper in front of you.

Mr. Strachan: I said "the effect of that"——

The Court: All right.

Q. (By Mr. Strachan): The effect of that is, then, that in your computation you multiply by

(Testimony of Robert Hodge.)

12,000 tons a cost which included $3.07 a ton as the element of administrative expense?

A. No, sir, that is not correct.

I am attempting to arrive at the difference in the processing cost as allowed under the TreeSweet contract with [2107] what Winckler & Smith's normal operating cost on a comparable basis would have been, had they had 12,000 tons of fruit additional to process.

Q. Mr. Hodge, could you make a computation showing the gross sales from the 12,000 tons of fruit of $750,000, which you testified to, show the costs of those particular sales, show the gross profit on the sales, deduct the selling expense on those sales, and the brokerage, deducting also general administrative expense, and show the net profit—profit or loss—on the processing of that 12,000 tons at that selling price, and also show us a reconciliation between that sort of an income account and your conclusion that with the 12,000 additional tons of fruit available Winckler & Smith would have converted $184,000 loss for the year ended 1952 into a net profit of $25,000, can that be done?

A. Yes, I don't see why that couldn't be done. It would take considerable time. But the end result would be the same. It is just a different form of stating it.

Mr. Strachan: I think in order to enlighten the jury, and counsel, and the court, that there should be such a computation, your Honor.

The Court: You can have one made. The witness

(Testimony of Robert Hodge.)

has said there are alternate methods of computing, and he has used one method. He said this could be made with considerable time. [2108]

I don't want to require him to do it.

Mr. Strachan: I suppose it would be within my rights to ask him to do it on the witness stand. I thought if he would do it at his leisure and bring in an exhibit it would save time in court.

Mr. Dixon: If the court please, I think that statement is not required practice. This witness is here for cross-examination as to the basis of his opinion on the basis of his testimony, and we will stay on this question as long as counsel wants to inquire on it; but it doesn't seem to me that in view of this witness' testimony, that any other number of methods might be taken, that this witness should be even requested to make such a computation.

The Court: The objection is sustained to that part.

Mr. Strachan: I would like to make an offer of proof on it.

The Court: You may make one.

Supposing there were 20 methods to compute this, do you think that the court would be required to make the witness compute the 20 different ways?

Mr. Strachan: I hadn't supposed that there were 20 different ways in which an accountant could make a computation and come out with 20 different answers and all of them be correct.

The Court: I don't know. [2110]

* * *

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury is absent.

Proceed.

Mr. Strachan: Your Honor, there were two matters as to which I said I would offer proof yesterday.

One was with respect to the forgiveness of the 38,000 indebtedness to Winckler. I would have shown by the witness, had I concluded that line of cross-examination, that the forgiveness of the indebtedness recorded in the year ended January 31, 1950, operated as an increase of capital deficit and reduction of net worth. The other matter was——

The Court: Well, let's pass on that. That is what you now offer to prove?

Mr. Strachan: Yes, sir.

The Court: I think you have cross-examined, and I permitted you to cover practically all of that. It sounds to me much like repetition. The facts were all brought out and the records showed there were the two sets of minutes, one of which was identified by an exhibit number and the other, as I recall, was not, one in January and one in June. The witness said he closed the books after the June meeting, picked up the information from the preliminary minutes, and that he put [2111] it in that year for that reason. Obviously if he had put it in the succeeding year, based on the June meeting, it would have been in the other year. I think you have got everything in the record.

The offer of proof is denied.

Mr. Strachan: Another one was with regard to the item of 19 some thousand dollars that was deferred from one year into the next. I would have shown, if I had proceeded with the cross-examination of the subject, the result of that was that the $19,000 item was deducted as a business expense for income tax purposes in each of two years. I think that would have borne on the credibility of the witness, and would also have borne on the question of whether the books and records were in fact kept in the usual and ordinary course of business.

The Court: The witness testified that from income tax purposes you have different problems than from bookkeeping purposes, and the questions to which I sustained objection related to what was done in the income tax returns and had no particular bearing on the issues of this case.

Your offer of proof is rejected. [2112]

Mr. Strachan: The other matter that I thought we should mention is the question whether you want the jury to have a view of a citrus processing plant.

I am sure it can be arranged.

It would be a matter of selecting the plant, time and place, and under what conditions.

The Court: I thought about it and my present inclination is no. There is no issue in this case about how you make orange juice. We are not concerned with how orange juice—we are not concerned, essentially, except that orange juice is made out of oranges.

Then you have the problem of plants. Going to the defendant's plant is one thing, going to some other plant might or might not be comparable to any of the plants in question. I don't think it adds anything.

I am inclined to tell the jury that their request is politely rejected.

Do you ask for this, or do you just raise the matter for discussion, Mr. Strachan?

Mr. Strachan: I think the jury, if they desire, should be allowed to see how a plant operates, how the fruits are processed for use as fruit, and how the remainder is shipped to the plant and processed, and inspection of the processing, the testing, the canning. And I should think, too, that it would be well to have the jury see the Winckler & Smith plant [2113] in Anaheim. So I would suggest that the jury's request be granted, and would suggest also that the jury be permitted a view of the Winckler & Smith plant.

The Court: What is your view, Mr. Dixon?

Mr. Dixon: Our view, your Honor, is definitely to the contrary, for the reason, No. 1, that with reference to viewing any plant for processing oranges into orange juice, I don't see how, even assuming that that was possible, and that it would be possible at this time of year to see such processing operations insofar as Valencia juice is concerned, that it would in any way aid the jury in deciding any of the issues in this lawsuit.

This isn't a patent case or a case involving questions of whether particular processing operations are lawful or unlawful.

Second, with reference to viewing the Winckler & Smith plant, I discussed this matter with the trustee, and he informs me that the plant having not been operated for a period of two or three years, and some of the machinery and so forth having been removed therefrom, windows broken, after the property changed hands, it sems to me that the impression that the jury might get from viewing the Winckler & Smith plant at this time might in a sense certainly be prejudicial to the plaintiff, rather than be of any assistance to the jury in determining the value of the plant. [2114]

And that is the only purpose for which I could possibly see any relevancy to any of the issues in this lawsuit.

For that reason I would oppose any visitation of the Winckler & Smith plant.

The Court: All right.

I think the question is addressed to the discretion of the court. I think both grounds of objection as stated by Mr. Dixon are good, and I am going to inform the jury that we will not visit any plant.

Now is there anything further?

Mr. Strachan: I might just mention, your Honor, that I have cleared with Mr. Dixon the stipulation with respect to the explanation to be made of these various exhibits, so that is behind us. [2115]

* * *

Mr. Dixon: The explanations of Exhibits 4, 9, 10, 11, 12, 13, 14, 23, 24, 29, 32, and 33.

We have agreed on the form of the explanation, your Honor, subject to the approval of the court, and if your Honor approves I will arrange to have it prepared in precisely this form and an exhibit number attached to it, with of course the explanation by your Honor to the jury that it is submitted as an exhibit solely for the purposes set forth.

Mr. Strachan: I wonder if that should be done or whether it wouldn't be well to have the text taken off and attached to each exhibit, so as the exhibit is examined the explanatory material will appear right on the exhibit.

Mr. Dixon: That is perhaps even better yet.

The Court: I think that is a good suggestion, Mr. Strachan; whichever way you want to do it will be satisfactory. [2116]

* * *

ROBERT HODGE

the witness on the stand at the time of the recess, having been previously duly sworn, was examined and testified further as follows: [2120]

Cross-Examination

By Mr. Strachan:

Q. Mr. Hodge, at whose request did you prepare the computation which you testified to with respect to the TreeSweet contract?

A. You refer to Exhibit 67?

(Testimony of Robert Hodge.)

The Court: Yes.

The Witness: I prepared that at the request of Mr. Dixon and Mr. Irwin.

Q. (By Mr. Strachan): Did Mr. Dixon or Mr. Irwin ask you to prepare a comparable computation from the Silzle agreement?

A. Yes, they did, which is Exhibit 66.

Q. Did they ask you to prepare a computation of profit or loss from the Silzle agreement similar to the one you have testified to with respect to the TreeSweet agreement? A. They did.

Q. Did you make that computation?

A. I did not.

Q. Don't you know, as a matter of fact, that if you had used the Silzle contract instead of the TreeSweet Contract and made a computation from that with respect to processing by Winckler & Smith of 12,000 additional tons of Valencias, that would have showed that there would have been a loss from that operation which would have increased the total loss for the [2121] year? A. I did not.

Q. Do you know whether that would be the result? A. I do not.

Q. You never made the computation?

A. It certainly would not have increased the loss under any conditions, counsel.

Q. But you didn't prepare the computation?

A. No, but it is very evident.

Q. I think you said that your computations assumed that the selling price of the canned juice from this 12,000 tons of Valencias that you assumed

(Testimony of Robert Hodge.)

for the purpose of the computation would be roughly $750,000. A. I think that is correct.

Q. Now, if the fruit had been acquired under the terms of the TreeSweet contract, the canned juice would have been bought by Winckler & Smith for the same price, $750,000, is that correct?

A. Whatever the sales price as computed would have been, it would have been bought at that price, that's right. It may or may not have been [2122] $750,000.

Q. It would have been the same as the selling price in any event? A. That's right.

Q. Assuming that the $750,000 purchase price for the purpose of this computation is the price, the cost of the juice in the cans would have been computed as follows, would it not—subtract from the $750,000 the processing allowance as the first item, can you tell us what that would amount to on 12,000 tons?

Mr. Dixon: Are you speaking of the TreeSweet contract?

Mr. Strachan: TreeSweet, yes.

The Witness: Well, in my computation I estimated that it would cost Winckler & Smith, based on their costs in 1949, some $34.06 a ton to process.

Q. (By Mr. Strachan): But that is not what would have been allowed under the TreeSweet contract, is it?

A. No, sir. They would have been allowed $35.57 under the TreeSweet contract.

(Testimony of Robert Hodge.)

Q. All right. That would have been, say, $426,840, would it not?

A. I do not know, counsel. I am not that good at arithmetic.

Do you wish me to make the computation?

Q. Yes, I would like to have you do it.

A. Will you repeat your amount, sir? [2123]

Q. $426,840.

A. Maybe you had better repeat your question. I evidently misunderstood you.

Q. What would be the amount allowed for processing 12,000 tons of fruit under the TreeSweet processing agreement? A. $426,840.

Q. Now, there would have been a label allowance, would there not, of $1.59?

A. There would have been.

Q. On 12,000 tons? A. Yes.

Q. What would that have amounted to?

A. On 12,000 tons it would have amounted to $19,080.

Q. There would have been an advertising allowance of what—$1.83, is it? A. $1.88.

Q. On 12,000 tons, what would that aggregate?

A. That would have aggregated $22,560.

Q. Then there would have been a 15 per cent brokerage allowance or $9.41 per ton?

Mr. Dixon: Counsel, that is not a brokerage allowance, if I may rise to correct you. It is a discount.

Mr. Strachan: Pardon me. Discount allowance.

(Testimony of Robert Hodge.)

(The question as corrected was read by the reporter as follows: [2124] "Then there would have a 15 per cent discount allowance, or $9.41 per ton?")

The Wtness: There would have been.

Q. (By Mr. Strachan): For 12,000 tons?

A. For 12,000 tons.

Q. What would that have amounted to?

A. That would have amounted to $112,920.

Q. If you add together the processing allowance, label allowance, advertising allowance, 15 per cent discount allowance, what would the total of those amount to?

A. Evidently counsel is not an accountant. You wouldn't add such things together, because they are different. One is a credit——

Q. Aren't those the amounts which are under the TreeSweet contract deducted from the purchase price of $750,000? A. No, sir.

Q. Well, isn't the cost of the fruit, isn't the cost of the $750,000 merchandise arrived at by charging the processor the $750,000 and then granting credits against that for processing allowance, among other things?

A. Why would you charge the processor $750,000, sir?

Q. I thought you said that the selling price of $750,000 was also the price of the finished product which the processor would be charged by Sunkist.

(Testimony of Robert Hodge.)

A. No, sir, that is not what I said. [2125]

Q. I thought that was the first proposition we set.

A. No. The $750,000 would be the amount that TreeSweet would sell it to its customers for. Not what the processor would be charged.

Q. Wasn't TreeSweet bound under its contract to purchase the processed goods at the Sunkist price? A. Yes, sir.

Q. And didn't you assume that the Sunkist price would also be the selling price by TreeSweet?

A. What do you mean by the Sunkist price?

Q. You answered a question once with——

The Court: Wait just a minute now.

If this $750,000 is what TreeSweet would sell to its customers for, TreeSweet was buying the cans from Sunkist at that figure, less 15 per cent, weren't they?

The Witness: Less label allowances, less other allowances, Judge.

Q. (By Mr. Strachan): So the $750,000 is the purchase price after the label allowance, the advertising allowance, and the discount allowance, and the processing allowance?

A. No. It is before it.

The Court: Tell us just how you would figure it out.

Would you start with the $750,000?

The Witness: Well, if you ask me to do this, I would start with the sales price of $750,000. Assuming that [2126] there is no element of profit in the

(Testimony of Robert Hodge.)

processing charges that TreeSweet recovered under the contract. So you would have $426,840. From that you would take the label allowances and the advertising allowances, at least in arriving at your cost of sales.

Q. (By Mr. Strachan): Deduct that from what, Mr. Hodge?

A. This is a rough attempt to reconstruct a profit and loss account now.

You have me on the stand, and I do not have time to think this out, and this is very rough.

On that basis the cost of sales of the $750,000 sale would have been $385,200.

Q. How did you arrive at that?

A. I took the label allowance and the advertising allowance—which I shouldn't have done, pardon me. As I said before, you don't give me time to think this all out.

The cost of sales, restated, should have been $407,760.

Q. Will you tell us how you arrived at that?

A. Yes, sir. I took the processing charge, which was paid TreeSweet, of $35.57 a ton, multiplied that by 12,000, which gave me a figure of $426,840. Included in that figure is the label cost, which was allowed TreeSweet under the contract. So, therefore, it is already in there, they got that back from Sunkist, so we would reduce our cost of sales [2127] by that item, which gives me a net cost of sales of $407,760.

(Testimony of Robert Hodge.)

Do you wish me to follow further on my reconstructed profit and loss?

Q. Yes, tell us how you arrived at that.

A. Under the contract TreeSweet received $35.57 a ton for processing. Assuming no profit in that figure whatsoever, TreeSweet's cost would have been $426,840. But in that cost is a label cost, which they allowed under the contract. They were allowed $1.59 a ton under the contract. So, therefore, it was no cost to them, because they were paid back that cost. So I would reduce the $426,000 figure by this label allowance. [2128]

The Court: Which is 19,000.

The Witness: Which is $19,080.

Q. (By Mr. Strachan): Now, in your direct testimony, Mr. Hodge, as I remember it, you showed, according to your computation, that the Winckler-Smith actual costs, according to your assumptions, amounted to $1.51 less than the processing allowance.

A. That is right, sir, You asked me for something else, though in this computation.

Q. All right. But in your processing costs you did not deal with the label allowance because you added an item for label allowance to that $1.51?

A. That's right, sir. I put the Winckler & Smith computed costs for labels into my figure the same as you did in multiplying this out on TreeSweet's processing allowance.

Q. Do you understand, then, that in computing the price to be paid in cash to Sunkist, you do not deduct from the $750,000 in this case, you don't

(Testimony of Robert Hodge.)

deduct and give credit for 19,000 on account of the label allowance?

A. You do deduct it, sir.

Q. Deduct it from the 750,000?

A. That would be true, sir. They were allowed $1.59 per ton under their contract for a label allowance.

Q. Now, was that in addition to the allowance for processing? [2129]

A. That is in addition to the allowance for processing.

Q. All right. Now, let's subtract 426,840 of processing allowance from the $750,000.

A. If you will reduce that by $19,080, I will go along with your computation.

Q. I thought you told me that the 750,000 was the base price at which Winckler & Smith would have sold and which it would have paid Sunkist.

A. That is true, sir.

Q. Well, now, will you just go through this computation with me and then if you think there is an explanation for any difference that occurs, I would like to have you tell me what it is.

A. I would be very happy, sir. Could I have a copy of your computation?

Q. What's that?

A. Could I have a copy of the computation?

Q. You have it practically now.

The Court: Do you have a computation there?

Mr. Strachan: Well, I have it just in my notes here.

(Testimony of Robert Hodge.)

The Court: Can you lay it on the desk and then you stand up here and the two of you look at it? I would like to see it, too.

The Witness: Accountants are trained to see things. They are not trained to hear things, as attorneys are. I must [2130] see things before I can understand them.

Q. (By Mr. Strachan): We start up here with an item of 750,000 as being the base price at which the finished product is to be bought by the processor and presumably the price at which the processor will sell. A. That is true.

Q. Now, against that the processor is entitled to credit for his processing costs in the amount of $35.57 per ton, or a total of $426,840.

A. That is true.

Q. In addition to that, the processor is allowed as a label allowance $1.59 per ton, is that correct?

A. That is true, sir.

Q. Coming to a total of $19,080.

A. That is true, sir.

Q. In addition, the processor is entitled to an advertising allowance of $1.88 per ton, times 12,000 tons is $22,560? A. That is true, sir.

Q. In addition to that, the processor is entitled to a 15 per cent discount, amounting to $9.41 per ton, times 12,000 tons is $112,920.

A. That is right, sir.

Q. Now, the aggregate of those items of allowance on the 12,000 tons would be $581,400. [2131]

A. Yes, sir.

(Testimony of Robert Hodge.)

Q. What is that figure, the total allowance is what? A. $581,400, sir.

Q. Subtracting those total allowances from the base price of 750,000, what is the difference?

A. The difference is $168,600.

Q. That would be the amount of return for the juice component after the allowances, wouldn't it? You might call that the fruit cost in the finished product?

A. No, sir. That is an entirely erroneous statement. That would be the total amount the processor would be allowed under the contract, but your statement——

Q. No, that is the difference in——

A. You are merely making a mathematical computation here. You are adding apples and pears.

Q. This is arithmetic. A. That's right.

Q. The difference between the 750,000 and the allowances is $168,600, is that correct?

A. That is the mathematical difference between the two.

Q. That is correct. Now, if you add together the processing costs, this is costs now, not allowance.

A. Yes.

Q. As you computed for Winckler. [2132]

A. Right.

Q. And the amount he would have paid, being the difference between his allowances and the price of the juice, namely, $168,000, gives you a total of $677,320, is that correct?

(Testimony of Robert Hodge.)

A. No, sir. That is a mathematical addition, but it is certainly not a correct statement.

Q. That is the statement of the processing costs as you computed it for Winckler.

A. That's right.

Q. And the difference between the 750,000 and the allowances.

A. Well, you can make such a computation, but——

Q. There is nothing wrong with that arithmetic, is there?

Mr. Dixon: Let the witness answer the question, please.

The Witness: I am sorry.

The Court: Go ahead.

The Witness: Subtracting the one from the other —no. You have added one to the other and got a figure, that is true.

The Court: Is it your position it is not correct?

The Witness: It is certainly poor accounting and certainly I would hate to operate under any such basis of accounting on a settlement of a contract.

Q. (By Mr. Strachan): If you take that $577,-320 from [2133] the $750,000 selling price, that leaves a balance of $172,680, is that correct?

A. That is true. The mathematics, I assume, are correct. $172,680, that's right, sir.

Q. Now, if you take away from that 172,000 selling expense of 87,652, additional brokerage of 22,500, and the general administrative adjustment

(Testimony of Robert Hodge.)

you mentioned of $37,296.11, you would aggregate those three items at $147,488.55, is that correct?

A. That is the mathematical addition of those three sums, you are right, sir.

Q. Now, if you subtract that aggregate of 147,500, roughly, of combined selling and administrative expenses from the $172,680, you get a result of $25,231.45, is that correct?

A. Yes, sir. That is a correct mathematical computation.

Q. That is the same figure, is it not, that you said in your direct examination would have been the net profit to Winckler-Smith for the year ended January 31, 1952, had they processed 12,000 tons of Valencia oranges on the same terms as the TreeSweet contract? A. That is true, sir.

Q. Now, as a part of your computation, you said you used $35.57 per ton as the processing allowance that would be [2134] paid to the processor. Do you recall that?

A. Paid to TreeSweet in accordance with the terms of their contract.

Q. Yes. A. Yes, sir, I said that. [2135]

Q. Now, you arrived at that, did you not, by dividing the total amount that was paid or credited to TreeSweet by the total number of tons processed by TreeSweet?

A. I divided the amount paid—I shouldn't use the word "paid" because these were bookkeeping entries—the amount allowed by EOP to TreeSweet for processing by the number of tons processed.

(Testimony of Robert Hodge.)

Q. You did not take into account the fact that TreeSweet processed various sizes?

A. No, sir. I reduced everything for the sake of simplicity to appear on a tonnage basis.

Q. Well, isn't it a fact that the price per ton of allowance would vary under the contract in accordance with the size of can and the number of cans in a carton, if you know?

A. I do not know, sir. I just took the total paid by the total number of tons processed.

Q. Did you know when you made that average per ton that the allowance for processing 12/46 ounce cases was $31.63 per ton, whereas the allowance for cases of 48/6 ounce was $61.77 per ton?

A. Counsel, the prices fluctuated so, as I recall, from my examination of the contract the overhead varied with the rates of production. There were many, many factors that entered into our various allowances. [2136]

Q. Well, it is a fact, isn't it, that the processing allowance for 12/46's was $31.63, because that is a small number of large cans in a case, whereas the 48/6 ounce cases, the allowance would be nearly $62. because there are more cans in smaller packages?

A. May I state that I disregarded sizes. I simply took the total paid for processing, divided by the number of tons, to get an average price per ton. No regard was made as to sizes or any quantities processed under the agreement, as to their various sizes, or anything else. We simply arrived at a price per ton.

(Testimony of Robert Hodge.)

Q. These are allowances per ton that you were figuring, is that corect?

A. This is an allowance—we are talking about the allowance paid to TreeSweet by EOP for processing so many thousand tons of fruit.

Q. Are you able to tell us as you sit there now what portion of the composite figure of $35.57 was represented by 12/46's as distinguished from 48/6-ounce cases?

A. No, sir, I did not make any computations like that.

The Court: I don't know where we are getting, but if you had had the number of cans of various sizes and the allowances allowed, and actually processed by TreeSweet, when you added them all up would you have gotten the same result? [2137]

The Witness: I would have gotten the same average per ton, yes, sir.

Q. (By Mr. Strachan): I think you said for the purpose of obtaining Winckler's cost you used as your base year 1949? A. That is right, sir.

Q. Did you in making that analysis determine whether your per ton cost of the Winckler & Smith plant was based upon the same proportion of large and small cans, as was the production of TreeSweet under its contract?

A. No, sir. I simply took the total expenditures for each of the items and divided by the number of tons processed in that year.

The Court: By '49 you meant the canning year '49?

(Testimony of Robert Hodge.)

Mr. Strachan: Yes, sir, the canning year.

The Court: The fiscal year ending January, '50?

Q. (By Mr. Strachan): I think that is correct, isn't it, Mr. Hodge? A. That is right, sir.

Q. You made no adjustments in the various items of cost which you took from Winckler's books to reflect any increase in the costs of ingredients, materials, or any other of the items as between the year ended January 31, 1950, and the year ended January 31, 1952?

A. No, sir, there was no attempt made to determine any increased costs during that period in this computation. [2138]

Q. Don't you know as a matter of fact there was a general increase in the price level which affected the cost of various items that entered into your computation, as between those two years?

Mr. Dixon: Price level of what?

Mr. Strachan: General price level.

Mr. Dixon: I object to that question. I think it has to be applied to this industry, your Honor.

The Court: Sustained.

Price increases in what, counsel?

Q. (By Mr. Strachan): Did you know that Mr. Browne of the Union Appraisal Company testified that in part his writeup was based upon the fact that there was a general increase in the price level of approximately 8 per cent between the two years?

Mr. Dixon: I object to that question, your Honor, on the ground that it has no relevancy to

(Testimony of Robert Hodge.)

the testimony of this witness, unless it is confined and directed to something that goes into the product.

The Court: Sustained.

Counsel, I have indicated you may inquire as to increase in prices on particular commodities that go into orange juice, if there are other things besides orange juice. But the question about machinery and equipment that Mr. Browne was talking about doesn't interest us here. [2139]

Q. (By Mr. Strachan): Did you know when you made your computation that between the year ended January 31, 1950, and the year ended January 31, 1951, the cost of cans increased?

A. I did not take any increase, such as that, into my computations, no, sir.

The Court: Well, the question was did you know whether or not cans increased?

The Witness: I did not know.

Q. (By Mr. Strachan): Did you know that the cost—that the increase in the can cost between the two years amounted to $1.13 per ton?

A. I did not, no, sir.

The Court: Per ton of oranges or cans?

Mr. Strachan: Per ton of oranges.

The Court: Is your answer still the same?

The Witness: I wouldn't have the slightest idea how counsel arrived at that figure, sir.

Q. (By Mr. Strachan): Did you know as you made your computations that there had been an increase in the cost of cartons between those two years?

(Testimony of Robert Hodge.)

A. I made no reference to such increase, sir.

Q. You made no references to any possible increase in costs between the two years?

Mr. Dixon: If the court please, I think this witness has testified that it is based upon the year 1949. I presume [2140] the examination was proper, but——

The Court: Overruled. Answer the last question.

The Witness: I did not give any weight to any such increase, sir.

Q. (By Mr. Strachan): I think you said that Winckler & Smith maintained a record of what you called standard costs?

A. They did at some time during their operations, they maintained what we would call standard costs.

Q. Did you in connection with your computations, or at any other time, for the purpose of testifying in this case, refer to Winckler & Smith's cost records? A. Yes, sir, I did.

Q. For the year ended January 31, 1952?

A. I did, sir.

Q. The costs which you used in your computation were not those that appeared in the Winckler & Smith cost accounts for the year ended January 31, 1952, were they?

Mr. Dixon: If the court please, I think that obviously can have no application to the testimony of this witness. There was no Valencia juice produced in '52 upon which he could possibly base such an estimate, by this company.

The Court: Answer the question. Let's get ahead.

The Witness: May I have the question again, please, sir?

(Question read by the reporter.)

The Witness: Counsel, I told you at least three or four [2141] times now that my computation was based on the actual per tonnage cost of Winckler & Smith during the packing season of 1949, or the fiscal year ended January 31, 1950. I gave no weight to any other factor.

Q. (By Mr. Strachan): Mr. Hodge, in your direct examination you testified that with this 12,000 tons of Valencia oranges processed under the terms of the TreeSweet arrangement, Winckler & Smith would have enjoyed a net profit for the year ended January 31, 1952, of $25,231.45?

A. I think they would have enjoyed it, yes, sir.

Q. They would have realized it was your testimony, was it not? A. Yes, sir.

Q. That profit, as I understand your testimony, would be after offsetting the actual loss for that year of $184,523.20?

A. That is true, sir. It would have made a net difference in their operations for the year of some $209,000.

Q. Nearer $210,000, isn't it?

A. I won't quibble with you over a thousand dollars, sir. It is not my thousand dollars.

(Testimony of Robert Hodge.)

Q. It would have made that difference after having met processing costs of $408,720?

A. That is not the figure I had. I had net processing cost of $407,760, sir.

Q. All right. I won't quibble over a few hundred dollars.

A. Good. Maybe we can get through yet. [2142]

Q. And that would have been also after having returned to Sunkist for the fruit, after allowances, approximately $170,000?

A. Pardon me, but how did you arrive at the $170,000?

Q. Well, that was after taking the $750,000, taking credit for the $426,000 processing, 19,000 label, $22,500 of advertising, 15 per cent for discount.

A. May I see the computation again, sir?

Q. Surely. A. I have forgotten.

Well, I don't agree with your methods here, counsel, your methods of computation at all. I can't see, possibly, how you add apples and pears and come up with a composite figure.

Q. I did not.

A. You are asking me to arrive at a net figure which is contrary to good accounting.

Q. We went through this on the arithmetic.

A. Then perhaps I misunderstood the question.

Q. On the arithmetic where we deducted the processing allowance, the label allowance and advertising allowance, the 15 per cent discount allow-

(Testimony of Robert Hodge.)

ance from the 750,000, and that left 170,000 as the balancing item, didn't it?

The Court: The witness told you he agreed with your arithmetic. [2143]

Mr. Strachan: Yes.

The Court: Now you are going over the same thing you went over before.

Mr. Strachan: That's right.

The Court: Then let's not do it. It has been gone over once. That is it. Ask another question.

Q. (By Mr. Strachan): Now, if we add that 170,000, then add the selling expense of 87,000, the additional brokerage, 22,500, and the administrative and general expense you used, $37,296, that would mean that the combination of all of those items would be approximately $900,000.

A. I am sorry. You are adding 170,000, 87,000, 22,000 and 37,000, and coming up with a total of 900,000, sir.

Q. No. I am adding those together with the 408,000 processing costs, and the $210,000, which is a combination of eliminating the $184,000 loss and converting that into a $25,000 profit.

A. Well, you are a little too fast on figures for me, sir. You will have to show me how you arrive at that figure. I can't follow it.

Q. Start out with a $25,000 profit figure, and we add to that the 185,000, roughly, of loss?

A. Yes, sir.

Q. That means that the difference which you attribute to the 12,000 tons in the year-end net would be virtually [2145] $210,000.

(Testimony of Robert Hodge.)

A. That would have made a difference in Winckler & Smith's operation of some $210,000, yes, sir.

Q. All right. Now, in order to make that difference, Winckler & Smith would have had to incur processing costs of, say, 408,000?

A. Yes, sir.

Q. We add to that what they would have returned to Sunkist in payment of the juice of around 170,000.

A. You mean to say the raw fruit would have only cost $170,000?

Q. No. It cost 750,000, and then you deduct these various allowances and come out with a balance of 170. Do you see what I mean?

A. $14.29 a ton. Yes, sir, I see what you are getting at.

Q. They would also incur, according to your computation, $87,652 of selling expenses?

A. That is true.

Q. , They would also have had to meet additional brokerage, $22,500? A. That's right, sir.

Q. There is also another item you added in there of $37,296 for administrative and general expense?

A. That's right, sir. [2145]

Q. Now, that comes down to a total of $937,403.20 that would have to be realized in order to meet all of those items?

A. That is correct, sir.

Q. Now, in order to realize that $937,000, will you tell us what the selling price per case would be for cases of 12/46's?

(Testimony of Robert Hodge.)

A. They didn't have to realize that much, sir. I have previously testified I anticipated realizing $750,000.

Q. In order to eliminate that deficit and create a profit, they would have to obtain this $900,000, would they not?

A. No, sir. They were allowed a label allowance of $19,000. They were allowed advertising allowance of 22,000 odd dollars. They were also allowed 15 per cent discount, or some $112,000.

Q. And they were allowed 408,000 of processing allowance? A. That is true.

Q. You substract the sum of those from the 750,000 and you get the 170,000 that we have been talking about.

The Court: Well, let the witness finish now. We are back on this same subject again. Go ahead, Mr. Witness.

The Witness: Counsel stated we would have to realize $937,000 under his computation.

Well, I don't agree with him, because the [2146] largest amount that could have been realized from the sale of this fruit would have been approximately $750,000. So what he is trying to contend, I don't quite comprehend. It is impossible to realize more than the market price for the fruit under any conditions.

I will ask counsel, would $2.50 a case be a fair selling price during that year?

Q. (By Mr. Strachan): I am asking you if you will tell us what price per ton would have to be

(Testimony of Robert Hodge.)

realized on 12,000 tons in order to make up a total of $937,000.

A. Assuming we had to realize $937,000 from the sale of this 12,000 tons processed?

Q. That's right.

A. Well, just a minute. We will divide it out. $937,000?

Q. Yes, sir.

A. The mathematical computation is approximately $78.08.

Q. Can you reduce that now to the equivalent of 12/46 ounce cases? How much per case, 12/46 ounces?

The Court: Figure it out and then we are going to stop this.

The Witness: Approximately $3.40 a case, sir.

Mr. Strachan: That's all of the cross-examination.

The Court: I said we were going to stop this because if [2147] you are going to rely on this type of account, I want a written statement prepared on it so it can be analyzed. I am not much of an accountant, but I think somebody is treating you wrong in their computation.

Mr. Strachan: We expect our witnesses will put in a computation.

The Court: If you rely on it, I want a written computation prepared like the plaintiff prepared, and it can be handed to them for study like theirs was handed to you.

(Testimony of Robert Hodge.)

Mr. Strachan: Of course, the plaintiff's computation was not reduced to written form. However, we propose to have a written computation that can be examined.

The Court: Well, that is true. This other computation was made orally, but I think you should have a written computation on these matters.

Before we leave the subject, do you have any explanation of this apparent discrepanuy?

The Witness: Yes, sir, your Honor. There are some very flagrant discrepancies. In the first place, counsel adds allowances and costs. In other words, label allowances, advertising allowances and discount allowances were deductions from TreeSweet's costs. They were not additions. Why would you add them? I cannot understand acuounting like that.

In other words, if it cost you 400 and some thousand dollars to produce this fruit, you have got a credit of [2148] 19,000 for labels, so your cost would be reduced by that, and your advertising and sales expenses, as we have used them, of $87,000 would be reduced by an allowance from Sunkist of 22,000. That would not increase your costs. Those would reduced the cost.

Mr. Strachan: I think I can clarify that, if you want me to. I didn't use them to increase it. I used them to decrease. I had him aggregate all of them together and subtract them in a group. If he wants to go back and subtract them one at a time, it will come out at exactly the same position.

The Court: You say you are going to offer some proof on this?

Mr. Strachan: That's right.

The Court: By another witness?

Mr. Strachan: That's right.

The Court: We will take care of it at that time. Any redirect?

Well, we will have our recess now. Will there be redirect?

Mr. Dixon: Oh, maybe one or two questions, your Honor, is all.

The Court: All right.

Mr. Dixon: I might say we will be glad to prepare for the record and the use of the jury the computation which Mr. [2149] Hodge has used in arriving at the figures which he gave to the jury as the basis of his figures.

The Court: I think that is helpful to counsel, and I think it is helpful to the witness, the jury and the court. I know it is helpful to the court. Maybe some of the jurors are smarter than I am.

Mr. Strachan: I wonder if in that connection it might not be well to prepare a statement of the computation that I just went through orally.

The Court: Yes, you may do that. I think it would be helpful.

All right. Remember the admonition of the court. Leave the papers here. Take a short recess.

You may step down, Mr. Hodge.

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury absent.

When that is done and these computations are prepared, I think it would make a lot more orderly procedure to terminate this cross-examination, reduce your two estimates to writing, and you will then, I take it, have expert witnesses to substantiate your calculations. If the plaintiff is not satisfied with it, they can call somebody back or they can cross-examine your experts. There will be no restrictions on you in recalling witnesses, except I hope on either [2150] side we don't have to keep going over and over the same thing.

Will that be all right to do it that way?

Mr. Strachan: I think so. That is a very practical way. [2151]

* * *

RONALD WALKER

a witness called on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Ronald Walker.

Direct Examination

By Mr. Dixon:

Q. Will you state your residence address, Mr. Walker?

A. If I can remember it. I just moved.

20505 Covina Hills Road, Covina.

Q. You have been sitting here for some time, Mr. Walker; will you tell the jury what your connection is with Winckler & Smith?

A. Well, the jury has heard reference to a

(Testimony of Ronald Walker.)

Chapter X proceeding, which was filed I believe on the 19th of March in 1952. Upon the filing of that petition I was appointed [2152] trustee under this Chapter X of the Bankruptcy Act to take over the affairs and management of the corporation.

Q. And you qualified and have been acting as such trustee since your appointment up to and including the present time?

A. That is correct, yes.

Q. Mr. Walker, will you tell the jury whether as trustee you processed in the plant of Winckler & Smith any citrus juice products after your appointment as trustee?

A. Yes, we operated for approximately two years.

Q. Would you state to the jury what the extent of those operations were?

A. We processed many of the types of juices which have been referred to as best we could. The function of a trustee is somewhat multiple. One thing which it was necessary to do was to get—this is perhaps not completely responsive, Mr. Dixon—was to restrain the sale, which had been set by the RFC under their trust deed, getting extensions of time on the sale from time to time through court orders, and in the interim period to operate as best we could under the circumstances in which the company found itself, and to attempt financing, to examine into the affairs of the corporation, of its officers, and to attempt to formulate some plan of reorganization which might involve a dozen dif-

(Testimony of Ronald Walker.)

ferent factors, to enable the company to reorganize and recommence its business.

Your question related to production of [2153] juices?

Q. That is correct. In other words, to what extent, if any, did you process any citrus juices at the Winckler & Smith plant after you were appointed trustee thereof?

A. When I took over the affairs of the corporation, it was totally without cash, that is, completely unliquid, so that the processing which was done under my direction was of a rather limited scope.

To try to cover the area, we produced some material for the War Department, produced some orange concentrate hot pack for a Chicago concern. We produced quite a bit of stuff in conjunction with the E. A. Silzle Corporation, which was the neighbor immediately to the north of the Winckler plant, some of it on a joint venture program, some of it straight processing for them, for which we were paid a processing charge.

I made a contract with the Muscat Co-operative Winery people during the first year of operation to produce frozen concentrate grape juice similar to the small can which Welch's put out.

The whole action conducted under my auspices, if you call it that, was more or less in the nature of a delaying action. In other words, it was to try to keep the plant open, because it had considerably more value, we felt, as an operating plant than it would have closed down, and to—well, simply to keep things going until we had exhausted [2154] every opportunity to obtain refinancing or to commence with a plan which would enable the company to continue business.

Q. Well, will you tell the jury, if you can, something about the efforts made by you as trustee to effect a reorganization and/or disposition by sale or otherwise of the assets of Winckler & Smith? [2155]

* * *

The Witness: Mr. Winckler has already testified as to his rather extensive efforts to obtain refinancing, to get fresh money into the corporation. He was automatically removed as an officer of the company at the time of my appointment.

The Court: You say removed. He was still an officer, but his authority——

The Witness: His authority was removed. I tried to utilize his efforts along the directions to which he has testified and co-operated with him whenever it was necessary in connection with attempting refinancing.

I personally tried to—that is, my efforts toward an ultimate sale of the property were directed more within the industry itself, and they were rather complex.

The Court: Well, you tried and you didn't succeed.

The Witness: Right.

The Court: All right.

(Testimony of Ronald Walker.)

Q. (By Mr. Dixon): Will you tell the jury what ultimately happened to the plant? The plant is still there?

A. The plant ultimately was sold under a voluntary liquidation. It was purchased by Allen Rubin. That is not Maxwell Rubin, but Allen Rubin, for the sum of $100, subject to all of the existing encumbrances.

Those encumbrances generally consisted of the balance on the RFC loan of $50,499, as I recall the figure, plus [2156] considerable accumulated interest; the second trust deed in the name of Albert Parvin for $57,500, plus several months of accumulated interest; some back taxes, state and county taxes—I have forgotten the exact amount. My recollection is it was either 7,500 or 10,500. There were withholding tax liens of the government for about $8,000.

As I recall, the total was somewhere in the neighborhood of $140,000 to $150,000.

In addition to that, the Anagold label, the rights to the Anagold label were sold to the Muscat Cooperative people, who had been using that name by arangement with me on this grape juice. That was sold for $1,000.

Mr. Dixon: Thank you, Mr. Walker.

Your witness, counsel. [2157]

The Court: I think I should also ask, are you a member of the Bar of the State of California?

The Witness: Yes, your Honor.

(Testimony of Ronald Walker.)

The Court: And a member of the Bar of the Federal Court in this District?

The Witness: That is correct. [2158]

• • •

ROBERT HODGE

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Redirect Examination

By Mr. Dixon:

Q. When you were excused yesterday, Mr. Hodge, we were [2166] discussing the manner in which you arrived at the approximately $210,000 figure as being the amount which would have been realized by Winckler & Smith on a contract or any other arrangement comparable to that between Tree-Sweet and Sunkist pursuant to which 12,000 tons of Valencia oranges would have been made available to Winckler & Smith. Have you prepared a short summary showing the manner and method of arriving at that figure? A. I have, sir.

Q. Directing your attention to Exhibit 69, I will ask you if that exhibit for identification is such summary? A. That is so, sir.

Q. Will you now state to the jury anything that you may desire to add to your testimony, which may help the jury in determining and clarifying the manner in which you arrive at the $209,754.65

figure at the bottom of Plaintiff's Exhibit 69 for identification?

A. It might be more readily understood if I stated that I base my computation of some $209,000 that Winckler & Smith would have realized under this so-called arrangement, that they would have been allowed these allowances, and they would have made this profit on their processing, and the advertising allowance, the discount, which totals $172,000; they would have gotten that under the contract. In addition to that they would have also absorbed some $56,417.38 of [2167] their general administrative overhead, which is included in my profit and loss statement for 1952. So the total realization under the contract would have been about $228,000, roughly. From that we will have to take the additional brokerage of some $22,000, which would have had to be paid to sell the merchandise, which would relieve them, roughly, of two hundred six or seven thousand dollars, just stated roughly, under the contract, that they would have realized under this contract.

Does that simplify it somewhat? [2168]

Q. Well, I think you made some mention yesterday, Mr. Hodge, on cross-examination about apples and pears. You didn't say anything about oranges and orange juice, though. Will you tell the jury what that reference related to?

A. Well, just a minute and I will see if I can find my pencil notes that I made at that time.

The defendant had some figures which were prepared—rather, which showed the following figures.

I understood we were to get a copy of these figures to be used this morning in court.

Q. Well, we will have them, so tell us to the best of your recollection.

The Court: Well, let's go on.

Q. (By Mr. Dixon): As I recall the examination by counsel for defendant, he referred to a figure of some 938 or some odd thousand dollars as being the amount which he computed would have been involved in performance of the contract or arrangement that you testified to with reference to the 12,000 tons of Valencia oranges referred to in Plaintiff's Exhibit 69.

Have you had an opportunity of considering those figures that were referred to yesterday by counsel in connection with that nine hundred and some odd thousand dollar figure?

A. I have, sir.

Q. That figure differs from the 750,000 figure which [2169] represents the selling price, does it not, to Winckler & Smith of the juice realized from the 12,000 tons of oranges, assuming they were made available to Winckler & Smith?

A. It differs materially, yes, sir.

Q. Can you explain to the jury what the difference is or how it was determined or what was wrong with your figures or with counsel's figures?

A. In my opinion the defendants' figures included the general administrative expense twice. The fallacy of his accounting, of his summation, is that those figures are in there twice. As I recall the

(Testimony of Robert Hodge.)

summary, the defendant started out with my estimated profit of some $25,000, to which he added a loss of 184,000. He also added 408,000 worth of processing costs, and $170,000 would have been paid for the raw fruit.

He again added selling expense of 87,000, the brokerage of 22,000, and the excess of general administrative expense over the amount that is in the 408,000 of some 37,000, which made up a grand total of $937,000.

The fallacy of that figure is that the selling and general administrative expenses of some $181,000, as shown by Exhibit 65 are in there twice. It is in the loss figure of $184,000. $56,000 of general administrative expense is in the $408,000 figure. The selling expense of $87,000 is clearly identifiable as such. [2170]

The excess of the G and A over what is in the processing cost of some $37,000 is also readily identifiable.

Taking those from the $937,000, you come back to approximately the $750,000 figure that I state would have to be realized from the—or would be realized from the sale of this juice.

Q. Directing your attention specifically now, Mr. Hodge, to 69, and the figure of $34.06 per ton, that figure multiplied by 12,000 tons, I believe, gives a figure of something like $408,000, does it not?

A. Yes, sir.

Q. In arriving at that $408,000 figure, will you state so that it will be clear to the jury what part

(Testimony of Robert Hodge.)

of the, roughly, if any, of the administrative overhead as shown on the Plaintiff's Exhibit 65, the operating statement for the fiscal year ending January 31, 1952, is included?

A. In that computation of $34.06, that includes the actual expenditures in the year ended January 31, 1950, of some $56,000, $56,417.38 is included in that computation, in that processing cost. In other words, that includes the absorption of that much expense in addition to the cost that would have been incurred in processing the fruit into cans, putting it into cans, cartons, and so forth.

Mr. Dixon: It might be helpful to the jury to better understand this if they had Plaintiff's Exhibit 65 before [2171] them, perhaps, your Honor, where they could see the items that are referred to in that exhibit.

The Court: You mean to understand what you are talking about now, or 69?

Mr. Dixon: To understand what this $56,417 figure is that he is talking about as being absorbed and recovered in the $34.06 figure. I think one of the jurors has a question.

The Court: Yes, sir.

Juror Berger: The computation on the $34.06 a ton, we have the letters G and A there. What does that refer to?

The Witness: General and administrative expenses. It is just an abbreviation used.

Q. (By Mr. Dixon): But that is the figure that is referred to or that covers the general administra-

(Testimony of Robert Hodge.)

tive expenses in the operating statement for the fiscal year ending January 31, 1951, is it not, Mr. Hodge? A. January 31, 1950, sir.

Q. 1952. I am sorry.

A. Now you have me confused. The $56,000 that is absorbed in the processing cost was the actual general administrative figure for the year ending January 31, 1950, and was used that way because all of my costs were computed on the basis of production of that year.

Q. You are right, I am sorry.

The Court: Now, I am no CPA, but I need explanation to [2172] understand 69.

Mr. Dixon: Proceed, your Honor. I think, however, it might be of help to the jury to have this operating statement for that period.

The Court: All right. Pass 65 to the jury.

The Witness: Couldn't we also pass 61 at the same time?

Mr. Dixon: Yes. Whatever you think is necessary to make it clear to the jury, Mr. Hodge.

The Court: 61 and 65. 61 is the statement of income account for the year ending January 31, 1950. That would be the canning season of 1949, which was the Valencia season you took?

The Witness: That is correct, Judge. [2173]

The Court: And 65 is the income account ending for the year January 31, '52, which involves the 11 months of the year 1951, and one month of the year '52, that is the year in question in which you are supposing that in addition to what business Winckler & Smith did in that year they also had 12,000 tons more of oranges available?

The Witness: That is correct, sir.

The Court: Let's see if I can understand this. On 69 you suppose that you are going to add 12,000 tons more to the work of Winckler & Smith for the year that ended January, '52, that would be the canning season of '51?

The Witness: That is right, Judge.

The Court: That is the year they only had $670,000 of sales, so you are going to add $750,000 more to sales, which would mean around $1,300,000, or somehting like that?

The Witness: That is true, Judge.

The Court: Which would be then comparable with the sales that they made in the year ending January 31, 1950, Exhibit 61, where there was $1,367,000 in sales?

The Witness: Yes.

The Court: Then you took that year, you say, because it was a Valencia canning year?

The Witness: That is true, Judge.

The Court: So the first thing you do is to list the TreeSweet processing cost from its contract, which meant that [2174] TreeSweet was paid $35.57 per ton for the processing it did?

The Witness: That is right, Judge.

The Court: Then you list that the Winckler & Smith processing cost on this basis of the '49 can-

(Testimony of Robert Hodge.)

ning season was $34.06 a ton. So you then say that Winckler & Smith would have made a profit of the difference between the two figures, $1.51 per ton for each ton it processed?

The Witness: Yes, sir.

The Court: Now, the $35 figure that TreeSweet was paid included, because it was a figure to cover TreeSweet's cost, included TreeSweet's selling, administrative expense, all those various items were included in that figure?

The Witness: I don't believe it included selling expenses, your Honor. I believe it included general administrative expense.

The Court: General administrative expense——

The Witness: Plus all of the costs incurred in actually processing the juice.

The Court: Actually processing?

The Witness: Yes, sir.

The Court: So by the same token the $34 figure, if you are going to make a comparison, would have to include the same thing?

The Witness: That is right, sir.

The Court: Therefore, since the $34 for Winckler & [2175] Smith was to include that, the financial statement of Winckler & Smith already has been charged with $56,000 for "G"—what is that?

The Witness: General and administrative expense?

The Witness: Yes.

The Court: So you merely make a note of that in passing?

(Testimony of Robert Hodge.)

The Witness: Yes..

The Court: To call our attention to the fact that your account has already been charged for that amount?

The Witness: That is right, sir.

The Court: Then you figure out these various items which total $172,000 of allowances, discount, advertising, and so forth—is that right?

The Witness: Yes, sir.

The Court: Then you go down here and you are going to take some things away, apparently, from the $172,000?

The Witness: Yes.

The Court: You are going to say Winckler & Smith would have had a selling expense of $87,000?

The Witness: That is right, sir. That is actual selling expense in that year.

The Court: That is the selling expense they had in the year ending January, 1952? [2176]

The Witness: Yes, sir.

The Court: And they had a brokerage of $22,000, brokerage expense on this additional canning?

The Witness: Yes, on the additional sales of this canning.

The Court: The next one you list, "Excess G. and A. in 1952," you give a $93,000 figure, which you took from Exhibit 65, which was the G. and A. expense actually shown on the books in 1952?

The Witness: Right, sir.

The Court: Over 1950. 1950, the year ending January 31st, the administrative expense was

(Testimony of Robert Hodge.)

$56,000, that was the bigger year, but it was a smaller expense?

The Witness: That is true.

The Court: So you said, therefore, that you would charge this account that you are setting up this excess?

The Witness: Yes, sir.

The Court: In other words, instead of saying administrative expense for the year—this suppositious year that ended January 31, '52, was only the same as this other year that you were comparing with, you took the difference and charged it on your suppositious account?

The Witness: That is right.

The Court: You took the difference because $56,000 was already included in the administrative expense, the G. and A., [2177] for which you had been paid the $34 a ton?

The Witness: That is right, sir.

The Court: So you didn't have to charge the fifty-six, but you charged the excess?

The Witness: That is right, sir.

The Court: That gave you a figure of $147,000?

The Witness: Yes, sir.

The Court: Now, what do you do? Deduct the $147,000 from the $172,000?

The Witness: Yes, sir.

The Court: Why do you do that?

The Witness: Because you would have had these allowances under the contract and you would have this additional expense.

(Testimony of Robert Hodge.)

The Court: That gave you $25,000?

The Witness: Yes, sir.

The Court: Then what are these next two lines?

The Witness: We would have had an operating profit of some $25,000 for the year ended January 31, 1952, instead of a loss as shown on Exhibit 65 of $184,528.20, as I have already deducted all of the expenses shown in Exhibit 65 in making this computation.

The Court: In other words, what you would have gained by the production of these oranges was $172,000. And then you have deducted—already there has been taken the expense [2178] of G. and A. in making them in the $34 a ton?

The Witness: That is right, sir.

The Court: So you merely added the additional amounts that should be charged, such as selling expense, as shown here, brokerage, and the excess in G. and A.?

The Witness: That is right, sir.

The Court: So that left you $25,000, and then since you would have come out with 25,000 on top, that meant that you would absorb the loss of one hundred eighty-four and were $209,000 ahead?

The Witness: That is right, sir.

The Court: What is the next item? Just a computation on 15,000 tons?

The Witness: That would have been the end result had we had 15,000 tons instead of 12,000 tons, computed in the same manner.

The Court: All right.

(Testimony of Robert Hodge.)

Q. (By Mr. Dixon): Just one more question. The $34.06 figure represents the juice in the cans with the labels; ready to go to the broker or to the consumer buyer, does it not?

A. Plus the absorption of $56,000 general and administration expenses.

Q. And this is based on the assumption that there would be no additional selling costs incurred other than the [2179] 3 per cent brokerage?

A. That is true, sir.

Q. Because the overhead of Winckler & Smith for the selling was already there, but not utilized to its full capacity? A. That is right.

Mr. Dixon: That is all, your Honor.

Recross-Examination

By Mr. Strachan:

Q. Mr. Hodge, I believe, if I understand Exhibit 69, that your figure of $25,231.45 is your computation of the profit which Winckler & Smith might have realized from the processing of 12,000 tons of oranges?

The Court: You answer that, Mr. Witness.

The Witness: No, sir. That is the profit that would have been realized by the corporation had they had an additional 12,000 tons for processing under the same terms and conditions as were under the TreeSweet contract.

The Court: Let's not have any misunderstanding. Whether the witness is right or wrong, the question you asked is not what he has said. This is his computation by adding 12,000 tons to the production and operation already carried on in the year ending January, '52. Therefore, it is not a mere computation, according to the way I understand his [2180] testimony, of what you would have made by merely processing 12,000 tons. It is a combination of that, plus the other things that had transpired in the year ending January, '52. [2181]

Q. Well, the heading, the titling of the $25,000 item is, and I quote from Exhibit 69, "Winckler & Smith Estimated Profit from Processing 12,000 Tons of Valencia Product Oranges, $25,231.45."

That is the way it reads, isn't it?

Mr. Dixon: If the court please, if that is an error——

The Witness: It reads that way.

Mr. Dixon: ——then it should be corrected. This was gotten up in a hurry, but it is not intended to be an isolated operation.

The Court: The objection is overruled. That's the way it reads.

Q. (By Mr. Strachan): That is the way it reads? A. That is the way it reads.

Q. And the way you obtained that $25,000 figure was to deal with items of cost and items of selling price for 12,000 tons of Valencia oranges, isn't it?

A. No. The way that figure is obtained is by taking the amount that was estimated to be realized under this contract and subtracting therefrom the

(Testimony of Robert Hodge.)

actual expenses during the year ended January 31, 1952.

Mr. Strachan: I would like to have this document marked with copies for the jury.

The Court: Defendants' Exhibit AZ.

Mr. Strachan: Well, now, I don't think I gave you the [2182] right one.

The Court: We have the wrong one?

Mr. Strachan: Yes. I am sorry. These came in after the court convened.

The Witness: One of the jurors wants to say something.

The Court: All right.

Juror Johnstone: I would like to know how many tons Winckler & Smith did process for the year 1951.

The Witness: The year ending January 31, 1951?

Juror Johnstone: No, ending January, 1952.

The Court: The canning season of 1951?

Juror Johnstone: Yes.

The Court: Ending 1952.

Mr. Dixon: I think it is in the record somewhere.

The Court: Yes, I believe it is in the record.

Mr. Dixon: I am not sure just where it is. The total of all fruit, as I recall, was about 5,000 tons, which included grapefruit and lemons, such as they were.

The Court: Do you have the figure?

(Testimony of Robert Hodge.)

The Witness: Do you wish me to answer the question?

The Court: Yes.

The Witness: The year of 1952, I mean the canning season of 1951, was a very unusual year for Winckler & Smith, and Mr. Winckler made some desperation deals to keep the plant going. [2183]

The Court: Just give us the figures.

The Witness: The figures?

The Court: Yes.

The Witness: It was a little misleading and that is why I tried to explain it.

The Juror: I want to know what you added the 12,000 tons to.

The Court: What's that?

The Juror: I want to know what you added the 12,000 tons to, the mythical 12,000 extra tons.

The Witness: Winckler & Smith processed 5,000 tons, 5,010 tons of Valencias. They processed 64 tons of lemons and 2,276 tons of grapefruit. They also processed 744 tons of navels.

The Court: What do they total in tons all mixed together, adding apples and pears?

The Witness: All right, sir. The total of all of the various fruit processed in that year by Winckler & Smith was 8,095 tons.

The Court: We have in the record, also, the tonnage processed in the canning year of 1949. I am trying to turn to my notes here.

Mr. Dixon: I think, your Honor, the total of all

(Testimony of Robert Hodge.)

fruit in 1949 was around between eighteen and twenty thousand tons.

The Witness: Was it 18,377 tons? [2184]

The Court: In the 1949 canning season?

The Witness: 1949 canning season.

The Court: Which was the year ending January, 1950?

The Witness: Yes, sir. Of that amount 12,780 tons were Valencias, 14,051 tons were navels, 4,146 tons were grapefruit. [2185]

* * *

Q. (By Mr. Strachan): Now, referring to Exhibit AZ, I believe your testimony is that you allow for processing costs of 12,000 tons at $34.06 a total of $408,720? That is the figure we went over yesterday? A. Yes, that is correct.

Q. That was one of the costs of sales?

A. Yes, sir.

Q. Now, the cost of the finished product was this. You start out with the Sunkist selling price of $750,000, because that is what the processor was required to pay for the product? A. Yes, sir.

Q. Or account for? A. Yes, sir.

Q. Now, we get to what you call adding peaches, pears and apples, so I separated the peaches, pears and apples here so that we wouldn't add them.

A. We now have oranges, sir?

Q. From the 750,000, which would be the purchase price to the processor—— A. Yes, sir.

Q. ——we deduct the processing allowance provided for [2186] in the Tree-Sweet contract?

(Testimony of Robert Hodge.)

A. That's right, sir.

Q. And that was $426,840? A. Yes, sir.

Q. On 12,000 tons? A. Yes.

Q. Next we deducted a label allowance of $1.59 a ton, $19,080, we deduct that, leaving $304,080. I believe that is what you testified to?

A. Yes, sir.

Q. Then the advertising allowance on the 12,000 tons would give us another deduction of $22,560, leaving to be accounted for out of the 750,000, $281,520.

Then the processor was allowed a discount of 15 per cent. You applied that 15 per cent to the cost of 750,000 and came out with $112,920, that is, you converted the discount to a tonnage basis of $9.41 a ton, is that correct?

A. That is correct, sir.

Q. So that left a remainder of $168,600 to be paid by the processor to Sunkist to balance that $750,000 selling price?

A. That is correct, sir.

Q. Now, when you add the processing cost to the cost of the juice, the 168,600 that is not absorbed in the allowances, that leaves $577,320, which is the total cost of the [2187] processing and the juice in the cans?

A. Plus the cost of the raw fruit, represented by the $168,600 figure.

Q. That's right. So that makes the cost of selling the $750,000, the cost of sale, $577,320?

(Testimony of Robert Hodge.)

A. You wouldn't express it that way, counsel. It is not the cost of selling the product.

Q. The cost of sales?

A. The cost of sales, yes, sir.

Q. Cost of sales is the expression that you used in your regular income account?

A. That's right, sir.

Q. And this is cost of sale on the 12,000 as developed in your computation? A. Yes, sir.

Q. So deducting the cost of sales from the gross sales leaves a gross profit of $172,680?

A. That's right, sir.

Q. Now, that is the gross profit on the 12,000 tons, is it not?

A. That does not include the absorption of some $56,000 worth of overhead, general administration.

Q. All of these figures have been developed by multiplying a cost factor by 12,000 tons, is that correct? A. That is true, sir. [2188]

Q. All right. Now you have the product finished and in the cans. There are going to be some other costs involved in disposing of them, is that correct?

A. That is correct, sir.

Q. The selling expense which you allowed was $87,652.44?

A. These selling expenses did not apply to this particular 12,000 tons, no, sir.

Q. Did any part of that selling expense apply?

A. Not in my computation, sir.

Q. Did you assume for the purpose of your com-

(Testimony of Robert Hodge.)

putation that there would be no selling expense for disposing of 12,000 tons of product?

A. There would be very little selling expenses other than additional brokerage of some $22,000. The company had a staff of salesmen which it kept during that period. It would have had to incur no additional selling expenses other than the brokerage. Oh, there might have been a few telephone calls or items like that, but nothing substantial.

Q. You did, for the purpose of your computation, deduct $87,652, didn't you?

A. Not from the basis you are arriving at, sir, or the statement you just made. You are inferring that I said this $87,000 would be spent——

Q. Go back to Exhibit 69, if you will, please. Tell me whether on the face of that exhibit you don't show that [2189] $87,652.47 as Winckler & Smith's selling expense?

A. You asked me if that would be the selling expense on this particular 12,000 tons of oranges, and I say it would not be.

The Court: The difficulty, counsel, and let's not confuse the jury, is that 69 is a composite estimate. Now you are working out an estimate on tons.

Mr. Strachan: He worked it out on tons, your Honor.

The Court: The witness has conceded he estimated that the general items of selling expense of $87,000, which was shown in Exhibit 65 for the year ending January 31, 1952, would have been the same, whether Winckler sold the goods they did sell or whether they also sold the additional 12,000 tons, with the exception of brokerage, and he made an allowance for additional brokerage.

Now, whether he is right or wrong, the 87,000 is treated differently in 69 than it is treated in AZ.

Mr. Strachan: I don't agree with that, your Honor. You look at Exhibit 69 and you will see that from the 172,000 that is shown on Exhibit 69, there are three items added together and deducted. They are $87,652.44 for the selling expenses, $22,500 for brokerage, and the other is the general and administrative. Now, if you will refer to AZ, you will find that instead of aggregating those three items and deducting them in a sum total, I have deducted them one at a [2190] time, but it is precisely what he has done arithmetically on Exhibit 69.

The Court: You are going to contend—let me get this straight—from AZ that the net profit for the 12,000 tons was only $25,000 and that, therefore, it should have been deducted or set off against the loss of 184,000?

Mr. Strachan: That is correct. [2191]

The Court: That is what you are going to contend?

Mr. Strachan: That is right.

The Court: On the witness' own statement, right or wrong, where he said he assumed the $87,000 of selling expense would include the sales of these new products, if that is true, that has already been taken into account in arriving at the $184,000 loss.

Accordingly, to start with, you would immediately have to take not only the $25,000 profit that you would concede from the $184,000 loss, but you would also have to take the $87,000 off, because you can't count it twice.

In other words, the $87,000 is shown as one of the figures on Exhibit 65, that expense is shown as one of the things that gave the $184,000 loss. If that is true, and the $184,000 loss is made up in part of $87,000 selling expense, if you are going to contend that you take the $87,000 off here, and then say that the net profit on this transaction is $25,000, you are taking it off twice.

I am no CPA, but that is apparent.

Mr. Strachan: I think on the face of Exhibit 69 it is apparent that he took that $87,000 off as selling expense.

The Court: Yes. But he takes it off there—I am not saying whether he is right or wrong, but I am trying to understand what he did—he takes it off there, because he is [2192] making a composite of what actually happened, plus adding 12,000 tons more. Accordingly, when he gets down, having taken it off, he says, "I am not going to take it off twice, since I took it off once, I am not going to count it in my $184,000 loss."

Mr. Strachan: I don't see where he has taken it off more than once here.

I have taken it off once and he has taken it off once, your Honor.

The Court: All I am saying is this: If you take

(Testimony of Robert Hodge.)

it off on Exhibit AZ, then your figure of 25,000 to that extent does not represent the composite operation of the year '51, on the supposed basis. Because it has already been taken off in the loss of 184,000, if you take it off again it is being taken off twice.

Mr. Strachan: All right. I will put the question to the witness now:

Q. If the $87,652 selling expense is included in the $184,000 loss, will you explain to us why, on Exhibit 69, you deducted it again as Winckler & Smith's selling expense?

A. Because I am trying to arrive at a figure which would have been the net profit for Winckler & Smith's operations for the year. I am not trying to arrive at a figure on 69 as to what would have been the profit under the contract.

I have already explained to the jury what in my opinion [2193] the profit under the contract would have been. It would not have been $25,000; it would have been in excess of $200,000.

The Court: That is, you mean if all Winckler & Smith had done would be to process 12,000 tons—forget everything else?

The Witness: Yes, forget everything else, they would have made a profit of some $200,000.

The Court: So that I understand you—and please don't misunderstand, ladies and gentlemen of the jury, whether I agree with one witness or the other, but I am trying to understand it—your Exhibit 69, then, is the composite by trying to add a supposed production of 12,000 to what already went on?

The Witness: That is right, sir.

The Court: Am I right in this—let me ask your opinion. On AZ counsel has stated that he contends that $25,000 shown at the bottom was the net result of the profit, apparently on this composite basis, that adding 12,000 tons to what was already done that there would have been a net profit of 25,000, which would, therefore, have to be deducted from the $184,000 loss, and there would still be a large loss, that is what he apparently contends as I understand him. If that is true, in your opinion is or is he not using the $87,000 figure twice?

The Witness: He is using the $87,000 figure twice; he is [2194] also using the $37,000 figure twice; he is also using the 56,000 some odd dollars absorbed in the processing cost twice; he is using a total of 181,000 odd dollars twice.

Q. (By Mr. Strachan): Let me see if I understand your position, Mr. Hodge. You say that the $87,000 of sales expense, the $37,000 of general administrative expense, are items that are included in the loss for the year of $184,000?

A. That is true, sir.

Q. What?

A. That is true, they are in there, the statement clearly shows it.

Q. Is the additional brokerage of $22,500 in there? A. No, sir, that is not in there.

Q. If the $87,000 and the $37,000 are in the $184,000 net loss, you on Exhibit 69 have made a double deduction, have you not—— A. No, sir

(Testimony of Robert Hodge.)

Q. ——in that you added together the $22,500 brokerage that is not in the loss, together with the $87,000, which you say is in the loss, and the $37,000 which you say is in the loss, and you deducted that total amount of $147,000 from your gross profit figure; isn't that correct?

A. No, sir, you are very, very wrong.

The Court: Counsel, this is so clear to me that unless we want to excuse the jury and talk about it, I am not going [2195] to permit you to go further.

On Exhibit 69, Mr. Witness, in order to arrive at a composite figure, you went back to 65, the statement ending January 31, '52, and before you started out—if you will look at 65, ladies and gentlemen of the jury—there was a $10,000 loss, the cost of sales exceeded the sales by $10,000. Now, there were two big items that went to make up the loss that eventually wound up of $184,000. One is $87,000 shown as selling expense. one is $93,000 shown as administrative expense. Let's forget the miscellaneous income. So you get $184,000 loss. Now, in making the composite the witness has made a premise—it may be sound or unsound, but he has said—Mr. Witness, is this correct, you said that you estimate that as far as the $87,000 item it would have been the same whether they processed 8,000 tons or whether they processed eight plus twelve thousand tons?

The Witness: Plus 22,000 brokerage.

The Court: Pardon me. We will take the brokerage next. But the general selling expense, which included outside warehouse, freight out, travel, ad-

(Testimony of Robert Hodge.)

vertising, sales and traffic salaries, telephone, telegraph, miscellaneous, you premise that would be the same?

The Witness: That would be the same.

The Court: There is figured in that $87,000 a $7,000 item on brokers' commissions? [2196]

The Witness: That is true, sir.

The Court: But since there was more brokers' commissions to be paid, you then figured another 3 per cent to make the $22,000 figure?

The Witness: That is right, sir.

The Court: So in making your composite figure you take the $87,000 in toto off of 65, is that right?

The Witness: That's right, sir.

The Court: So, therefore, by making your subtraction here you have taken it out of the loss which shows on 65?

The Witness: Right, sir.

The Court: Then you have added $22,000 for brokerage, which is in addition to the $87,000; is that right?

The Witness: That is right.

The Court: Now, you come down to the $93,000 item, which shows on 65, and you say that $56,000 of that was general and administrative, which was included in the price paid for processing?

The Witness: That is right, sir.

The Court: So you say there is an excess shown here of $37,000, so you dispose of the figure on 65, the $93,000 figure, by saying $56,000 of it was included in the cost of processing, which they got back——

(Testimony of Robert Hodge.)

The Witness: That is right, sir.

The Court: So you don't count it, you say the excess [2197] $37,000 we will count?

The Witness: Yes.

The Court: So you count the $37,000. Therefore you have, in substance, crossed off 65 the $87,000 and the $93,000 figure, and instead you have substituted three new figures—eighty-seven, twenty-two, and thirty-seven thousand, which total $147,000 as the cost?

The Witness: That is true, sir.

The Court: Therefore, you have taken all the cost items off of 65 and you say we wind up with $25,000 profit, and we have eliminated the loss we have shown?

The Witness: That is right, sir. [2198]

* * *

The Court: Now, ladies and gentlemen of the jury, nothing that I have said here indicates what I believe as to this man's credibility, his competency, the accuracy of his figures, whether I agree with the premises that he has taken or admitted, anything like that; I am merely trying to understand what he did. And if I am in disagreement with counsel, that is another matter.

Any accounting problem is a complicated problem, and to the extent that I can help you understand it, and that you not be confused about it, that is what I want to do. I am not trying to argue plaintiff's case; I am not trying to argue defendants' case. I think that we are all entitled to understand what the witness claims by a computation. [2199]

* * *

The Court: The record will show the jury absent.

I want you to cross-examine if you want to, but it is so patent to me, the basis on which this is figured, that I don't want any attempt to confuse the jury in what the witness did.

The witness may have done it wrong, but it is patent to me that he has disposed of, from 65, on his theory, these two items; that, therefore, he has no loss left, and when he comes down to the end of 69 his so-called profit is the composite profit.

Mr. Strachan: That just isn't the way it was done, [2200] according to my view.

The Court: Look here. It took me a little time to get it in my head, but it is here. On his 69 he started out with what he would have made, and then he has taken $87,000 and deducted it from one seventy-two —is that right?

Mr. Strachan: That is correct, and that is what I did here.

The Court: That crosses eighty-seven off over here on 65. Just follow me a minute.

Mr. Strachan: I have taken it off here (indicating).

The Court: He has taken—if you have taken it off here, then you also have a composite figure, which will mean—you are proving the same thing he proved, it is just a matter of argument what you contend—let's take his for a minute. He also has taken $37,000 of the $93,000, he has taken that off, so you dispose of 37,000 here. He contends that the other 56,000 is included in the processing, so he has taken the other 56. In substance, he has taken the 93,000 off here. He therefore has disposed here—forgetting about the ten up here and the six down here, ten loss to start with, and the six other income—he has disposed of the $184,000 loss, therefore on his calculation the $25,000 shown down here becomes the composite result. He has also added an item of expense of $22,500. Now, your result—our dispute arises here, is your result a composite result [2201] or is it a result on 12,000 tons of oranges? If it is a composite result, then there is no dispute in the two exhibits.

Mr. Strachan: I say it is exactly what Exhibit 69 says, the Winckler & Smith estimated profit from processing 12,000 tons of Valencia oranges, period.

The Court: That is conceded to be an error, that statement.

Mr. Strachan: I don't think it is an error.

The Court: Let me show you what you have done here. Your result is the same as plaintiff's result, but your result instead of being what you say it is, what they would have made on 12,000 tons, it is a composite result. Here is why. Follow me a moment. You first take off the $87,000 here—is that right?

Mr. Strachan: That is a selling expense, and that is what it is designated.

The Court: You then have taken the $87,000 out of the statement right here, you have reduced this loss by $87,000. You have taken the $37,000 out of the $93,000. You have cut this down to fifty-six——

Mr. Strachan: You haven't eliminated that. That is still expense that he had to be borne.

The Court: You have taken it out here (indicating).

Mr. Strachan: He has taken it out, too.

The Court: You can't take it out twice. [2202]

Mr. Strachan: What you do is pick up this figure from this and make the deduction there.

The Court: Do you concede that the $56,000 that he talks about under his theory could be included in the processing that was paid?

Mr. Strachan: No.

The Court: He says he takes $56,000 out there because it has been paid for. Our whole dispute is what you contend on AZ is this figure of $25,000. If you contend that that figure on AZ is the profit made on 12,000 tons without reference to anything else——

Mr. Strachan: That is what I contend it is.

The Court: You are in error. If you contend that that is the composite result, then there is no dispute between you.

Mr. Williams: May I interrupt a minute to talk to counsel?

Mr. Strachan: My accountant points this out, and I am referring now to the income account as of the end of the year, if you eliminate these two here, the 87,000, part of the 93,000, then you no longer have the loss of 184,000, but you have only this loss of 10,000.

The Court: Right. That is what I have been talking about. And if you eliminate these in making a composite return, you can't include them twice, you can include them once, but you can't include them twice. [2203]

Mr. Strachan: Then in here, instead of $184,000 you should have a $10,000 figure, because he has added it back in here.

The Court: I think Exhibit 69 is poorly set up, with all respect to you, Mr. CPA.

Mr. Dixon: I agree.

The Court: And it is very confusing. But I think if you will confer with your accountant you will see that——

Mr. Strachan: If you are going to make a composite of that, then you disregard this. Say you have taken those out up here in this computation, then what you have is a $10,000 operating loss only, instead of the $184,000. So you would set the $25,000 of profit on the 12,000 tons off against a $10,000 loss, and would have come up with a $15,000 profit. [2204]

The Court: Well, now we are getting close together, but don't forget that in getting the $184,000 loss, you started off with a loss of seven, and there was other income, so it was on that basis that there is a $3,000 loss here. I don't know, following it through, but that it might be that you would set the $25,000 off against the 3,000 and wind up with twenty-two. I am not concerned about that.

Mr. Strachan: I think that might be it.

The Court: Well, let's confer about it between yourselves, and then get back and finish up this cross and see if we can get rid of this man.

The Witness: Thank you, your Honor.

(Recess.)

VOLUME V

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record
In .... Volumes

Volume V
(Pages 1949 to 2424)

Appeal from the United States District Court for the
Southern District of California,
Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

The Court: The record will show the jury present in their proper places.

Everybody wants time to look over these figures and restudy and analyze where they are, so we are going to excuse you, Mr. Witness, until Tuesday morning at 10:00 o'clock. We promise to be through with you pretty early Tuesday morning. Don't we? [2205]

* * *

The Court: Let me explain. Counsel for both sides have gone over some of these exhibits that were offered, particularly Exhibit 4, 9, 10, 11, 12, 13, 14, 23, 24, 29, 32 and 33, and they have agreed on a little explanation as to what there figures and material on these sheets are. So by agreement they are attaching this little slip to each exhibit by way of explanation.

This is one of those explanatory things. It is offered in evidence not for any value that it may have, but only insofar as it is of assistance to explain the exhibit. So the clerk will be instructed to cut up the original which he has, which is in sections, referring to the exhibits, and fasten to each exhibit indicated, Exhibit 4, 9, and so forth, [2206] this little explanatory paragraph.

Mr. Fisher: If the court please, as to that, it has been so long ago, I frankly forget what objections there might have been, but if there were any, we would like to have them restated.

The Court: Whatever objections there were, if any, will be preserved and this stipulation will not have the effect of wiping them out.

* * *

The Court: Plaintiff's Exhibit 70 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 70 for identification.)

Mr. Dixon: May the record show for the benefit of the [2207] jury that Plaintiff's Exhibit 70——

The Clerk: It is not in evidence.

The Court: Are you offering it?

Mr. Dixon: I offer it in evidence, your Honor.

Mr. Fisher: May it please the court, as to a portion of the exhibit, we have no objection. As to that portion of the exhibit which relates to matters other than Valencia orange juice, we object on the ground it is immaterial.

Mr. Dixon: I am very agreeable, counsel, to eliminating all the price lists that may be contended to deal with——

The Court: Can't we just tell the jury that all that is of concern is Valencias? We have got no other price issue in this case, have we?

Mr. Dixon: That is correct.

Mr. Fisher: Well, I would prefer——

The Court: Can it be removed, physically removed?

Mr. Fisher: I think so. On the understanding that those that don't relate to Valencias will be removed, it is all right.

Mr. Dixon: That is agreeable.

The Court: Counsel will do that later. Exhibit 70 is offered in evidence. Is there any objection? It is received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 70, was received in evidence.) [2208]

Mr. Dixon: Ladies and gentlemen of the jury, this exhibit consists of the price list covering Valencia oranges as issued by Sunkist for the years 1950—well, you already have the 1951, so it only relates to 1950.

The Court: Counsel will agree between them hereafter on the parts to be removed that don't concern Valencia.

Juror Johnstone: It is probably stupid on my part——

The Court: What's that?

Juror Johnstone: I am probably stupid. If Winckler & Smith did have 5,010 tons of Valencias in the 1951 season, was that included in the 12,000 tons or was that 12,000 additional added? I mean the hypothetical 12,000?

The Court: On the hypothetical proposition, they were assuming that there would be 12,000 tons more added to the tons that they had already processed. You have the figures given you for what they processed in 1949, eighteen or nineteen thousand tons. What was it in 1949, Mr. Dixon?

Mr. Dixon: I beg your pardon, your Honor?

The Court: What was the production of Valencias in 1949? Eighteen or nineteen thousand tons? I think the figure was given you by the accountant. In 1951, the year in question, all this case centers down to the canning year of 1951 that ended January 31, 1952, as I recall, there was some grapefruit and some lemons and odds and ends. This hypothetical estimation was on the basis that Winckler & [2209] Smith would have received 12,000 tons more of Valencias to can in that season.

Mr. Dixon: That is correct, your Honor. The figures, I think, we 12,780 odd tons, as I recall it, for 1949 of Valencias.

The Court: No, not 12,000.

Mr. Dixon: Yes.

Mr. Williams: That's right, your Honor.

The Court: Then what was the total?

Mr. Dixon: The total processed of all fruit, including grapefruit and lemons, during that year was in excess, as I recall, of 18,000, eighteen or twenty thousand tons.

The Court: Yes.

Mr. Fisher: May the court please, with reference to the question asked by the juror, the witness' statement is, as I understand it, the witness' contention is that that would be an additional tonnage for that year.

The Court: That's right.

Mr. Fisher: On the theory that it was a composite statement.

The Court: That's right.

Mr. Fisher: And then as to that there is a dispute between counsel as to whether that properly reflects it.

The Court: Yes. Specifically, this suppositious estimate is based on an additional 12,000 tons of Valencias. [2210]

Mr. Fisher: And the defendants' position is that the figures really reflect only the 12,000 and not the other.

The Court: But that the issue that we have sort of enjoined here is the defendants' contention that on Exhibit AZ the $25,000 would represent a profit that was made just by canning the 12,000 Valencias. On 69, the same $25,000 figure is arrived at, but the accountant says that is a composite figure taking together the 12,000 new oranges and what was already worked on, and that the composite would be 25,000 in the red, having wiped out the deficit, in other words, a couple hundred thousand made on that 12,000 tons. That is where the dispute is on the matter. It is one of those things where each man has the same figure.

Mr. Dixon: In other words, your Honor, if I may add this——

Mr. Fisher: Your Honor, I think we shouldn't go into this now.

The Court: I am willing to stop, but you raised the question about the contentions of the parties. I have just tried to state them. Are we satisfied now?

Mr. Fisher: I think that is correct. In other words, the contention of the defendant is that this 25,000 is the alleged profit that would have been made on the 12,000, and that the accountant is in error in saying that it would have [2211] wiped out the loss.

Mr. Dixon: I would just like, with the permission of court and counsel, to add this additional fact, so the jury is not going to get the wrong position here. I think it is already in the record that the total tonnage of all fruit processed by Winckler & Smith in the fiscal year ended January 31, 1952, was between six and seven thousand tons, as I recall, of all fruits. This computation is based upon the assumption that the 12,000 additional tons of Valencia oranges would be added to the 6,500, or whatever it is, which would equal the total approximate tonnage processed by Winckler of all fruits in 1949.

Mr. Fisher: Mr. Williams directs my attention to the fact that he thinks Hodge testified it was 8,300.

The Court: I think so, too, that the total tonnage in the canning year 1951, as was, was around eight something, because there was grapefruit, a little bit of lemons, not very much, and some Valencias.

Mr. Williams: And navels, in addition to the Valencias.

The Court: Yes. All right. Now we have answered the question. Let's get on with this.

Mr. Dixon: May it be stipulated by and between counsel for the plaintiff and the defendants that TreeSweet processed a total of 20,163 tons of oranges for its fiscal year ending May 31, 1949; 26,428 tons for its fiscal year ending May 31, [2212] 1950; and 21,479 tons for the fiscal year ending May 31, 1951. The figures for the total amounts processed by TreeSweet under the contract, the documents that are in evidence, and the total production are already in evidence, your Honor.

The Court: That is stipulated now? It is stated as a stipulation. Is it stipulated, Mr. Fisher, whatever it is?

Mr. Dixon: It is further stipulated——

The Court: Now, wait and let's see if this is stipulated.

Mr. Fisher: It is so stipulated.

The Court: All right.

Mr. Dixon: May it be further stipulated by and between counsel that during the fiscal year for TreeSweet ending May 31, 1949, TreeSweet processed a total of 10,976 tons of oranges under the arrangement with Sunkist; that during the fiscal year ending May 31, 1950, for TreeSweet, it processed a total of 21,103 tons under Plaintiff's Exhibit 21?

The Court: Which was a contract with Exchange Orange or Sunkist?

Mr. Dixon: Between Exchange and TreeSweet.

The Court: All right.

Mr. Dixon: And for the TreeSweet fiscal year ending May 31, 1951, TreeSweet processed a total of 18,614 tons under Plaintiff's Exhibit 22.

The Court: What is the contract between TreeSweet and [2213] EOP?

Mr. Dixon: TreeSweet and Exchange Orange.

The Court: One of the processing contracts.

Mr. Dixon: That's right. It is already in evidence.

The Court: All right.

Mr. Fisher: I don't have the exhibit before me, but subject to check it may be so stipulated, and wherever he stated Sunkist, the contract was between Exchange Orange and——

The Court: That's all right.

Mr. Dixon: May it also be stipulated by and between counsel that for the period ending May 31, 1949, for the fiscal year of TreeSweet, it billed Exchange Orange $17,493.10 for processing oil under its arrangement for the year ending May 31, 1949.

Nothing was billed to Exchange Orange for processing of oil under the TreeSweet fiscal year ending May 31, 1950.

$4,890.83 was billed to Exchange Orange for processing of oil during the fiscal year ending May 31, 1951, by TreeSweet to Exchange Orange under its contract, Plaintiff's Exhibit 22.

Mr. Fisher. Again subject to check.

The Court: That is subject to checking on the number of the exhibit?

Mr. Fisher: Yes.

The Court: Whatever that processing contract exhibit is.

Mr. Fisher: Yes.

The Court: All right. So stipulated. [2214]

Mr. Dixon: Mark this next in order, please.

The Clerk: Plaintiff's Exhibit 71.

(The exhibit referred to was marked Plaintiff's Exhibit No. 71 for identification.)

Mr. Dixon: Plaintiff's Exhibit 71 offered in evidence, the same being an office memorandum of the Exchange Orange Products Company dated August 9, 1950, by Mr. Lindsay of that company to Mr. Finley, and others named thereon, concerning the subject Blend Product by Case-Swayne Co.

Mr. Fisher: May the court please, as to the introduction of this exhibit, the defendants object on the ground of the statute of limitations, and I think as to that we have a continuing objection, do we not?

The Court: Let me see the exhibit.

(Document handed to the court.)

The Court: The plaintiff doesn't offer this as to any alleged act concerning Case-Swayne, does it; it is offered generally.

Mr. Dixon: That is right, your Honor, to show that there was an arrangement.

The Court: The continuing objection is overruled and the exhibit is received in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 71.)

Mr. Dixon: I just want to read the first paragraph. [2215]

Mr. Fisher: As to that, then, as I understand it, you are offering it merely for background purposes?

Mr. Dixon: That is right, and as evidence of the general allegations made in the complaint.

The Court: As I understand it, counsel concedes that this is no alleged specific act of damage. Is that it?

Mr. Dixon: That is correct.

The Court: All right.

Mr. Dixon: I am reading, ladies and gentlemen, from the first paragraph of this exhibit:

"Mr. Finley has made arrangements with Case-Swayne Co., of Santa Ana, for them to process EOP oranges and grapefruit into canned sweetened, blended orange and grapefruit juice, single strength This memo will confirm arrangements made yesterday with Mr. Fred Lurmann of Case-Swayne on the operation they will conduct for us."

Mr. Fisher: Counsel, the date of that letter was August 9, 1950.

Mr. Dixon: Correct.

May it be stipulated, counsel, that under this arrangement, Plaintiff's Exhibit 71, Case-Swayne processed 498 tons of grapefruit, 479 tons of oranges, into canned grapefruit-orange blend?

Mr. Fisher: As to that, we have the same objection, [2216] your Honor, on the statute of limitations; and also the objection of immateriality with respect to the grapefruit.

Mr. Dixon: May it also be stipulated, counsel, that for the processing operations Case-Swayne was paid therefore the sum of $30,460?

Mr. Fisher: Subject to the same objection.

The Court: In other words, it is stipulated, but the objection is made. The objection is overruled and the stipulation will be accepted.

This refers back to the transactions referred to in Exhibit 71?

Mr. Dixon: That is right.

The Court: Processing by Case-Swayne referring to the memorandum of August 9, 1950?

Mr. Dixon: Yes, your Honor, it does.

The Court: All right.

Mr. Dixon: May it be stipulated by and between counsel that during the season 1949 and '50, E. A. Silzle Corporation processed 266 tons of oranges and

275 tons of grapefruit into canned grapefruit-orange blend and was paid therefore the sum of $15,469?

The Court: What were your figures——

Mr. Dixon: On tonnage? 266 tons of oranges and 275 tons of grapefruit.

The Court: All right. [2217]

Mr. Fisher: Subject to the same and continuing objection of the statute of limitations, and subject also to the immateriality of the reference to grapefruit, we will so stipulate.

The Court: The objection is overruled and the stipulation will be accepted.

Mr. Dixon: Mark this 72, please.

The Clerk: I have marked Plaintiff's Exhibit 72 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 72 for identification.)

Mr. Dixon: Plaintiff's Exhibit 72 offered in evidence.

The Court: 72 received in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 72.)

Mr. Dixon: Ladies and gentlemen, this exhibit contains excerpts from the minutes of the regular executive committee meeting of the Exchange Orange Products Company, held in Los Angeles, California, January 2, 1951, and deals with the distribution of fruit 1950-51. I am reading from the minutes.

The Court: The meeting was held January 2, 1951?

Mr. Dixon: Correct.

The Court: All right.

Mr. Dixon: "Mr. Wilcox reported on the tentative [2218] distribution of fruit for the 1950-51 season. He stated that it is estimated the industry will have 54,000 tons of navels of which the Exchange will handle approximately 36,000 tons. The Exchange Orange Products Company has facilities to handle this fruit without outside help although some juice fruit will be sold to outside processors. The Valencia estimate for 1951 is 485,000 tons eliminated from the industry of which the Exchange will have approximately 325,000 tons. There is then deducted approximately 25,000 tons of low-grade fruit and generally unsuitable for any juice products. As The EOP Company does not have facilities to handle this total volume of fruit, Mr. Wilcox suggested that working agreements be made with reliable outside processors so that the Valencia crop can be handled most efficiently, the price of this fruit to be set at the end of each two weeks period.

"It was recommended that the California Fruit Growers Exchange"—that is now Sunkist—"be authorized to negotiate contracts with independent processors on some equitable basis. Moved by Mills, seconded by Jennings, that the recommendation be approved. Carried." [2219]

Mr. Fisher. As to the exhibit just offered, the defendants have no objection except as to the immateriality of the references to navels.

The Court: All right. You may have the objection, and it will be overruled.

The Clerk: I have marked Plaintiff's Exhibit 73 for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 73 for identification.)

Mr. Dixon: 73 offered in evidence.

The Court: 73 received in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 73.)

Mr. Dixon: Ladies and gentlemen of the jury, this is an excerpt from the minutes of the regular executive committee meeting of The Exchange Orange Products Company, held in Los Angeles, California, May 1, 1951.

The heading is: "General Foods Fruit and Processing Contracts:"

"The Manager read a proposed fruit contract to be discussed with General Foods Corporation covering their fruit requirements for the Valencia season. In addition to the fruit contract, it is proposed to have a processing contract with General Foods so that the Exchange can use their facilities [2220] in the event General Foods do not need their facilities for their own products. The general form of both of these contracts has ben approved by Farrand & Farrand, the Manager said. The prices and charges for custom packing are to be negotiated with General Foods.

"After some discussion, it was Moved by Jennings, seconded by Mehren, that the management of California Fruit Growers Exchange and The Exchange Orange Products Company negotiate these contracts with the best possible terms. Carried."

The Clerk: I have marked Plaintiff's Exhibit 74 for identification, your Honor.

(The document referred to was marked as Plaintiff's Exhibit No. 74 for identification.)

Mr. Dixon: 74 offered in evidence, your Honor.

The Court: 74 received in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 74.)

Mr. Dixon: Ladies and gentlemen of the jury, Plaintiff's 74 is an exhibit containing an excerpt from the minutes of the special executive committee meeting of the Exchange Orange Products Company held in Los Angeles, California, June 13, 1951. The subject is "Cold Gold and Harts Processing Facilities." [2221] I am reading from the minutes:

"The manager stated that every effort should be made to put juice into frozen concentrate after July 15. To do this all frozen concentrate facilities should be operated: Cold Gold Corporation and Harts Fruit Products Company, he said, are not going to operate for their own account this season and these facilities will be available to The EOP Company. He stated he has not been in these plants for several years and would look over their facilities but did not want to do so if it was not desirable to do business with them. It was Moved by Jennings, seconded by Mills, that the manager be authorized to negotiate a contract with Cold Gold Corporation and Hart's Fruit Products Company, on the best terms possible. Carried."

May it be stipulated by and between counsel that a total of 19,758 tons of oranges were delivered by EOP for processing to Bireley's or General Foods under Plaintiff's Exhibit 18? That being the contract previously referred to in these minutes for that year.

The Court: What year is that?

Mr. Dixon: 1951, your Honor.

The Court: Is it so stipulated?

Mr. Fisher: Again, subject to check with the exhibit. [2222]

The Court: All right.

Mr. Fisher: And, again, the understanding that it is being introduced for background purposes.

The Court: It is not an item on which plaintiff is specifically predicating damages.

Mr. Fisher: Yes.

The Court: The stipulation is approved.

Mr. Dixon: May it be stipulated by and between counsel that under Plaintiff's Exhibit 19, the same being the contract dated July 23, 1951, between Hart's Fruit Products Company and Exchange Orange Products Company, covering the processing of oranges into frozen orange concentrate, 3,690 tons of oranges were thus processed?

The Court: 3,690?

Mr. Dixon: Correct.

Mr. Fisher: Again, subject to check, subject to the fact that it is being introduced for background purposes, and the statute of limitations point, it is so stipulated.

The Court: The stipulation is accepted; any objection is overruled.

The Clerk: I have marked Plaintiff's Exhibit 75 for identification.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 75 for identification.)

The Court: Is it offered? [2223]

Mr. Dixon: Offered in evidence, your Honor.

Mr. Fisher: No objection.

The Court: 75 received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 75.)

Mr. Dixon: By way of explanation, since this exhibit deals with statistical figures on production of frozen concentrate, this exhibit shows that during the year commencing November 1, 1949, and ending October 31, 1950, Exchange Orange processed 383,733 gallons of frozen concentrated orange juice; that during the period November 1, 1950, to August 31, 1951, Exchange Orange processed 2,427,572 gallons of frozen concentrated orange juice.

Mr. Fisher: So stipulated. [2224]

Mr. Dixon: May it be further stipulated by and between counsel that the United States Department of Agriculture figures and reports for the year ending November 1, 1951, show a total California-Arizona pack of 4,180,000 gallons of frozen concentrated orange juice, 42-degree Brix?

Mr. Fisher: I point out to the jury that with reference to Exhibit 75, the figures there given with reference to frozen concentrated orange juice were 45-degree Brix, whereas in the tables they are apparently 42 degrees.

The Court: All right. Now, what about the proposed stipulation as to gallonage, 4,180,000 gallons?

Mr. Dixon: I wanted to add something further to that, your Honor, before I finished the stipulation.

The Court: All right.

Mr. Dixon: That of the total 2,427,572 gallons of frozen concentrate reported by Exchange Orange to the Department of Agriculture, United States Department of Agriculture, as having been processed during the period commencing November 1, 1950, and ending October 31, 1951, that 1,044,508 gallons of 45-degree Brix were included in the report of Exchange Orange to the United States Department of Agriculture as having been processed by independent processors.

Mr. Fisher: Well, I am unable to stipulate as to that without checking.

Mr. Dixon: Well, I assume that is what it [2225] means.

The Court: Isn't that included in Exhibit 75? It is already in evidence.

Mr. Dixon: It is, your Honor, but I just want it clear to the jury at this time what that exhibit is.

Mr. Williams: Perhaps I could clarify it.

Mr. Dixon: All right.

Mr. Williams: I think we are willing to stipulate this figure of 2,427,000 some gallons includes the gallonage that was produced for Exchange Orange under the processing contract with Hart's, General Foods, and for any others there were who produced frozen concentrate.

Mr. Dixon: That is correct.

Mr. Williams: So that the total figure includes the gallons produced for Exchange Orange, as well as those produced by Exchange Orange.

The Court: Then the last line refers to this 1.004 gallons, because that figure was produced by the independent processors.

Mr. Williams: Under contract for Exchange Orange.

The Court: Is that satisfactory?

Mr. Dixon: It is one million plus.

The Court: 1.0048.

Mr. Dixon: Of the 2,427,572 gallons was processed by the independent processors.

Mr. Williams: For Exchange Orange. [2226]

Mr. Dixon: Yes.

Mr. Fisher: Processed by others for Exchange Orange.

Mr. Dixon: May it be stipulated by and between counsel that during the season 1948-49 the plaintiff purchased no navels from Exchange Orange or Sunkist. It purchased 1,299 tons of navels during the year 1949-50, and 511 tons in the year 1950-51.

That during the year 1948-49 season, the plaintiff purchased 2,161 tons of Valencias from Exchange Orange or Sunkist; 128 tons during the year 1949-50, and 21 tons during the year 1950-51.

That it purchased no miscellaneous oranges during that period.

And that it purchased 126 tons of grapefruit during the year 1948-49; 208 tons during the year 1949-50; and 192 tons during the year 1950-51.

Mr. Fisher: It is stipulated that the figures given by Mr. Dixon during the respective years and as to the respective varieties read were purchased from Sunkist, and in each case where the year is referred to, it make reference to the year November 1 to October 31.

The Court: So stipulated.

Mr. Dixon: It was purchased by Winckler & Smith. Was that included in the stipulation, counsel?

Mr. Fisher: Yes. I was merely correcting the fact that [2227] he said Exchange Orange.

The Court: All right. Go ahead.

The Clerk: I have marked Plaintiff's Exhibit 76 for identification.

The Court: 76 marked.

(The exhibit referred to was marked Plaintiff's Exhibit 76 for identification.)

The Court: Do you offer it in evidence?

Mr. Dixon: Offered in evidence, your Honor.

Mr. Fisher: No objection.

The Court: Received.

(The exhibit referred to, marked Plaintiff's Exhibit 76, was received in evidence.)

Mr. Dixon: Plaintiff's Exhibit 76, ladies and gentlemen of the jury, is excerpt from minutes of the regular annual meeting of the shareholders of the Exchange Orange Products Company, held in Los Angeles, California, November 21, 1951. It reads as follows:

"Ratification of Acts of Directors and Officers:

"Moved by Lyon, seconded by McLain, that this meeting of Shareholders ratify all the acts of the directors and officers of the Corporation as the same appear on the Minute Book of the Corporation during the past year. Carried." [2228]

The Clerk: I have marked Plaintiff's Exhibit 77 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 77 for identification.)

Mr. Dixon: Plaintiff offers Exhibit 77 in evidence.

The Court: 77 received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 77, was received in evidence.)

Mr. Dixon: Ladies and gentlemen of the jury, this is the last exhibit, and it is excerpts from minutes of the regular committee meeting of the Exchange Orange Products Company, held in Ontario, California, October 16, 1951. It deals with production. I am now quoting from this exhibit.

"Mr. Lindsay, Plant Superintendent, reported on fruit receipts and production during the month of September, 1951. There were 23,500 tons of Valencias processed in Ontario and 23,000 tons processed by contract processors and under deferred payment sales, making a total of 46,500 tons credited to the Valencia pool during September, the largest tonnage received in recent years. In September, 1950, there were 36,000 tons of Valencias credited to the pool. Solids averaged 131 pounds per ton as compared with 115 pounds last September. Year to date receipts of all varieties totaled [2229] 254,200 tons at the end of September compared with 213,300 tons for the same period last year; 203,000 tons in 1949; and 212,000 tons in 1948."

Mr. Fisher: No objection.

Mr. Dixon: Plaintiff rests, your Honor.

The Court: Subject to the conclusion of the cross?

Mr. Dixon: Yes, subject to the conclusion of the cross-examination. [2230]

* * *

ROBERT HODGE

recalled as a witness herein, having been heretofore duly sworn, was examined and testified further as follows:

Mr. Strachan: I should like to have the copies of Exhibit 69 distributed to the jury.

(Copies of the exhibit were distributed.)

Cross-Examination
(Continued)

By Mr. Strachan:

Q. Have you a copy of Exhibit 69 before you, Mr. Hodge? A. Yes, sir, I have.

(Testimony of Robert Hodge.)

Q. In the third line you have an item reading Winckler & Smith Processing Cost Computed on 1949 Basis, and then interlined in pen, includes $56,417.38 of general and administrative [2234] costs.

A. Yes, sir.

Q. The general and administrative costs that you used throughout this computation for the year 1951 were the general and administrative costs of the year 1951, is that correct? You made an adjustment.

A. Yes, sir.

Q. Those general and administrative costs that entered into your computation were those which actually occurred in the conduct of the Winckler & Smith business in 1951, is that correct?

A. That is true, sir.

Q. And you have not in your computation made any allowance for general and administrative costs which might have been incurred had this mythical 12,000 tons of fruit been processed, have you?

A. I made the assumption there would be little or no general and administration costs had this mythical 12,000 tons of fruit been processed.

Q. That is, your assumption is this, I take it, that even though you increase the tons processed from about 8,000 to about 20,000 tons for the year 1951, there would not have been any increase in general and administrative costs?

A. There might have been very slight, there might have been a little. [2235]

Q. Well, that is your assumption?

A. Yes, sir.

(Testimony of Robert Hodge.)

Q. You know that Winckler & Smith processed and sold little, if any, single-strength Valencia juice in the year 1951?

A. I don't believe they sold any, sir, that they processed. [2236]

Q. So that the general and administrative expenses were attributable, as they occurred on the books, entirely to products other than single-strength Valencia juice? A. Yes, sir.

Q. Now, as I understand it, in working out the costs per ton you allowed a certain amount per ton for ingredients, cans, cartons, labels, drum, sacks, plant expense, totaled those to $32.22 a ton, and then subtracted $1.23 on account of an inventory increase, which you said would require downward adjustment of these costs; is that correct?

A. No, sir. I believe counsel has his figures wrong. I have a total of $34.06 a ton, and if I subtracted from $32 a ton, it would be less.

The Court: You will recall, in arriving at that $34.06 you had some smaller figure, and then you added some $3 a ton, which brought it up to $34.06?

The Witness: I just didn't recall the $32 figure, your Honor. The total figure including everything was $34.06, yes, sir.

Q. (By Mr. Strachan): That included as I understand your testimony, $3.07 on account of general and administrative costs for the year 1949?

A. That is true, sir.

Q. Now, if you multiply the $3.07 for general and administrative expense by 12,000 tons, you will not arrive, [2227] will you, at $56,417.28, which is the amount which Exhibit 69 says has been included in your per ton cost?

A. Such a mathematical computation will not result in fifty-six thousand odd dollars, that is right.

Q. That is, 12,000 times that $3.07 would not?

A. That is right, sir.

Q. As a matter of fact, that would result in there having been included as general and administrative costs on the 12,000 tons, $36,840, would it not?

A. $36,840 is correct, sir.

Q. So that in the factor that has been included up there for general and administrative, then, down near the bottom of Exhibit 69 you have these less items, you say the excess of the general and administrative in 1952, of $38,000 over the $56,417.28. Actually what you have included for general and administrative is about $74,000, isn't it, instead of the $93,000?

A. Based on this mathematical computation that we have just gone through?

Q. Yes.

A. Yes, sir, if you wish to add the two.

The Court: Are you referring to yours or to counsel's?

The Witness: To counsel's.

The Court: All right. [2228]

Q. Now, will you please make the substraction of of the 36,840 from the $93,714.49 and tell us what the excess of the G. and A. in 1952 over 1950 would be?

(Testimony of Robert Hodge.)

A. I am sorry, but you are not stating your question very well. You are asking me to subtract 36,000 from 93,000.

Q. That's right. As I understand it, that $3.07 per ton for 12,000 tons, the G. and A. would amount to $36,840. A. That is true, sir.

Q. Now, you make an adjustment for the difference between the amount included there and the total G. and A. for the year ended January 31, 1952, in your computation, don't you? A. Yes, sir.

Q. Now, the amount that was actually incurred in the year ended January, 1952, was 93,714.

A. Yes, sir.

Q. I am asking you to take the difference between that total amount and the aggregate which was included in the multiplication of 36,840.

A. The difference would be $56,974.49.

The Court: Well, what is the difference in the two computations? I don't mean money difference, but I mean what is the explanation, if any, as to the difference between the two? [2239]

The Witness: Your Honor, this $34.06 a ton was merely an attempt to place Winckler & Smith's citrus processing cost on a similar basis to those in the TreeSweet contract. It is not simply a mathematical computation. It is merely an attempt to get what the cost might have been on the same basis as TreeSweet's were in the contract. It is not simply multiplying this by this. It is an attempt to arrive at a similar figure.

If we went further, I testified that plant ex-

(Testimony of Robert Hodge.)

penses were $11.10 per ton. Now, multiplying that out is some 130,000 odd dollars which would be in that computation if you used the same basis that counsel is approaching for general and administration expenses. Now, if we go along those lines, it seems to me a large part of that $130,000 which is in the $34.06 on your basis is also in the cost of sales as shown on Exhibit 65 as $680,845.97.

I did not attempt to compute it because it is too involved, but in my estimation there is a duplication there of over $60,000.

In making up Schedule 69, we merely tried to get what was definitely known and to keep it as simple as possible. We did not try to throw all these varying costs in, these factors such as what is this made up of? It is an attempt to compare the two contracts, different processing costs, so if we are going to throw things back and forth, we can come [2240] up with a much larger figure. This is a conservative figure.

Q. (By Mr. Strachan): Isn't it true that in this factor of $1.51 profit per ton you have general and administrative expenses, $3.07?

A. That is in the computation.

Q. So when you multiply that composite figure by the 12,000, you have included there only the 36,840 of administrative costs, haven't you?

A. I previously told you that mathematically you are correct, sir.

Q. If you subtract that from 93,714 of actual administrative expenses, general and administrative, in the year ended January 31, 1952, you get a difference of $52,874, don't you?

A. Pardon me. Was that $93,714.49 less $36,840?

Q. Yes, sir. A. No, sir. I get $56,974.49.

Q. 56 of what?

A. $56,974.49. Pardon me. 874.49.

Q. I missed on one figure and you missed on another. A. That's right, sir.

Q. Then if that difference between 1951 general and administrative as it occurred and that which has been included in the multiplication is your unit cost and you were to deduct that $57,000 figure instead of the 37,000 which [2241] you deducted, that would bring the profit down as stated on your exhibit to between five and six thousand dollars instead of $25,031.45, wouldn't it?

A. I told you previously, counsel, I did not include it in the $34.06 as such. The $34.06 as such is merely to try and bring Winckler & Smith's citrus processing cost in line with those under the TreeSweet contract. It is not a mathematical computation. I am merely building up something, trying to get the two comparable. [2242]

Q. Perhaps, I misunderstood your testimony. Referring to page 1895, you say that you put in ingredients at $2.14, cans $15.17, cartons $2.01, labels, drums, sacks, plant expense, and so forth, and then you say, "The inventory increased during this period to the extent of $1.23 a ton, so I subtract that from these costs. To these costs I also added general and administrative expenses of $3.07 a ton, which makes a grand total of $34.06 a ton. Taking that from the amount paid TreeSweet for processing gives Winckler & Smith a profit of $1.51 a ton, or a total of $18,120 profit on processing."

Now, that means, does it not, that the allowance of $3.07 a ton for general and administrative expense was mutiplied by the 12,000 and did not come to the total of $56,000 as shown on the face of Exhibit 69, but came, rather, to $36,874?

A. Well, I have told you several times, counsel, I can't see why you keep coming back to this, the $34.06 is a figure. Now, let's take the inventory variation of $1.23. There was no inventory variation of $1.23 in 1952, because at that time the company had little or no inventory. Therefore, how could I get an inventory variation in that figure? It is an attempt to put something on a comparable basis, that is all it is. You cannot multiply this by this, or that by this.

Q. Perhaps, again, I misunderstand, but I thought your testimony was to be understood as meaning that in 1949 there [2243] was an inventory increase, so because you were using 1949 costs instead of 1951 costs, you subtracted the equivalent of that inventory adjustment on the per ton basis?

A. That is true, sir.

Q. You were still using 1949 figures, weren't you?

A. Using '49 figures, '49 costs. We are not multiplying anything; we are merely trying to arrive at a per ton cost for processing to compare that with TreeSweet's per ton processing cost.

Q. If that assumption be correct, it would follow that Winckler & Smith's costs in '49 were the same as TreeSweet's costs in '52, is that true?

A. No. I think there is $1.51 difference between my computations of the two costs, counsel.

Q. Going over some of the items of general and administrative expense, you assume that the addition of the 12,000 tons in the processing of single-strength juice would have made no change in the telephone or telegraph costs?

A. Our computation is based on that assumption, but there would have been undoubtedly additional telephone costs, there is no doubt about that.

Q. Now, do you also assume that there would have been no increase in stationery supplies in processing and marketing?

A. We have assumed that in this computation.

Q. There would have been none?

A. There would have been some.

Q. But that is not allowed for in the computation? A. No. It is minor.

Q. What about postage, would there have been added postage?

A. There undoubtedly would have been added postage of some small amount.

Q. That is ignored in the computation?

A. You are looking at small figures here, counsel. Telephone and telegraph was only $1,400, sta-

(Testimony of Robert Hodge.)

tionery and supplies was $3,200, which includes the postage you mentioned.

Had I given weight to all these factors, counsel, it would have taken a Philadelphia lawyer to understand it. This was a computation made as simply as I could possibly make it to bring out a point. Had I made all these computations that you are asking for——

Q. What about travel expense?

The Court: Just a minute. Let the witness finish.

The Witness: Had I made all these computations that you are asking me for, you would have attacked those, too, so why should we quibble about a few dollars here and there?

The Court: Ask your question.

Q. (By Mr. Strachan): We are not quibbling about a few [2245] dollars; we are quibbling about several thousand, on the basis of your computation.

A. Yes, sir.

Q. How about travel expense?

A. I see no reason for the travel expense to increase very much. The travel expense was very large that year due principally to the Florida operations, which were discontinued in the early part of the year. It would not have been necessary for much traveling for the general administrative staff to sell this 12,000 tons of fruit.

Q. What about bookkeeping?

A. There would have been little or no bookkeep-

(Testimony of Robert Hodge.)

ing costs. The staff was there the whole year and were paid their salaries.

Q. Likewise, you assume for the purpose of your computation that there would be no selling expense involved in disposing of this additional product from the 12,000 tons, other than three per cent brokerage; is that right?

A. No increased selling expense, that is true, sir.

Q. Would there not have been selling expenses, increased selling expenses involved in salaries and commissions?

A. I do not believe there would have been any, sir. Their sales staff was there the whole period.

Q. In 1952?

A. As far as selling—— [2246]

Q. 1951, rather.

A. As far as selling this single-strength juice, it would have sold itself, practically, there is no argument about that. I shouldn't say that. Anyone can argue. The product was in short demand, it was so much sought after that Mr. Winckler actually went out and bought some unlabeled single-strength juice from EOP in order to try and keep one of his customers happy, that is how short in supply the single-strength juice was. There would have been no need to sell it.

The Court: You allowed, however, a brokerage of three per cent on these additional sales?

The Witness: That is right, sir.

Q. (By Mr. Strachan): Did you know that Mr.

(Testimony of Robert Hodge.)

Winckler had testified that the market on single-strength juice declined and declined until it hit two twenty, because of the over-supply from Florida?

Mr. Dixon: If the Court please, that is not relevant it seems to me. The record shows that that was the opening price in June, as I recall it, of Case-Swayne. The ultimate price was two eighty.

The Court: The objection is overruled. Go ahead.

The Witness: I do not know, sir.

Q. (By Mr. Strachan): In connection with the selling, would there have been an increase in the freight charges on [2247] outgoing freight due to the shipment of the added product?

A. There might have been. There probably would have been some increase, certainly.

Q. You made no allowance for that?

A. No, sir. [2248]

Q. What about telephone and telegraph?

A. Again, there would have been additional telephone and telegraph incurred in phoning customers and things like that, undoubtedly.

Q. What as to automobile expense?

A. I don't believe they would have increased any, sir.

Q. What about traveling expense?

The Court: Counsel, you already asked about that.

Mr. Strachan: No. That was under the general and administrative, your Honor. This is selling.

The Court: All right.

(Testimony of Robert Hodge.)

Mr. Strachan: They broke it down between the two general classifications.

The Witness: There would have been little or no increase in the traveling expenses because this travel expense was largely incurred in the Florida operations, a good part of it.

Q. (By Mr. Strachan): The travel expense for the year ended January 31, 1952, in connection with the selling expense was only about $2,400, wasn't it?

A. Pardon me. How do you arrive at the $2,400? I am sorry, but I did not follow you.

Q. From the books of the company.

A. $2,400 for what?

Q. For travel charged to selling expense.

A. In the year ended January 31, 1952?

Q. Yes.

A. No. In the selling expense there is $9,530.55.

Q. What was it in the year ended 1950, January, 1950?

A. I can't see that that is important since I adjusted the computation for the actual in 1952, but the year ended January 31, 1950, the travel expense was $7,168.12.

Q. Now, what about advertising? The advertising expenditures actually made in the year 1951 all related to production of single strength, didn't they?

A. A good part of it, as I previously testified, was spent in 1950 and deferred into 1951 operations, 1951 season.

Q. That didn't relate to single-strength Valencia juice, did it?

(Testimony of Robert Hodge.)

A. No, sir, it did not, sir.

Q. Did you assume that this product would not have to be advertised had it been made?

A. Had it been made, it probably would not have incurred much advertising, no, sir.

Q. So that the advertising allowance of $1.88 a ton under the TreeSweet contract was in effect a profit because Winckler & Smith, according to your computation, wouldn't have spent anything on advertising, is that correct?

A. They would not have spent very much under this computation. [2250]

Q. That means that anything they were allowed for advertising under the TreeSweet basis would have been profit? A. That is true, sir.

The Court: Do you know whether TreeSweet spent $1.88 for advertising?

The Witness: I do not know what TreeSweet did, sir.

Q. (By Mr. Strachan): In your processing cost, have you made any investigation to determine the extent to which the cost of cans, cartons and labels increased between 1949 and 1951?

A. I believe I testified on Thursday or Friday that I did not, sir.

Q. Don't you know that in those three items alone Winckler & Smith's costs increased in the amount of approximately $5.50 per ton between 1949 and 1951?

A. I do not know that, sir.

Q. If that be the fact, on the 12,000 mythical

(Testimony of Robert Hodge.)

tons, there would have been an addition to the processing cost of $66,000, wouldn't there?

A. If that be the fact, sir, certainly.

Q. In your computation you made no allowance, did you, for discounts that Winckler & Smith would have allowed from the selling price?

A. My selling price was based on the same selling price as TreeSweet got for the product, sir, approximately. [2251] For the sake of simplicity, I reduced it from $752,880 to $750,000.

Q. Actually, Winckler & Smith's regular terms of sale allowed a 1½ per cent discount, did they not, from the sales or selling price?

A. I previously told you that I based the selling price on the same price TreeSweet got for it.

Q. Do you know whether that sales price that you say TreeSweet got was before or after the 1½ per cent discount?

A. No, sir. I simply took it from the Exhibit 11, the facts contained in Exhibit 11.

Q. If it is a fact that from that selling price there was allowed a 1½ per cent cash discount, that is not reflected in your computation, is it?

A. Yes, it is reflected in the computation if the same 1½ per cent discount was given by TreeSweet.

Q. If TreeSweet's price that you have assumed would be Winckler & Smith's price was before the discount, then that means that TreeSweet had absorbed a 1½ per cent discount and Winckler &

(Testimony of Robert Hodge.)

Smith's price would have to absorb a 1½ per cent discount, would it not?

A. The computation is based on the net amount TreeSweet realized from the sales, sir, so if TreeSweet gave the discount, then Winckler & Smith gave the discount in this computation. [illegible]

Q. But do you know whether that sales price you have used from TreeSweet was before or after the 1½ per cent discount?

A. I know it is from Exhibit 11. That is the amount realized by TreeSweet; whether it is before or after, I do not know, but it is the amount realized. I do not know whether TreeSweet gave any discount.

Q. Do you know that Winckler & Smith gave 1½ per cent discount, don't you?

A. I believe that was customary.

Q. That was his customary basis of sales, wasn't it?

A. No, it was not. I wouldn't say customary, because their discounts are net—their sales are netted, sir, and I assume that TreeSweet's are the same, after discounts and allowances. I mean from the information in Exhibit 11, I took the same figure that was supplied us in this computation as being the—Exhibit 11-G states, "There was paid by TreeSweet in actual dollars the amount of $1,204,081.41 for the orange juice it processed and purchased." I assume the purchase price is a net figure.

Q. That is the purchase price by TreeSweet from Sunkist, isn't it?

(Testimony of Robert Hodge.)

A. Yes, sir, for the canned juice that it processed.

Q. Do you know whether from that list price the discounts [2253] are deducted?

A. I told you, counsel, I did not take the list price. I took the actual amount realized by TreeSweet as shown in Exhibit 11. I do not know anything about TreeSweet's discounts. TreeSweet may have given a 5 per cent discount for all I know.

Q. Do you know that in selling the trade Winckler & Smith customarily allowed another discount called the swell allowance of ¼ of 1 per cent?

A. That is customary. I mean that was Winckler & Smith's custom.

The Court: You took TreeSweet's figure, which was the net amount to TreeSweet, is that right?

The Witness: That's right, sir.

The Court: So as far as you were concerned, it didn't make any difference what allowance TreeSweet allowed?

The Witness: That's right, sir.

The Court: Because whatever they allowed, you took the figure of what they allegedly got?

The Witness: That's right, sir.

Q. (By Mr. Strachan): I call to your attention, if you have it, a copy of Exhibit 20, the processor in this case being TreeSweet. I am talking about the TreeSweet processing contract. [2254]

* * *

Q. (By Mr. Strachan): It says, "The processor agrees to purchase their canned juice require-

(Testimony of Robert Hodge.)

ments from California Fruit Growers Exchange at the Exchange price in effect at the time of purchase less label allowance," and other allowances that are specified, and what you have used here as the amount paid to Sunkist is really the purchase price of the juice, and the contract does not specify the selling price by TreeSweet.

A. Sir, I don't think you are being fair. If you will read the paragraph further, it also reads: "Any Exchange discounts and rebates under [2255] price protection agreements, other than swell allowances, brokerage, cash discount, and label allowances allowed by the Exchange to any of its buyers will also be made available to processor."

Q. That has to do, however, with the price that the processor pays Sunkist. It doesn't have to do with the pricing or the discounts that are allowed by the processor when it resells the juice to its customers?

Mr. Dixon: Counsel, may I interrupt? Your Honor, it seems to me the contract speaks for itself. This witness has already testified that he took that into consideration. In other words, the figures used were assumptions that Sunkist also gave to TreeSweet the discounts that it gave any other purchaser, in addition to which it gave the discounts allowed in the contract, because the contract requires them to do so. As the witness has already pointed out, he took those into consideration and assumed that Sunkist gave them to them because the contract required them to do so. [2256]

(Testimony of Robert Hodge.)

Mr. Fisher: Mr. Dixon, I think you are in error in your interpretation of the language of the contract.

Mr. Dixon: The contract provision will speak for itself.

The Court: Certainly I don't think you should cross-examine an accountant on the legal meaning of a contract. He has told you what he did.

How much longer will you be on this cross-examination?

Mr. Strachan: Perhaps 10 minutes.

Mr. Dixon: May we have that provision read to the jury, your Honor, so that the jury can understand the witness' last answer?

The Court: I am not sure that I know what it means, either.

It starts out, "Processor agrees to purchase"—this is TreeSweet—"their canned fruit requirements from California Fruit Growers Exchange at the Exchange price in effect at the time of purchase, less * * *"

Mr. Dixon: Then further on I think the contract also provides in the same provision that those discounts shall be in addition to the discounts allowed by Sunkist to any other customer. And that is the point this witness was making.

The Court: This Exchange price referred to, I suppose, is the price at which Exchange was selling canned juice to the trade; is that right?

Mr. Strachan: Yes, that is my understanding.

The Court: I suppose that although this contract did not in so many words tell TreeSweet what

(Testimony of Robert Hodge.)

it should sell juice for, since it was competitive to Exchange, it probably had to sell at about the same price?

Mr. Fisher: No, sir.

Mr. Strachan: No, I don't think that that is what the contract provides for, your Honor. Because when the goods are sold in the trade, the resale by the trade, as you might call it, to their customers isn't at a price that is fixed by Sunkist at all. It is fixed by economic and other such factors.

The Court: I wasn't getting at that. I was getting at what TreeSweet got for this juice.

Exhibit 11 was the result of what TreeSweet got, was it not?

Mr. Dixon: If the Court please, may I interrupt for just a moment? Mr. McCracken of TreeSweet testified, I am certain the record will so show, that the sales were made by TreeSweet in accordance with its published list, price list, which is already in evidence, which is the same as the Sunkist price list, which is also in evidence, both of which provide for these discounts that the witness has testified to. And in addition thereto, my recollection is that Mr. McCracken testified that all the sales were made at the Sunkist selling price by TreeSweet. [2258]

The Court: I haven't made myself clear to counsel, either.

What is this Exhibit 11? Was it the result of a subpoena?

Mr. Strachan: Yes, sir.

The Court: What does it provide—what TreeSweet got in dollars?

(Document handed to the Court.)

The Court: Mr. Fisher.

Mr. Fisher: Your Honor, I think the question is a matter of interpretation of the sentence starting, "Any Exchange discounts and rebates under price protection agreements, other than swell allowance, brokerage, cash discount and label allowance, allowed by the Exchange to any of its buyers will also be made available to processor."

In other words, discounts other than swell allowance, brokerage, cash discount——

The Court: Are you going to contend that there were such other allowances made to TreeSweet?

Mr. Fisher: Well, I don't know that there were.

The Court: But my question is, does Exhibit 11 show——

Mr. Strachan: As I understand the fact, your Honor, there were no additional allowances made there. That provision of the contract, therefore, had no actual effect on the transaction.

The Court: Then let's forget about it. But now my [2259] question is, does Exhibit 11 show what TreeSweet got?

Mr. Strachan: What they got for their product?

The Court: What they got for their product?

Mr. Strachan: No, sir.

Mr. Dixon: No, it does not.

(Testimony of Robert Hodge.)

Mr. Strachan: What the witness has picked up and used as TreeSweet's gross sales, I take it, is this: There was paid by TreeSweet in actual dollars the amount of $1,204,031.41 for the orange juice it processed and purchased. That relates entirely to TreeSweet's purchase price and does not relate to the amount realized by TreeSweet from the resale.

The Court: The witness has picked up, then—has taken the figure of what TreeSweet paid and not what TreeSweet sold for?

Mr. Strachan: That is right.

The Court: Then the witness has taken the most conservative figure that he could take, because he has taken the figure of $750,000 as a selling price, when actually it was, you tell me, a cost to TreeSweet. Is that right?

If TreeSweet then sold this juice for $850,000—well, let's leave it this way: The witness says he got his figure from Exhibit 11, we are all agreed what Exhibit 11 shows what TreeSweet paid for the product.

Mr. Strachan: That's right.

The Court: All right. [2260]

Any objection will be overruled. Let's have another question and wind up this cross-examination.

Mr. Dixon: May we have the last question and answer read, your Honor?

The Court: It is pretty far back. Let's start over.

(Testimony of Robert Hodge.)

Mr. Dixon: All right. I will withdraw my request.

Q. (By Mr. Strachan): In your computation what did you assume would be the return to Sunkist for oil produced by Winckler & Smith in processing this hypothetical 12,000 tons?

A. There was no such computation made, sir.

Q. What?

A. There was no such computation made. I assumed that Winckler & Smith would turn out—back whatever oil it produced to Sunkist, as did TreeSweet.

Q. And did you also assume that the realization of oil by Winckler & Smith would be the same as the realization by TreeSweet?

A. No, sir, I made no such computation as to the amount that Winckler & Smith would have produced from these 12,000 tons. No computation was made, because as I understand the contract TreeSweet and/or Winckler & Smith, had they had such a contract, would have turned over whatever oil was produced back to Sunkist.

Q. Would you assume that the same quantity of oil or the same value of oil would be returned by Winckler & Smith [2261] as was returned by TreeSweet?

A. I previously told you I made no such computations, sir.

The Court: I will sustain an objection, counsel, to this line of questioning on a comparison made by the witness.

(Testimony of Robert Hodge.)

He brought out the fact that he didn't compute it, and he based it on the fact that the oil would be returned. What the difference was would not make any difference in this computation, which is not a computation as to what Sunkist would have got; it is a computation as between TreeSweet and the plaintiff on this mythical tonnage.

Q. (By Mr. Strachan): Would you want the jury to understand that under the terms of the TreeSweet agreement Sunkist would have realized for the juice and for the oil as much from Winckler & Smith as they did from TreeSweet?

The Court: Counsel, I told you the question was improper. Now you have asked the question again. There has to be an end to cross-examination. A court has a right to determine what is proper and what is not proper.

Is there any difference between the question you just asked and the one I told you that I would sustain an objection to as not proper?

Mr. Strachan: I was trying to find out from the witness whether he had made an assumption that the Sunkist would come out as well under the TreeSweet contract in Winckler's hands [2262] as it did——

The Court: No. 1, he already has told you that he did not make the computation. Secondly, he has told you that he assumed that TreeSweet was turning the oil back, and that plaintiff was turning the oil back, and I have told you that we are not comparing what Sunkist would get. We are making a comparison—the witness has testified to a comparison between TreeSweet and the plaintiff.

You are outside the scope of cross-examination. Some other witness who testified to this, you might cross-examine, but not this witness.

At least I don't know of any testimony this witness gave about computations about oil. If there is, it doesn't involve this exhibit. It involves some other testimony.

Mr. Strachan: I was talking about Exhibit 67.

The Court: 69?

Mr. Strachan: No. Exhibit 67.

The Court: Maybe I misunderstood, counsel. I never have understood that we left 69 until just this minute.

If you asked any question about 67 heretofore, I apologize to you. If you have previously mentioned 67 I apologize. If not, as I saw the record——

Mr. Strachan: I don't know whether I mentioned 67, or not, but I had gone back to 67 and was going back into the subject of the oil yield.

The Court: Then we understand each other and we are not talking about 69, computations that we were heretofore discussing.

Proceed.

You had better ask your question again to save time.

Mr. Strachan: All right. Referring to Exhibit 67, the third page, you show cost of the juice to TreeSweet was $4.29, and the oil and peel was $10.81. Oil and peel was what was realized by Tree-

Sweet and accounted for by TreeSweet to Sunkist, was it not?

The Witness: I believe the oil and the peel, sir, were to be turned over to Sunkist, that is true, sir.

Q. (By Mr. Strachan): So this reflects the worth of the oil and peel to Sunkist that was turned over?

A. That is true, sir, that is my computation.

The Court: Exhibit 67, you will recall, ladies and gentlemen, was the computation of what TreeSweet was paying, according to the witness' computations, for the juice, and then the figure for the oil, and the total amount that Sunkist obtained from the oranges. There was a similar exhibit, 66, I think it was, involving Silzle. Now counsel is referring to the TreeSweet, Exhibit 67.

Q. (By Mr. Strachan): Have you made a computation to show how the oil and peel, which would have been returned to Sunkist by Winckler & Smith, would compare with the oil [2264] and peel returned by TreeSweet?

A. No, sir, I have not made any such computation.

Q. The return of oil by TreeSweet was at approximately the rate of four pounds per ton, was it not?

A. Yes, sir, that is approximately correct.

Q. Do you know what the production of oil per ton was by Winckler & Smith according to Mr. Winckler's testimony?

(Testimony of Robert Hodge.)

A. From these mythical oranges? No, sir, I couldn't begin to estimate it.

Q. I believe Mr. Winckler testified that it was between a pound and a half and two pounds per ton that he would have realized of oil?

A. That I do not know, sir. [2265]

Q. So you have not made any computation as to what the loss to Sunkist would be if Winckler & Smith were to process these, because of the fact that its production of oil was less than half the rate of TreeSweet's production of oil?

Mr. Dixon: Now, just a moment. I object to that question, your Honor, as being completely outside the scope of direct examination.

The Court: Overruled. It has already been answered.

The Witness: Several times.

The Court: Has it, Mr. Witness?

The Witness: Several times, sir.

The Court: That's the end of that. The witness has made no such computation. Ask another question.

Mr. Strachan: That's all of the cross.

* * *

(Testimony of Robert Hodge.)

Redirect Examination

By Mr. Dixon:

Q. Mr. Hodge, you were asked on cross-examination concerning your inquiry of the RFC concerning the status of Winckler's & Smith's loan, and testified concerning a reply to your request from the RFC dated August 2, 1951. I hand you [2266] what has been marked for identification as Plaintiff's Exhibit 78 and ask you if that is the reply that you received concerning which you gave testimony.

A. That is the reply, sir.

Mr. Dixon: 78 offered in evidence, your Honor.

The Court: Received in evidence, Exhibit 78.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 78.)

Mr. Dixon: I believe Exhibit 69 is not yet in evidence, your Honor. I accordingly offer Plaintiff's Exhibit 69 for the sole and only purpose of indicating the manner and the figures used concerning which this witness has testified as to the basis of his opinion concerning the difference in results in the operations of Winckler & Smith for the fiscal year of that company ended January 31, 1952, had Valencia oranges been available to it during the processing season of 1951 on the same or comparable basis to that on which they were made available to Tree-Sweet.

Mr. Strachan: I don't understand the limitation expressed.

(Testimony of Robert Hodge.)

The Court: The limitation is one of these—I assume it is that it is merely one of these explanatory things, not direct evidence. It is only illustrative, similar to other exhibits. Is that satisfactory? It will be received——

Mr. Strachan: There is one thing I want to call your [2267] attention to. I think it is improper for the witness to have the exhibit contain items called Winckler & Smith damage, and I think the jury should be instructed that doesn't mean damage.

The Court: Yes. We will strike that out at this time. Let's have it.

Mr. Strachan: It appears twice in the exhibit.

The Court: Let me have one of them.

The Clerk: The jurors have them.

The Court: Well, there is a copy here that is conformed. I will use the copy I have and we will explain this. Do you have Exhibit 69?

The Jurors: Yes.

The Court: 69 is being admitted in evidence, but some changes are going to made in it. It is not direct evidence. It is one of these exhibits that is a computation. It is illustrative. You gentlemen and ladies can yourselves make computations, if you want to, but the exhibit is illustrative of the witness' opinion. This witness has given some opinion testimony and this is illustrative of his opinion testimony and is not direct evidence of anything.

Is that a satisfactory limitation on this exhibit?

Mr. Strachan: Yes, but I think the jury should be instructed particularly with reference to the improper use of the word damage, in addition. [2268]

The Court: Yes, I am going to get to that. These exhibits are going to be corrected. I will show you what is going to be done. This word damage, where it says, "Winckler & Smith damage," the word "damage" is going to be struck out.

Actually, that whole sentence should be changed to show what the witness means by that statement. This witness can't tell you what damage anyone suffered or did not suffer. That is one of the issues in this case. That is a question for the jury. So that should be changed.

As a matter of fact, I think counsel should make several changes. Where does it appear again?

Mr. Strachan: Well, it appears in the last line.

The Court: The last line?

Mr. Strachan: In the handwritten portion.

The Court: In the last line, it should go out, and also this statement up from the bottom where it says, "Winckler & Smith estimated profit from processing 15,000 tons of Valencia product oranges," is not a correct statement of what the witness has been talking about. That should be corrected. I think I prefer to let counsel work this over.

Mr. Strachan: The heading also, as Mr. Fisher points out, "Loss of Profits and Damage," I think is utterly——

Mr. Dixon: That was corrected, wasn't it?

The Court: No. The heading was not corrected. Counsel can work it over at the recess between

(Testimony of Robert Hodge.)

themselves. Certainly [2269] some of those statements need correcting and we will advise you later as to what we do with this and as to the changes we make. When you get the exhibit along with the case, you will see the changes have been made in it.

Any further questions?

Mr. Dixon: I just have one other question of this witness, your Honor.

Q. (By Mr. Dixon): Mr. Hodge, referring to Plaintiff's Exhibit 69, is there anything that you wish to add to your testimony by way of explanation of any of the questions put to you by counsel concerning the manner and method in which you arrived at the figures set forth in said exhibit?

Mr. Strachan: I don't think that is proper redirect, to ask the witness that.

The Court: I don't think it is proper in view of the way we handled it. I let the witness make his explanations as we went along so that the jury would have the matters before them instead of waiting for redirect and then having to go back and talk about matters that had long transpired.

Haven't you explained everything as you went along?

The Witness: Yes, sir; I thought I had pointed out everything as we went long.

Mr. Dixon: That's all I wanted to know, your Honor. It has been a long cross-examination. That is the only reason for my question. [2270]

* * *

Mr. Dixon: Exhibit 78 reads: Ladies and gentlemen of the jury, this exhibit is dated August 2, 1951, and is directed or sent to Hodge and Company, re: Winckler & Smith Citrus Products Company loan No. 400220.

"Dear Sirs:

"Pursuant to request of the subject company we are pleased to supply you with the following information. [2271]

"The principal unpaid balance of the subject loan as of July 31, 1951, is $50,499.04 with interest paid to July 1, 1951." [2272]

* * *

RONALD WALKER

recalled as a witness herein, having been heretofore duly sworn, was examined and testified further as follows:

Cross-Examination

By Mr. Strachan:

Q. Mr. Walker, you are the same Mr. Walker who previously testified in this case?

A. I don't think I have changed my identity.

Q. You have continued down to the present time to serve as trustee in this Chapter 10 proceeding?

A. That is correct, Mr. Strachan. I am still acting in [2273] that capacity.

Q. In regard to the status of the Reconstruction Finance Corporation's real estate loan and chattel mortgage loan to Winckler & Smith, I will ask you to look at this copy of the court record, which is a petition——

The Jurors: Can't hear you.

Q. (By Mr. Strachan): I ask you to look at the Court's copy of the Reconstruction Finance Corporation's petition to modify, a stay, as it is called, and ask you if you recognize that document.

A. Yes, I do.

Q. Calling your attention to paragraphs 7 and 8, I would like to ask you if the facts there stated in regard to the condition of that loan are not correct?

A. Is this the Court file here or the one before the Referee?

Yes, I have examined these before and they are correct.

Mr. Strachan: I should like to read paragraph 7 from the Reconstruction Finance Corporation petition.

> "The indebtedness oved to your petitioner by said debtor is evidenced by a certain promissory note dated December 5, 1946, executed by said debtor as maker to the order of your petitioner as payee in the original principal sum of $100,000 payable on or before February 5, 1952. As of July [2274] 5, 1951, six installments of principal, each in the amount of $2,000, were delinquent, and on July 26, 1951, your petitioner exercised its election under the terms of the promissory note to accelerate the indebtedness so that the unpaid principal bal-

(Testimony of Ronald Walker.)

> ance of $50,499.04 plus accrued interest became immediately payable.
>
> "On August 15, 1951, your petitioner filed for record the notice of default and its election to sell under the power of sale in said deed of trust, and the date of trustee's sale was subsequently set for December 15, 1951."

Q. Now, can you tell us briefly, Mr. Walker, about the subsequent proceedings on that notice of foreclosure sale which was set for December 15th?

A. I believe the facts which you want, Mr. Strachan, are that the sale was continued two or three times, was finally scheduled for March 21, 1952, but was restrained by the Court order on March 20, 1952.

Q. The foreclosure sale was never conducted during the period of your trusteeship, was it?

A. No, sir. It was never conducted at all. The restraining order was continued from time to time while the plant was still operating under my supervision.

Q. That was until approximately when? [2275]

A. That was until the close of the season in 1953. Subsequent to that time the property was sold, as I have previously testified, and it is my understanding that the RFC loan was thereafter paid off by the purchaser at the trustee's sale.

Q. The RFC loan was one of the liens or charges against the property at the time it was sold?

A. That was a secured lien.

(Testimony of Ronald Walker.)

Q. Yes.

A. As far as it came under my handling.

* * *

Mr. Dixon: It is stipulated by and between counsel that TreeSweet was furnished 3,246.76 tons of lemons by Exchange Lemon pursuant to the letter of contract dated July 10, 1951, Plaintiff's Exhibit 31, already in evidence. Is it so [2276] stipulated?

Mr. Fisher: Subject to check, that is so stipulated. I find I don't have the documents. [2277]

The Court: All right. It will be stipulated. If any error is found in the facts, you call it to our attention.

Mr. Dixon: Plaintiff now rests, your Honor.

Mr. Strachan: We prepared a motion directed at the sufficiency of the evidence. We would like to have that presented.

The Court: We will excuse you ladies and gentlemen of the jury.

I think I had better excuse you until about 2:30. Before you go, let me say one other thing. Plaintiff has rested its case, and we have some other matters to take up, which we will take up in your absence.

This little misunderstanding between Mr. Strachan and me is no concern of yours. Mr. Strachan probably thought that he had mentioned Exhibit 67. If he did, I didn't hear him. He thought he had, and I thought he was still talking about 69, so we had a misunderstanding.

Incidentally, it is a lot easier for somebody to sit up, like you as a juror, and I as a judge, with nothing bothering us except what we hear, then it is for the lawyer who is trying to present a case, who is not only thinking about the question he is asking, but what he is going to ask next, and where does he go from there. If you ever had any corresponding experiences you will know what I mean.

I shouldn't have been irritated, Mr. Strachan, and [2278] apologize.

Mr. Strachan: Neither should I.

The Court: It was a misunderstanding between you and me. [2279]

* * *

The Court: The record will show the jury absent.

Mr. Strachan: If it please the Court, we have here a motion which has been served on Mr. Dixon, and have filed with the clerk, Defendants' Motion for Directed Verdict at the close of the plaintiff's evidence. I should like to have Mr. Williams present the argument in support of the motion, if I may.

The Court: All right. Let me read it first, if you will. [2281]

* * *

Mr. Williams: I am about through with the conspiracy count, because there is no point in discussing the TreeSweet contract, further, or the Silzle contract further. My point is that each of those contracts are lawful standing alone.

The Court: I agree, they are lawful standing alone.

I will go further. I will agree that Sunkist and EOP [2305] could have monopolized 100 per cent of the orange industry in Southern California.

* * *

The Court: In substance, then, your position is that therefore the dealings between Orange and Lemon back and forth has some evidentiary value?

Mr. Dixon: Some. Not much, your Honor.

If that was all there was we wouldn't be here. [2353]

And if it was not for the fact, also, that Exchange Lemon saw fit to give TreeSweet this special kind of deal in 1951, which no one else got, they might not even be a coconspirator in this case. But it is obviously of some advantage to Exchange Orange and to Sunkist that they are able to have the facilities of Exchange Lemon, an entirely separate and distinct corporation—true, it is a co-op—but to have the facilities of that corporation available to it to process oranges at cost if they care to do so. Because the control of the processing facilities here is just as much an important element in the control of the citrus juice market as is the control of the product which makes the juice.

The Court: All right. [2354]

* * *

The Court: In addition to making comparison between the oranges and oranges and juice and juice, is it also your contention that the juice as made would be entitled to make a comparison between oranges and processing contracts by which there could be figured out the price of the oranges?

Mr. Dixon: Yes, I think they are, your Honor. I think, however, that there is a question of fact here. Obviously, there are many questions of fact upon which your Honor will have to charge the jury with reference to these contracts. We wouldn't be here today if these contracts were only processing contracts. [2364]

* * *

The Court: All right.

The motion of the defendants for a directed verdict is denied as to the first and second and third causes of action.

I assume that there will be further motions at the end of the defendant's case, and any ruling that I make now is without prejudice to what I might do at that time.

You don't finally know, I don't suppose, until a case is completed what causes of action the plaintiff will go to the jury on.

Presently the indication is that you want to go to them on all three?

Mr. Dixon: Yes.

The Court: If you change your mind, I think that the third cause could be eliminated, and I would see no prejudice there, for the evidence offered on the third cause would in any event be available generally for background and general use as to one and two.

I want to study these sections further. I am inclined to think that they are properly in the case, but Mr. Dixon talks about not wanting to present any novel question, which would mean that he would like, at least as far as his ability is concerned, if he gets a judgment against the defendants, to get one that will stick, and I assume that he will study [2380] further, as I will, the Clayton and Robinson-Patman sections. [2381]

* * *

Mr. Strachan: I will call Mr. John A. Lynch as a witness for the defendants.

JOHN A. LYNCH

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: John A. Lynch.

Direct Examination

By Mr. Strachan:

Q. What is your business or occupation, Mr. Lynch?

A. I am a certified public accountant and my business is public accounting, certified public accounting, under the name John A. Lynch and Company, 231 South La Salle, Chicago, Illinois.

Q. What was your education for your profession?

A. I began my college career at Mount St. Mary's College in Emmitsburg, Maryland; then at-

(Testimony of John A. Lynch.)

tended the University of Pittsburgh, graduated in 1938, receiving a Bachelor of [2386] Science Degree, major in accounting. I took post-graduate work at Northwestern University and at Loyola University in Chicago.

Q. In what fields were the post-graduate work done?

A. In cost and advanced cost and cost installation systems—cost system installations.

Q. Where are you licensed as a certified public accountant? A. State of Illinois.

Q. When were you so licensed? A. 1946.

Q. Do you belong to any professional associations or societies?

A. I do. I belong to the American Institute of Accountants and the Illinois Society of Certified Public Accountants.

Q. Will you review the history of your experience in the accounting field?

A. Upon graduation from the University of Pittsburgh I accepted a job with the Bureau of Internal Revenue in the Income Tax Unit, and after approximately a 10-week training course was assigned to Chicago, Illinois. The major portion of that time I was assigned to Swift & Company cost analysis under the Processing Tax, and to cost analysis at Hunter Packing Company in St. Louis. In 1940 I resigned from the [2387] Bureau of Internal Revenue to accept an appointment as a Special Agent in the Federal Bureau of Investigation. I remained with them until November 1, 1945. The

(Testimony of John A. Lynch.)

experience in the FBI consisted specifically of investigations in the accounting line in the Court of Claims, claims of contractors against the Government, bankruptcy investigations, ascertaining financial ability investigations, antitrust investigations. Mostly—— [2388]

Q. Did you have any experience in connection with renegotiation of Government contracts?

A. Yes.

Q. War contracts and the like?

A. Right. We were the agency to verify for the various departmenuts, State and Army—not the State Department, but Army and Navy and the Air Force, the allocable costs of specific contracts for the purpose of renegotiation.

Following my FBI experience, I became a resident partner of Barnes & Company, Certified Public Accountants, in Chicago. I operated the Chicago office for one year, at which time I went into business for myself, and I at the present time operate as a proprietorship, with a staff of five seniors and one junior.

Q. What is the nature of the practice that you conduct as John A. Lynch & Company?

A. Our practice is the general practice of public accounting, tax accounting, and system installations. During the course of our general practice, we have had special projects or special assignments embracing the sale of companies, valuation for estate purposes, cost analysis on negotiated Army contracts. I think that about covers it.

(Testimony of John A. Lynch.)

Q. Have you also had some experience in your private practice in accounting and cost analyses for antitrust cases? A. Oh, yes, sir. [[illegible]]

Q. Will you tell us when you were first employed to do accounting work, your firm, rather, was employed to do accounting work in connection with this case?

A. I was employed by Mr. Hurd of the firm of Pope and Ballard in approximately May, 1955.

Q. Will you tell us what was done by you and your firm under your direction and supervision pursuant to that employment?

A. The scope of our investigation embraced the examination of the books and records of the plaintiff for the period 1951 and 1952, together with photostatic copies of certain documents, such as the Commissioner of California file, which embraced the period prior to 1951, transcripts of testimony taken in various phases of the business life of the plaintiff. We were not limited in any respect in the investigation we made.

Because of the magnitude of the assignment, I generally handled all the preparation of the financial statements, the work dealing with the preparation of the financial statements, and Mr. Regan, who is an employee of mine, performed most of the work with respect to costs and cost analyses during the course of that investigation.

Q. To what extent did you familiarize yourself with the work that Mr. Regan was doing?

(Testimony of John A. Lynch.)

A. The entire assignment was under my jurisdiction and [2390] accountability. I reviewed all the work of Mr. Regan and his assigned staff members, and he in turn reviewed all mine, so that there would be a cross-review on the investigative techniques of both units.

Q. You said that with respect to the period subsequent to the year ending January, 1950, you had available the corporate financial records and underlying documents?

A. Well, we had the books and some of the underlying subsidiary records. We were limited to a certain extent by lack of pertinent supporting records. We had sufficient information, I believe, for all our purposes, however.

Mr. Strachan: I would like to refer to the partnership balance sheet that is marked as Exhibit A-1 for identification. I would like to have copies distributed to the jury. [2391]

Mr. Dixon: May the record show at this time, your Honor, that the palintiff registers a general objection to any evidence which antedates the institution of active operations by this plaintiff after the termination of the proceedings under Chapter XI by this court in the early part of 1949, as being wholly irrelevant, immaterial, and not tending to prove or disprove any of the issues of this lawsuit.

The Court: How much time do you propose to spend on matters prior to—what was it, about January of '49 or early in '49 when the company came out of reorganization?

(Testimony of John A. Lynch.)

Mr. Strachan: I simply intend to go over the three certified balance sheets, tracing out the earnings record of the company, and tracing out the history of the fixed assets. I shouldn't think it would take over, I would say, maybe 45 minutes.

I don't think the time really bears on the objection that Mr. Dixon has made.

Mr. Dixon: We have made it abundantly clear, counsel, that we rely on the years 1949, '50 and '51 in connection with this case, and the proceedings that occurred after this company resumed operations.

The Court: I know both your positions.

I am going to overrule the objection; but, on the other hand, I am not going to permit you unlimited time on these preliminary matters, because the issue in this case, as I [illegible] told the jury before, is the condition of the plaintiff company in 1951. Also the question of its earning record as asserted by the plaintiff in the years '49 and '50, as well as '51.

I will certainly permit the defendant to introduce evidence or go into matters which bear upon those issues, as far as the condition of the plaintiff is concerned, which bear upon what the condition of the plaintiff was in the year 1951; and, therefore, the evidence, I hold, will be admissible, but I think it is a matter of controlling the time, as to how much time we put on these preliminary matters.

In other words, the plaintiff does not claim that it was damaged in the years '49 or '50. It claims it was damaged in the year '51. And the defendant is entitled to show what the character of this plaintiff was in the year '51, and to do that the defendant is entitled to go back—let's just take one example. The land which existed in 1951 was land which was acquired in, I think, during the partnership days—wasn't it?

Mr. Strachan: That is right.

The Court: Therefore, there is a certain continuity in tracing this matter out. However, the pertinent issue is, as far as the condition of the plaintiff, what was it in '51. So this type of evidence is material and only material insofar as it explains what the condition of the plaintiff was in '51. [2393]

Mr. Strachan: Yes. And on that, your Honor, it is our feeling that you can't really understand what happened after the conclusion of the 1949 reorganization without knowing what went ahead, not only with respect to land, but with respect to other things. For example, there was a discharge of indebtedness that occurred there. That in the subsequent period became an apparent surplus or capital asset. And those things I want to trace out.

The Court: All right. However, I am going to limit you on that. We have been all over that before. You are talking about this $39,000 item?

Mr. Strachan: I wasn't at that point.

The Court: We did discuss that.

Mr. Strachan: I was talking about an item of over $200,000.

The Court: In the case of the $39,000 item, the evidence shows it was discharged. I will permit you

(Testimony of John A. Lynch.)

to show what it was that was discharged, but we are not going to go into all the background on it, because the ultimate thing you want to prove is——

Mr. Strachan: That it was discharged.

The Court: And, therefore, under your contention the assets of the company were increased that much.

The same rule would apply to the other matters, a matter [2394] of judgment as to the extent of this.

I make these remarks only for the reason that I am trying to keep the jury's mind on the issues in the case.

If we were going to try every issue that came up, every little fringe issue, we would be here forever. So let's proceed with that understanding.

The objection is overruled.

Mr. Strachan: As to that $39,000 item, as long as it has been injected, I believe Mr. Irwin has a statement as to the composition of that, and we can stipulate to it. I talked to him by phone a day or two ago and he said he had such a statement.

Perhaps we can use it when we reach that [2395] point.

* * *

Q. (By Mr. Strachan): Mr. Lynch, Exhibit A-1, which I now show you, is the balance sheet of the partnership as of the time of the transfer of assets to the corporation, is that correct?

A. That is correct.

Q. Will you call attention to the items on that balance sheet that you regard as having accounting significance?

A. The date of the balance sheet is immediately prior to the transfer of assets to the corporation in exchange for the stock. On this balance sheet the total current assets as reflected thereon and the total current liabilities reflected thereon indicate a bad current ratio prior to the corporate operations. The ratio is less than one to one, which indicates that ratio is less than one to one, which indicates that even the conversion of the accounts receivable and inventories to cash would be insufficient to pay the current obligations.

Proceeding further, the fixed assets are reflected at [2397] the appraised value, notably an increase of $150,000. That has significance in effect because the partners' capital accounts are reflected correspondingly at $240,000.

The reflection of that appraisal is indicated at the bottom in the capital section where the $150,000 is spread among the partners. There appears to be no relationship existing between the capital contributions which represented the original investment of the partners and the markup of the assets. Without being specific, the percentage ranged to ten times of original capital contribution on the one hand to a six per cent allocation on the other hand.

Mr. Strachan: I would like to have the document that has been marked Exhibit BA [2398] distributed.

* * *

(Testimony of John A. Lynch.)

(The exhibit referred to was marked Defendants' Exhibit BA for identification.)

The Court: What is the materiality of this, counsel?

Mr. Strachan: Sir?

The Court: What is the materiality of BA?

Mr. Strachan: This is a summary statement of the allocation of capital which the witness has just testified to.

The Court: What would it tend to prove?

Mr. Strachan: It tends to prove that the write-up was applied differently to different classes of assets, would tend to indicate the unsupportable, or, you might say arbitrary basis of the write-up and its distribution.

The Court: You concede partners would have a right at the time they form a corporation to distribute their shares among themselves as they see fit?

Mr. Strachan: I think that they could do that; yes.

The Court: Is there any objection to the exhibit before we go any further with it?

Mr. Dixon: Yes, your Honor. I wish the record to again show that I have a continuing objection to anything that does not directly relate, and I mean directly relate to the [2399] situation that plaintiff relies on in this case as set forth in its exhibit of operating income and balance statements commenc-

(Testimony of John A. Lynch.)

ing wth the year 1949, the first one being—I think it is Exhibit——

The Court: We have three different views here. You have one, Mr. Strachan has one, and I have another. You would rule it all out. Mr. Strachan would put it all in. I think some goes in and some goes out. You object to any further proceedings as to BA?

Mr. Dixon: I do; yes, definitely, your Honor.

The Court: Sustained.

Mr. Dixon: In other words, so that I may make my position clear, your Honor, I have no objection to any evidence that is offered that may directly relate to any item contained on any exhibit that the plaintiff has offered to show its operations after the termination of proceedings under Chapter XI, provided it is directly related to it.

The Court: It is really none of the jury's business why I sustain an objection, but so there won't be any mystery about it, this Exhibit BA which you now hand in concerns solely the question of how the write-up was allocated among the partners at the time the corporation was formed. It hasn't anything to do, therefore, with the issues of this case. You have already inspected the exhibit, so forget about [2400] it. However, there is other evidence in the record to the same effect.

Mr. Strachan: Of course, I hadn't laid the basis for the offer.

The Court: I asked you what you would propose to show by it, and I based my ruling on what you stated.

Mr. Strachan: I would have asked the witness to state whether he prepared the exhibit, what data he used, how he used it, and on the basis of his testimony, I would offer it in evidence. The lack of basis, I suppose, is not the ground for the ruling?

The Court: The lack of basis is not the ground. It is based on your purported offer to prove by it.

Q. (By Mr. Strachan): Mr. Lynch, in regard to the depreciation shown by the difference between the columns of cost and appraised value, Mr. Winckler testified——

Mr. Winckler: Speaking now about A-1, counsel?

Mr. Strachan: Yes.

Mr. Dixon: I assume I have a continuing objection, your Honor.

The Court: You have one. Overruled. [2401]

Q. (By Mr. Strachan): Mr. Winckler testified that the machinery and equipment shown at a cost of about $89,000, having an apparised value of $154,000, the difference could be accounted for because there were costs involved in installing machinery and equipment over and above the invoice price of the machinery and equipment. Is it correct accounting or bookkeeping practice to enter on the books the invoice only of the machinery and equipment, without also including in that account the other costs, such as freight and installation?

A. Sound accounting principles state that all costs incurred in the nature of freight, installation, and wiring and so forth, should be reflected in the account up to the point of operation. We didn't have the records to verify that here. But if sound accounting practices were followed, then the freight and installation charges would be reflected therein.

Q. I now ask you to refer to Exhibit A-3.

I ask that copies be distributed among the jurors.

The Court: Is A-3 in evidence?

Mr. Strachan: I will offer it in evidence now.

Mr. Dixon: Just the general objection, your Honor, on the basis heretofore stated.

The Court: Overruled. A-3, if it hasn't been heretofore received in evidence, is received now. Copies may be [2402] passed to the jury.

* * *

The Court: This is the balance statement as of January 31, 1947?

Mr. Strachan: That is correct, your Honor. That is the end of the first fiscal year of operations under corporate organization.

Q. (By Mr. Strachan): Will you refer to Exhibit A-3 and point out the items therein which have accounting significance in your opinion?

A. Again, in the year following Exhibit A-1 the current position of the company indicates that the conversion of all current assets into cash would be insufficient to pay the current liabilities. The ratio is not a normal ratio upon which funds would be advanced for credit purposes. The fixed assets as

(Testimony of John A. Lynch.)

reflected herein are shown at a figure which is hybrid in nature——

Q. What do you mean the figure is a hybrid figure?

A. It has the assets reflected after a write-up of $150,000, and the subsequent additions are reflected at cost. So that the final figure is a combination of cost and appraised value on certain specific assets.

Q. With no distinction made in the accounts between [2403] costs and appraisal?

A. That is right. It is not noted, and there is no indication that such assets are not being reflected at cost.

An examination of the notes pertinent to the balance sheet indicates that the assets are carried at the book value from the predecessor partnership, but the book value is not spelled out to include the appraised value.

Referring to "Other Assets," there is an item of $10,000 prepaid employees' bonus——

Q. That is under the classification, "Other Assets," at the foot of the assets column?

A. That is correct.

Mr. Dixon: May I interrupt for a moment, your Honor?

I notice that this Exhibit A-3 said: Subject to notes contained in report. Does the witness have and did he have access to those notes, and do you have them with you now, Mr. Witness?

The Witness: I have them here.

(Testimony of John A. Lynch.)

Mr. Dixon: Are any of these matters that you are talking about now covered in those notes?

The Witness: I referred——

Mr. Dixon: I am talking about the notes that are mentioned here that are not attached to this Exhibit A-3.

The Witness: I explained that the notes referred to the partnership predecessor book cost. That is the only note [2404] that refers here——

Mr. Dixon: I ask if they have these notes that they be attached to this exhibit so that the jury will have the full benefit of the notes which accompanied this report.

Mr. Strachan: There is no objection to them being before the jury, but if counsel for the plaintiff thinks there is anything in there that qualifies this, I suggest he pick it up and read it in, rather than have us encumber the record and prove a negative.

Q. (By Mr. Strachan): As I understand it, Mr. Lynch, there is no indication in these accompanying notes, or notes in the accompanying report, that distinguishes between the value of fixed assets due to appraisal write-up and that due to cost; is that correct?

The Court: I am permitting you to go back on some of these matters, again there is a three-way disagreement between the two lawyers and the judge, and I think the notes should be attached. They can be attached later on, since they are apparently a part of the statement, and the statement itself with-

(Testimony of John A. Lynch.)

out the notes would not be a complete statement.

You may do that later on.

The objection is overruled in part and sustained in part.

Q. (By Mr. Strachan): You were referring to the so-called [2405] assets of prepaid employees' bonus; will you complete your explanation of that item?

A. That infers that a bonus arrangement was in effect, and that the amount taken was—I don't wish to infer the amount taken, but the amount paid was paid to an employee. In reality, that should be an account receivable officer. If there was a bonus, it would have been computed on a negative figure, unless it was related to sales or gross profit, or some type of percentage arrangement prior to a net profit figure, as the operation for the year showed a loss.

To continue with the significance of this balance sheet. The capital stock reflects as paid-in capital for the stock $240,697.22, which includes the $150,000 write-up that is offset in the fixed assets section without note thereto.

Q. What effect does that have on the statement of net worth of $229,000, approximately?

A. Without disclosure, it connotes the fact that they have an actual cost net worth of $228,000, when in reality it is approximately $78,000.

The Court: Mr. Witness, Exhibit A-1, the year before, showed the cost value and the appraised value for the assets?

The Witness: That is correct.

(Testimony of John A. Lynch.)

The Court: Now, do I infer from your statement that every year thereafter there would have to be carried forward on the statement the matters which appeared on the previous [2406] statement?

The Witness: That is correct, your Honor, in accordance with sound accounting practice and with the rules of the American Institute of Accountants, and various state societies, you have to disclose to potential creditors the pertinent facts with respect to financial statements which are issued.

The Court: Do you mean, therefore, that you would have to show on your balance sheet the date of appraisal, for instance, of a building?

The Witness: That is right, your Honor.

The Court: The date of appraisal?

The Witness: Or place it in the surplus section of your balance sheet by date, in order to show that some reorganization or recapitalization took place on that date.

The Court: Go ahead.

Q. (By Mr. Strachan): The second sheet of Exhibit A-3 is the income account for the same year, namely, the corporate fiscal year ending January 31, 1947. Are there any items there that call for attention from the accounting point of view?

A. The important thing is to note the operations resulted in a loss for the year, and that that loss included a loss of capital assets dismantled.

Q. In other words, the inclusion on the income account of a loss on capital assets, as it is reflected here, [2407] is in accordance with correct bookkeeping and accounting practice? A. It is.

Q. I would like to have you refer to Exhibit A-4. And I would like to have copies of that distributed.

The Court: Mr. Clerk, is A-4 in evidence?

The Clerk: A-4 was admitted; yes, your Honor. Counsel has now supplied extra copies.

The Court: Pass it to the jury, and pass the extra copies.

Mr. Strachan: And A-5 I should also like to have distributed in this connection.

The Clerk: A-5 is not in evidence at this time.

Mr. Strachan: I will offer it, then. It is the income account for the same period, ending January 31, 1948.

The Court: A-5 received in evidence.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit A-5.) [2408]

Q. (By Mr. Strachan): Referring to Exhibit A-4, being the balance sheet for the second year of operation under corporate form, I ask you to call attention to and express your opinion on matters appearing in that exhibit which are of accounting significance?

A. A-4, representing the position of the company one year subsequent to A-3, dicloses further aggravation of the current position. In this instance the ratio of current assets to liabilities is approximately one to three as compared to a normal current ratio of two to one. This reflects a bank overdraft. It shows

(Testimony of John A. Lynch.)

petty cash of $59.85. Insufficient cash to meet the accrued taxes, which are immediately due if they represent payroll taxes

The conversion of all current assets into cash would not be sufficient to have paid the current liabilities.

Again, the fixed assets are reported at a figure which includes the appreciation or the write-up of $150,000 without disclosure specifically that the write-up is included therein.

The surplus section of the balance sheet reflects a capital stock which includes the $150,000 write-up with no disclosure that it was based on an appraisal or based on a fact other than any officers' or partners' evaluation.

Mr. Dixon: If the court please, I wish to again object to some of this testimony unless it is stipulated and made [2669] clear that none of these records, balance sheets of this company, were ever made available to the public or used for public purposes in selling stock or anything else until the application was filed and permission granted in 1951.

The Court: I don't see the materiality of some of this. If this was a suit involving what some member of the public had relied on, a balance sheet, then this testimony about the fact that it was not indicated when the property was appraised to arrive at a certain value, would be material.

What has that got to do with the issues of the case? You say it is poor accounting practice. What does poor accounting practice in 1947 and 1948 have to do with the issues of the case?

Mr. Strachan: This goes to more than poor accounting practice.

The Court: What does it tend to prove? That is the test of admissibility of evidence. What does it tend to prove?

Mr. Strachan: Well, one of the things it tends to prove is that the apparent valuations on the assets at the time of the final failure of this company were not true values.

The Court: As far as that is concerned——

Mr. Strachan: And another thing——

The Court: Now, let's take one thing at a time. As far as that is concerned, it isn't material in my opinion. What else would it tend to prove? We are not trying why this [2430] company went into reorganization upon the first occasion. We assume it did, and we assume it did probably for good reasons.

Mr. Strachan: It also goes to prove that the company, and when we finish with this showing we will have demonstrated that the company was a consistently losing operation.

Mr. [illegible]: I object to that comment, your Honor. That is the conclusion of counsel here, and that is why I am objecting to this witness——

The Court: Just a minute. The objection is overruled. I have permitted you to show the statement which shows whether the company lost or made money, but I am speaking now specifically of the questions you have been asking this witness as to what was good or bad accounting practice. What does that tend to prove?

Mr. Strachan: Well, I shouldn't perhaps limit it to whether it is good or bad accounting practice. Perhaps it should be whether the records accurately reflected the true conditions. That is what I mean by sound accounting practice. I think sound accounting practice does reveal the condition that actually occurred, and insofar as the practice followed here departed from that, that is what I want to point out. I am not arguing theoretical accounting processes.

Mr. Dixon: Your Honor, the reason I rose to object to this question was the fact that this witness on a general [2411] question testified about some mark-up on which there was no basis for it. The record shows, and counsel knows that it was based upon the appraisal that is already now in evidence.

The Court: I understand. Your general objection is overruled. You will have to object specifically to particular things that come along, because you made a general objection, and some of this is admissible and some isn't.

Ladies and gentlemen of the jury, you are not concerned with whether or not somebody reading this document would or would not have been misled. That is not in issue in this case. Do we understand each other?

The Jurors: Yes.

The Court: Whether the plaintiff was damaged by alleged acts of the defendant has nothing to do with whether an investor might have been misled in going to this company.

Mr. Strachan: I don't agree with that view in the light of the prospectus position here, and this evidence we will bring to bear on the prospectus which we will show was a misrepresentation.

The Court: You will make that offer out of the presence of the jury, then, because we are not trying any case that is concerned with whether any investor was misled. You could multiply the issues in a lawsuit, and particularly one of this size and magnitude, ad infinitum. But we are not [2412] going to do it. There is no indication whether anybody was misled.

I am going to permit you to show what this corporation was like in 1951 and things that existed in 1951 that go back to something prior to that time. We are not going to try some supposed issue as to whether some investor was misled in putting money into this company.

Mr. Strachan: I am not trying that issue, but Mr. Winckler in his testimony undertook to give the impression that the company was at the dawn of a new era, it had the permission of the state to sell a lot of securities, it had a fine prospectus that showed a long earning practice, and that the corporation failed because of lack of fruit supplied it. I want to show that is not the situation.

The Court: Well, you show it by proper evidence. We will rule on the matters as they come along.

Again, ladies and gentlemen, argument of counsel

(Testimony of John A. Lynch.)

and discussions by the court are not evidence and are not to be considered by you in the trial of this action.

Proceed.

Q. (By Mr. Strachan): Mr. Lynch, I now call your attention to the item under the capital stock and surplus section here on Exhibit A-4, which shows loss for the year ended January 31, 1948, as $72,221, and ask you whether that correctly represents, according to standard and approved accounting [2413] practices, the loss sustained in that year?

Mr. Dixon: I object to that question as being entirely too general, your Honor, having no tendency to prove or disprove any issues in this case.

The Court: Counsel, are you approaching the question as to whether the $47,000 should be included in that figure?

Mr. Strachan: Correct, your Honor.

The Court: Objection sustained. Reframe the question. Call attention to the other item and then ask the question.

Q. (By Mr. Strachan): I will ask you, referring to Exhibit A-4, whether there appears anywhere on that balance sheet any item or items which should be reflected so as to appear as a part of the loss for the year which have not been so included?

A. There are.

Mr. Dixon: I object to the form of the question, your Honor.

The Court: Overruled.

Q. (By Mr. Strachan): Will you name one?

(Testimony of John A. Lynch.)

A. The reduction in market value of inventory, $47,849.12.

Q. Will you state why it is that that reduction in market value of inventory should be included as an item entering into the profit or loss for the year?

The Court: This is according to your opinion as to [2414] standard bookkeeping practice?

The Witness: That's right, sir.

The Court: All right. Go ahead.

The Witness: Recognized accounting practice dictates inventory adjustments should be reflected as a proper charge against profit and loss accounts. The accounting principles anticipate losses, but do not anticipate profits. Such losses should be recognized. If the inventory value is not there, it should be immediately put on a sound pricing basis and the difference written to profit and loss account.

Q. (By Mr. Strachan): And as I understand it, in this processing industry, for example, when citrus products are packed, and instead of being sold immediately are held in inventory, they are included as assets in the current assets group; is that correct?

A. That is correct.

Q. And that is what is shown on Exhibit A-4 in the item, inventories, finished products; is that correct? A. That is correct.

Q. So if the products or inventory is credited as a current asset at the time the goods are produced, then if that inventory credit is too great and you have to reduce it, it should be reduced from the inventory as a current loss; is that correct?

(Testimony of John A. Lynch.)

Mr. Dixon: If the court please, may I again register an [2415] objection to this line of questioning. I fail to see where it has any relevancy whatever to the issues of this lawsuit.

The Court: Overruled. The only relevancy would be the question, did the company make or lose so much money in a certain year. That is the only relevancy I see. It is permissible for that purpose.

Mr. Dixon: I just want the record to show that we are not relying on or contending anything with reference to what happened prior to the reorganization under Chapter XI.

The Court: All right. But that doesn't mean the defendant can't rely upon the fact that you lost money in 1948 and went into reorganization.

Mr. Dixon: It is conceded that we did.

The Court: All right. Overruled. Is there a question pending?

The Witness: Yes. It should be deducted from the income account.

The Court: The way it is handled on A-4, you get the same total, do you not, on A-4?

The Witness: You do, but it is misleading.

The Court: You would have included it up as part of loss for the year, added to the $72,000?

The Witness: That is correct.

The Court: And, secondly, on A-5, the income account, you would have included it to show a greater loss in the year [2416] ending January 31, 1948, than it showed?

(Testimony of John A. Lynch.)

The Witness: That is correct, your Honor.

The Court: That is your point, right?

The Witness: That's right, your Honor.

The Court: Is that all you want to cover?

Mr. Strachan: Yes.

The Court: Okay.

Q. (By Mr. Strachan): Are there any other items on the balance sheet that, according to standard accounting and bookkeeping practice, would be included in profit and loss, but have not been so included?

A. Yes; there are. The decrease in the reserve for doubtful accounts would represent an additional income item of $1,500, which should be treated in the income account, and this reserve for damaged merchandise, $5,000, I would think it should be included, but I wouldn't want to specifically state that because if the merchandise has not been damaged as yet and it is just a reserve for estimated damage, then it is not a proper P and L charge, but this item, reserve for damaged merchandise, is indicative of the fact that merchandise had been damaged, and therefore I would have included it as additional loss for the current year.

The Court: And those two items, 5,000 and 1,500 are items that you would have in all events included in profit and loss? [2417]

The Witness: I would have included them personally, but I wouldn't say in all events, because of the qualification I made with respect to the damaged

(Testimony of John A. Lynch.)

merchandise, that it might be just a provision for estimated future damage which wouldn't be current.

Q. (By Mr. Strachan): Tell us what would have been the statement of loss for the year ended January 31, 1948, had the inventory adjustment of reduction in market value of inventory been included in profit and loss?

A. It would have been approximately $125,000.

Q. Instead of 72,000?

A. That is correct. [2418]

Q. Now, referring to A-5, would you have the same comment to make on the loss for the period that is stated at the foot of that exhibit?

A. I would.

Q. In your examination of the fiscal records of this company, do you know whether the loss on inventory was, for income tax purposes, included or excluded from the income reported for that year?

Mr. Dixon: I object to any inquiry along that line.

The Court: Sustained.

We have gone over that before, counsel. What was done for income tax purposes has nothing to do with what is done for the accounting purposes of the company. There are different rules, statutes, different provisions involved.

I will put it very broadly. I don't care whether this company, as far as the issues of this case are concerned, defrauded the government or defrauded themselves on those returns. It hasn't got anything to do with the issues of this case. [2419]

* * *

(Testimony of John A. Lynch.)

The Court: The record will show the jury present.

Q. (By Mr. Strachan): Mr. Lynch, I forgot to ask you some preliminary questions, whether the working papers which you and Mr. Regan prepared from the books and records and other documents of the Winckler & Smith Corporation are in the courtroom and are available for inspection of opposing counsel and their accounting advisers.

A. They are.

Q. You were not furnished with any balance sheet or income account for the fiscal year ended January 31, 1949; is that correct?

A. That is correct, we had no financial statements.

Q. At the end of the year January 31, 1949, the corporation's affairs were still in bankruptcy reorganization under Chapter XI?

A. That is correct. [2420]

Q. Did you find in any of the books and records that were made available to you any record of the profit or loss realized by the corporation during that fiscal year ending January 31, 1949?

A. Yes, sir.

Q. What record did you find?

A. A 1950 federal income tax return reflected the amount of the loss for the operating year 1949.

Mr. Dixon: If the court please, I again object to that and move that the answer be stricken, for the reasons previously given.

(Testimony of John A. Lynch.)

The Court: Did you inspect the trustee's or the receiver's reports?

The Witness: No, your Honor. I inspected the income tax return.

The Court: The objection is sustained. The company was in reorganization during that period. What the income tax returns would show would have no bearing, in my opinion, on the issues of the case.

Mr. Strachan: Without, your Honor, undertaking to argue the matter after the ruling, it seems to me that a statement that is made by corporate officers as to a gain or loss during the particular year, quite without regard to its carry-forward or carry-back implications, is evidence of what the corporate gain or loss was. [2421]

The Court: What would it tend to prove—that the company was losing money during that year?

Mr. Strachan: Yes, sir.

The Court: It wasn't operated by the officials of the company; it was operated by the court through the court officers. It would tend to show that a court officer had not been efficient in operation?

Mr. Strachan: No; it doesn't show that at all. The court officer's conduct we are not impeaching in the least. The court officer, receiver or trustee, keeps a set of books for his own purposes, his receipts and disbursements, and accounts to the court on that basis. But the corporation that ought the refuge of the bankruptcy proceeding must still keep its records of gain or loss. Those can be tied into the

(Testimony of John A. Lynch.)

receiver's, but there still is a corporate profit or loss, distinct from that of the receiver, and that is what I am trying to show.

The Court: Objection sustained. [2422]

* * *

The Court: Then what you are interested in is the balance sheet and the assets and liabilities?

Mr. Strachan: And the income account.

The Court: That is 61, and the clerk has extra copies of it.

Mr. Strachan: That is all right.

The Court: Pass 61 to the jury.

Mr. Dixon: My attention has just been directed, your [2423] Honor, to the fact that the covering letter is not in as part of the exhibit of the plaintiff.

The Court: That is what I called Mr. Strachan's attention. The covering letter is in Exhibit G for identification.

What do you want?

Mr. Dixon: I would suggest that the covering letter, at least, be offered in evidence, so if any reference is going to be made and criticism made of it, that it be part of the record of this exhibit.

The Court: Give G, then, the exhibit Number 61-A. Is there any objection?

Mr. Strachan: No.

The Court: Received in evidence as Plaintiff's Exhibit 61-A, which is really 61 plus the covering letter. [2424]

* * *

(Testimony of John A. Lynch.)

Q. (By Mr. Strachan): Referring to the income account, which is part of Exhibit 61, I will ask you to point out any matters that from your examination of the books and records of account are not correctly reflected in the income account.

A. Our examination reflected that the operations for the year ended January 31, 1950, embraced a period when a loss on the sale of assets was realized, but such loss was not recognized in this income account. Our examination reflected that——

Q. Will you tell us specifically what records you referred to to determine when the loss on the sale of fixed assets did appear on the books and records?

A. The actual books and records themselves reflected entries as of July 31, 1949, recording the loss. Reference back to the entries, the general entries covering that entry, reflected that the loss took place April 3, 1949.

Q. April 3, 1949?

A. The loss actually occurred April 3, 1949. The cash proceeds from the escrows were received into the corporation at that time, and the reports of the accountants for the firm indicated the sale at March 1, 1949. But the actual records [2425] reflect April 3rd. The income tax return states the sale took place April 3, 1949.

Q. When you say the accountant's report, you are referring to the second page of Exhibit—what was it, 61-A?

A. No. I was referring to the notes that ac-

(Testimony of John A. Lynch.)

companied that report at the time. I believe it is our A-6, if I am not mistaken, page 2.

That is correct.

The Court: Let me look at Exhibit 61-A, Mr. Strachan.

(Document handed to the court.) [2426]

Q. (By Mr. Strachan): As I understand it, the Hodge & Company report rendered in August of 1949 fixed the date of the sale of assets as of March, 1949; is that correct?

A. March 1, 1949.

Q. And what was the amount of the loss which the Hodge report stated as of March 1, 1949?

A. $169,377.32.

Q. Is that a loss which an accountant would reflect as a part of profit or loss for the year under review if he found on the books and records of account that it was recorded as a transaction occurring in that year?

A. It would be. It would be reflected in the income statement as a loss from the gain or sale of fixed assets, the same as the prior exhibit, A-5 reflected a loss in the sale of an automobile, and the same as Exhibit 3 reflected the loss on the capital assets dismantled.

Q. Then in eliminating from the profit and loss for the year this loss of 169,000 on the sale of the plant, the accountant departed from the practice that he had theretofore consistently followed?

A. That is correct.

(Testimony of John A. Lynch.)

Q. As including such items in the profit or loss?

A. That is correct.

Q. Are there any other items reflected in this balance sheet which are not in accordance with the books and records? [2427]

A. Our examination reflected further a write-off of an accounts receivable of $38,140.33, which amount would ordinarily be classified in an income statement either as additional compensation to an officer or as a bad debt. That item is not reflected in the income account.

Q. How was it reflected in the books?

A. It was charged to surplus without passing through the income account.

The Court: Did you ascertain from the inspection of the proceedings in reorganization that the write-off of that item had been arranged for as part of the arrangements made to get out of reorangization?

The Witness: My examination reflected the opposite, your Honor. It was additional compensation, and my recollection of the transcript at the bankruptcy hearings was that——

The Court: That is not my question. You are not answering my question.

The Witness: I am sorry.

The Court: Did you inspect the minutes of the corporation while the corporation was in reorganization?

The Witness: I did, sir.

(Testimony of John A. Lynch.)

The Court: You sat through this trial, did you not?

The Witness: Yes, sir.

The Court: You heard the testimony?

The Witness: I did. The minutes reflect the write-off [2428] in June, 1949.

The Court: I am talking about, did you hear the testimony about the minutes in, I think January?

The Witness: I did.

The Court: Whereby certain escrows were arranged for and this item was to be taken into account, or part of it?

The Witness: I heard it, your Honor, but it was not.

The Court: You didn't take that into account?

The Witness: The minutes reflect that the stock was purchased on March 5, and that is part of the 38,000, and Bernard J. Smith, the corporation loaned Mr. Winckler $4,000 to make the first payment. So this is March 5. It couldn't have been prior to January 31, the date of the reorganization.

The Court: You mean the effect of it?

The Witness: The cash check was dated the same date, your Honor, or subsequent thereto.

The Court: The time it became effective was after the date of the reorganization, is that what you mean?

The Witness: No, sir, your Honor. I mean that after the reorganization by two months this transaction took place, according to the minutes and ac-

(Testimony of John A. Lynch.)

cording to the cash checks which were issued and charged in this 38,000.

The Court: All right. Go ahead.

Q. (By Mr. Strachan): Had the income account for the year ended January 31, 1950, been prepared from the transactions [2429] which were shown in the books and records of account as having occured subsequent to the reorganization proceedings and within the year ended January 31, 1950, what would be the effect on the statement of profit or loss for that year?

A. The effect would have been to have shown a loss.

Q. How would you arrive at the amount of that loss from the books and records of the corporation?

A. The loss would have been arrived at by deducting from the profit listed at 120,000, deducting 169,000 on allowance on the sale of assets and deducting the 38,000 as either additional compensation or as a bad debt. That would aggregate roughly $85,000 loss for that year.

Q. Instead of a profit?

A. That is correct.

Q. I will ask you to refer to the balance sheet as of the close of that year. Tell us by referring to that balance sheet what, if any, transactions you found appearing on the books and records of the corporate organization that are different from the transactions and conditions reflected on that balance sheet?

(Testimony of John A. Lynch.)

A. Our examination of the minutes and the books reflected that the transactions I previously spoke of with respect to the loss and the sale of the assets and the forgiveness of the debt were backed up to be included in the results of the prior year's operation, in the 224,000. This Exhibit G [2430] fails to reflect the loss or any of the dealings surrounding the transactions in this statement. The disclosure should have been set forth in order to enable the reader to determine, regardless of classification of the expenses or the loss, to determine that the incidents occurred during the current year and that they were not prior to January 31, 1949, as shown on this deficit of $224,000.

Q. Without some explanation of those transactions or any reference to them, would the balance sheet correctly reflect the profit or loss for the period to a person to whom it was submitted?

A. No——

Mr. Dixon: I object to the form of the question. It should be made clear to the jury this is the witness' opinion.

The Court: Sustained. It is not a question of who this was submitted to. The defendants never relied on the statement. That is not a question here. You can ask the witness if in his opinion that was proper bookkeeping practice, but let's not inject into the case questions about who these were submitted to.

Mr. Strachan: The record shows that they were submitted to various persons.

(Testimony of John A. Lynch.)

The Court: There is no issue in the case as to the fact that the defendants—do you contend that the defendants relied at any time on these balance sheets or assets and liabilities [2431] sheet?

Mr. Strachan: No, but——

The Court: Then that's the end of that. You may inquire whether it was good bookkeeping practice, what it would have shown if it was done the way he said it should be done, but keep out of this case the talk about if it had been submitted to somebody.

Mr. Strachan: It is apparent it was submitted. There is evidence on that.

The Court: What has that got to do with the case?

Mr. Strachan: It has this to do with it, that a person not realizing these transactions that were disguised behind this balance sheet, would have extended credit, and eventually the over extension of credit by the customers, by the can suppliers and various people, would have had a very material bearing on why the corporation went through its failures.

The Court: Objection sustained. You may inquire as to what was good bookkeeping practice and what he would have done, this witness would have done.

Mr. Strachan: All right.

Q. Referring, Mr. Lynch, to the item at the bottom of the liability sheet, capital stock and deficit, will you tell us what if any items shown in that

(Testimony of John A. Lynch.)

capital stock and deficit are not correctly reflected as sound accounting practice, and if any of those transactions appear not to be supported [2432] by the underlying books and records of account?

First, I will refer you to the 240,000 some odd dollars of capital stock.

A. Referring to the $240,697 of capital stock indicates a continuity of the same corporation which was the successor to the partnership, at which time the corporate stock had been issued for net assets with a write-up of $150,000 in it.

The next figure of January 31, 1949, showing deficit represents the accumulation of the $11,000 loss in 1947, the $135,000 loss in 1948, and the loss for the year 1949, plus the loss on the sale of the fixed assets, plus the write-off of the forgiveness of indebtedness, all of which was reduced by a credit which arose in the amount of $205,000 from forgiveness of debts on behalf of the debtor as a result of the first reorganization. That is the make-up, approximate make-up, of the item, 224, but as of January 31, 1949, the $205,000 forgiveness and the write-off of the 38,000 and the loss of 169, occurred subsequent to January 31 and hence should have been reflected in detail as operating results for the current year, or as capital adjustments for the current year.

Q. According to the books and records of the corporation, those transactions occurred during the fiscal year ended January 31, 1950, rather than during the prior year? [2433]

(Testimony of John A. Lynch.)

A. April 3, 1949, they occurred.

Q. It is your opinion it was not proper to record them as if they had occurred prior?

Mr. Dixon: If the court please, I think that is the conclusion of this witness and I move the answer be stricken. It is a question for this jury, if this is material, to determine whether this was or was not done during the trusteeship, and not for this witness to make his own statement.

The Court: Objection overruled. The witness' statement as to when this occurred will be his opinion. I will be up to the jury to determine that as a matter of fact. This is an expert witness. He may give his opinion and his reasons, but you are the sole judges of the weight to be given to any witness' testimony, including an expert.

Go ahead.

Q. (By Mr. Strachan): Is your statement that the loss on the sale of capital assets occurred, according to the books and records of the corporation, as of March or April, 1949, rather than during the prior year, a matter of opinion, or is it a matter of record? A. It is a matter of record. [2434]

Q. Can you refer to the record that you have in mind?

A. I can. I can refer to journal entry No. 37, dated July 31, 1949, of the plaintiff's books.

Q. Will you read that journal entry?

The Court: Now, just a minute.

I am going to permit this to be read, together with any other journal entries that concern the matter, but this witness is testifying as to his opinion, and any statement that he gives is based upon other evidence in the case. The other evidence is the evidence of those facts and not this witness' statement.

Your question was improper, although what you are trying to get at is proper. I am not going to be technical on that.

This is an expert witness, and he is giving opinions. The mere fact that he tells you something is a fact hinges upon the evidence in the case. You can look at that evidence as well as he can.

Now, if there is more than one journal entry involved, I want them both read.

Mr. Dixon: I objected, your Honor, because—I didn't object, because I thought that he was going to refer to some journal entry of this court. But if he is referring to some journal entry of the books of this company, or minutes, then I do object. I think whatever it is will speak for itself.

The Court: Overruled. He may give his reasons for his [2435] opinion. His reasons will rest upon the thing that he reads. If the thing that he reads is not admissible, that is something else. But there is no doubt but what these minutes would be admissible, if they are not already in evidence.

Mr. Dixon: Yes. I am not objecting as to that, your Honor.

The Court: This is the reason for his opinion.

(Testimony of John A. Lynch.)

Is there more than one entry involving this matter?

Mr. Starchan: I would like to ask the witness. I happen to remember this one.

Is there another, Mr. Lynch?

Mr. Dixon: May I inquire as to what journal entry counsel is referring to, and with reference to what?

Mr. Strachan: The witness has identified it by number and date.

Mr. Dixon: I haven't seen it. What is it?

The Court: Step up and look at it.

Mr. Dixon: This is an entry in the books of the company?

The Witness: That is correct.

Mr. Dixon: I thought you were talking about something else.

If it is from the books of the company, your Honor, we have no objection.

I don't know what it is. [2436]

The Court: Proceed.

The Witness: The entry reflecting the loss is as follows:

Debit sales of asset's, $50,000.

Reserve for depreciation—building	$ 15,030.78
Reserve for depreciation—machinery and equipment	$ 50,144.43
Reserve for depreciation—furniture and fixtures	$ 2,910.77
Mortgage payable	$ 89,830.65

(Testimony of John A. Lynch.)

Credits:

Land	$ 5,816.11
Building	$135,457.32
Machinery	$214,767.33
Furniture	$ 9,638.72
Tools	$ 2,450.47
Note receivable	$ 9,164.60
Debit Reorganization surplus	$169,377.32

To write off plant sold to stockholders on Apirl 3, 1949.

Mr. Strachan: Mr. Figg, is Exhibit A-6 in evidence?

The Clerk: According to my record it is not.

Mr. Strachan: I will offer A-6 in evidence.

The Court: It is page 2 of the letter, and the subject matter on page 2 is all of the matter, except the first line.

Exhibit A-6 received in evidence. [2437]

* * *

Q. (By Mr. Strachan): Do you have a copy of A-6 before you? A. Yes, I have.

Q. Does that contain any part of the books and records that you took into account in forming the opinion that the loss on this transaction occurred during and not prior to the year ended January 31, 1950?

A. May I have the question again, please?

(Question read by reporter.)

The Witness: It does not. [2438]

* * *

(Testimony of John A. Lynch.)

The Clerk: Is the journal entry BK, your Honor?

The Court: Yes, BK in evidence. This is what the witness read from.

> (The exhibit referred to was received in evidence and marked as Defendants' Exhibit BK.)

The Court: All right. Go ahead.

Q. (By Mr. Strachan): You mentioned that the surplus reflected what might be called the liquidation of debt at less than the face amount thereof. Was there a journal entry on that?

A. There was.

Q. Have you that journal entry before you?

A. I have.

Mr. Strachan: Perhaps we had better mark that, your Honor, so we will know what he is talking about. [2439]

The Court: Yes, BL.

* * *

The Court: BL received in evidence.

> (The exhibit referred to was received in evidence and marked as Defendants' Exhibit BL.)

Q. (By Mr. Strachan): Will you identify the journal entry that you refer to and read it to the jury, please?

A. Journal entry dated July 31, 1949, journal voucher No. 48.

Credits:

Notes payable N. J. Winckler	$ 3,512.34
Prepaid bonus N. J. Winckler	$20,000.00
Account receive	$18,140.33

Debit Surplus from reorganization
To clear receivables owed corporation by N. J. W. and give credit to N. J. W. for his expense of reorganization per agreement with Mr. Rubin............$41,654.67

Q. Are those two journal entries, which you found in the records of the company, the reason for your opinion that these transactions should have been reflected as having occurred within the year, rather than within the prior year?

A. That, coupled with the minutes of the corporation.

Q. What minutes do you refer to?

A. I believe the minutes were dated June 24, 1949.

Q. Relating to the forgiveness of that indebtedness? A. That is correct.

Q. You mentioned one of the items included in that was an item of $10,000, do you recall that, which represented treasury stock? A. Yes, I do.

Q. Will you tell us what the books and records showed with respect to that $10,000 transaction?

A. The books and records reflect that upon termination of the escrow agreement the proceeds——

Q. Those escrow agreements were the ones through which the sale of the fixed assets were accomplished?

(Testimony of John A. Lynch.)

A. That is correct. There were two escrows, and through the termination of the one the funds were deposited with the corporation, net of trustee's expenses. They were utilized in the ordinary course of business. During the subsequent period an agreement was entered into to acquire Bernard J. Smith's stock on March 5, 1949. Bernard J. Smith [2441] was in attendance at the meeting, and the corporation approved a loan of $4,000 to Mr. Winckler to acquire Bernard J. Smith's stock——

Mr. Dixon: If the court please, I feel I must object somewhere along this line to going into all the details of this transaction. If counsel——

The Court: I have already ruled on it, that you can show what elements made up the item that was forgiven, but why it was done, or whether it was honesty or crookedness, or anything else, hasn't anything to do with it.

Mr. Strachan: When it was done is material, your Honor.

The Court: When it was done is proper. I thought you and Mr. Irwin had a stipulation as to what made up these items.

Mr. Strachan: I haven't seen it yet. He told me on the phone that he had it, but I haven't examined it.

The Court: Well, this is part of the item of 34,000 some odd dollars?

The Witness: 38,000, your Honor.

The Court: 38,000 some odd dollars that was forgiven, as it were?

(Testimony of John A. Lynch.)

The Witness: That is correct.

The Court: Which had previously been an asset on the books of the corporation?

The Witness: That is correct, your [2442] Honor.

The Court: And when it was forgiven, it ceased to be an asset?

The Witness: That is correct.

The Court: We are only concerned with the fact that the asset was taken off the books and some description of what it was.

Mr. Dixon: We have for counsel our understanding of what the $38,140.33 is composed of, if it is material. [2443]

* * *

The Court: Let the record show the jury absent.

Mr. Fisher: May it please the court, with reference to Exhibit 9, which is the one where we entered into a stipulation with respect to it, we have made a change, agreed to by Mr. Dixon and myself, in the explanation by changing the word "to" to "do" in the fourth line in the explanatory part. We have initialed it.

The Court: You have initialed it?

Mr. Fisher: Yes.

The Court: Then I will merely call that the jury's attention, and if and when they look at it, they can see what it is.

Mr. Fisher: Mr. Dixon has initialed it, too.

The Court: All right.

Mr. Fisher: Similarly in Exhibits 32 and 33.

The Court: All right.

Mr. Fisher: Similar changes were made in those exhibits, the explanatory notes to the exhibits, which have been intialed.

The Court: All right.

The Clerk: As I understand it, as to those other exhibits which we attached notes to, both counsel have examined the attachments and find them satisfactory. [2444]

Mr. Fisher: That is correct.

Mr. Strachan: The matter I wanted to discuss with your Honor has to do with the subject of income tax returns and the reporting of income tax for Federal tax purposes as compared with the computation of income according to the corporate books. There is a gap in the information that has been furnished in that we have neither had access to the books nor to the income tax returns for the fiscal year ended January 31, 1949.

The Court: Well, wait just a minute. You have had access to such records as the company kept. Whatever they had in their books, you have seen, have you not? When Mr. Hodge testified about trying to reconstruct something, you have seen that?

Mr. Strachan: I think we have, but we have not seen a copy of the income tax return for the year ended January 31, 1949. Mr. Hodge referred to that in the course of his cross-examination, but we have never seen it.

I want your Honor to understand that I sincerely mean that I am not trying to emphasize any differences between income tax, taxable net income and corporate net income. I am simply trying to get at the facts. I know for capital gain or loss purposes, there are differences, where you have accruals or unrealized expenses.

By and large, the bookkeeping that is done for income [2445] tax purposes should coincide with the bookkeeping for other purposes, and wherever there is a disparity between taxable income and ordinary income, as shown by the books and records, the income tax return itself shows that [2446] reconciliation.

Now, I have several times offered to show what the taxable income was for the reason that we didn't have any other figure available to us. I had thought originally that if there were any adjustments of income for tax purposes necessary to reconcile it with income for other purposes, because that material is available to the plaintiff and is not available to us, that they adduce it, and I am sure they could, because Mr. Hodge had on the witness stand with him a copy of the return for this year in question.

I would like to have that made available to us, and I would like to be able to put it in.

I think it is quite important, over and beyond its probative value as factual evidence, in this: That I am afraid that the jury, because of the rulings that your Honor has made so far, and because of your Honor's explanations that the accounting was for two entirely different purposes and they were unrelated, the jury may have gotten some impressions of what the significance or lack of significance of income tax returns really is. So I would like to suggest to your Honor that we be allowed to examine the income tax return for the year ended January 31, 1949, look at the reconciliation, and that both the corporate income for ordinary purposes and the reconciliation for income tax purposes be shown of record.

The Court: You present in a way two different problems. [2447]

One is whether the return would be admissible in evidence, and that I am certain about, for various reasons. First of all, to use it in evidence would require trying to explain to this jury something about tax laws and tax returns, and all, and we have got enough of a problem with a group of laymen to get them to follow what we have ordinarily been doing, and we would be opening up a second set of principles in certain respects.

Secondly, that period was a period in which the court through its officers operated the business, and therefore whether there was gain or loss introduces evidence too extraneous to have anything to do with the management of this company or the proper use of its facilities, and so forth. Therefore, I don't propose to admit them in evidence.

Now, in your statement you ask that you have access to this as information. Now, that is a little different. The only trouble with your request is that it may get back into what I am trying to avoid.

If, for instance, some matter was handled differently in the income tax return than it was handled in the books, reconstructed books, such as they were, I wouldn't admit the income tax return.

If there appeared thereon information that would be of assistance to you in making a reconstruction, such as Hodge tried to make, that might be different. [2448]

Do you follow me on what might be the use of it and what might not? I mean have I made myself clear? I don't mean whether you agree or not, but have I made myself clear?

Mr. Strachan: I don't know, but I would say you had. I think I understand what you have in mind.

The Court: What is your position now, Mr. Dixon, as to allowing what amounts to discovery of this return filed, reserving until, I suppose, some later ruling what use of it counsel might make? I don't propose to admit it in evidence. But suppose there was information on that return that helped explain something that subsequently appeared in the books? [2449]

Mr. Dixon: Your Honor, I am frank to say at this time when we are in the midst of trial and with the defendants, and I again say this, having been afforded full access to any and all records of this company, it seems to me that it is wholly out of order at this time to require this plaintiff to produce any further records for mere examination of the defendant in this case.

Now, with reference to the particular return, if any, that was made by this corporation for the year 1949, Mr. Hodge informs me he doesn't know whether one was ever filed for this corporation in 1949, but as far as he was concerned, as auditor for the company, he regarded that as the function of the trustee and not the function of the corporation, since during that year the operations were carried on, such as they were, by the trustee under the supervision of the Court.

Now, to ask this plaintiff to try and again go through records, and frankly I don't know where they are, if there is one, and spend a lot of time trying to find something just on the hunch or the surmise of counsel that it might produce something that might in some remote way aid him in proving something that is alleged or is contained in the documents and the balance sheets relied upon by the plaintiff in this case, it seems to me not only irrelevant and immaterial, but it imposes an undue burden upon the plaintiff at this stage of the trial of this case. [2450]

The Court: Was any request heretofore ever made for this particular return?

Mr. Dixon: I don't know, your Honor. Your Honor well knows that whatever they have asked for, and I again say this, the trustee has, if it is available, was available, endeavored to find it and present it to them, and I think the records of the trial in this case and the material and the photostats and everything else that the defendants have of the full and complete records of this plaintiff, clearly show that they have not been denied access at any time to anything.

Now, to come in in the middle of the trial and ask the plaintiff to try to find some tax return for a year in which this company was not even being operated as a company, was under the supervision of this Court, it seems to me is——

The Court: All right. Has a specific request ever been made for that return until now?

Mr. Strachan: We asked for access to all of the documents from the inception of the business down to date, and the ruling was that we were not entitled to those prior to the reorganization proceedings, until the first of December. Our examination of the records that were submitted to us has never shown us the existence of this return.

The Court: Do you know that it exists?

Mr. Strachan: Yes, sir. Mr. Hodge had it on the stand with him, as I understand it. [2451]

Mr. Dixon: Now, just a moment, counsel.

Mr. Strachan: And in addition to that——

Mr. Dixon: Just a moment, please.

The Court: Let Mr. Strachan finish.

Mr. Dixon: All right.

Mr. Strachan: In addition to that, the return for the succeeding year by Mr. Hodge shows what the 1949 return showed as the loss for carry-over purposes. Now, that could only have been taken from a return for the year ended January 31, 1949, and was not picked by Mr. Hodge out of the air.

Mr. Dixon: If the Court please, I don't think that that is what Mr. Hodge testified to at all. Mr. Hodge, if I recall his testimony, said that there was extreme difficulty on his part as auditor for this company in reopening the books.

The Court: Let's question Mr. Hodge.

Mr. Dixon: Yes. He is here and he can answer for himself if your Honor wants to ask him.

The Court: Do you know whether a return for Federal income tax purposes was made for the year, fiscal year ending January 31, 1950? That would be the year, would it not?

Mr. Hodge: It was January 31, 1949, the year in question, your Honor.

The Court: January 31, 1949, yes.

Mr. Hodge: I don't know if it was filed, your Honor. I built one up to get a starting point. I gave the company a [2452] copy of one, according to my records. Whether it was ever filed with the Director of Internal Revenue or the Franchise Tax Board, I don't know, but I did build one up to get a starting point for the new corporation for income tax purposes as best as I could.

The Court: The same as you tried to build up the records of the company?

Mr. Hodge: That's right, sir.

The Court: For the purposes of corporate accounting?

Mr. Hodge: That's right, sir.

Mr. Strachan: And in your return for the year ended January 31, 1950, you showed the 1949 net loss as being the figure that this return which you prepared for the prior year showed to have been the loss for tax purposes, is that correct?

Mr. Hodge: Yes, sir, that is true. I took the figure that I have built up in this return as part of the loss carry-forward computation.

Mr. Strachan: You did carry that figure forward into the next one?

Mr. Hodge: Yes, sir.

Mr. Strachan: That was on the assumption that was the amount that had been returned for the year ended January 31, 1949?

Mr. Hodge: I don't know that it was returned. I know that was the amount I computed. I did make up a return, and [2453] whether the company filed it or not, I do not know.

The Court: Well, I am going to sustain the objection on the ground that the request comes too late, that you have had access to records of this corporation and have been able to search through them and find what you wanted; that there was no specific request that I know of made for income tax returns until now; that the income tax returns are figured upon a different basis, anyhow; that you have the accounting, corporate accounting set up in the records for the succeeding year, and you had the witness Hodge available as to how he set it up; that you have equal access to the records of this Court as to whatever material might there be found as to the plaintiff, and any other valid grounds of objection made by the plaintiff. [2454]

Mr. Strachan: Your Honor, as to the request coming too late, it will not in any manner delay the trial. I believe in a matter of less than two minutes, if I have access to that return, I could make an offer of proof. And I would like to have access to it to make an offer of proof now as to what I would show if permitted to do so.

The Court: What do you think you would show by it?

Mr. Strachan: I believe I would show that there was a corporate loss during that year.

The Court: What would that tend to prove? That for income tax purposes there was a corporate loss during the year during which the Court, through its officers, operated the corporation? What would that tend to prove?

Mr. Strachan: I would show not only the loss for income tax purposes, but I would show the reconciliation between the loss for income tax purposes and the loss for corporate purposes.

The Court: The objection is sustained. You would be going into extraneous issues, and the other reasons I stated.

You have available the books as set up, you have the witness here, you could do the same kind of a job that he tried to do on reconstruction. There were accountants employed by Court officers who kept records during that time. There are Court files as to what went on. He had the problem of trying to set something up, and he has explained here how he did [2455] it.

The objection is sustained.

Mr. Strachan: One other matter that perhaps I should take up now, and that is this proposed stipulation in regard to the forgiveness of Winckler's indebtedness.

I think perhaps we need the good offices of the Court to help us straighten this out.

Mr. Irwin gave me this document this noon. It is entitled, "Summary of Nicholas J. Winckler's Indebtedness Released by Resolution Adopted by Board of Directors of Winckler & Smith Citrus Products Company on June 24, 1949."

That is the typed heading. Somebody has changed it by interlining so that it is a summary of the "alleged" indebtedness. And with reference to the minutes it changes it from reading "Minutes of Winckler & Smith Citrus Products Company on June 24, 1949," to "January 18, 1949, and June 24, 1949."

Mr. Dixon: I will take responsibility for that, counsel.

The Court: Let me see it.

(Document handed to the Court.)

The Court: Do you have a copy, too?

Mr. Strachan: That is the only copy I have.

Mr. Irwin: Here is another copy. I thought I gave you two.

Mr. Dixon: If it please the Court—do you want to read [2456] it first?

The Court: Let me look at it, yes.

What is your dispute—merely the two interlineations made by Mr. Dixon?

Mr. Strachan: No. That is the first one. Actually, the only minutes that refer to the released indebtedness are the June 24, 1949, minutes. The January 18, 1949, transaction was only to provide what would happen if the deal did not go through, and in no way determined that the deal would go through or on what basis.

The next thing that I want to mention is that Item 1 is called "corporation checks to and/or for Louise Campbell," in the amount of $6,778.68.

The fact of the matter is that those checks while they were made payable to Louise Campbell were charged to Winckler's personal account. That was the way the indebtedness against Winckler——

The Court: Who was Louise Campbell?

Mr. Dixon: Your Honor, I am glad to go into this if we have to.

Louise Campbell was the mother of Mr. Goodland, one of the stockholders of this company at the time of its organization, I think in 1946, who, as I understand it, put up some or all of the money which her son put up, and therefore these checks were made payable, I guess, to her because she [2457] was kind of an equitable trustee or owner of the stock.

However, your Honor, if I may make this comment at this time. As the record shows in this case, I have made repeated objections to the introduction of any testimony in connection with this item. Counsel has spent, I would say, almost days here endeavoring in one way of the other to get into this record the fact that somehow on the books of this company when there were just two stockholders, a closed corporation, something was set up and charged against Winckler, which was forgiven on the books of the company. Now, let me direct your Honor's attention to this fact, that all of these items here—and counsel can't deny this, they have made an exhaustive, and exhausting, I might add, examination of the books of this company trying to find something of this kind, and the facts here antedate —I mean insofar as any part of this money is concerned—antedate the trusteeship under Chapter XI, which terminated according to the records of this Court when the sale of the corporate assets was ultimately made some time in April, ultimately confirmed, in April of 1949.

Let me direct your Honor's attention to this fact: That if these items were on the books of the company as an asset of this corporation—it is disputed —but certainly it would be the function of the trustee under Chapter XI, if this was an asset, to handle this asset and do something [2458] about it. Collect it.

The testimony is here through Winckler, the testimony is here through Hodge, that however or upon whaever basis this claim might be said to rest on the books of the company——

The Court: It was forgiven?

Mr. Dixon: ——it was forgiven.

And not only that, your Honor, but it was disposed of as part of the reorganization and the sale of the assets of this company, which had to be confirmed by the Court before the trustee could be discharged under Chapter XI.

Now, why we have to spend hours, and even days, in going into this fact, I am frank to say I just don't understand the relevancy of it, the materiality of it. [2459]

Mr. Strachan: The position Mr. Dixon takes, your Honor, is directly contrary to the position taken by Mr. Irwin and Mr. Walker in the still pending Chapter X proceeding.

The Court: I don't care about inconsistencies. There is no requirement that counsel in one proceeding take the same position he takes in another proceeding. You are a lawyer.

Mr. Strachan: But here is a factual statement.

Mr. Irwin: May I have an exception to that statement?

The Court: You may have an exception, but I am not interested in that.

Mr. Strachan: Just getting at the facts of this thing, here is the verified petition of Mr. Walker setting up the facts, and that's all I want to establish here.

He says this Louise Campbell transaction, that she was the owner of 60 shares of capital stock of the debtor corporation.

That on or about July 9, Nicholas Winckler agreed to purchase the shares; that on July 9, Winckler caused and procured the debtor to pay with its own funds the purchase consideration which he agreed to pay Louise Campbell for said 60 shares, to wit, the total sum of $6,000, and that Winckler caused a certified to be issued to himself and later exchanged that for the other stock, and Winckler has not at any time paid the debtor or at all any part of the $6,000 purchase [2460] consideration for said shares.

And under the date of January 15, 1953, they object to the claim of Winckler.

The Court: What has that to do with it? What does that tend to prove? The ultimate fact has been proved, namely, that there was an asset on the asset side of the ledger of $38,140, but that was crossed off, and therefore on the books of the corporation there was $38,000 less in assets. Now, that is in the record. No dispute about that, and that is the only fact I see is material.

What does all this prove that you are reading to me? Tell me what it tends to prove? What issue in the case?

Mr. Strachan: Well, it is this. There has been an attempt made to show that Winckler didn't owe this money to the corporation after reorganization.

The Court: This was brought out by you on cross. The plaintiff never offered any evidence.

Mr. Strachan: Whether it is brought out on cross or not, it is a fact, your Honor.

The Court: You can't bring out something on cross and then say you have got another issue in the case you have got to meet. If that were true, you could extend the issues of a case forever.

What does this prove, except to prove Winckler is a bad boy? It doesn't prove anything about his ability to run a [2461] citrus plant, does it?

Mr. Strachan: I think it proves he is a bad business man.

The Court: Suppose he defrauded a widow out of this money?

Mr. Strachan: This is quite different.

The Court: Suppose he made a fast deal to get these funds and never lived up to his agreement? What does that prove?

I am sorry now I let any of this go in the record about what this was and didn't limit you to the proof there was a $38,000 asset and that was forgiven and that decreased the assets of the company in that amount.

Mr. Strachan: Well, we have been trying to stipulate as to the composition of this. If we could get a stipulation, it could go in and that would be the end of it.

The Court: I have changed my mind. I am not going to let it in even as a stipulation as to what it is composed of.

Mr. Strachan: Well, if permitted so to do I would show by the witness now on the stand in part——

The Court: By your CPA, Mr. Lynch?

Mr. Strachan: That's right.

The Court: All right.

Mr. Strachan: That on March 7, 1946, Bernard J. Smith was the owner of 376 shares of the debtor's capital stock [2462] and of certificate No. 2 which the debtor issued on or about April 5, 1946, in the name of Bernard J. Smith for said 376 shares.

That on March 7, 1949, Nicholas J. Winckler, Bernard J. Smith and the debtor entered into and executed a contract in writing wherein and whereby said parties agreed that Bernard J. Smith should sell said 376 shares for the sum of $10,000 to Nicholas Winckler and/or his nominee, or that the debtor should retire said 376 shares as soon as Bernard J. Smith received said purchase consideration.

That Nicholas J. Winckler caused and procured the debtor to pay said purchase consideration for said 376 shares with its own funds.

That after the debtor had paid such purchase consideration in full, to wit, on October 28, 1949, Nicholas J. Winckler caused and procured the debtor to issue certificate No. 8 for said 376 shares in the name of Nicholas J. Winckler.

That thereafter Nicholas J. Winckler exchanged such 376 shares evidenced by certificate No. 8 for 118,477 shares of the debtor's common stock; that said 118,477 shares were shares issued to him for which Winckler has not at any time paid the debtor or at all any part of the $10,000 purchase consideration for the said shares; and that that $10,000 was a part of the $38,800 of indebtedness forgiven pursuant to the directors' resolution of June 24, [2463] 1949.

Mr. Dixon: If the Court please, before we are through with this offer of proof, I would like to ask counsel a question.

Do you represent to this court, counsel, that this witness, if called, would testify of his own knowledge of the offer of proof which you have just made to this court, or were you reading the offer of proof from a record in this court representing a claim or an application filed by the trustee in this action which was ultimately dismissed?

I would like the record to show your answer to that question. The objection, rather.

Mr. Strachan: I was reading it from the verified objections by Ronald Walker, Trustee, to the allowance of Nicholas J. Winckler's claim, and it is my offer to prove substantially those facts by the witness now on direct examination.

The Court: Do you represent that this witness could testify to all those facts?

Mr. Dixon: And of his own knowledge?

Mr. Strachan: From the books and records.

I am advised by the witness he can show the payment of $10,000, that the stock transfer records submitted to him show the transfers of the stock referred to, and the records also show that the $10,000 used in the purchase of that stock was advanced by the corporation. [2464]

The Court: I asked specifically, can he testify to all the things you stated in your offer of proof? You can answer that yes or no.

Mr. Strachan: I will ask him if there is anything there he can't.

The Court: All right.

Mr. Dixon: The attorney for the trustee is right here, counsel, who filed the application that you are reading from.

The Court: Well, we are wasting time. Let's assume that he could. I have my doubts about it, but let's assume the witness could testify to those facts. We are off on a tangent again, assuming he could testify to the facts.

Mr. Strachan: That is my assumption. I was just checking it.

The Court: Your objection is as heretofore stated, on the various grounds as heretofore stated?

Mr. Dixon: Yes, your Honor; that the representation could not be supported by this witness.

The Court: And you incorporate your further objections heretofore made in discussing this?

Mr. Dixon: I do, your Honor.

The Court: Materiality, and so forth?

Mr. Dixon: I do, your Honor.

The Court: Objection sustained to the offer of proof. The clerk will mark as Exhibit BM for identification, as [2465] next in line for identification, the slip apparently prepared by Mr. Irwin and worked over by Mr. Dixon, which is what the plaintiff was prepared to stipulate to if this was material.

Is that a fair statement of what the document is?

Mr. Strachan: And which, according to my understanding of the facts and my offer of proof, is not——

The Court: You don't accept it?

Mr. Strachan: I wouldn't accept that as a stipulation.

The Court: I merely want it identified. It is not in evidence. It is merely in the record. My ruling is the same, whether you stipulated to this or whether you reworked it and put it in stipulation form. My ruling is the matter is not material to the issues in the case and your offer of proof is rejected.

The ultimate fact that has bearing is that there was an asset of $38,000 which was forgiven, and when it was forgiven the assets of the corporation were decreased by the $38,000, and that is shown in the record. There is no dispute. I am not concerned with how that asset came into being or did not come into being. I am not concerned with whether Winckler was a bad boy or was not. [2466]

The matter, if gone into, would inject far more extensive issues which would lead us nowhere, because ultimately it all boils down to the same thing, that the asset was eliminated by forgiveness of debt.

And on the further ground that your offer of proof concerned testimony of what might be said to be the juggling of shares, which ultimately did not change the outstanding number of shares in the corporation. It is merely a question of who held the shares. And the question of who held the shares, or what they paid for them in transactions one with the other, is not an issue in the case.

You will not be precluded, and have not been precluded, from showing what physical assets were behind the outstanding shares of the company.

You have done that already, and you are going to do it for 1951, I am sure.

As to who held them, or whether one shareholder robbed another, or whether there was value exchanged between them makes no ultimate difference in the net result of so many shares outstanding, so much value behind the shares.

Those are my reasons, plus the other reasons stated in the objections of counsel.

Mr. Strachan: For the sake of having the record on this whole matter consecutive, I would like to have marked as an exhibit the Objections to Allowance of Claim that I [2467] have just referred to, which bear a stamp mark showing Filed with the Referee on January 19, 1953.

The Court: The same objections, I take it?

Mr. Dixon: Yes, your Honor, the same objections.

The Court: Same ruling, BN for identification.

(The exhibit referred to was marked Defendants' Exhibit BN for identification.)

The Court: You are offering it, I take it?

Mr. Strachan: Yes.

The Court: The objection is sutained to it.

Mr. Strachan: Mr. Dixon did mention, in connection with that, that the objections were subsequently withdrawn?

Mr. Irwin: Dismissed with the approval of Referee Head on a showing by the trustee that he was unable to obtain evidence to sustain the allegations.

The Court: In other words, this Objection to the Claim of Winckler, which is BN for identification——

Mr. Irwin: May I state, your Honor, it was not an objection to a claim for indebtedness, but an objection to the allowance of Mr. Winckler's claim of ownership of the stock for which this money was used to purchase.

The Court: All right. The claim was then withdrawn——

Mr. Strachan: No. The objection.

The Court: The objection was then withdrawn and approved by the referee, on the representations of the trustee [2468] that he couldn't prove the allegations?

Mr. Irwin: That is true. The showing was made before Referee Head, and he made the order permitting us to withdraw the objections.

The Court: Those are the same allegations that Mr. Strachan offered to prove by the witness Lynch?

Mr. Irwin: I presume so.

Mr. Strachan: What was the date of that order?

Mr. Irwin: I would have to look it up. Speaking very roughly from memory, it was within the past year.

The Court: Well, Mr. Lynch apparently would have been a very valuable witness to you had he been available at that time, Mr. Irwin.

Mr. Irwin: May I say that I would like to have had him as a witness at that hearing.

Mr. Strachan: I believe that the date was April 8th. Can we stipulate to that, subject to being checked?

The Court: April 8, '55?

Mr. Strachan: Yes.

Mr. Irwin: My guess was better than I thought. I think that is about the time.

The Court: So stipulated, subject to correction if either counsel wants to verify the date. [2469]

* * *

JOHN A. LYNCH

a witness by and on behalf of the defendants, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Strachan:

Q. Referring again to Exhibit 61, and referring to the balance sheet which is a part of Exhibit 61, you mentioned the items appearing on that balance sheet which from your examination of the records submitted to you should be explained?

A. I did.

Q. What did you say?

A. I thought you asked me if I had made the explanation. I said I had.

Q. Did you mention the deficit that is shown on the balance sheet as of January 31, 1949?

The Court: He described what made up the figure——

Q. (By Mr. Strachan): As it appears on Exhibit 61, which is the same as G? [2471]

A. That is correct, I itemized the amount to be the accummulation of the losses for the period adjusted for and to reflect the reorganization items which took place in the year ended January 31, 1950. And based on the adjustments, which I enumerated, the loss of $169,000 on the assets, and the forgiveness of $38,000, minus the accummulated loss to date, or to the beginning of the year, would be

(Testimony of John A. Lynch.)

$135,000. That would leave an approximate loss for 1949 of about $85,000 to $90,000, as shown in this deficit account.

The Court: Do you mean for the year ending January, 1949?

The Witness: That is correct, your Honor.

By the term of the deficit, accounting for all items except '49, it would indicate that for the year ended prior to this report, or for the year ended January 31, 1949, the loss would have been approximately eighty-five to ninety thousand dollars.

Q. (By Mr. Strachan): Now, will you refer to the balance sheet and income account for January 31, 1951?

Mr. Figg, that was marked once as a part of Exhibit B. I think there is probably a plaintiff's exhibit identical with.

The Court: The year ending January 31, '51?

Mr. Strachan: Yes.

The Court: 63 is a balance sheet and statement of assets [2472] and income account.

The Clerk: 63 is in evidence, except we only have one copy of it.

I beg your pardon. We do have multiple copies of that.

The Court: Pass them out.

Q. (By Mr. Strachan): Mr. Lynch, will you refer to the balance sheet as of January 31, 1951, and call attention to items thereon which, based upon your experience and examination of the records, should be explained?

(Testimony of John A. Lynch.)

A. My attention would be directed first to the ratio of the current assets and current liabilities. In this instance the current assets exceed the current liabilities by approximately $16,000. Referring back to the year previous where the current assets exceeded current liabilities by $65,000, it is obvious that the current ratio is declining. In this case the cash on hand was sufficient to pay immediate current liabilities and showed that their cash position was satisfactory.

The examination of the fixed assets reflects, and from my own examination, refilects that these assets are recorded on the books at cost.

Referring down to "Other Assets," there are questionable items being carried on the balance sheet to improve its appearance——

Mr. Dixon: If the court please, I object to those comments [2473] of the witness, "improve its appearance."

The Court: This is his opinion now. An expert witness can give his opinion.

Mr. Dixon: I am sorry.

Q. (By Mr. Strachan): Will you mention one such item and explain the reasons why you regard it as questionable to carry it as an asset?

A. The deferred promotion expense, which our examination developed was made up of advertising and salesmen's salaries, is an item which is a current expense for the year in question. The accounting system and the cost system was not such that you could have isolated any salesmen's travel or salesmen's salary, whichever it embraced, to pinpoint to any specific product, as was set forth in the comments accompanying the report.

The comments on the report indicated that the amount represented promotional expense on behalf of citrus products, lemonade and orangeade.

Our review of the sales for the period and for the subsequent period reflect that they deferred more promotional expense than they had total sales of those products for the whole subsequent year.

Q. Is that all of that item?

A. I was going to make the statement that it is not normal accounting procedure to ever capitalize adminstrative [2474] expense or selling expense.

Q. What would be the normal treatment of that item?

A. The normal treatment would be to charge it to the income statement for the period in which the expense had been incurred. [2475]

Q. Now, is there any other item in that "other assets" classification?

A. Yes. There is an unabsorbed preseasonal expense of $22,443.

Q. Did your examination of the books and records indicate to you the nature of the items that were called preseason expenses?

A. Yes, it did. The examination reflected that this was nothing but unabsorbed overhead for the current year's business. Unabsorbed overhead is a term applied by accountants to represent the accumulation of plant expenses which was not through their cost system taken into inventory. It represents the excess accumulated plant expenses for the year or the excess cost of manufacturing as compared to the realization from sales. It is a current expense which to my thinking it should be included as an asset and would have been taken through the inventory and those inventories in turn would have been marked down to realizable value, and it would have ended up in profit and loss either directly by a chargeoff or write-down of the inventory prior to the statement.

The Court These notes will be supplied, I take it, the same as the other ones? Maybe they are marked.

Mr. Strachan: It seems to me we had some understanding when Mr. Hodge was on the witness stand in that respect. I think perhaps the notes were made a part of the exhibit. [2476] I am not sure.

The Clerk: They are in 63-A and also in B.

The Court: We have two exhibits marked for identification, each of which has a note. One is 63-A and the other is B.

Mr. Strachan: Are they both the same?

The Court: As I see it, they are both the same. One is the defendants' number and one is the plaintiff's number. You can have your choice. Does anybody want to offer them?

Mr. Dixon: I will offer 63-A, your Honor, just to get it in the record.

Mr. Strachan: No objection.

(Testimony of John A. Lynch.)

The Court: All right. 63-A in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 63-A, was received in evidence.)

The Witness: Further examination of this statement and of this item reflects that this is a departure from consistent accounting practice with respect to this company, without any comment relative thereto in the report.

Q. (By Mr. Strachan): Can you cite prior inconsistent treatment?

A. There was for prior years, there was no such asset as deferred promotion expenses or unabsorbed preseason expenses. If there were, they were charged directly into profit and loss for the year in question. [2477]

As I recall from the examination, this 22,000 of unabsorbed preseason expenses constituted approximately $19,268 of unabsorbed factory expenses, and the balance represented a proration of, I believe it was sales salaries, which definitely could not be isolated on the books. I may be wrong on that, whether it represented sales or plant. I think it represented sales expenses and sales travel, sales salary and sales travel. There was no way on the books one could either through a cost analysis or from information contained in the records, isolate the salesmen's expense or travel as being applicable to any specific item, whether it was grapefruit, orange juice or factory expense, for any purpose. The next item——

Q. Before you leave that item, will you tell the court and jury how that expense that is here classified as unabsorbed preseason expense would normally be handled as an accounting matter?

A. It is nothing more than the variation, or the actual cost of producing over and above what is set as a theoretical standard cost. Under a standard cost system a corporation will charge into its cost of sale a theoretical unit price for the cost of manufacture. If there is any deviation from that theoretical price, whether by price deviation or by quantity deviation, the amount is charged into an unabsorbed factory overhead expense, and then at the end of the year it [2478] is just closed into the expense account again.

Q. As profit or loss?

A. As an actual loss. If it is under-absorbed, it is taken into additional income. If it is over-absorbed, it is additional expense.

Q. Is there any other item classified as an asset that is not normally handled that way?

A. Yes, the advance to employees, $3,550. Our examination reflected that was a bonus arrangement whereby $2,080 was expensed to Mr. Winckler in June, and another $1,500 check in September, and it was charged to officers' bonus. Subsequent thereto, the items were reversed and set up as an asset.

Then subsequent thereto again they were reversed again and charged as officers' bonus again in a subsequent period.

(Testimony of John A. Lynch.)

Q. How would normal accounting procedure deal with that transaction?

A. As it was originally treated before the reversal on the books. It would have been charged as an expense, administrative expense, officers' bonus, or as a selling expense, officers' bonus, depending on which category the bonus was applicable.

Q. If those three items had been dealt with in what you have described as the normal accounting procedure, what would have been the effect on the balance sheet? [2479]

A. The aggregate of those abnormal expenses, or not abnormal expenses, but abnormal treatment of such expenses, if applied to the profit and loss for the year ending January 31, 1951, would have shown a loss of $10,000 or thereabout, as against the profit that was shown for the year of $40,000.

The total of those assets deferred, or the expenses deferred, I should say, aggregate $50,000, which was more than the profit for the period.

Q. Have you any items in the capital stock and deficit account other than the profit item that your experience and examination of the records would indicate should be commented on?

A. The deficit of January 31, 1951, as shown there——

The Court: That should be corrected to 1950.

The Witness: That should be 1950. That is what I was going to comment.

The Court: It was supposed to be corrected on all the copies.

(Testimony of John A. Lynch.)

The Jury: It is.

The Witness: I am sorry. That represents the accumulation of losses from the period beginning February 1, 1947, to date, adjusted for any reorganization expenses that took place subsequent or prior to January 31, 1949. I am referring to the capital wherein the debts were forgiven to the amount [2480] of $205,000 which had been credited there against.

The Court: You are talking now about a prior year?

The Witness: I am talking about the period from the inception of the corporation to date, after giving consideration to $205,000 of forgiveness of indebtedness.

Q. (By Mr. Strachan): So that except for that liquidation of debts at less than face value, $205,000, you have no net worth as of this date, is that correct?

A. It would be wiped out. It would be further wiped out, of course, if I took the $50,000 of deferred assets out, too.

Q. That, too, is included in the capital and surplus account? A. That's right.

The next deficit here is 62,000. The 50,000 write-off would amount to another total of 112,000. The forgiveness of 205 would make it 317,000, which would mean the wiping out of the capital stock at that date.

Q. The next balance sheet I would like to have you refer to is that of July 31, 1951, which I suppose is Plaintiff's Exhibit 64.

The Court: 64?

The Clerk: Do you want 64 passed to the jury?

The Court: Yes. That is what you want, isn't it? Do you want 64 passed to the jury? [2481]

Mr. Strachan: Yes, please.

The Court: 64-A is the complete statement with the notes attached to it.

Mr. Dixon: Is that in evidence, your Honor?

The Court: No. It is just for identification.

Mr. Dixon: We will offer it then so the notes will be there in the record.

The Court: 64-A received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 64-A, was received in evidence.)

Q. (Mr. Strachan): Now, will you explain Exhibit 64, the balance sheet at mid-year 1951, referring to matters worthy of comment based on your examination of the documents and upon your experience?

A. I would again direct my attention to the current ratios, which is the current assets as compared with the current liabilities. In accountants' terminology, the corporation at this time was insolvent. It had current assets of $100,000, represented by various items, receivables, inventory, supplies, and so forth. If they had been converted to cash at that very moment for working capital purposes, they

(Testimony of John A. Lynch.)

could not have paid off the obligations which would normally come due in the 30-day period.

Reference to the cash on hand and in banks reflects there was insufficient cash to pay the payroll taxes for [2482] the period just ended.

Inventory had been pledged. The items were—the accounts receivable had been discounted. The position at this point obviously was hazardous from a financial standpoint.

The fixed assets at this stage reflects $721,000 of value. Our examination reflected this to be a hybrid of cost and appraisal.

Mr. Dixon: What?

The Witness: A hybrid, h-y-b-r-i-d.

Mr. Dixon: A hybrid. I got that, but what was the other?

The Witness: Of cost and appraisal.

Mr. Dixon: Hybrid of cost——

The Witness: And appraisal.

Q. (By Mr. Strachan): Will you describe what you mean by that so Mr. Dixon and I and the jury can understand?

A. The prior year's statements reflected the fixed assets which were purchased by the corporation during the period when they were renting the plant to be represented at cost. The accumulation of all these assets were at cost. The purchase of the plant took place in April, 1951, for approximately $200,000. The $200,000 plus the accumulated fixed assets of $97,000 were then reflected in this statement at $721,000.

(Testimony of John A. Lynch.)

Now, reference back to the prior statements will show [2483] that the tools were carried at cost on the previous balance and are also carried at cost on this balance sheet.

Reference to other items would show us that the appraisal was only applicable to certain items, and this total fixed assets figure embraces both cost and appraisal.

Q. And doesn't distinguish between the two?

A. It does not.

Q. Did you check through the appraisal with respect to certain specific assets for the purpose of ascertaining to what extent the write-up had been applied to the particular assets?

A. Yes, we did.

Q. Will you mention some of the items you checked through?

A. We checked various items. It was difficult to follow through the additions, but I remember a concentrator on the first—well, I had better check. I am not sure it was a concentrator.

Mr. Dixon: May I have the question?

(Record read.)

The Witness: We prepared a list that partially identified the items during each subsequent appraisel.

Mr. Dixon: May the record show what appraisal you are referring to, Mr. Witness?

The Witness: The first appraisal will be March

(Testimony of John A. Lynch.)

18, [2484] 1946. The second appraisal is February 17, 1950, and the third appraisal——

Mr. Dixon: Those are plaintiff's exhibits——

The Witness: ——January 12, 1951.

Mr. Dixon: 51 and 68.

The Witness: Specifically, one item I have here, a concentrator, part steel jacket, five feet zero inches diameter by 12 feet zero inches high, and further description here——

Mr. Dixon: Which one are you reading from, Mr. Witness?

The Witness: The 1946 one, page 37. Page 29 is the typed figure.

Mr. Dixon: What is the item?

The Witness: A concentrator, part steel jacket, five feet zero inches diameter by 12 feet zero inches.

Mr. Dixon: Yes, I have it.

The Witness: Is represented at a sound value of $30,000. A subsequent appraisal, February 17, 1950, page 22, a steam concentrator, steel jacket, five feet zero inches diameted by 12 feet zero inches high, 500-gallon capacity, sound value represented $65,000.

Mr. Dixon: What page again?

The Witness: Page 22 on the second appraisal.

Mr. Dixon: Page 22?

The Witness That is correct.

Mr. Dixon Go ahead.

The Witness: Do you want me to name some more, Mr. [2485] Strachan, or try to identify some others?

(Testimony of John A. Lynch.)

Q. (By Mr. Strachan): Do you have any readily identifiable there?

A. I had a few items listed, but I don't know what I did with the sheet.

Mr. Dixon: May I inquire, if it please the court, the purpose of this examination?

Is this witness purporting to question the appraisal value placed upon this particular item by the appraiser who has testified concerning the appraisal made?

I am frank to say I don't understand the purpose of the question, unless it is that. And if it is, I object because I don't think this witness is competent to testify as to value or to question values.

The Court: Well, I wasn't following too closely whether this was some item that had been appraised at five thousand and then sixty-five thousand.

Mr. Strachan: It is to show the successive mark-ups of the same piece of equipment, as illustrative of the method used by the appraiser.

The Court: There is no dispute but what there were mark-ups on the appraisal. So, therefore, nothing would be served by pointing out particular mark-ups, since the over-all appraisal resulted in a mark-up.

You don't propose to use this man as an expert witness on value—or do you? [2486]

Mr. Strachan: He is just tracing through illustrative ones to show what the appraiser did.

Mr. Dixon: Then I object.

The Court Objection sustained.

(Testimony of John A. Lynch.)

Q. (By Mr. Strachan): Mr. Lynch, what was the total amount of the write-up by appraisal method of the assets as reflected on this balance sheet, and as derived from the prior balance sheet?

A. Approximately $439,000.

Q. That was from what cost to what appraised value?

A. The cost of the assets reflected in this fixed assets section totaled approximately $297,000.

Q. And they were written up to what?

A. Written up to a net after depreciation for the period of $721,000.

Q. What was the effect of that write-up with respect to the apparent or stated net worth of the corporation as of July 31, 1951?

A. The effect of the write-up was to increase net worth by $439,000. The figure of $622,000 in the net worth section is after the write-up of the $439,000. The capital surplus here arising from the appraisal of fixed assets in the reorganization of the company represents a figure after transfer of $75,000 to the common stock to account for the 315,110 shares of $1.00 par value issued in exchange for [2487] 1,000 shares of no par value stock, which had previously been carried at $240,697.22.

Q. So that 75,000 is the difference between the old capital value of the common stock and the stated par value of the stock that was issued in exchange for it? A. Yes.

Q. Mr. Lynch, Exhibit 64 shows an operating

(Testimony of John A. Lynch.)

deficit of $201,649. Did your examination of the records indicate any matter worthy of comment on that stated operating deficit?

A. The operating deficit of July 31st is after inclusion of an operating loss of July 31st of $148,000. It represents the accumulated operating deficit which was reflected on the prior exhibit of January 31, 1951—excuse me, an operating profit of the previous exhibit of 63 and the previous exhibit in 1950 of 61. To summarize, the profit as shown on 61 of $121,000, plus the profit shown on 63 of 40,000, makes a total profit of 161,000, and a loss of 148,000 in July, 1951, would still leave a net operating profit, whereas it is shown as a net operating deficit of $201,649.17. Which indicates an accumulation from the inception of the corporation to show the continuity of this corporation as being one enterprise from February 1, 1947.

Q. So that that operating deficit goes back how far, is an accumulation from how far back in the history of the business? [2488]

A. From February 1st, 1947. [2489]

* * *

The Court: All right. The record will show the jury present in their proper places. Proceed, Mr. Strachan.

Mr. Strachan: Mr. Figg, is the income account and the balance sheet as at January 31, 1952, Exhibit 65?

The Clerk: 65.

(Testimony of John A. Lynch.)

Mr. Strachan: I want to refer to that next and have it distributed.

The Court All right. [2491]

Q. (By Mr. Strachan): Mr. Lynch, referring to Exhibit 65, I will ask you to point out, based on your experience and on your examination of the records, what should be called to the jury's attention from an accounting point of view?

A. Exhibit 65 reflects the operations and the position of the corporation at January 31, 1952.

The current position of the company at this time has been more aggravated and the current assets approximate only one-quarter of the current liabilities.

The cash figure of $2,000 is only 20 per cent of the payroll taxes which are due and payable.

The fixed assets in this report are still reflected at the appraised value, which includes the write-up of $439,000, without disclosure as to the amount of such write-up in the report accompanying the financial statements.

The capital stock and surplus amounts reflect the preferred stock at $170,000, $153,000 of which is offset by the fixed assets shown as $699,000.

The par value of common stock again reflects the par value which is after transfer of $75,000 of the write-up to the par value of the stock, indicating a paid-in amount of that amount, $315,110.

The capital surplus stated at $322,000 reflects the net of the write-up of $439,000, plus the $205,000 forgiveness of indebtedness from the prior bankruptcy, minus the loss of [2492] $169,000 in the

(Testimony of John A. Lynch.)

year ending January 31, 1950, and the $38,140 of forgiveness.

The operating deficit of 237,000 is shown exclusive of the items which I have previously commented on of $200,000, which is included in the capital surplus.

The report itself, from my previous examination, our examintion reflected that the report dated March 18 portrays the net worth of $570,000 approximately one month after the corporation had by resolution adopted a petition in bankruptcy.

The Court: The report is H for identification, the report referred to by the witness. It is not in evidence.

Mr. Strachan: In order to give it comparable treatment with the other reports, perhaps it should be 65-A.

The Court: 65-A.

Mr. Dixon: We will offer it, your Honor.

The Court: 65-A received in evidence.

(The exhibit referred to marked Plaintiff's Exhibit 65-A, was received in evidence.)

Q. (By Mr. Strachan): Is it normal auditing practice to examine the corporate minutes of a corporation under examination?

A. It is standard auditing procedure to examine corporate minutes prior to issuance of any corporate report.

Q. Is it standard procedure in such a report to make [2493] reference to any matters appearing in

(Testimony of John A. Lynch.)

the corporate records which would have a bearing upon the apparent financial condition as shown in the income account or balance sheet?

A. Disclosure of pertinent items and pertinent facts necessary for the proper interpretation of a financial statement is a tenet and is fundamental to the practice of certified public accounting. [2494]

Q. In your opinion the preparation of this report did not adhere to that?

A. It did not properly disclose facts which were essential to anyone reading the report.

Mr. Dixon: If the court please, I think he should specify what facts he is referring to.

Mr. Strachan: That is all right.

The Witness: It purports to show a net worth of $570,000 at a date subsequent to an adoption of a resolution on behalf of the officers that the corporation was bankrupt, and that they intended to file a petition in the bankruptcy Court. It reflects a $570,000 net worth one day prior to the actual filing of such petition in the Bankruptcy Court.

That is a disclosure that should be noted in the report which was issued on March 18, 1952.

Q. (By Mr. Strachan): Should it further be disclosed, in accordance with that tenet, that the major part of that net worth as stated was the result of write-ups, rather than investment?

A. The extent of the write-up by appraisal should be shown in accordance with policy formulated by the American Institute of Accountants, and as such should have been expressed in the report. [2495]

* * *

Mr. Witness, Exhibit BB you prepared from other of the exhibits here in evidence?

The Witness: I prepared them from the reports of Mr. Hodge.

The Court: You prepared them from exhibits here in evidence, did you not?

The Witness: Yes, your Honor.

The Court: And you have limited yourself to current assets and current liabilities?

The Witness: That is correct.

The Court: And subject to correction, your figures are correct?

The Witness: That is correct. [2496]

The Court: Is it offered in evidence?

Mr. Strachan: I should like to—yes, it is offered in evidence.

The Court: Exhibit BB in evidence.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit BB.)

The Court: Now, ladies and gentlemen of the jury, this, again, is one of these exhibits for illustrative purposes. It is based upon other exhibits, other matters in evidence, so you would have to go back to the others for the actual evidence. But this is for illustrative purposes, similar to exhibits which the plaintiff used.

(Testimony of John A. Lynch.)

Q. (By Mr. Strachan): Mr. Lynch, there are three pages to this exhibit. Will you explain to the jury how the last page of the exhibit was prepared and what it is intended to show?

A. The last page of the exhibit was prepared from the exhibits which I just discussed and which are in evidence, and represents the transfer to this exhibit of the identical figures reflected on the exhibits as of the date outlined in the heading of each column. It represents the total current assets for the period subsequent to the reorganization, and it represents the current liabilities for the period subsequent to the reorganization, showing the net difference between the current assets and the current liabilities by years [2497] or by accounting periods.

Q. Taking the second, next to the last sheet, will you explain how that was prepared?

A. That was prepared from the exhibits in evidence and represents a manual transfer of the items under the current assets of the exhibits for each accounting period, and reflects, also, the current liabilities for each accounting period taken from those exhibits.

The Court: Prior to the reorganization?

The Witness: Prior to the reorganization.

The net summary of them representing the net current assets or deficiency in that current assets for each period.

Q. (By Mr. Strachan): Then the top page is

(Testimony of John A. Lynch.)

a summation of the other two pages that you have just described? A. That is correct.

Q. Will you point out what is the significance, based on your experience and examination of the records and other documents referred to, what is the significance of the facts appearing on the face of the top sheet of Exhibit BB?

A. The comparison of these schedules prior to reorganization and subsequent to the reorganization shows a definite pattern or business cycle where the deficiency—in the first instance, the deficiency and assets, current assets, accumulate to the point of bankruptcy. In the second section, which is after the reorganization, the net current [2498] assets are depleted, and a deficiency accumulates again to the point of bankruptcy.

It shows a pattern where the assets are dissipated, or the net working capital becomes deficient in each subsequent accounting period.

Mr. Strachan: I would like to have the document marked BC distributed.

The Court: Mr. Witness, BC is again made up from other financial exhibits already in evidence?

The Witness: That is correct, plus some additional knowledge that was gleaned from the books and records.

The Court: Well, that is shown in what column—the last column?

The Witness: No. In the first two columns. It is gleaned from these exhibts, but where the account

(Testimony of John A. Lynch.)

was not fully explained, we had to go to the books to find out what it represented.

Mr. Strachan: I think a little explanation is in order there, Judge.

The Court: All right.

Distribute the copies.

Q. (By Mr. Strachan): Mr. Lynch, was Exhibit BC prepared by you or under your direction and supervision? A. It was.

Q. It says that it is a comparison of total current [2499] assets and total current liabilities showing net current assets and current ratio; and it shows those by months, does it not?

A. That is correct.

Q. In the last previous exhibit, your statement of assets and liabilities was taken, as stated, directly from what we might call the Hodge audit report, is that correct? A. That is correct. [2500]

Q. Is that true of this exhibit?

A. That is true, with some refinement of items classified as other assets. In accounting terminology, current assets and current liabilities are items which would ordinarily be converted within a period of 12 months. Such current assets include prepaid rent, prepaid insurance and taxes, all prepayments which in reality would have been paid in the normal course of business within a 12-month period.

Q. Can you illustrate to the jury what difference your treatment made from the treatment given by Mr. Hodge?

A. Well, we classified the other assets of pre-

(Testimony of John A. Lynch.)
paid rent, prepaid insurance, prepaid royalties, unexpired insurance, as current assets to favor the current ratio position. They are technically current assets and we so include them.

Q. So that to the extent that you gave different treatment to the current assets and current liabilities, your treatment was more favorable and showed a stronger current position than did Mr. Hodge sometimes show, is that correct?

A. Well, that would be the result by adding any amount to the current assets, it would be more favorable.

Q. You didn't add anything to the current liabilities in any case?

A. No, I did not. There were none. The only exception [2501] from adding the total of other assets to the current assets was such items as prepaid officers' bonus, which in reality we interpreted as being accounts receivable, officers, as deferred or other assets.

The Court: You took that away?

The Witness: Such items as organization expenses, which weren't current assets, they were expenditures made at the time of the incorporation of the plaintiff, we didn't add those items. We only added strictly what in accounting terminology are current assets.

The Court: What about the prepaid promotional expenses?

The Witness: No. Those items I commented on previously, prepaid promotional expenses and unabsorbed factory expenses, those items I commented on in previous testimony, I did not include. I only included the items which in correct accounting procedure would be included.

The Court: This is a computation of current assets and liabilities based on your judgment as a CPA as to how it should be done?

The Witness: That is correct.

The Court: In addition to adding assets you have taken away assets?

The Witness: No, your Honor. I haven't taken away any assets from the current section up here. I have only added items. [2502]

The Court: Where did the prepaid promotional expenses appear?

The Witness: It appears in other assets at the bottom. It never did appear in current assets.

Q. (By Mr. Strachan): Mr. Hodge didn't classify those as current assets, did he?

The Witness: No.

The Court: All right.

The Witness: We just added specific items to current assets.

Q. (By Mr. Strachan): Referring to this exhibit, will you explain to the jury what, based on your experience, is the significance of the showing there made?

A. The normal requirements for adequate working capital and the rule-of-thumb method is the current position of two to one is ordinary and necessary for the active conduct of a business. We prepared

(Testimony of John A. Lynch.)

this schedule to show at what point and how frequently the normal two to one current ratio was maintained or reached. This schedule shows that during the entire history of the corporation from the time of its reorganization, the plaintiff only had a ratio of two to one or better in only three months of the period. This reflects that as of March 31, 1951, the current ratio was down to 1.06 to one, which included such items as supplies and inventories normally classified as current assets and had to be converted into [2503] liabilities.

As of April 30, 1951, the plaintiff or the corporation had a deficiency of current assets in an amount of $51,343.41.

In other words, at that date it could not meet its current liabilities to the extent of $51,000, and it had gone below even the original current position at the inception of the corporation.

Mr. Strachan: If I haven't already offered Exhibit BC, I will offer it now, your Honor.

The Court: BC received in evidence.

(The exhibit referred to, marked Defendants' Exhibit BC, was received in evidence.)

Mr. Strachan: I would now like to have Exhibit BD distributed.

The Court: Distribute BD.

Mr. Witness, is BD based on exhibits in evidence here?

The Witness: As adjusted by our examination, your Honor.

(Testimony of John A. Lynch.)

The Court: All right.

Q. (By Mr. Strachan): Mr. Lynch, is Exhibit BD prepared by you and under your direction and supervision? A. Yes, sir.

Q. As I understand it, it is a comparative statement of the income and profit and loss of Winckler & Smith by years from the year ended January 31, 1950, and for the three successive fiscal [2504] years? A. That is correct.

Q. And each year's profit and loss statement is set up vertically so that they can be compared year by year? A. That is correct.

Q. Will you tell in what manner you prepared these income accounts which differ in results in some respects from Mr. Hodge?

A. Our examination of the records and books was made independent of the exhibits previously referred to, and adjustments were made by us which are reflected here. This statement reflects the segregation of the Florida operations from the California operations, and except for an adjustment on depreciation, which is cumulative through each year, the changes include the proper charge of the loss to operations in the amount of 169,000. It includes the charge of the $38,140.33 to operations, and it includes the charge in our opinion into the proper year when such charge should have been absorbed by operations. I am referring to the deferred promotional expense, the unabsorbed factory expense, and any bonus accounts. They are handled

(Testimony of John A. Lynch.)

on this exhibit in the year in which it was our opinion they were properly categorized.

Q. Take the year ended January 31, 1950. I take it that red figure at the foot of that column, $91,220.20, is your statement of the net loss to the corporation for that [2505] fiscal year?

A. That is correct.

Q. And is that based directly upon the books and records of account that you examined?

A. That is based on the books and records as we examined them adjusted for the account to which we felt the items should have been charged.

Q. Those adjustments were made in accordance with usual and ordinary accounting practices, is that correct? A. That is correct.

Q. So that the figure of $91,220 loss is the net loss for the period as shown by the books and reflected through standard accounting procedure?

A. As reflected by the books adjusted by us, the loss, as I told you before, was charged to surplus account instead of to the profit and loss account. The $169,000 did not get charged to the profit and loss account. It was charged to the surplus account. The whole operation here, including our balance sheet, is as reflected by the books, the two of them together.

Q. Now, with respect to the year ended January 31, 1951, you show there, a net loss in a red figure of $14,203.20. A. That is correct.

Q. Is that again a statement of the net loss on the profit and loss statement constructed directly

(Testimony of John A. Lynch.)

from the books [2506] and records in accordance with correct accounting principles?

A. That is correct.

Q. Now, with respect to the year ended January 31, 1952, the year ended then—let me go back to the figure of 14,000. Is that the net income or loss from Florida or all operations?

A. That is a combination of both.

Q. Will you show us of what components that is made up, referring separately to the California and to the Florida operations?

A. About one-third up from the bottom of the page is an item, net income or loss, California. That represents the results from operations for the fiscal years ended January 31, 1950, 1951 and 1952 for strictly California operations.

The bottom line prior to the totals represents the net income or loss from the Florida operations.

Q. In that case the gain or loss was what on Florida?

A. On Florida the gain, as reflected from the books, was $15,824.29 for the year ended January 31, 1951, and for 1952 the loss as reflected by the books unadjusted was $10,290.82.

Q. Will you explain the year ended January 31, 1952, briefly?

A. Well, in the year ended January 31, 1952, the loss [2507] from operations, as reflected by us, for California aggregated $147,135.33. The changes from that previously exhibited here resulted from the expensing in the proper year of approximately

(Testimony of John A. Lynch.)

$50,000 which had previously been deferred and charged in 1952 operations, plus one adjustment of appreciation on depreciation. To state that briefly, if on the one hand the corporation elects to represent a fictitious, or a write-up on an asset, it must on the other hand be bound by charging the operations with the proper write-off for wear and tear on that write-up figure, written-up figure. [2508]

Q. By that do you mean that where you have written up your assets to a certain figure, that then your base for depreciation should be on the stated or book value after the write-up?

A. That is correct accounting practice.

Q. And that if you write up an asset and add some amount to the stated value of the asset over and above its cost, it is improper to depreciate on a cost basis and carry the asset on the write-up basis; is that the point you make?

A. That is right. And that is what was followed by Mr. Hodge in his first statements prior to the first bankruptcy, but not followed subsequent thereto.

Q. So you have made an adjustment to compensate for that? A. That is correct.

Q. Would you say that the net loss figure for the year ended January 31, 1952, of $157,426.15 is a correct statement of the loss as it appears from the corporate books and records when examined and accounted for in accordance with standard and normal accounting procedure? A. I would so state.

Mr. Strachan: If I haven't offered the exhibit in evidence, I will do so now, your Honor.

(Testimony of John A. Lynch.)

The Court: BD received in evidence. [2509]

* * *

The Court: These exhibits, the last two, are illustrative of the witness' opinion. This exhibit, again, is one of this kind that has a limitation. The testimony of the witness is for your consideration, and this is really a summary of his testimony. Isn't it, Mr. Strachan?

Mr. Strachan: Well, it is certainly based on it, and I believe it might be said to summarize his testimony.

The Court: The exhibit differs from some of the other exhibits that have been received in evidence. I think you understand these things.

Mr. Strachan: I would like to have the document marked BE now distributed, your Honor.

The Court: Yes.

Q. (By Mr. Strachan): I ask you to refer to Exhibit BE, Mr. Lynch, and state whether that was prepared by you and under your direction and supervision. A. It was.

Q. Will you state the manner in which it was prepared and how the facts reflected thereon are stated?

A. It was prepared from the books and records of the Winckler & Smith Citrus Products Company, and adjusted by us following our examination to reflect adjustment for depreciation and to reflect the elimination from other assets of [2510] items which in our opinion represented operating expenses for the respective years.

(Testimony of John A. Lynch.)

It was prepared to reflect the results of operation as disclosed on Exhibit BD previously commented upon.

Q. Was it prepared from the books and records of Winckler & Smith Citrus Products Company in conformity with accepted and standard accounting procedures? A. It was.

Q. I call your attention to the fact that in the surplus statement there appears to be a deficit for the year ended January 31, 1950, a somewhat larger deficit as of January 31, 1951, and a surplus in that account as of the year ended January 31, 1952, immediately prior to bankruptcy, and ask you if you can explain that. A. I can.

The surplus was created by the write-up of the assets purchased in April and reflected on the books at the increased value. The surplus thus created absorbed the previous operating losses, the cost of the recapitalization, and the gain from the forgiveness of debts from the previous bankruptcy. Elimination of the $439,000 write-up of those assets would of course have a vital effect on that black figure of $76,000 and would be reflected in a red figure of approximately $360,000.

Q. Have you made an analysis and statement of the surplus [2511] and retained earnings for the purpose of analyzing that stated surplus of $76,000?

A. I have.

Mr. Strachan: I will ask that there be distributed to the jury——

The Court: Do you offer BE?

(Testimony of John A. Lynch.)

Mr. Strachan: Yes, sir, I will offer BE, your Honor.

The Court: BE received in evidence subject to the same statement that I made as to the previous Exhibit BD. In substance this is a summary of the witness' testimony.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit BE.)

* * *

Mr. Dixon: Are you going to use any exhibits tomorrow that I haven't previously seen?

Mr. Strachan: I gave you some that we will use the first thing tomorrow.

The Court: We have BJ and——

The Clerk: There are six more of these.

The Court: BI, BG, BH——

Mr. Dixon: I have BG, BH, BI, BJ and that is all I have.

The Court: Where do you go from there?

Mr. Strachan: I have some more. The mechanical work hadn't been completed on them when I left the office this morning. Where could I get them to you tonight, Mr. Dixon?

Mr. Dixon: I don't know. I don't expect to be at my office tonight. I have a meeting that I must attend.

Do they relate to something we have already seen?

Mr. Strachan: No. It will be a different subject.

Mr. Dixon: What is the subject?

Mr. Strachan: It will be costs. [2514]

Mr. Dixon: I think I certainly should have that material in advance so it could be examined by the accountant.

Mr. Strachan: I have no objection to it.

The Court: You could go to something else tomorrow, couldn't you, so that counsel could have a chance to inspect these?

Mr. Strachan: You get over here early, don't you?

Mr. Dixon: I am generally here by 9:30.

Mr. Strachan: If I could have them here by 9:00 o'clock, does that suit you?

Mr. Dixon: That doesn't give the accountant a chance to look at this material, that is the point. I can't hope to analyze that type of material, in particular.

Mr. Strachan: If the accountant doesn't mind hopping in an automobile or cab with me, if he will come down with me I will try to assemble them tonight.

Mr. Irwin: He has been here all day and is tired.

The Court: If you can work something out, all right. Otherwise, you have enough of a case that you could go to some other matter, as we did with plaintiff's case from time to time, you could go to some other matter and then come back to this.

Mr. Strachan: I would rather keep these things together.

The Court: So would I. But pursuant to the understanding we have, I think counsel is entitled to see these. [2515]

Mr. Strachan: It is counsel's own personal arrangements and the accountant's weariness.

If they go with me, I can give them to them in the next 20 minutes. I could find them and give them to him.

Mr. Irwin says Mr. Hodge has been here all day and he is tired. I have been here all day and I am tired, but I could still get the exhibits tonight.

The Court: If you could get them to counsel's office by 5:00 o'clock, that will be satisfactory. But I don't think you can.

Mr. Strachan: Where is the office?

Mr. Dixon: Subway Terminal Building. It is downtown.

My only inquiry, counsel, is that I just can't hope to work with those exhibits unless I have them a day ahead of time.

Mr. Strachan: There was no understanding that we would have our exhibits ready in their hands before adjournment time. I said I would do the best I could.

The Court: I don't know about you, but I said I wanted exhibits on either side turned over beforehand, so we wouldn't have this business of them coming up and somebody wanting to see what is this, and let me read it, and all that sort of thing.

Mr. Strachan: If counsel will ride with me in a cab to my office right now, I will give them to him, and pay his cab [2516] fare over to his office.

The Court: If you have got them ready. If not, deviate from your method of presenting your case to put something else on out of order.

Mr. Strachan: I won't use any exhibits tomorrow that I don't give him tonight.

Mr. Dixon: Fine. Thanks a lot. [2517]

* * *

Thursday, January 19, 1956, 9:55 A.M.

The Court: The record will show the jury absent. Does somebody want to present something?

Mr. Dixon: Yes, your Honor. I would like to take up with the court the general subject before we proceed with the jury of the proposed summaries which have been handed to me since yesterday and their use in this case.

It has been my understanding up to this point that when the witness was testifying concerning mathematical computations which he made, a summary could be given to the jury for the purpose of summarizing his computations, showing how they were arrived at; and so forth.

Now, I don't know what use at this time the defendants expect to make of some of the documents, or for what reason the exhibits have been submitted to us since last evening's close, or yesterday's close, but I would like to present some of them to the court at this time, because I feel that some of them are clearly incompetent for any purpose.

I think if the defendant intends to pass them out to the jury at the time he starts the examination with reference to this, that it would only add to confusion, would necessitate my objecting at that point to not only the use or the presentation of the summaries to the jury, but at least I would feel I should at that time inquire, if possible, into the [2520] basis of some of these so-called summaries before they are even used by the witness.

Now, some of them, I feel, are clearly incompetent and are not summaries. In other words, so that I may make my position clear, your Honor, the plaintiff will at any and all times stipulate to any mathematical figures here that we have had an opportunity to check, I mean just figures for the record. I did that in presenting our case and counsel so stipulated to a lot of statistical material, but it seems to me it is going to be placing undue emphasis upon the defendants' part of this case with reference to these exhibits if, in addition to the oral testimony on some of these matters, the jury is going to have what in fact is not and could not possibly be construed in many instances as a summary at all of statistics or other mathematical data that the witness may have testified to.

Now, to become specific, we already have marked for identification BH.

The Court: I don't know if I have that. Yes. BH.

Mr. Dixon: In the first place, any testimony at all with reference to any of the figures contained herein would be objected to by the plaintiff as being wholly irrelevant and immaterial, and not tending to prove or disprove any of the issues of this lawsuit. If it should develop that it was material, some of the facts here might possibly be stipulated [2521] to, but certainly not in the manner and form in which this BH has been headed, because the obvious inference to be drawn against the plaintiff by even the wording here is clear. I don't think there is no need for a summary of that kind of information, if it is proper evidence in this case.

In other words, I don't think that type of computation or information comes within the scope of the type of summary that the plaintiff has been using with reference to the testimony of Mr. Hodge as to how he arrived at his estimated profit figure on the 12,000 tons.

The other exhibits, as your Honor knows, are actual balance sheets and operating statements of the company and are not summary exhibits.

Second, we have this Exhibit BG, which purports to be a schedule of fixed assets starting at January 1, 1947, and then a total in 4/51, in other words, April, 1951. I assume the purpose of this is to show some kind of a mark-up. Well, it has already been testified and it is not in dispute that there was a mark-up in this case. But, frankly, I would have to object to the use of this even by this witness until it could be determined, I mean as far as the jury having it, at the time the witness is testifying concerning any of these figures, until it could be determined that this made provision for the increase or additions to the assets of this company by way of capital purchases of machinery and equipment and [2522] other things which obviously are not reflected——

Mr. Strachan: Those are shown there.

Mr. Dixon: No, they are not.

Mr. Strachan: They are shown in the second column, net cost additions.

Mr. Dixon: There is nothing here.

Mr. Strachan: It shows buildings and machinery.

Mr. Dixon: Those figures purport to be as of 1947, if I read them correctly, and there is nothing shown between those dates, from January 31, 1947, to March of 1951. It is all zero in the column under net cost additions, if I read this correctly.

Mr. Strachan: That will be explained.

Mr. Dixon: I am not concerned about explaining it, counsel. I am here to say I am objecting to distribution to the jury to this kind of an exhibit while the witness is testifying to it. It could only mislead——

The Court: Weren't there additions between 1947 and 1951?

Mr. Dixon: Over 100 and some odd thousand dollars, your Honor, actual capital expenditures.

The Court: Wait a minute.

Mr. Strachan: That will be explained, your Honor. The lower vertical group of figures there shows the assets in April, 1951. That is the date of the reacquisition of the [2523] plant for $200,000. The witness will explain that the difference between the 200,000 and the 97,900 are the additions at the April date. Both of these are as of a single date and so necessarily there are no additions at that date.

Mr. Dixon: Further, your Honor, we have not had an opportunity to check this and we couldn't have. It would take us an insurmountable amount of time. For example, this does not bear any relation to any of the balance sheets of the plaintiff corporation. The date fixed here for assets as of April, 1951, if I read this exhibit correctly, certainly does not show on its face in any sense of the term that there is any provision for it, and I don't want, therefore, to take the time, and I don't think it should be injected into this case, and therefore I do object to its use on that basis before an explanation is made.

If counsel wants to have a stipulation on certain of these facts of the write-up, if they will submit that to us and we have a chance to check it, we will agree to such a stipulation, but I could not agree to the use of this exhibit for that purpose.

Coming next to BI, I am just running over some of these exhibits to illustrate my point——

The Court: BI? All right. [2524]

Mr. Dixon: This purports to relate to withdrawals by the president of the plaintiff company for salary, bonus, forgiven debt and expenses, during the period from February 1, '49, to January 31, '52.

Assuming this to be true—and we certainly see this item here that has been put in, forgiven debt, and the language, and there is something here on allowances—we would have to go into what those were for, and I utterly fail to see any relevancy or materiality to this exhibit or any of the contents contained therein.

If the witness wants to testify, if it is material, that from examination of his books it shows that Winckler took or received a salary set forth here.

that is the test of it, and how would that be material in this case?

I would like to ask what is the salary of Mr. Armstrong, but what materiality would it be to this case, except compare the differences between the two.

And the forgiven debt provision here appears again. We have been spending at least three or four days on that question, and here we see it again coming in through the back door, if this exhibit is even submitted to the jury, while this witness is permitted to testify concerning it.

Then we have some new ones. These are the ones we got yesterday but didn't have a chance to examine them until after the close of the case. We were handed this one—— [2525]

The Court: What is that?

Mr. Dixon: These have not been identified, your Honor, but I assume they will be. Maybe before we talk about them they should be given an identification mark if counsel expects to use them.

If they don't expect to use them we will say nothing about them.

Mr. Strachan: I expect to use all of them, yes.

The Court: Mark them for identification.

Mr. Dixon: Let's mark them for identification so I can talk about them, if you expect to use them.

We got this morning some additional ones. They may be correct. Statistics on Government oranges.

We will be glad to stipulate that any governmental figures on anything may be admitted, if relevant. They are subject only to that objection.

But to get back to these other exhibits——

The Clerk: Temporarily we can just mark one, pending a ruling on the distribution to the jury.

The Court: Do it this way: Can't you just mark the outside of the cover?

Mr. Strachan: I have my own markings on that.

The Clerk: Couldn't you just give me one of each exhibit?

Mr. Strachan: Yes. I am handing the clerk——

Mr. Dixon: Are you going to mark them all, counsel? [2526]

The Court: Just one to start with, and you can see which one it is.

Mr. Dixon: I had these three in mind.

Mr. Strachan: This document is entitled Sales of All Products Excluding Florida Operations Year Ended, showing three columns for the years ended, fiscal years of '50, '51 and '52.

The Clerk: That is Exhibit BO for identification.

(The exhibit referred to was marked Defendants' Exhibit BO for identification.)

Mr. Strachan: Your office got that one before 5:00 o'clock last night.

Mr. Dixon: What is the number of that?

The Court: BO. The next will be BP.

Mr. Strachan: BP is a document entitled Purchases of Raw Fruit, in Tons.

(The exhibit referred to was marked Defendants' Exhibit BP for identification.)

Mr. Strachan: BQ is entitled Purchases of Raw Fruit According to Source of Supply, in Tons.

Mr. Dixon: I thought that was BP.

The Court: BP is a long one like this, and BQ is the short one.

(The exhibit referred to was marked Defendants' Exhibit BQ for identification.) [2527]

Mr. Strachan: BR is a photostat of a record entitled Winckler & Smith Citrus Products Cost Analysis, Month of September, 1951.

(The exhibit referred to was marked Defendants' Exhibit BR for identification.)

Mr. Strachan: BS is entitled Statement of Projected Results of Operations by Winckler & Smith Citrus Products Company on Processing 12,000 Tons of Valencia Oranges under TreeSweet Contract Terms.

(The exhibit referred to was marked Defendants' Exhibit BS for identification.)

Mr. Strachan: BT is Combined Statement of Income Including Actual Results for Year Ended January 31, 1952, and Projected Results of Processing 12,000 Tons of Valencia Oranges under TreeSweet Contract Terms.

(The exhibit referred to was marked Defendants' Exhibit BT for identification.)

Mr. Strachan: Those are documents which were delivered to the office of counsel for plaintiff before 5:00 o'clock yesterday afternoon. In addition to that, I understand that we have delivered to him some additional documents today, and I think we may as well have those marked.

The Court: All right.

Mr. Strachan: Before I go to those, your Honor, I might mention this: [2528]

On BJ, as it was originally marked, we showed references to the source of the figures as being certain exhibit numbers, and we used the defendants' identification numbers on certain exhibits, which were later admitted under plaintiff's markings. So I have had a revision of BJ made to change only the identification and make it correspond with the documents in evidence.

If it is satisfactory to everybody, I would suggest that I be permitted to substitute this revision.

The Court: BJ is only marked for identification, it is not in evidence, so you can substitute the set that you now have for the set the clerk has. Is that what you mean?

Mr. Strachan: But there have been copies of that marked for the jury, too.

The Court: But the jury haven't seen that yet.

Mr. Strachan: If we could make the substitution right now. The only alteration, I think I can point it out—BJ as it is now marked refers to, in the last three items, F-1, G and B. I have changed that to 59, 61 and 63. [2529]

The Court: Just make the substitution. Pull out the old BJ's that have only been marked and put in the new BJ's. Nobody has seen the exhibit. There has been no testimony.

Mr. Strachan: Fine. I would like to do that.

The Court: All right.

Mr. Strachan: This is a draft——

The Court: What is this? What is the number?

The Clerk: It is something new.

Mr. Strachan: This document I am now asking to have marked is a draft of average prices f.o.b. Florida from 1949 to 1951, attached to which is the statistical data that is represented in graphical form.

The Clerk: That will be BU, your Honor.

The Court: BU.

(The exhibit referred to was marked Defendants' Exhibit BU for identification.)

Mr. Strachan: We don't have an extra copy of this even for ourselves.

Mr. Stark: We will have them this afternoon.

Mr. Strachan: The next document is called Production, Juices, Packs and Season Closing Prices Paid by Canners for Florida Oranges 1948-49 to 1950-51.

The Clerk: BV for identification.

(The exhibit referred to was marked Defendants' Exhibit BV for identification.) [2530]

Mr. Strachan: The next document is entitled Florida Oranges, United States Department of Agriculture Official Crop Estimates, 1950-1951, by Months. There is a manual correction to January, 1951, on this exhibit. The exhibit will be rerun and the correction will appear on the printed copies we finally get.

Mr. Dixon: Then do you want to mark it at this time, counsel, or we will hold it?

The Court: We will save the number and don't submit it until later.

Mr. Strachan: I think for our discussion this morning you might look at it, your Honor. There will be only the one change.

(The exhibit referred to was marked Defendants' Exhibit BW for identification.)

Mr. Strachan: The next document is called Valencia Orange Purchases 1950, Mutual Citrus Products Company, and the second page is the same data for 1951.

The Clerk: BX for identification.

(The exhibit referred to was marked Defendants' Exhibit BX for identification.)

The Court: When did the defendants decide to introduce this mass of documentary charts and exhibits?

Mr. Strachan: Well, I don't know when the decision was made. I would say as to this last series that I have had [2531] marked and that Mr. Dixon received only this morning, the decision was made last night because of the availability of a witness that I expect to put on out of order.

The Court: And do you think that deciding last night to prepare charts and then throw them at the plaintiff at this stage of a case comports with the idea of pretrial and how a case of this kind should be tried?

Mr. Strachan: They are Department of Agriculture figures. They have been stipulated so far. I hadn't realized they would be put in——

The Court: You are talking now just about these Agricultural figures?

Mr. Strachan: The group that was just marked that I said had just been delivered to him this morning, yes, sir.

The Court: I am talking about this entire group, starting out with actually BA, some of which are already in evidence, and on down through. When was the decision made to use this type or propose this type of documentary evidence?

Mr. Strachan: Well, a good part of it was decided upon, your Honor, after Mr. Hodge's testimony. Certainly all of those dealing with cost were computed after we had had Mr. Hodge's testimony, knew what the plaintiff's theory of damage was, and after we had had an opportunity to examine, cross-examine on Exhibit 69-A.

The Court: Certainly you knew the plaintiff's theory [2532] of damages, that they proposed to use the financial records of the company, that they proposed to rely upon the TreeSweet and the Silzle contracts, and that that was their theory of damages. You have known that from the beginning.

Now, at this stage in a long case with a jury trial to inject a series of, I don't know, 15 or 20 documentary exhibits, some of which you admit were delivered to counsel at 5:00 o'clock last night, and all of which to date have never been shown to the plaintiff during any of the pretrial proceedings——

5

Mr. Strachan: And I can tell you the reason why, your Honor.

The Court: Why?

Mr. Strachan: Because we did not realize the theory of damages that the plaintiff was going to adopt as being that there would have been an over-all profit on the year's operations if 12,000 tons had been processed by Winckler & Smith under the TreeSweet contract until your Honor asked the witness, "Now, I want to get this straight, is this the profit on 12,000 tons, or is it a profit for the year?"

That is the first intimation we had of that.

Exhibit 69-A was given to us with the witness on the stand, without 30 seconds' opportunity to examine it or analyze it. It was distributed to the jury with some very obvious improprieties in it. It was revised and redistributed [2533] again, and it is still subject to redistribution. I want to say it is one of the most difficult documents to analyze that I have had to deal with in this case or any other. We spent hours and hours trying to develop what the theory of that was, and I will tell you in regard to these documents that were delivered to Mr. Dixon yesterday that the computations on those were not finished until the night before last and I didn't see the finished product until yesterday after court adjourned. I had seen the drafts from which they were printed.

The Court: Well, I have got several comments to make on that. First of all, if you didn't know that the plaintiff's theory of damages would be to proceed on the basis of their financial statements, the trial brief indicated that, plus the fact that their whole contention throughout the case was that had they gotten a contract for Winckler & Smith like TreeSweet or Silzle, they would have made money and not gone broke, that has been in the case from the very beginning, then I underestimated the ability of the firms of attorneys representing the defendants.

Next, No. 2, the document you speak of on the question as to whether it was 25,000 profit for that lot or whether it was a profit for combined operations, we had a rowdy-dow here, I concede, but you asserted a proposition which I think was untenable and which I think you yourself backed [2534] away from, namely, that the exhibit showed a profit on only the operation when it was obvious the witness was trying to show a profit on combined operations. So much for that. That is that exhibit.

You are probably correct in saying that it was not delivered previously, and it should have been. However, it is one exhibit and it was on a theory which has been in the case from the beginning.

Now, with that, I suppose, as an opening wedge, you then throw at the court and counsel, and you deliver to him the night before document after document on this problem.

Now, I am not going to sit still for this kind of documentary evidence. If you want to put in a corresponding document to analyze what they did with 69, you may do so, and you can, of course, put in documents concerning figures of the Department of Agriculture and things of that sort, which, of course, counsel has been prepared for.

This has been a sad case in many ways in that our pretrial procedures were disrupted and we didn't get to accomplish all that could have been accomplished, but inherent in all the proceedings was the fact that each side was to know what the other side was going to do about this case.

With the exception of 69, which we have already talked about, there has been nothing I know of that the plaintiff has offered here that in any way is comparable with what the [2535] defendants now propose to offer in this case. That isn't the way you try a two or three-day case in the federal court, and it isn't going to be the way we try a jury case that has already gone over a month.

Mr. Strachan: I insist, your Honor, that there has been no lack of diligence on our part in preparing and immediately releasing these exhibits. We spent a large part of the adjournment between Friday and Tuesday trying to determine from Mr. Hodge's cross-examination on 69-A wherein lay the fallacies and the errors, and we did not come to any conclusions on that until some time Monday, and the accountants then proceeded to prepare their data based on considerable revision of anything that we had considered before, and we finally came up with these exhibits. They are the first and only exhibits we have ever prepared on the subject of loss of profits and these damage items, and I will say that Mr. Dixon had them within a matter of

24 hours after the decision as to how they should be prepared was arrived at.

The Court: I advised counsel as this trial progressed that I wanted these exhibits that were to be used to be exhibited beforehand. We talked about that time and time again. I know of no instance where the defendants were taken by any surprise by the evidence that was put on by the plaintiff.

Mr. Strachan: I was taken by surprise.

The Court: With the possible exception [2536] of 69.

Mr. Strachan: 69 came as a great surprise. A large part of these have been prepared in haste in order to analyze and rebut the contents of 69 and the implications. [2537]

The Court: No complaint was then made by defendants as is now made by the plaintiff. And there is a lot of difference between one document, where the witness is available for cross-examination, and a multitude of documents tossed into the hopper with the presses working the night before, and then colloquy like we had last night, where you say, "Well, if you will come down to the office I will give you what I have right now and give you some tomorrow morning."

You can't try lawsuits that way.

Mr. Strachan: I didn't tell him that. I said he could have them last night if he would simply go to the office. Your Honor said it would be all right if the documents were delivered to his office by 5:00 o'clock, and Mr. Fisher and I got them delivered there before 5:00 o'clock.

The Court: I didn't know how many documents there were.

Certainly I am going to try to go along with counsel in their problems, but I am saying now that I am surprised that this is the way Pope and Ballard think an antitrust case ought to be tried, or any case ought to be tried, where documentary evidence is involved, in the Federal Court.

Mr. Strachan: I will say this, your Honor, with all due deference to the aspersions cast at me—and you have the right to cast aspersions if you want to—but I know of no other way in which I could have prepared adequately to represent my client other than what I have done here. And [2538] I have done my utmost. We have worked under extreme pressure, and I don't know of anything else that could have been done.

I have delivered these documents to Mr. Dixon at the earliest possible moment. I prepared them at the earliest possible moment. And I assure you on my word that that is the truth.

The Court: I understand that most of these documents that we are talking about, with the exception of such things as official figures on sales and production, and things of that sort, are in defense or rebuttal, as it were, of 69, Exhibit 69?

Mr. Strachan: I don't think it is all 69. If you want to go over them seriatim I will be very glad to do it.

The Court: One thing more. It has been common practice in this court and in other courts to permit, in cases that involve a series of figures, a summary of evidence already in the record. That is how we started to talk about this, and that is how eventually the TreeSweet and Silzle exhibits were drawn, based upon testimony in the record.

The rule that permits that to be done doesn't permit this type of thing, a multitude of documents.

In some of the most complex cases involving a number of figures and situations of that sort—and I have in mind income tax prosecutions—it is not a multitude of documents submitted at the last minute, it is a summary prepared after [2539] a witness has testified, boiled down in some capsule form, of the computations.

Now you are stretching the point further in this matter. And much of this matter obviously is, as it were, a recordation of the witness' oral testimony.

Last night when I admitted two of these I was a little puzzled at the time. If you look at the record, we had admitted previously some exhibits that were compilations of things in the record, and as to a couple that I admitted I had to tell the jury that in substance this was, as it were, a recordation of the witness' testimony.

That doesn't come within the general rule or practice of a summary of figures to assist the jury in summarizing the whole picture.

This type of thing would serve no purpose except to utterly confuse a jury, and I don't intend that this case be tried on that kind of a basis.

On various counts I think this is wrong.

First of all, documentary evidence that was to be used was to be made available to plaintiff, just as what they used was to be made available to you.

Mr. Strachan: I don't agree that it was made available to me, in the first place, and I say we did comply with that, your Honor, by giving it to them at the earliest possible moment. [2540]

The Court: With the exception of 69. And as to 69 there is no doubt in my mind that you are entitled to prepare some similar computation as to how you figure the matter, to even up or rebut on 69.

No. 2, most of these matters, or many of them, which we can sort out, are matters of recording the testimony of the witness.

In addition—I don't need to summarize what I have heretofore said. I don't need to go any further on it.

Mr. Strachan: I would suggest this, your Honor: Instead of talking about a mass of documents, that each document can be made to stand on its own foundation, and I think can be rendered admissible.

I think if we conformed to the practice that was followed by plaintiff, of showing his unqualified documents to the jury before foundation was laid, that I should be permitted the same practice. If your Honor——

The Court: Now, wait on that. We would have to go back over the record. If that was done, it was done with consent, because ordinarily that is not the way it is done. You will have to point out in the record to me where that was done, because the practice is, and I have tried to follow it, that these exhibits should be in evidence before they go to the jury.

There are exceptions. [2541]

I think you will find there was a situation where it was conceded the document would go into evidence, beforehand, without any argument.

It is not the practice to exhibit any document to a juror. And if you recall, as the plaintiff's case went along, there would be something identified, and occasionally somebody would want to read from it, plaintiff would want to read from it, which I didn't permit until the document was in evidence.

Mr. Strachan: When I acquiesced in the practice that was followed, I assumed that it would be followed throughout the case and in favor of both sides.

The Court: Which documents do you refer to were exhibited to the jury before they were received in evidence?

Mr. Strachan: Well, I could go back over quite a number of them. 69-A is an outstanding example of that.

The Court: 69-A?

Mr. Strachan: Or 69. I don't know.

The Court: Let's talk not about examples. 69. What other documents?

Mr. Strachan: I can name some others. I think the whole series 67, 66, 65, 64, 63, 62, 61, 60—I believe all of those.

The Court: First of all, the majority of those with three exceptions were the financial statements of the company, which you have had access to for three or four years, and [2542] which you have been studying, and which was conceded would be properly put in evidence, which you were told in the plaintiff's memorandum, pretrial memorandum, they were going to rely upon their statements of operations, and so forth.

Now, I would have to check the record as to each of these to see what actually did happen. But as to those, they stand in an entirely different category than the mass of material that you have submitted here.

Mr. Strachan: One other thing that I want to say on the plaintiff's theory of damages. It wasn't until last week end that I realized that there had been in Hodge's testimony, and in Exhibit 69, such a shift of position as there was. Partly that was because even on 69 itself an item was designated Profit on 12,000 Tons, and it took me a long time to realize that that wasn't really the basis of that exhibit. It took the accountants a long time to convince me on that.

The Court: I am a dumb lawyer, I never had a course, except in high school accounting——

Mr. Strachan: I never even had that.

The Court: ——and it took me about 15 minutes up here, hearing what was going on, to determine what it was.

I concede it was poorly prepared and it was misleading, but it didn't take me very long to see what had happened.

I have a lot of respect for men like Mr. Lynch here, a CPA with a lot of background. I can't believe that a man who [2543] is a CPA couldn't see what I could see in just a few seconds.

Mr. Strachan: Perhaps he saw it, but it took him, I would say, 48 hours to put it through my head.

And I think that that is a departure and a shift in position from the statement contained in the pretrial brief or the trial brief, I have forgotten which it was, and also in the letter which Mr. Dixon wrote outlining what his theories ~~of~~ damages were.

I was misled by those things.

The Court: I have understood this case all along was a case based upon the contention that TreeSweet and Silzle had been given a favored position by contracts they had with Sunkist, and that a suit had been brought by the plaintiff in this case against Sunkist for treble damages on the ground that they had been damaged by these contracts, and that if the contracts had not been in existence—no, that is not correct—and that the only way that they could complain about the contracts was that TreeSweet and Silzle got them and they didn't; and, therefore, if they had gotten such a contract on a fair basis, without discrimination—the Clayton and Robinson-Patman Acts—that the plaintiff would not have suffered damages and gone out of business.

That the gist of plaintiff's case from the beginning was the preferential treatment and what would have happened if plaintiff had been treated the same way. [2544]

Whether plaintiff comes in and says, Let's take

12,000 tons, or 1,000 tons, doesn't seem to me to make a lot of difference in the problem.

Mr. Strachan: But it seems to me it does make a difference whether he comes in and says, "I would have had a profit on processing 12,000 tons, as an individual transaction, of so much money," or whether he comes in and says, "I would have had a profit from processing 12,000 tons that would have absorbed $184,000 of loss and given me a net profit for the year."

That is just the disparity between what I understood originally from the trial briefs and Mr. Dixon's letter to us explaining his theories of damages, and as I say, it took perhaps 48 hours after 69 had been introduced for me to become oriented to that shift of position.

Until I had become oriented I didn't know how we wanted to prepare to meet Hodge's testimony of 69.

The Court: You certainly will have time to decide how you are going to meet it, and you may use a computation, likewise, but we are not going to use a bulk of exhibits to purportedly meet a calculation made of Exhibit 69.

Assume that you were surprised and misled because of the wording of the document, you are not misled now. You know what they are contending. You have known it since the thing got straightened out on the afternoon when you suggested that [2545] we go to some other matter and you might further study it.

Mr. Strachan: I wasn't straightened out then.

That was last Friday. And it wasn't until sometime Sunday night that they had me straightened out.

The Court: You first then began to have some doubt about what your position was?

Mr. Strachan: That is right.

The Court: You don't have to do that today or tomorrow; you can do that before your case ends, make some computation as to your figures on 69.

Mr. Strachan: That is what was done. It is that that Mr. Dixon is objecting to this morning.

The Court: We are not going to do it this way. Make a computation and submit it at the earliest moment to Mr. Dixon. Give him sufficient time to study it, and then go into it.

Mr. Strachan: The computations which we have made are among those which we have had identified here and which were submitted to Mr. Dixon yesterday.

Your Honor, I don't want you to think that I am trying to play fast and loose with the court in what I propose to do, so I intend to tell you, that in view of the fact that the propriety of distributing these exhibits to the jury prior to their qualification has been questioned, and apparently your Honor is not going to allow that to be done [2546] while the qualification is being made, I propose to, with the witness now on the stand, and with respect to other exhibits and subsequent witnesses on the stand, to qualify, have these marked documents explained, the manner of preparation described, the sources used, and then offer them in evidence. I think it would be helpful to the jury if they could follow the discussion with the documents before them, but as your Honor says, that is not customary practice, so I will proceed, if your Honor will not allow them to be distributed, as if we were following the ordinary rule that the foundation should be laid before they are exhibited to the jury.

Do you see any impropriety in that, your Honor?

The Court: I am not as concerned with that proposition as I am with the major proposition as to whether you are going to use this at all.

I want to go back and check the record as to what exhibits were handed to the jury without being admitted in evidence. But I am not too concerned with that. If it is going to be apparent that an exhibit can go into evidence, that is a matter of form. [2547]

I am not concerned with your attempt to make a calculation in rebuttal to Exhibit 69, but this flood of documents. I informed you at the time that 69 was being used that you might make a computation. I didn't say you could make 50 computations and run the presses overnight and give them to counsel at 5:00 o'clock and expect to go ahead the next morning with these exhibits.

That's the main thing in this case, this mass of documentary evidence without the matter having been exhibited to counsel or without counsel being informed it was to be used.

Mr. Strachan: I don't think there is anything in this that should have a tendency to surprise counsel for plaintiff. If we examine the documents step by step, all of them build up, one after the other, on facts they have known or should have known from their books of account, facts which I think Mr. Hodge knew or could have known, advised or could have advised plaintiff's counsel on. I don't think there is anything wrong in what we have done, and I don't think there is any element of surprise justified to be claimed by counsel for plaintiff.

The Court: What is Exhibit 68, Mr. Clerk?

The Clerk: The appraisal.

Mr. Dixon: That was the 1946 appraisal, your Honor.

The Clerk: The computations are 66 and 67.

The Court: 66 is what? [2548]

The Clerk: 66 is a computation on Silzle. 67 is a computation on TreeSweet.

The Court: I don't know whether I have all the transcript or whether the plaintiffs are using some of it. Are there other copies of the transcript available here?

Mr. Strachan: Which transcript do you want, your Honor?

The Court: I want to go back and check these 60 exhibits and what happened as they came into evidence. The transcripts you have borrowed are probably at your office?

Mr. Dixon: Mr. Walker has them.

Mr. Strachan: Your Honor, I think I have a set here. Where would you like to start?

The Court: I have to check back and see when we started with this 60 series.

The Clerk: January 10, your Honor.

Mr. Strachan: Your Honor, while we are getting the transcript together, there is another matter I would like to mention, that is, that we were discussing the avilability of the income tax return for the year ended January 31, 1949, yesterday. I was asked whether we had ever specifically asked for that before. I was not able to give a direct answer because I did not recall the record. So we had the record checked last night and found that in a notice of motion for discovery and production of documents under Rule 34 which was dated February 19, 1954, item 11 calls for the production [2549] of copies of federal income tax returns and supporting exhibits filed by the plaintiff for its fiscal years ending in 1949, 1950, 1951 and 1952, and that by an order entered, I believe it was filed April 14, 1954, the plaintiff was ordered to produce those documents.

That income tax for the year ended January 31, 1949, has never been submitted to us pursuant to that request and order.

The Court: Thank you for calling it to my attention. I doubt if it changes my view on the admissibility of the return.

Now, I am going to bring the jury down and excuse them until 2:00 o'clock. I have got some work I want you gentlemen to do while I am going over some of this matter.

Bring the jury down, Mr. Bailiff.

What I want counsel to do while I am looking through this to refresh my recollection about it is to start out with this BA list on down through the numbers which have been identified today and prepare for me a list in a few minutes of those exhibits which are purportedly in rebuttal to or connected with Exhibit 69.

Secondly, those which are on other subject matters.

From plaintiff's counsel I want a statement as to those there will not be objection to, such as reports from government agencies and so forth, which the plaintiff may or may not object to. I want to know the plaintiff's position. [2550]

I want to know the defendants' position as to what they particularly propose or what you intend to prove by them. By that I mean are they intended as rebuttal to 69, and so forth?

Then I want a definite understanding as to what is to be done with exhibits from here on out. If necessary, I will take a recess of this jury for a week and hold a pretrial and make you say to me which exhibits you intend to use, to see if I can't say to counsel I want these exhibits that are going to be used to be exhibited to the plaintiff. If it is a matter he knows about and you say, "We are going to use financial statements of such-and-such and minutes of meetings," and so forth, that is one thing, but in common decency both sides should know what the other side is going to use.

If we hadn't had our abortive experience in this pretrial, we would have gone into this in more detail than we did. I don't think there is any doubt in anybody's mind as to what I wanted done in this case.

Mr. Strachan: Your Honor, while we are discussing the general program, I want to mention this. It has been bothering me. At odd times I have gone over the great bulk of correspondence that has been selected from various files of the plaintiff trying to decide what I want and what I don't want. I have, I don't know whether it is 40 or 60 documents from [2551] their files that I may or may not use, and I haven't decided yet.

The Court: Is there anything that would keep you, Mr. Strachan, for your clients and your firm apparently have unlimited means, from putting a stenographer on those documents and for the plaintiff to have copies of them, list them or turn them over to the plaintiff and say from these 60 documents I may use 40?

Mr. Strachan: That is what I was going to say. I have quite a group. If Mr. Dixon wants them now before I decide which I may use and which I may not, I will give him those.

The Court: I don't see much of a problem in 40 out of 60, but I do see a problem if you shove them at the plaintiff and say, "Here is a lot of documents we are going to use a few of."

By this stage of the lawsuit, long before the trial, and certainly by this stage of the lawsuit, you ought to know almost definitely what you are going to use and what you are not going to use.

Mr. Strachan: Your Honor, I am not trying to solicit any sympathy for my personal problem, but I was brought into this case under extremely adverse circumstances.

The Court: I know, and you have done very well under the circumstances. You are going ahead as though you had lived with it to start with, which I know you didn't, but that [2552] is not the point. What I am trying to point out is the difference between saying to the plaintiff, "Here, I have got three or four documents. I don't know whether I am going to use them or not."

Three or four doesn't present a problem, but if you say to the plaintiff, "Here is a flock of documents. I may or may not use them," I don't think that is fair.

Mr. Strachan: As far as the documents that were delivered to his office last night, I am perfectly certain the way things developed this morning that we will in all likelihood not reach those before Monday or Tuesday, rather. That certainly would give ample time to analyze them. More time than I have had.

I do want to say this. Because of the necessity of keeping up with this trial, I haven't been able to do any planning in advance. I have had to do this on a day by day basis. For that reason the exhibits weren't prepared in advance, because I couldn't clear them. I had to take first things first. It has been a difficult thing.

I am sorry the result has irritated your Honor.

The Court: It has irritated me and it also concerns me very much in connection with the trial of this suit.

Mr. Strachan: I assure you I have done the best I could and I will continue to do so.

The Court: I realize we have had difficulty, and if you [2553] tried to conjure up a series of circumstances such as happened in this lawsuit, you couldn't come up with any combination that actually did happen, with Hurd going to try the case, getting in an accident, then he gets out here and has to go back and ends up in the hospital. You are admitted, but it isn't proposed you will be used. Williams can't be used because of an order I made, then I backed up and let him be used. The question is how much you want to use him. You couldn't have mathematically come up with a combination of what actually did happen.

Mr. Strachan: Whether it is possible mathematically or not, I hope it never happens to you or to me again, your Honor.

The Court: I hope so, too. [2554]

* * *

Mr. Strachan: May it please the court, we have had prepared for your Honor a memorandum with regard to the exhibits, Defendants' Exhibits BA through BT, and have furnished opposing counsel with it and we have discussed those exhibits seriatim to determine which ones counsel has objection to.

We are ready to discuss them with your Honor.

The Court: I went through the record to see where we were, and having in mind particularly Mr. Strachan's statement that I had permitted documents to go to the jury without them being in evidence, and having in mind also some determination of where we are at this stage of the case.

I will start with page 1804 of the record, which concerned Exhibit 60, 60 being a financial statement of the company for six months ending July 31, 1949. On page 1804 the clerk marked 14 copies. It was marked for identification.

"The Court: These are only marked now for identification. Do you want the exhibit identified before the copies are handed to the jury, or may they be handed to them and the questioning go ahead? It will save some time the latter way.

"Mr. Strachan: Yes. I have no [2556] objection."

Let's bear in mind that these were financial statements of the company which the defendants had access to——

Mr. Stark: Your Honor, on Exhibit 60 and Exhibit 62 we had not seen them until the day they were produced at the trial, those two financial statements.

The Court: July 1st, '49?

Mr. Stark: Yes.

The Court: Why had you not had access to them if you had been inspecting this company's records?

Mr. Stark: I might state in that regard, your Honor, because I would like to clarify the record on them, that we had not received all of the records, as you will recall, until the November 30, 1955, argument on the continuance, and past that, after the dismissal of Exchange Lemon. On Wednesday. December 12, 1955, at the close of our pretrial discussion I pointed out at page 65 of the transcript that notwithstanding Mr. Dixon's representation at the prior hearing that we could have the books behind 1949, that we had not been given access to those books, and Mr. Walker stated the reasons why he felt we should not have them, and at that time, after the trial was commenced, we were finally given access, not as your Honor says by having particular books, but by getting a room full of books while the trial was in progress.

These particular statements, however, so far as we know, were not in those books. Our auditors had never had occasion [2557] to see Exhibit 60 or Exhibit 62 until they were introduced in evidence.

The Court: 60 and 62 were the two six-month statements?

Mr. Stark: That is correct.

The Court: But you had had, prior to that, the yearly statements?

Mr. Stark: We had had the annual statements, we had gotten them either immediately preceding or during the early stages of the trial.

The Court: At least a month ago? The trial started December 12th, and would you say at least by——

Mr. Stark: We hadn't gotten them on the 7th. We probably got them some place probably a month ago.

Of course we had the problem that we were in the course of trial at that time. But I think the record should be clear that these were not documents, as your Honor indicated this morning, which had been available to the defendants for three or four years. [2558]

The Court: Well, now, these two you are talking about?

Mr. Stark: That's right.

The Court: According to the explanation, apparently they had not——

Mr. Stark: Or any of the other documents prior to 1949 had not been available for any length of time prior to trial.

The Court: The plaintiff didn't offer documents prior to 1949. Those are the ones offered by the defendant. The plaintiff started with 60, July 31, 1949.

Mr. Stark: Yes.

The Court: Those two 6-month statements.

Mr. Stark: As I understand it, we did not have those.

The Court: What were you going to say, Mr. Dixon?

Mr. Dixon: At this point, your Honor, I think I should make clear for the record that on October 18, 1955, I wrote Mr. Hurd in full concerning the availability of records that they had requested specifically, and also in full concerning the theory of damages and the records and the type of evidence which the plaintiff expected to rely on to support its theory of damages. If your Honor wishes, I will be glad to either read this letter into the record or to have a copy made and attached to it. I think it should be in.

The Court: How long a letter is it?

Mr. Dixon: Here is the date of the letter. So many references have been made here to the fact that some of these [2559] things were seen for the first time by counsel that I think that that part of it, as far as availability is concerned, should be made clear.

Mr. Stark: I simply want to point out not that Mr. Dixon had not offered the material, but that the material itself had not been made available.

The Court: Material as to 60 and 62?

Mr. Stark: 60 and 62 or any of the material prior to 1949, the great bulk of the material, but so far as this present discussion——

The Court: We are not talking about 60 and 62.

Mr. Stark: 60 and 62.

Mr. Dixon: I should say in reply to that I understood that when the request was made by Mr. Hurd that they wanted it, I informed the trustee to give them full access to the balance sheets and records and I assumed that they had already had them.

The Court: I know the problem. If it was a going concern, it would be different. But it was not a going concern and both sides had problems. I don't think we will dispute that.

The letter of October 18, 1955, was sent to Mr. Hurd. I have seen it before as part of pretrial proceedings and I am sure counsel have the original. Subject to any correction, at this stage, Mr. Reporter, you will incorporate that letter [2560] into the record?

(The letter referred to is in words and figures as follows:)

"Mr. Ferris E. Hurd,
"120 South La Salle Street,
"Chicago 3, Illinois.

"Re: Winckler & Smith Citrus Products v. Calif. Fruit Growers Exchange, et al.

"Dear Ferris:

"This will acknowledge and thank you for the enclosures contained in your letter of October 14. I presume you have already received a reply from the Trustee concerning your recent inquiry as to when your accountant would be able to examine the records of Winckler and Smith that were referred to in your letter. We have been somewhat handicapped in this entire matter due to the illness of the person on whom the Trustee must rely to secure the requested records.

"I am in the process of preparing and should be able to file in the near future our trial brief which will doubtless cover the damage questions referred to in your letter of October 14. I thought at one time that we might be able to limit the damage items as suggested in my letter of June 23. I have, however, found it extremely difficult to get together all of the information I desired before I could make a final decision on this point. Since we are approaching the time of trial, it is not fair to you to further delay an answer to your [2561] request. I find it necessary, therefore, to indicate that we will rely on the following claimed items of damage:

"(1) The loss of profits during the year, 1951, from the inability of the plaintiff to process single-strength juice and to sell it in competition with other single-strength juice processed and sold by Sunkist and other California processors of single-strength juice. The measure of damages would be based upon the assumption that the plaintiff would have been able to have utilized its full processing capacities for such juice during the 1951 season. Evidence on the loss of profits would be not only based on the previous profit record of the plaintiff on these items, but would also be determined by evidence as to the operating profits of competitors, TreeSweet and Silzle, on this item during the 1951 season.

"(2) We also expect to claim and show as damages the loss of plaintiff's plant, including its forced sale, loss of good will and prospective future profits had it not been forced to take action under Sec. 10 of the Bankruptcy Act as a result of the alleged violations of the antitrust laws.

"We shall, of course, expect to use the [2562] operating statements of the plaintiff from the date of its incorporation to the date of the filing of the lawsuit as a basis for the loss of profits claimed, together with the plant and good will values of the company, as stated in the operating statements and balance sheets of plaintiff for the aforesaid period. We also expect we may make use of the statement of the plaintiff which was filed with the Division of Corporations of California at the time it applied for permission to secure additional capital for expansion purposes. By this I mean, of course, that the statements contained therein with reference to the business of the company would be supported by the accounting records of the company. In other words, we shall naturally expect to support the accounting practices and procedures of the plaintiff in connection with its operating statements and balance sheets for the period commencing with its incorporation to the filing of the lawsuit.

"I expect the books and records of the company on these elements of damage, together with the testimony of accountants and officers of the company, will be given in support of these claimed items of damage.

"In addition to the foregoing, we will, of course, rely on damages sustained by the alleged discrimination between sales of oranges and single-strength juice to the plaintiff by EOP as against sales of such products to TreeSweet and Silzle under their respective contracts with EOP. This, of [2563] course, refers to the items of damage claimed by reason of the alleged violations of the Clayton and Robinson-Patman Acts.

"The damages claimed under the State act would, of course, in substance be the same as those claimed for the violation of the Sherman, Clayton, and Robinson-Patman Acts. Plaintiff, of course, will contend that the damages suffered stem from and are a direct and proximate result of the alleged conspiracy in violation of Sections 1 and 2 of the Sherman Act involving the defendants, Sunkist, EOP, and ELP, and the damages flowing from the alleged violation of Section 2 of the Sherman Act by defendants Sunkist and EOP, with reference to the alleged attempt to monopolize and maintain monopoly control over that part of the trade and commerce in citrus juices represented by such citrus juice products as are processed in the State of California, including single-strength Valencia orange juice in particular, and thereafter sold in intra and interstate commerce.

"I have made some very minor corrections in the Stipulation of Facts, none of which, I am sure, you will object to. I am having it placed in final form and will, of course, submit it to Fisher and Stark for signature. The only changes which I made relate to paragraph one in which I have added the words 'by virtue of the provisions of paragraph 10 of the Bankruptcy Act' to the end of that paragraph. I have stricken the words 'except for Case-Swayne' [2564] in item 9 since Exhibit E of the answer to plaintiff's Interrogatories (No. 23) shows that Case-Swayne purchased 545 tons of oranges in 1951.

"I inserted the words 'greater part of the' after the first word of paragraph 12 and struck the words 'the greater part of which' from the third line of that paragraph which, I believe, is more in line with our intention. I mean our mutual understanding of this paragraph.

"The Trustee informs me that the processing plant of ELP at Covina was destroyed by fire during the latter part of 1951. I have, therefore, corrected the tenses of this paragraph to indicate that ELP *had* rather than *has* a processing plant at Covina in 1951 which *could* rather than *can* process

300 tons of citrus fruit per day and indicates that it *did* not, rather than *does* not, process single-strength juice, adding the words after '(Ex. A, Int. 10)' 'It was destroyed by fire in the Fall of 1951.' I am sure you will have no objection to these changes.

"I have further inserted the particular exhibits as they are described in the answers of Sunkist and EOP to the various interrogatories so that the particular exhibits will be more clearly identified as they are now known to all parties under the answers to the Interrogatories filed by the various defendants in the case.

"The subpoenas duces tecum, which I am preparing and [2565] hope to file in the immediate future, will call for some of the documents which are contained in some of the answers to the Interrogatories. I am, of course, providing in the subpoena that photostats of any records or documents called for will be accepted in lieu of the originals so that it will not be necessary for any of the companies to bring in their original records if they do not care to do so. I am calling for the Minutes which you were kind enough to forward to me in your letter and the excerpts contained in your letter will, of course, be satisfactory as a proper return to the subpoena.

"With kindest personal regards,

"Sincerely yours,

"WILLIAM C. DIXON.

"WCD:ehc."

Mr. Stark: May we then, in that regard, incorporate our letter of June 16? There are two letters. I don't have the dates. One is June 16 and the other is, I believe, September 16, relating to this same subject matter. We will have them here tomorrow.

The Court: We will look at them at that time.

Thank you, Mr. Stark, for calling my attention to the situation as to 60 and 62, the two six-months statements.

However, I think it will be conceded by counsel for [2566] defendants that once identified as financial statements of the plaintiff, they were admissible in evidence. We won't argue about that.

Mr. Strachan: Well, if proper foundation has been laid, I think that is true, and I did not call for the laying of the foundation.

The Court: As a matter of fact, as to 60, Mr. Dixon then laid a foundation on 1805.

As to 61, which was the first yearly statement and is not subject to the explanation just given by Mr. Stark, I have probably no other comment except it was then exhibited to the jury prior to its admission, a foundation being subsequently laid. It was a record of the company and there could have been no dispute about that, and Mr. Strachan's statement as to 60, I would suppose, would continue to apply as to the succeeding documents since I had raised the question with him at the very time 60 was offered, as I heretofore read from 1804.

As to 62, 63 and 64, 62 appears on 1821, 63 at 1826 and 27, and 64 at 1842.

To save time, I laid a foundation by questions to the witness, and I think the record will show that each were exhibited to the jury prior to their admission into the record.

62 we have already mentioned is a six-months statement. [2567]

63 was a yearly statement.

64 was another six-months statement.

65 appears at 1857, and again I laid a foundation and again I think the record shows at 1857, the record shows that they went to the jury before they were received in evidence.

Now, that concluded the financial statements of the company except that in between certain notes, 63-A, 64-A, and so forth, were identified, although I don't think they were received in evidence at that time.

As to these financial statements, I think they were clearly admissible and, in fact, there was and could have been little dispute about them. [2568]

As to the yearly statements, the defendants had them for a long time prior to trial. As to the six-month statements, 60 and 62, probably the same thing would apply to 64——

Mr. Stark: We had 64.

The Court: 60 and 62, which were six-month statements, further reflected in the yearly statements, at least counsel, by Mr. Stark's admission, had them late in December, approximately a month ago.

Mr. Stark: I don't want to prolong this point, your Honor, but so the record will be clear, it is my understanding that we never had 60 or 62 until they were produced on the stand.

We don't know where they came from, but our auditors never had those.

The Court: You can't say whether or not they were in the material that was moved over to the room near Mr. Fisher's office? At least all you can say is——

Mr. Stark: All we can say is that we had never seen them.

The Court: Now we come to 66, which was the Silzle matter, and the record there is at 1864. It was marked for identification. The court said:

"This is a different kind of exhibit?

"Mr. Dixon: Yes, it is, your Honor.

"The Court: Is this made up entirely now from [2569] records in evidence now in the case?"

The question wasn't asked of any witness, but it was asked of counsel.

Mr. Dixon said: "Now contained in the record in this case, your Honor.

"The Court: Some place or other?

"Mr. Dixon Some place or other, with the exception of the actual computation.

"The Court: And you propose to identify through the witness where the witness has secured the various figures, and so forth?

"Mr. Dixon: Yes, your Honor."

Then I told the jury it was to be used for a limited purpose, and it was passed to the jury, with no objection on anyone's part.

Mr. Strachan: And without having been previously submitted to us.

Mr. Dixon: If the court please——

The Court: I am not so sure about that.

Mr. Dixon: I think that isn't correct, your Honor.

All of these exhibits were submitted, to the best of my recollection, on the Monday preceding the Tuesday on which it was even contemplated any use was to be made of them, pursuant to the order of your Honor.

The Court: Be that as it may, the complaint talked about [2570] the contracts that the defendants entered into, and the amended complaint specifically talked about the Silzle and TreeSweet contracts, and how there could have been any surprise in knowing that the plaintiff was going to argue about some computations under those contracts is entirely new to me.

As to 67, at page 1884 the TreeSweet contract was passed out without objection, and the witness was asked whether he had done the same thing with those as he had done with 66.

This, again, was a compilation of evidence already in the record for illustrative purposes only.

Now we come to 69——

Mr. Strachan: Was that 67 your Honor was speaking about?

The Court: 67.

Mr. Strachan: I think there, again, it was one that we saw the day that it was marked.

Mr. Dixon: I would like the record to be clear on that. It is my distinct recollection, and Mr. Irwin informs me to the same effect, that this document Exhibit 67 was also made available to the defendants, along with the previous exhibits already referred to by the court on the Monday—by Monday noon, when in accordance with what the record will show we indicated we would prepare them and make them available at least a day in advance of their use, and we set that as the [2571] date.

Mr. Fisher: Mr. Dixon, perhaps we are together on this.

Are these the matters which you delivered to my office, Mr. Irwin, on a Monday?

Mr. Irwin: I am not clear in my mind, but I believe it is.

We had two different matters under consideration at different times.

Mr. Fisher: I am not clear either.

There was one occasion when Mr. Irwin got some exhibits to my office on a Monday, and court was the next day.

Mr. Irwin: Mr. Fisher's recollection probably coincides with my own. I telephoned Mr. Fisher that we had promised to have them ready and available by noon Monday, and after discussion as to who would do the delivering, I carried them over to your office personally and delivered them to your secretary by 1:00 o'clock noon, before they were used in court on Tuesday.

Mr. Fisher: That is right.

The Court: At any rate, the record shows no surprise on the part of the defendants by able counsel at the counsel table. No one raised any objection. The court can only draw the inference that the defendants knew and had known for a long time that the Silzle and TreeSweet contracts were the gist of this case, and that complaint would be made by the plaintiff of it, and that reliance would be placed [2572] upon what the record showed as to the figures resulting from the Silzle and TreeSweet contracts.

Exhibit 68 we pass up, because it was the appraisal marked for identification.

We come to 69. 69, to refresh your recollection, is a computation made by Hodge to show what he claimed would have resulted from the additional 12,000 tons. The document was not marked until Friday at 10:00 a.m., at page 2166, but the record concerning that starts at about 1888 of the record when Mr. Dixon started to ask Mr. Hodge his hypothetical question.

This was the thing that led up eventually to 69. And the question was asked—it may have been asked earlier than page 1888, because I sustained one objection and it was rephrased, and so forth. The question was repeated on page 1892, which probably became the final question, and there the question wound up with these words:

"——taking all of those things into consideration, do you have an opinion as to whether Winckler & Smith would have processed or operated through processing the 12,000 tons of Valencia oranges on the same basis at a profit during the year 1951?"

It seems to me the question meant with the 12,000 tons would the corporation have operated at a profit. However, it was clarified at page 1893:

"The Court: But the particular question didn't tie [2573] the 12,000 tons to any supplier. I am still worried about the last part of the question, whether you said processing those 12,000 tons at a profit, whether Winckler & Smith would process those at a profit, or whether the question was whether Winckler & Smith on the basis of their books and records after processing the 12,000 tons, would have made a profit instead of a loss." [2574]

Now, I can only conclude where defense counsel are ordering ten copies of a transcript, and when I see it indexed as it is here now, that the transcript is being read.

Mr. Strachan: May I just inject something there, your Honor?

The Court: Yes.

Mr. Strachan: That is what the transcript of the witness' testimony said at the time he made the computation orally, which I think was before Exhibit 69 was introduced.

The Court: All right.

Mr. Strachan: Then when 69 was introduced and shown to me at the same time it was shown to to jury——

The Court: It had that misleading statement.

Mr. Strachan: At the bottom it said Winckler & Smith Estimated Profit Processing 12.000 Tons of Valencia Product Oranges $25,000. I thought surely the witness had made a mistake when he added that to the actual loss as shown by the income account, because I thought that instead of adding it to 184,000, he should have subtracted the 25,000 from 184,000. I couldn't get through my head for days why that wasn't true.

The Court: All right.

Mr. Strachan: It may be a mental infirmity, but that is the fact.

The Court: At 1895, Hodge starts to tell how he [2574-A] arrived at this computation and gives his figures, 1895, 1896 and 1897, and at 1908 there is found testimony about the figures.

Then we come to cross-examination of Mr. Hodge, which began at 10:00 o'clock, January 11, and it proceeded all day Wednesday, January 11, and on Thursday, January 12, the cross-examination proceeded on the question of these computations. In fact, the cross-examination starts about 2057—2059, I guess it is, on this subject. It went all day on this subject matter, all day Thursday. It went until the time we quit on Friday with some minor interruptions on this one subject matter, the computation, a day and a half, which explains something further along the line.

At 2105 the court said:

"I don't know that he gave a profit on 12,000 tons. He gave a profit of what would have happened if they would have had 12,000 tons added to what they already had, and the figure was—are you talking about the $25,000 figure?"

At 2108, Mr. Strachan asked a question:

"Mr. Hodge, could you make a computation showing the gross sales from the 12,000 tons of fruit of $750,000, which you testified to,"——

Well, I will read the whole question.

"——which you testified to, show the cost of [2575] those particular sales, show the gross profit on the sales, deduct the selling expense on those sales, and the brokerage, deducting also general administrative expense, and show the net profit—profit or loss—on the processing of that 12,000 tons at that selling price, and also show us a reconciliation between that sort of an income account and your conclusion that with the 12,000 additional tons of fruit available Winckler & Smith would have converted $184,000 loss for the year ended 1952 into a net profit of $25,000, can that be done?"

Page 2130, the witness is then asked to make certain computations and states—well, the question is by Mr. Strachan:

"Well, now, will you just go through this computation with me and then if you think there is an explanation for any difference that occurs, I would like to have you tell me what it is?

"A. I would be very happy, sir. Could I have a copy of your computation?"

And so forth.

2142. 69 for identification has never yet been even marked. It is not even in existence on Thursday. It comes into court for the first time Friday morning. At 2142: [2576]

"Mr. Strachan: Mr. Hodge, in your direct examination you testified that with this 12,000 tons of

Valencia oranges processed under the terms of the TreeSweet arrangement, Winckler & Smith would have enjoyed a net profit for the year ended January 31, 1952, of $25,231.45?"

The witness says yes.

"Q. That profit, as I understand your testimony, would be after offsetting the actual loss for that year of $184,523.20?"

Now, we have spent the whole day on the matter. At 2147 there was a question asked of the witness and the court said:

"Figure it out and then we are going to stop this.

"The Witness: Approximately $3.40 a case, sir.

"Mr. Strachan: That's all of the cross-examination."

If there is some doubt about what I meant by stop, I meant we were stopping the cross-examination, but Mr. Strachan said "That's all," and the court said:

"We are going to stop this because if you are going to rely on this type of account, I want a written statement prepared on it so it can be analyzed. I am not much of an accountant, but I [2577] think somebody is treating you wrong in their computation.

* * *

"If you rely on it, I want a written computation prepared"——

Well, go back to my first statement.

"Mr. Strachan: We expect our witnesses will put in a computation.

"The Court: If you rely on it, I want a written computation prepared, and it can be handed to them for study like theirs was handed to you.

"Mr. Strachan: Of course, the plaintiff's computation was not reduced to written form. However, we propose to have a written computation that can be examined.

"The Court: Well, that is true. This other computation was made orally, but I think you should have a written computation on these matters."

I think that illustrates that the court insisted that a computation be made and that one be made by both sides if this was going to be in issue.

2150, further on the same matter:

"Mr. Strachan: I wonder if in that connection it might not be well to prepare a statement of the computation that I just went through orally. [2578]

"The Court: Yes, you may do that. I think it would be helpful."

Then we come to Friday morning, 2166. There is then marked for identification 69.

"The Court: Do you want to pass it to the jury?

"Mr. Dixon: May it be distributed to the jury?

"The Court: Pass it to the jury."

This was a reducing to writing of a computation which the witness had made orally, based on the record already made, and apparently was done at the court's request and with the concurrence of counsel for both sides and with permission granted to the defendants to make a similar computation, as a result of which AZ was prepared in behalf of the defendants, and it likewise was a computation based upon what was in the record.

The clerk marks the exhibit at page 2185.

"The Clerk: Shall I distribute them to the jury, your Honor?

"The Court: Yes."

The jury were likewise told that this was another illustrative exhibit.

The matter comes to an end at 2204 and 2205, where Mr. Strachan states several matters which made me think that he had got himself straightened out by that time and he was [2579] then excused for the rest of the afternoon.

On summary, you had a series of financial reports of the company with foundation laid. On the original one, 60, the question was raised as to whether there was any objection to passing it to the jury before it went into evidence, and no objection indicated, and the rest treated the same way.

You had 66 and 67, computations based upon matters in the record, namely, contracts particularly relied upon by the plaintiff, which the defendants knew of such reliance, certainly, from the time the amended complaint was filed, and particularly as to TreeSweet, certainly earlier, and from the time the complaint itself was filed.

69 again is based on matters in the record and requested by the court after a day's cross-examination on one series of computations and after the court had indicated it heard all the cross-examination on that it was going to permit.

Now, that is where we are up to date. Now we come to another series of exhibits. I am not going to permit the witness to illustrate each and every bit of his testimony by an exhibit. If that were to happen, we might as well have the testimony typed up and hand it to the jury to take to the jury room. That is about what the thing amounts to. [2580]

Certain of these exhibits would seem to me to be proper. I am talking now about the general list from BA down to BX.

Some of them would clearly appear to me to be improper.

Others, it would seem to me, should be rejected on one ground, and some on another.

Certainly the defendant may substitute for AZ, which is not in evidence, or use along with AZ a computation that was the result of this long cross-examination, as to what they contend by it.

That refers to BS and BT.

I don't think you can put in two of them. You have got two that look towards the same result. It would seem to me that an exhibit along that line would be proper.

Mr. Strachan.

Mr. Strachan: I should like to have your Honor allow me to lay a foundation for that and explain the manner of preparation.

I want to say as to AZ, I think it shows on its face that it was prepared at the time that I and those working with me were under a misapprehension as to how Mr. Hodge had gone about his computation. For that reason I didn't follow it up and I don't intend to offer it.

The Court: You have no problem. It is not in evidence and it can be ignored, but I am merely for our discussion tying it in with BS and BT. They all relate to the same [2581] matter.

Mr. Strachan: They relate in their entirety to what 69 covers in one exhibit. In BS we have dealt with the processing of the 12,000 tons as 12,000 tons added to the production which actually occurred during that year. Applied the costs as they have been developed from the books of account for the year '51. And that shows that the loss attributable to the added 12,000 tons would have been $52,000.

Now, BT is a consolidation of the showing on BS, where you take item by item the actual results from Exhibit 65, which is the profit and loss statement for the year, and in parallel columns show how this hypothetical 12,000 tons would have affected each of those items, by adding across, and show the combined effect, and at the end result show a loss to be the combination of the 184,000 of actual loss, plus 52,000 of added loss due to the processing of the added tonnage.

The Court: How does it become material in this kind of a computation what Sunkist would have made out of the oil?

You have got your whole exhibit built around, in part, a proposition that Sunkist would have got more oil from TreeSweet than they got from Winckler & Smith. The computation that was under discussion, and which the court permitted 69 to be filed, and for which the court also permited you to make a computation, concerned what Winckler & Smith would have made out of 12,000 tons. As I read BS, and I take it the [2582] defect would also apply to BT, you have computations in here as to the difference that Sunkist would have received from Winckler & Smith work and from TreeSweet work.

Mr. Strachan: Your Honor, that is based on the same thinking, I believe, that was behind your Honor's requirement that Mr. Hodge combine, in the analysis of the Silzle and in the analysis of the TreeSweet contracts, the return from the oil and return from the juice.

It is basic in our development here that if Winckler & Smith were to operate under the terms of the TreeSweet contract it should return for the fruit that it received as much, in value, as TreeSweet returned. That we shouldn't allow them to have a windfall of the value of the oil; the difference between the value of the oil that they would return, and the value which TreeSweet would return.

The Court: You have a right to bring that out. You have brought it out on cross-examination as to Exhibits 66 and 67, and if you are not satisfied with the computations there made you can have your accountant make other computations. But let's not confuse the situation with an exhibit which you propose to offer pursuant to the discussion we have had—we have been over the record—which concerns the computations made by this accountant of what Winckler & Smith would have made. Let's not confuse it with an exhibit which comes in, and then show what Sunkist would have made if it had got a [2583] certain amount of oil out of the TreeSweet production.

Mr. Strachan: We are looking at it from the other side.

The Court: Separate the two sides, then.

Mr. Strachan: The basis on which Mr. Hodge made his computation was an assumption that Winckler & Smith could have had the gains but not the costs involved in obtaining and processing fruit under the TreeSweet contract. Now, part of the cost of that fruit to TreeSweet was returning ten dollars and some cents worth of oil per ton, and that should, likewise, be charged up as one of the costs of the fruit. If it was delivered to Winckler & Smith, they shouldn't get a cheaper price on the same fruit than TreeSweet did.

That is the basis of both of those computations.

The Court: You may be right on that. I am only thinking about that. If I decide you are right, then my criticism on that point would be obviated.

It seemed to me what you were doing with one exhibit was working it as an exhibit that involved 66 and 67 and also 69. But from what you just stated, upon reflection, it may be that that would be proper.

Mr. Strachan: Let me say this, your Honor, about the planning of this branch of our presentation. I didn't have an exhibit as such relating to 69, because I expected that the witness would identify particular items, and which he would testify that he did adjustments, such as the cost of [2584] cans, cartons, and cost of labels, and tell us what the adjustment should be in those items. That is the way we were going to deal directly with 69 and its express and implied assumptions. But this other was our own computation of what the cost of the whole fruit should be to a processor if he expected to have the gains and also take the losses or costs that went with the processing of the fruit under the TreeSweet contract.

The Court: I will look those two over further. But there is still a question, also, as to whether you should put in two of them or only one exhibit.

Mr. Strachan: I don't care to encumber the record, and if it would seem that one could be made to serve the purpose of two, I wouldn't want to put in an exhibit just for the sake of there being another exhibit.

Mr. Dixon: I am not sure whether your Honor wants to hear from us on this proposed Exhibit BS at this time or not.

The Court: Let me hear from you briefly.

Mr. Dixon: Our position is that we certainly would oppose the use of this exhibit with reference to that part which relates to the oil, because while that possibly might be part of the return to Sunkist, it had nothing to do whatever with the profit which TreeSweet made by reason of having fruit made available to it, which is the basis for this [2585] contract.

Mr. Strachan: I don't agree with that. Because it seems to me the more efficient processing of the oranges, in order to get the higher yield, would be reflected in TreeSweet's costs, and therefore if Winckler & Smith had a less efficient, more costly way of dealing with the fruit, and consequently were able to return less value in oil, that it shouldn't be allowed the same processing cost that TreeSweet has for its more efficient treatment of the fruit.

The Court: There are two things being mixed up here. One is a purported defense attack on whether Sunkist would have given Winckler & Smith a contract. That may well involve the question of whether Winckler & Smith could have profitably returned as much to Sunkist as did TreeSweet for oil.

The other question is the question to which 69 was directed, and to which the reply compilation should be directed, and that is what would Winckler & Smith have made, not what Sunkist would have made, had Winckler & Smith had the additional tonnage.

Also, I think the record is clear that 69 was based upon the computations made by the witness which were then in the record, and that the permission to file the counter-computation was also granted on the basis of what was in the record.

It was merely summarizing the computations that you had had the witness make orally. [2586]

Mr. Strachan: That was AZ, or whatever it was. Are you referring to AZ?

The Court: Whatever exhibit you are going to use, it would be one based upon that record.

Mr. Strachan: BS and BT will be based upon the testimony of our witnesses, which testimony is not yet in the record. It goes further than mere rebuttal.

The Court: Then to the extent that it goes further, if that foundation is laid, I am going to sustain an objection to it upon the ground that it is merely to illustrate by exhibit form the testimony of the witness, and does not have any relationship to the situation that appears in the record.

Mr. Strachan: The facts that are reflected there will appear in the record when our witness is through testifying, I am sure; just as 69 was predicated on Hodge's testimony, so BS and BT will be predicated on evidence yet to come.

The Court: I propose to sustain an objection to BI, withdrawal by Winckler, what Winckler got.

I don't think it has any bearing on the issues of this case. The assets and liabilities of the company reflect what they had left. I don't think it is material whether he was paid $100,000 or $1 a year. I think it is outside the issues. It is an artificial issue in the case.

Mr. Strachan: As to that, your Honor, I think it has a very direct bearing upon whether this business was properly [2587] managed or improperly managed, to show whether the manager, within an unbroken series of loss years, was warranted in taking, personally, out of the business, when the corporation was in terrible financial condition and was still losing money, the very substantial amounts of money that Mr. Winckler took.

I would like to lay a foundation for the offer, in any event.

The Court: BJ I think is clearly bad. If I read it, as I think a juror would read it, the inference there is that the prospectus was issued fraudulently, which is not an issue in this case.

Mr. Strachan: The prospectus has been admitted in evidence, and on its face it would show something over one-half million of net earnings by the business during its whole life, and it does that by overlooking certain facts.

For example, instead of taking the whole business life, it would take a period of 11 months and say there was a profit in that 11 months, although when you get to the twelfth month you find out that at the year end operations there may have been a loss. And it is by ignoring the particular losses that they come up with that figure, and I think we are entitled to analyze the manner in which this prospectus shows the net earnings of over a half million dollars, because on the face of the prospectus that is what [2588] it is, and it is not arrived at by any correct methods.

I want to offer evidence on that subject, and Exhibit BY as illustrating the testimony. [2589]

Well, I am going to permit you to use exhibits in connection with the matters I allowed plaintiff to use exhibits on. I am going to permit you to use exhibits on a summary of what you think about Silzle and TreeSweet contracts, which the plaintiff did. You will be entitled to use an exhibit in connection with the Exhibit 69, the computation.

I am not going to permit you to use exhibits to illustrate every bit of the testimony of the witness as he goes along. Otherwise, as I said before, we might as well give the jury a typewritten copy of the witness' testimony to take to the jury room.

I think that you would be entitled to make a reconstruction of the financial statement for the year 1951 upon proper foundation. You have got already in evidence BB, BC, BD and BE, BF and BG.

Mr. Strachan: BG will not be offered, your Honor.

The Clerk: BF isn't in evidence.

The Court: I know, but you have identified BF concerning surplus. What you have done, of course, is by five exhibits broken down each portion of the financial statement. That is sort of under the bridge now.

How are we going to proceed on this? I suppose we might as well proceed in the absence of the jury on some of these.

Mr. Strachan: I think procedurally that might be the most expeditious way to do it, your Honor. I think that will [2590] present the questions of procedure in the most pointed form and give me the opportunity to lay such foundation as I want to, and Mr. Dixon, on the other hand, an opportunity to be specific in his objections.

Mr. Dixon: May I discuss this for a moment, your Honor, because I think it is important, at least to the plaintiff, in point of time. We had to reread testimony, and so forth, and it probably speeded it up to some extent. However, I don't think this situation is quite analogous.

The so-called exhibits which the defendant expects to offer that we have been discussing are in fact summaries, as I read them, of the testimony which the accountant witness will give. It is on that assumption that they are offered. It seems to me the question will be whether or not he could testify first to the statement, and if it is not objectionable, the evidence is in, and then if the summary is proper of the evidence, it could go in, if necessary. But that is not the situation we dealt with in the previous exhibits we have discussed of the plaintiff.

The Exhibit 39 the plaintiff had made up after the witness had fully testified concerning his opinion and conclusion and the basis for it. Then we put it in. In other words, there was already evidence in the record to support the showing of this to the jury.

Now, what counsel expects to do with this, and that is [2591] why I rose to object to the procedure that I was sure he wanted to follow this morning, is that before any testimony at all is in the record by the witness concerning any of these things in these exhibits, he wants the jury to have the exhibit, so, presumably, the jury can more easily follow the testimony. That is the only justification for it, as I see it.

Now, on that basis I object to it because the jury already has something in advance of the testimony in the record, and I don't think it is proper. It is not a summary, in other words, of the opinion of the witness.

All of these exhibits deal, your Honor, with alleged facts which can be directly testified to by the witness on the stand. For example, some of the material in these exhibits, I have informed counsel, and I say again that I am agreeable to a stipulation of fact at any time that I am satisfied that any of these things that they are talking about are facts. I will so stipulate, subject to my reservation of objection as to materiality and irrelevancy of the fact.

But it seems to me that these exhibits that they want to offer are being offered for an entirely different purpose, not to explain testimony already in the record or the basis of an opinion of the witness, but to get in through the back door in advance of the actual testimony a lot of things that the jury might at least consider which might well be prejudicial [2592] to the case before any foundation at all has been laid for it.

The Court: That is why I went through the record up to date to see where we were, and in each instance to date there has been no exhibit given to the jury except where the material in that exhibit was already in the record.

Mr. Strachan: I can comply with that same requirement.

The Court: That then raises the question of whether we are going to have a flood of these exhibits. I am going to permit reasonable summaries. In the plaintiff's instance, they had a summary of the TreeSweet and Silzle contracts, and we got into 69, which apparently the plaintiff never intended to offer as an exhibit, but which the court requested after long cross-examination and informed counsel that they could do the same thing and present a computation.

The plaintiff had financial statements in the record. The defendant is certainly entitled to have a financial statement showing from their standpoint the financial condition of the company certainly in the year 1951 and possibly in the other years. Presently you apparently have it all in except F on surplus, broken down into five different years.

But beyond that I don't propose to have everything the witness testifies to illustrated by an exhibit. The illustrative exhibits are within the discretion of the court. All the court has to do is be even handed, and that is what I [2593] propose to do. [2594]

* * *

Mr. Strachan: May it please the court, as I told you, I have two witnesses that I would like the privilege of putting on out of order, and for that purpose I would like to have Mr. Lynch temporarily excused from direct examination.

The Court: You may.

Mr. Strachan: Mr. Walker.

MARVIN H. WALKER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Marvin H. Walker.

Direct Examination

By Mr. Strachan:

Q. Mr. Walker, where is your home?

A. Lake Wales, Florida. I am general manager of the Florida Citrus Canners Co-operative.

Q. You are in Los Angeles temporarily, is that correct?

A. For a meeting of a National Council of Farmer Co-operatives.

Q. Which has adjourned here today?

A. That's right.

Q. You appear here pursuant to subpoena served upon you by the defendants? [2595]

A. I do.

Q. Now, will you tell us when you had your first connection with the citrus fruit industry in Florida?

A. About 1923.

Q. What was that connection with the industry?

A. With a local association of citrus fruit growers, and in the same year with the Florida Citrus Exchange, which is a fresh fruit co-operative marketing organization.

Q. You say you are general manager of what organization?

(Testimony of Marvin H. Walker.)

A. Florida Citrus Canners Co-operative.

Q. Will you tell us briefly what that organization is?

A. It is a citrus processing association which handles the processed oranges, grapefruit, tangerines and limes of about 9 or 10 per cent of the growers of the State of Florida.

Q. How long have you been general manager of that co-operative?

A. Since the fall of 1950. I have been with the co-operative since 1949.

Q. Before that what was your position with the Florida Citrus Exchange?

A. I was assistant general manager of the Florida Citrus Exchange.

Q. Will you describe briefly the nature of that organization?

A. It is an organization that markets the fruit, fresh [2596] fruit, packed by local associations of growers. Most of my time, however, in the last—well, in the ten years before I went to Lake Wales, was with the Florida Citrus Commission.

Q. What is the Florida Citrus Commission?

A. The Florida Citrus Commission is a state government agency that administers our various citrus programs, our advertising program—we levy taxes on all of our fruit for advertising purposes, a research program, and we engage in transportation problems, and matters of that kind.

Q. As I understand it, the orange varieties and the packing seasons in Florida are somewhat dif-

(Testimony of Marvin H. Walker.)

ferent from those that we find in California. Will you describe briefly the varieties and the packing seasons of the Florida crops?

A. Florida oranges are harvested usually from about the first or middle of October to the end of June. Once in a while when we get some late bloom fruit, we will harvest fruit through July and into August.

We have quite a large number of varieties in Florida, but they are classed in three major groups. The early varieties harvested in October and November and December, the Hamlin oranges, the Parson Brown oranges, which are comparatively low in soluble solids, juice solids, and which have a juice rather pale in color.

The mid-season oranges, which are usually harvested in December, January and February, sometimes in March, and [2597] is a very good orange, but an orange with a lot of seed in it, pineapple orange, and what we call the seedling orange.

Then the late orange, which is almost entirely the Valencia type of orange, which is harvested from about March 1 until the end of the harvest season in late June or July.

Q. Are you able to recall the market conditions and the market prices as they trended over the years 1949, 1950 and '51, from your personal recollection?

A. Those were my first three years with the Florida Citrus Canners Co-operative and I have

(Testimony of Marvin H. Walker.)

quite a good recollection of some of the things that happened in that period, yes.

Q. Will you describe those crop conditions and the prevailing market conditions over that period of time to the jury as best you can recall them?

A. Well, in those days Florida had an orange crop of about 58 or 60 million boxes of oranges, and frozen orange concentrate was a new product, just getting started.

As a matter of fact, frozen orange concentrate was developed and even patented by the Florida Citrus Commission at the time when I was with it, and frozen orange concentrate is the product that has taken over and almost controls what happens in the Florida orange industry these days.

I think the first packs of frozen orange concentrates were back in 1945-46. Very small pack that year. Very small pack the next year. Those were the first few years following [2568] the war. We were all quite concerned about economic conditions in this country. We lost all this Army and government business for our products.

But then suddenly frozen orange concentrate found a market and captured the imagination of people, and it was in 1948-49, I think, that we, the industry, Florida industry, packed almost two million gallons of frozen orange concentrate and, contrary to the experience of the two preceding years, we didn't have enough of it. Everybody wanted it.

The Court: Let me interrupt. When you use the terms "48 and 49," you are speaking of the season?

(Testimony of Marvin H. Walker.)

The Witness: That is the season.

The Court: It started October, 1948, and went to June, 1949?

The Witness: That is correct.

The Court: All right. [2599]

Q. (By Mr. Strachan): Was it the '47-48 year or the '48-49 year——

A. '47-48 that we produced about 2,000,000 gallons.

The Court: '47-48?

The Witness: '47-48. Then in '48-49 the production jumped all the way to 10,000,000 gallons.

Mr. Dixon: Do you mean in frozen concentrate?

The Witness: Frozen orange concentrate.

And in '49-50 it jumped to 20,000,000 gallons, or it might have been twenty-one, in that neighborhood. It was going up at the rate of 10,000,000 gallons a year, a phenomenal increase in the production of a food product.

And in '50-51, as I remember the situation, it went to approximately 30,000,000 gallons. And it went even higher of course, in the followings years.

But it was in that period that we had this tremendous initial growth in the production and distribution of frozen orange concentrate.

Q. (By Mr. Strachan): Now, starting with the year 1949, what effect——

The Court: By 1949—he is using seasons, so adjust your questions, if you can, to seasons.

Q. (By Mr. Strachan): Taking the year '48-49, then, can you recall what was the effect on the

(Testimony of Marvin H. Walker.)

price of fruit and the price of citrus products, particularly with reference [2600] to orange juice. sweetened and unsweetened single strength?

Mr. Dixon: I object to the question, your Honor. It calls for a conclusion. What was the effect is a question that is entirely too general. I have no objection to a question asking for testimony as to the facts.

The Court: I think the witness is qualified as an expert on Florida problems, so the objection will be overruled.

We will be charitable to you.

The Witness: May I have the question repeated?

(Question read by the reporter.)

The Witness: The prices went to substantially higher levels in that period.

Q. (By Mr. Strachan): Can you recall approximately how high the price of orange juice went during that period? A. That is '47-48?

Q. No. '48-49.

A. May I refer to my own figures on that?

Mr. Dixon: Just a moment. I would like to know where the witness got the information, and so forth, your Honor.

The Court: Do you have some document that you want to refer to, Mr. Witness?

The Witness: This document is a report of our actual average selling prices of the Florida Citrus Canners Co-operative.

The Court: Who prepared the document? [2601]

(Testimony of Marvin H. Walker.)

The Witness: Our accounting department. Our treasurer would be the man responsible for it. Our average selling prices, by months, in these years——

The Court: Just a moment.

Do you want to inquire on voir dire?

Mr. Dixon: Yes.

Mr. Walker, when was this prepared, can you tell the jury?

The Witness: I beg your pardon?

Mr. Dixon: When was the paper, whatever it is you are referring to, prepared by the treasurer of your company?

The Witness: It was prepared——

Mr. Dixon: Before you came out here?

The Witness: Yes. At least six months ago.

Mr. Dixon: Specifically at your request six months ago?

The Witness: Yes.

Mr. Dixon: For the purpose of bringing it out here for this case?

The Witness: No. At the time I did not know that I was going to testify in the case.

Mr. Dixon: Do you make a habit of carrying those records with you?

The Witness: I had this one because I had a call about the thing and was asked if I would be prepared to say something about it. [2602]

Mr. Dixon: I am only questioning you at the moment with reference to this particular paper that you are referring to.

(Testimony of Marvin H. Walker.)

The Witness: This is the only one I had brought, by the way.

Mr. Dixon: That was prepared at your request six months ago?

The Witness: Yes.

Mr. Dixon: For what purpose, please?

The Witness: For a friend in the California Fruit Growers organization, or Sunkist Growers. He asked me at the time—he was in Florida, he phoned, I didn't even see him at the time, he phoned and asked me if we could let him have our selling prices in this period. And I just turned the request over to the accounting department and was furnished with a copy of what was prepared.

Mr. Dixon: This was prepared not for your own particular use, but for someone in Sunkist, and at their request?

The Witness: Yes.

Mr. Dixon: Who was the person making the request?

The Witness: Mr. Finley.

Mr. Dixon: All right. Go ahead.

Q. (By Mr. Strachan): Now, will you tell us how the prices ranged in the season '48-49?

A. They started out at comparatively low levels, about [2603] $1.75 per dozen, 46-ounce cans. The 46-ounce can is this large can of orange juice. This is the price at Lake Wales. 12 cans to the case. At roughly $1.75. And by September, 1949, our average prices had gone over $4.50 per dozen.

(Testimony of Marvin H. Walker.)

Q. Is that an unprecedented price for such citrus products?

A. I think it is the all-time record high price. I recall no higher price.

Q. Following the setting of that record high price in 1949, will you tell us how the market trended thereafter?

A. Prices started to go down some during the season of 1949 and '50, and they dropped greatly in the season of 1950-51.

I might explain that when orange concentrate first got into extensive distribution in this country the consumers were paying about 29 cents for a six-ounce can. That is what you paid for it in places like New York and Chicago.

Prices kept going down steadily as we started packing 10,000,000 more each year, and there was, naturally, quite a change in the entire frozen orange concentrate business. We had to achieve a great many economies in our operations to reduce prices and to market the very rapidly increasing production.

Last year, for example, prices got down to 10 cents a can from the 29 cents a can that we were getting a comparatively [2604] few years ago.

I think that the average price of frozen orange concentrate today, just as a matter of information, would be about 15½ or 16 cents——

Mr. Dixon: If the court please, I have no objection to this witness telling what the situation is today, but I think the testimony should be confined to the period in question and ending 1951, please.

The Witness: I beg your pardon.

The Court: Yes. Ask your question, Mr. Strachan.

Mr. Strachan: Yes.

Q. (By Mr. Strachan): Will you trace the price trends and the market conditions on the Florida orange juice, including the single strength, sweetened and unsweetened, through the year '49-50 and into the following year of '50-51?

A. The Florida packs of canned orange juice in this first season you mention of '48-49, and the second one of '49-50, were, as I recall, in the neighborhood of about eighteen or nineteen million cases a year. Then in this season of 1950-51 we all got a little too optimistic and packed close to 20,000,000 cases that year. It was at the end of that marketing season that we had a very drastic decline in the prices of all of our processed orange products, both concentrate and canned juices.

Q. Did the Government crop estimate have any bearing [2605] on the quantity of juice packed and the canners' expectations with regard to the market, during the first six or seven months of 1951?

Mr. Dixon: Objection to the form of the question, your Honor. Just for the record.

The Court: Overruled.

The Witness: I would say that the Government estimate didn't have any influence on the quantity packed, but it had a lot of influence on the ex-

(Testimony of Marvin H. Walker.)

pectation of the canners. In 1950-51—it is sometimes a little difficult to remember each of these seasons—we started out with a Government estimate, a production of 61,000,000 boxes of Florida oranges, 62,000,000 boxes was the first estimate; that estimate was actually reduced to about 61,000,000 boxes. If I correctly recall the figures, by July we had harvested 68,000,000 boxes, we harvested substantially more oranges that season than the Government forecast, and most processors, like ourselves, figure prices on the basis of these Government crop forecasts.

Another factor that year, and this has just come to me, is that it was at about that time that we were also increasing our yields of frozen orange concentrate, particularly, and to some extent canned orange juice from oranges. And by "yields" I mean how many cans we get out of a box.

Mr. Dixon: Is this in '51?

The Witness: This was back in '51. [2606]

There was a marked increase. I recall a report I made to our board of directors at the end of that disastrous season down there trying to justify some of the low prices we were returning to our growers. It was not only the great increase in the Government crop estimate by the end of the season, but also this increase that we achieved during the season in the yield of frozen orange concentrate. We had more boxes of oranges, the production was actually greater than indicated by the increased

(Testimony of Marvin H. Walker.)

number of boxes, we got a greater yield out of the boxes we had.

Q. (By Mr. Strachan): What was the effect of those circumstances, in combination with each other, upon the market price of orange juice, canned orange juice?

The Court: Are you talking about Florida juice?

Mr. Strachan: The Florida juice, yes, your Honor.

The Witness: The effect was disastrous.

Q. (By Mr. Strachan): Will you trace it from, say, the spring of 1951 into the summer months?

A. There is a lot of psychology in the citrus canning business. We had had two or three very profitable years, and prices were going up and up and up, and concentrated came along, and grove prices were going up, orchard prices, as you would call them in California, were spiraling, and suddenly we had this big increase in our crop production, the increase in our yields, we had raised our product prices— [2807] by "product prices" I mean the prices we were charging for a dozen six-ounce cans of concentrate, and a dozen cans of 46-ounce juice —to levels which naturally reduced the quantities the consumers were purchasing. Inventories built up. We were all frightened, when we wound up the 1950-51 season with a lot more oranges than anybody thought we had, and weather conditions were favorable, and the bloom for the next year's crop had appeared, and the new crop was showing

(Testimony of Marvin H. Walker.)

up on the trees, and we were all deeply concerned about a further large increase in the following year's crop to be marketed beginning in October, 1951, so most of the packers, and many of them with the urging of their bankers, decided to unload, and they just unloaded their juices and unloaded them fast.

Q. Now, can you, by recollection or by reference to the average prices that you have on your memorandum there, trace the effects of that unloading?

A. Well, in the year 1951, the monthly average sales prices of Florida Citrus Canners Co-operative for unsweetened orange juice, per case of 12/46 ounce cans, f.o.b. Lake Wales, were in January, $2.47; February, $2.63; March, $2.85; April, $3.01; May, $2.70; June, $2.41; July, $1.91; August, $1.73. That is when we unloaded, in August.

Our prices strengthened a little bit then on what we had left. [2608]

September $1.99, October, $2.04.

Mr. Strachan: I would like to have this document, if you don't mind, marked as an exhibit in the case.

The Court: What will be the next number unassigned, Mr. Clerk?

The Clerk: BY.

(The exhibit referred to was marked Defendants' Exhibit BY for identification.) [2609]

Mr. Dixon: The general objection heretofore made, your Honor, on the ground the witness has

(Testimony of Marvin H. Walker.)

already testified concerning anything in the document. I don't think it is necessary to further encumber the record.

The Court: Objection sustained.

Mr. Strachan: Had the document been received. I would like to furnish copies to the jury. The objection is sustained, I understand.

The Court: I will permit some reasonable use of exhibits commensurate with the plaintiff's illustrative exhibits, but I am not going to permit every witness who testifies to illustrate his testimony with a written exhibit. If I did, I might as well let the jury take the written transcript of the testimony of the witness to the jury room, and that I will not do.

Q. (By Mr. Strachan): Mr. Walker, will you state to the court and the jury what the relationship is between the pricing of Florida orange juice and the pricing of California orange juice, or vice versa, and give us the reasons for whatever effect or lack of effect you describe?

A. Florida establishes the market price levels for canned orange juice for the reason that our Florida packs of canned orange juice are on the average at least 10 times larger than the California packs of canned orange juice.

Q. Can you state in quantities what that 10 to 1 relationship [2610] is?

A. Well, the last two years Florida has packed about 17½ million cases of canned orange juice a year, and I don't even look at the California figures

(Testimony of Marvin H. Walker.)

very often, they become rather unimportant to us, but my guess would be California is packing not more than a million cases a year today.

Q. What effect has that on the fixing of prices at which California juice may be sold?

A. Of course, California canned orange juice is sold right here in Los Angeles. Our own company sells our own brand of good Florida orange juice right here in Los Angeles, California. The competing California prices are usually the Florida prices plus the freight differential, which would amount to possibly 70 or 75 cents a case. In other words, if we are selling canned orange juice at $2.00 a case f.o.b. Florida, and then shipping it to Los Angeles here, these California packers can get roughly $2.75 a case for their product in this market, and most of the California pack, to my knowledge, is distributed on the Pacific Coast here.

Q. What are the factors that enter into the fixing of prices of the Florida citrus products on a nationwide basis, Mr. Walker?

A. Supply of fruit available, consumer demand, all other demands that we might have, and at times our psychology on prices, how we feel about prices. Prices are the opinions [2611] of a lot of people.

Q. There has been some testimony in this record concerning the dumping by Pasco of a large quantity of orange juice in the summer of 1951. Are you familiar with that situation?

A. I have some recollection that Pasco, like

(Testimony of Marvin H. Walker.)

other large canners of Florida citrus juices, cut prices rather drastically along about June, 1951. Pasco Packing Company of Dade City, Florida, at that time it was, and still is the largest canner of citrus juices in Florida. In the period we have been discussing here, 1949 to 1951, I would estimate that Pasco was packing approximately 25 per cent of all of the citrus juices packed in the state of Florida. So, of course, the prices which they quoted had a very strong influence on market values generally.

Q. I understand in Florida there is what is sometimes called the two price system for citrus product fruit. Will you tell the jury what that two price system is and what its influence is on the cost of producing orange juice, single strength, by Florida packers?

A. If I correctly understand your question, it is that processors pay different prices for what we call juice oranges and concentrate oranges, for the oranges used in canned juice and the oranges used in frozen orange concentrate.

The organization with which I am connected packs [2012] both single strength canned juice and frozen concentrate. By the way, we also buy oranges on the open market like any corporate canner does, though we handle our own membership fruit on a co-operative basis.

There has been a difference in recent years, and there was certainly a difference, I think, in this 1949 to 1951 period, in the season average prices paid by Florida processors for the juice oranges

(Testimony of Marvin H. Walker.)

going into single-strength juice and the concentrate oranges going into frozen orange concentrate. That difference comes about by reason of the fact that most of the juice oranges are purchased in the early part of the season and are mostly the early and mid-season varieties, while the concentrators operate more heavily on the mid-season and late varieties. The concentrators can get a better quality pack out of the later oranges, and they can get better yields out of the later oranges.

By the way, I might explain that in Florida we have the Florida Canners Association, I think I was president of it in this 1950-51 season, and I am still a director of the thing, but it is primarily a statistical organization. All of the canners, all of the concentrators in Florida, are members of this association.

We furnish the association each week quite detailed information as to the number of boxes of fruits of different varieties we use, all the items that we pack, the prices that [2613] we pay for fruit, the yields that we get per box of fruit, and that is all mimeographed and comes to us in a report each week, so all the processors have detailed information. We have these weekly reports as to the prices paid in the preceding week by juice canners for juice oranges and the prices paid by the concentrators for the concentrate oranges.

Merely to illustrate the point—I hesitate to say anything after 1951, but I can remember what has

(Testimony of Marvin H. Walker.)

happened since then a little bit more clearly, so I would say——

Mr. Dixon: If the court please——

The Witness: Excuse me.

Mr. Dixon: I think this witness should confine his testimony to 1951.

The Court: Yes. Don't go beyond 1951, Mr. Witness. Have you answered the question asked you?

The Witness: I think that I have, your Honor. Because the juice canners get most of their oranges and put up most of their pack in the early part of the season, the price that they pay for juice oranges usually is less than the price paid by the concentrators for the later oranges.

Q. (By Mr. Strachan): I notice, Mr. Walker, you speak of quantities of fruit in terms of boxes?

A. Yes.

Q. Is that the customary usage in Florida as contrasted with the use of tons in measuring the pack in California [2614] oranges?

A. Yes. We never use the term tons in Florida. It is always boxes. A box of oranges in Florida is 90 pounds of oranges.

Q. So there would be a conversion factor of what? 20 boxes to 1?

A. A little over 22 boxes to a ton.

Mr. Strachan: That's all on direct examination. Mr. Dixon may have some questions.

Mr. Dixon: Yes, I think I do, counsel.

(Testimony of Marvin H. Walker.)

Cross-Examination

By Mr. Dixon:

Q. Mr. Walker, I think you said you prepared this exhibit that you referred to at the request of Mr. Finley of Sunkist, is that correct?

A. That's right.

Q. About six months ago? A. Yes.

Q. Did you have any discussion of this case with Mr. Finley at the time he requested you to prepare this exhibit?

A. To this extent. He phoned me long-distance from Tampa. He was coming to Lake Wales and wanted to see me. I was going to be out of town. He asked me if I could furnish him some information on our selling prices in those years, and [2615] he said that he had in mind using the information in connection with some lawsuit. I had no information whatever regarding the litigation at that time.

Q. Was there any suggestion made at that time that you would be glad to support those figures?

A. No thought of it at all, no discussion.

Q. How long had you known Mr. Finley, Mr. Walker?

A. At least 10 years, might have been 12 or 13.

Q. Mr. Finley is in charge of the processing of product oranges and grapefruit for Sunkist, is he?

A. I understand that he is the manager of their processed orange division, and most of the time—

(Testimony of Marvin H. Walker.)

I have met him when he comes to Florida once every year or two.

Q. Do you know what are the duties, if any, he performs for Exchange Orange or Sunkist?

A. No, I do not.

Q. Do you know whether he is in charge of the marketing of the citrus juice products processed by Exchange Orange for sale by Sunkist?

A. Well, I have understood that his position is somewhat similar to mine.

Q. Do you set the price in your association at which the, say, single-strength juice will be offered for sale to the public, Mr Walker?

A. Well, some days I do and some days I [2616] don't.

Q. Who does in your association, if you don't?

A. We have, of course, a sales department and we have a division of the sales department handling the canned product. We have a marketing manager and a canned products sales manager. Then we have a marketing committee. We have all these meetings and all these people, and we think we know what we are going to do, and then something happens and we have to do something different. I usually make the decision and we go ahead and do it.

Q. You are the one in your association who makes the decision on prices, are you?

A. Well, I usually try to let the others make the decision, but when I don't agree with them, I make it myself.

Q. Do you recall anything about whether there

(Testimony of Marvin H. Walker.)

was a surplus of citrus juice products on the national market right after the war, say in 1946 and 1947?

A. I was not in the canning business at that time.

Q. You probably wouldn't remember or know about that situation, would you?

A. No. I was not so close to the canning business.

Q. Then I am not going to ask you any questions about it. I think you testified that Florida produced substantially more single-strength juice and frozen orange juice than does California?

A. That's right. [2617]

Q. In 1951, I believe you testified that was about what ratio, do you recall?

A. In the year 1951—in the season 1950-51, as I remember, Florida packed approximately 20 million cases of canned orange juice.

Q. That is 24 No. 2's? A. Yes.

Q. And California in that year packed one million six—is that correct?

A. I would accept that figure, yes.

The Court: What figure did Florida pack?

The Witness: About 20 million.

Q. (By Mr. Dixon): That is 20 million cases of 24 No. 2's, is that what you call them, Mr. Walker?

A. I might explain, if I might, we pack canned orange juice in cans of different sizes.

Q. Yes, the jury knows that.

(Testimony of Marvin H. Walker.)

A. But we convert it all to this one size merely for comparative purposes.

The Court: What figure was that for California?

Mr. Dixon: One million six cases, your Honor, of 24 2's, and I think the jury is already informed, if it is important, that there are 3.75 gallons to each case of 24 2's.

The Court: All right. Go ahead. [2618]

Mr. Dixon: That is 1,600,000 cases.

The Court: All right.

Q. (By Mr. Dixon): You say Florida establishes the price for orange juice, that is single-strength juice, sold in the United States?

A. Yes.

Q. Is that true out here on the West Coast, too?

A. Yes.

Q. I believe you said it cost about 75 cents a case for freight for a case of 12/46 to be shipped from your plant in Lake Wales, Florida, is it, to Los Angeles, is that the freight rate?

A. No. The freight rate is actually greater than that. This 70 or 75 cents was the difference between the average California rate and the average Florida rate.

Q. You said something about orange juice, single-strength juice, Florida juice, being sold. I believe, in June, 1951, for $2.40, something like that, a case f.o.b. Lake Wales, Florida. Now, at that time what would the freight have been, if you recall, for a shipment of that case? In other words, what

(Testimony of Marvin H. Walker.)

would be the delivered price to a wholesaler or retailer here in Los Angeles?

A. Well, I would estimate that for that year you would have to add 80 or 85 cents for a case of 46-ounce cans.

Q. About 85 cents? [2619]

A. Yes, in that neighborhood.

Q. So that would bring the price up to about what in June of 1951, delivered here in Los Angeles? A. That would be about $3.25.

Q. Do you know whether California was selling any single-strength juice in this market at that time?

A. I have no personal knowledge. I would believe that they would be selling some.

Q. From your knowledge of the California single-strength operations, when does the California Valencia single-strength juice come into the market, the national market, so to speak, as a rule?

A. During their period for harvesting Valencia oranges here, starting in about May of each year, I would say. [2620]

Q. Does Sunkist sell in your market in Florida?

A. No, sir.

Q. That is, single-strength juice?

A. No, sir.

Q. California juice doesn't get that far?

A. Not to my knowledge.

Q. Does it compete with Florida juice in any of the eastern markets? I am talking about single-strength Valencia juice, in, say, '51?

(Testimony of Marvin H. Walker.)

A. No, I don't believe that Sunkist competes with us in any eastern markets.

I am talking about the canned orange juice.

Q. That is what we are discussing, Mr. Walker. What about the rest of the country, do they compete with you out here?

A. Well, I hesitate to answer a question like that right in the middle of California, but the best market——

The Court: You be frank, now.

The Witness: The best market that Florida Citrus Canners Co-operative of Lake Wales has for its frozen orange concentrate is Northern California. And I think that the last consumer purchase report that I saw for the Los Angeles market, in which our company does not operate to any extent, showed the Florida brands to be the largest sellers in this market.

Q. (By Mr. Dixon): But a processor out here, say in [2621] Los Angeles, of course, if they sold the product in the local market here, if they wanted to they could certainly undersell Florida juice, couldn't they?

A. Oh, yes, they could undersell us. And we could undersell them, too.

Q. Do you mean here, after paying the freight?

A. It depends on how badly you want the market that particular day.

Q. In other words, that is just a statement of the obvious, that if you don't have to pay this freight, that you have that, at least, freight advantage in your own market where the juice is processed? A. That's right.

Q. I believe you testified that all of the California, or substantially all of the California pack of single-strength juice was sold in the West Coast area? A. That is my belief.

Q. Do you know? Have you ever made any study of it to determine the extent to which California juice and Florida juice, single-strength Valencia juice, meets in any of the other States of the country, on the shelves of the retail dealers?

A. Through the years I have seen a great many reports, of course, on the sales of all kinds of canned citrus products, and all of the reports that I have seen would indicate that [2622] California sells most of its canned juices along the Pacific Coast.

Q. Do you know whether that is true with reference to frozen concentrate, too? Orange concentrate, I am talking about now.

A. It might not have been true in 1951.

Q. Why was that, will you tell the jury?

A. California made a serious endeavor to develop a distribution of California packed frozen orange concentrate, and they at one time packed substantially more orange concentrate than is packed in California today. The California pack of frozen orange concentrate has gone down very, very sharply.

Q. Mr. Walker, it is a fact, is it not, that the price at which, say, Sunkist single-strength Valencia juice is sold in California, say here in Los

Angeles, is substantially the same as the price at which Florida juice is sold here in Los Angeles?

The Court: Are you talking about juice or concentrate?

Mr. Dixon: I am talking now about single-strength Valencia juice.

The Witness: Generally speaking, yes.

Q. (By Mr. Dixon): With the freight advantage that any processor had here in this area, California processor had, it could, if it wanted to, considerably undersell the [2623] Florida juice in this, its own market, isn't that a fact?

A. Yes.

Q. Mr. Walker, you said something about your organization having a two-price system to processors of juices and frozen concentrate in Florida. Is that a correct recollection of your testimony?

A. You recall very well the question I was asked. I don't like the phrase two-price system.

Q. I am just using the language of counsel that asked the question.

A. That's right. You are correct.

Q. I believe you said that your organization charged processors of single-strength juice who came into the market early to buy the product oranges a lower price than your association charged the processor of frozen concentrate, is that correct, who came into the market later?

A. No. I think you are mistaken as to our function in Florida. We do not sell fruit to other processors.

(Testimony of Marvin H. Walker.)

Q. You don't sell any fruit to processors?

A. No. We buy fruit.

The Court: Wait.

The Witness didn't say that he sold. He said that the processor paid less for oranges for juice than they did for concentrate.

The Witness: Yes. [2624]

The Court: That is where you made your error.

Mr. Dixon: Thank you, your Honor. I misunderstood.

Q. (By Mr. Dixon): In other words, your association doesn't represent growers, is that correct?

A. We are a co-operative association of growers formed for the purpose of processing and marketing our own fruit.

Q. But you don't sell any product fruit to independent processors? A. No, sir.

Q. You process it all yourself and then sell both the fresh fruit in the fresh fruit market and the canned juice that you process from the by-product fruit that isn't sold in the fresh fruit market?

A. Our members are corporations and co-operative associations of growers which sell some fresh fruit. We don't sell any fresh fruit. All we do is to process fruit.

I would like to explain that in addition to processing the fruit delivered by our own members, that we go into the open market and buy additional quantities of fruit.

Q. In other words, you do buy some, shall we

(Testimony of Marvin H. Walker.)

say, by-product oranges to be processed into single strength juice or frozen concentrate, is that correct?

A. That is correct.

Q. Did I understand you correctly that when you are buying oranges, that is by-product oranges for processing [2625] into single-strength juice. that you pay a lower price than when you are buying oranges to process into frozen concentrate?

A. No, sir.

Q. Tell me about the two-price system referred to by counsel.

A. We, as canners and concentrators, buy oranges this week, that week, the following weeks, we buy some of them for juice, some of them for concentrate, and there is not much difference in the price of oranges in any one week. Now, we will buy our juice oranges in the early part of the season, when prices normally and historically are at lower levels for these poor oranges; we will buy the concentrate oranges later in the season when the quality is better, we have got to pay a higher price for the concentrate oranges.

That is where the phrase two price comes in. We are not paying two prices for oranges; we are paying the same prices. The prices will fluctuate greatly during the season.

Q. Is the price that you pay at any time based on anything like the soluble content per ton?

A. It has to a limited extent only in the last few years. In 1951 it was not. Everything was on a box basis at that time.

(Testimony of Marvin H. Walker.)

Q. Do you know what the California system was in 1951 on which the selling price of product Valencia oranges to [2626] independent processors was based?

A. I was out here about that time, and as I remember it, the California price was based on a ton which represented 110 pounds of solids.

Q. Soluble solids? A. Yes.

Q. But Florida doesn't use that system?

A. Florida is still using the box price.

Q. In other words, in Florida you sell by the box and not by the soluble solids per ton basis?

A. A few processors, like ourselves, have started to buy oranges on the basis of so many cents per pound of fruit solids. We don't buy it on a ton basis, but 35, 36, 37 cents a pound of fruit solids.

Q. Getting back to this two-price system, I just want to be sure that I understand what was meant by it. Am I correct in my recollection that you stated that the juice canners pay less than the concentrators to process later? I mean the ones who are processing into frozen concentrates.

A. I am not sure that I have the question. Do the June canners?

Q. Juice.

The Court: Read the question.

(Question referred to was read by the reporter as follows: [2627] "Getting back to this two-price system, I just want to be sure that I understand what was meant by it. Am I cor-

(Testimony of Marvin H. Walker.)

rect in my recollection that you stated that the juice canners pay less than the concentrators to process later? I mean, the ones who are processing into frozen concentrates.")

Mr. Dixon: The question is rather awkward.

The Witness: Normally, and I am sure this was true in the '49-51 period, and I am sure——

The Court: Let me ask a question.

Is that price differential based on the law of supply and demand?

The Witness: No. It is based on quality.

The Court: It is based on quality, but it is also based on the law of supply and demand? If you had more of a demand for the poor quality goods, would that increase the price of the goods?

The Witness: Well, demand is some factor, I will readily admit.

The Court: The quality of the goods?

The Witness: Quality is the big reason for the difference in the prices paid for the juice oranges and the concentrate oranges.

The Court: Is the price fixed by any price that is set by any company? [2628]

The Witness: No, sir.

Mr. Dixon: Thank you very much, Mr. Walker.

Mr. Strachan: I have one or two questions, Mr. Walker.

(Testimony of Marvin H. Walker.)

Redirect Examination

By Mr. Strachan:

Q. I show you again Exhibit BY. From that exhibit it appears, does it not, that there was a period in which your products were out of the market, sometime in 1949 I believe?

A. That is correct, the three months of October, November and December, 1949, we did not have any unsweetened orange juice and did not sell any unsweetened orange juice.

Q. In times like that it would be true, would it not, that the geographical market for California juice might be extended?

A. Yes, very definitely so.

Q. But those would be abnormal times, would they not? A. That is right.

Q. Based on your knowledge of the industry, do you know whether there are any factors that affect the cost of producing orange juice in Florida that would make that cost higher or lower than the cost of producing fruit and orange juice in California?

Mr. Dixon: What year, counsel? Or are you talking generally?

Mr. Strachan: In general. [2629]

Mr. Dixon: I would like to have the question specifically directed to a particular time, your Honor.

The Court: Read the question.

(Question read by the reporter.)

(Testimony of Marvin H. Walker.)

The Court: If you know.

The Witness: Most Florida——

The Court: Objection overruled.

The Witness: Most Florida costs, citrus costs, are lower than California costs.

Q. (By Mr. Strachan): What are some of the factors that enter into that, if you can recall them?

A. Land values, labor costs.

Q. Both of those are lower, in Florida, than in California?

A. Yes, sir. The only cost item that I can recall that is higher in Florida than in California is the fertilizer cost item. We raise our oranges on a sandy soil and are completely dependent upon fertilizers down there. But our other production costs, and our processing costs are all quite substantially lower than your California costs, and that is true of all processed products.

Q. Do the Florida growers have the irrigating problems and costs such as are incurred in California?

A. Florida does not irrigate as extensively as does California. We don't have the grove firing costs. There are [2630] a number of important costs out here which we do not have in the production of fruit in Florida.

Q. Does Florida use the system that is followed in California of sending the fruit from the groves first to the packing houses, and then from the packing houses to processing plants?

(Testimony of Marvin H. Walker.)

Mr. Dixon: If the court please, I think this is wholly outside the scope of the examination.

The Court: What is the materiality of that? Haven't we pretty well exhausted the Florida witness?

Mr. Strachan: Mr. Dixon's cross-examination was directed to showing that because of the 75 or 80 cent or 70 cent transportation factor, that California growers had that much of an advantage in the California market, and I want to show that offsetting those are lower production costs in Florida, and that enables them to compete here notwithstanding the freight differential.

Mr. Dixon: If the court please, this witness testified that they couldn't compete here on the price situation. That is his testimony, to my recollection.

The Court: That is my recollection.

Mr. Strachan: I will put another question, then.

The Court: He said California could undersell Florida in its own market.

Q. (By Mr. Strachan): Would the lower production costs [2631] in Florida production permit the Florida juice to compete, pricewise, in the California market with the California products?

A. Yes, sir.

Q. And that is notwithstanding the freight differential? A. That's right.

Mr. Strachan: That is all.

The Witness: Our own——

The Court: Now, which do you mean? You have told us that you could compete with California producers, and you have told us that California could undersell Florida.

The Witness: Your Honor, I understood Mr. Dixon's question was, could California sell at a lower price in its home market here.

Why, certainly it could sell at a lower price in its home market. California packers could reduce their prices just as much as they want to any day of the week.

Q. (By Mr. Strachan): You didn't mean that they could do it at a profit, did you?

A. No, siree. It just depends on how much you want that particular market.

On some of our canned and processed products we can pack them and deliver them more cheaply in California than California packers can. [2632]

The Court: What products are they?

The Witness: Frozen orange concentrate is a good example of it. That is the biggest product we have.

Mr. Dixon: If the court please, I hate to carry on this, but I would like to clear up this situation. It won't take me very long, I think.

Recross-Examination

By Mr. Dixon:

Q. I think I really have been misled now, Mr. Walker. You say that because of the lower labor cost in Florida, and what was the other factor?

A. Lower fruit production cost to begin with.

(Testimony of Marvin H. Walker.)

Q. You mean producing the fruit?

A. Producing the fruit.

Q. That Florida could, because they would have a cheaper fruit and because labor would be cheaper. they could process the same product in Florida, single-strength Valencia juice, and pay the freight at 80 or 85 cents per case, and sell it in the California market here in Los Angeles at a price which would be at least equal with the cost of California processing and selling that product in this market? Is that what you want this jury to believe?

A. Your Honor, I find the question a little difficult to answer, because of the way our cost factors vary constantly. [2633]

Q. Let me ask you this question, then, and maybe the whole thing will be out. Have you ever made and do you have any knowledge of the actual cost of producing single-strength Valencia juice in the state of California by Sunkist?

A. No, I have no records or any information whatsoever on——

Q. So that you are in no position——

A. Not in recent years. I have obtained the information in other years, but I paid no attention to it in recent years.

Q. Did you have that information when you made your statement about 1951?

A. I have taken the trouble to develop that information particularly on frozen orange concentrate.

Q. I am talking, Mr. Walker, about single-strength Valencia juice and the cost of producing it here in California. Do you of your own knowledge know anything about the cost of producing a case of single-strength California Valencia juice here in the state of California by Sunkist?

A. To some extent.

Q. Did you have that information in 1951?

A. I have had some general information throughout all the years on California costs.

Q. My question is, did you have that information in [2634] 1951? A. Oh, yes.

Q. From whom did you get it?

A. From a great many packers here. I would make a trip to California and go around to the canning plants and I would ask the various people here how much are you paying for workers in these plants, and then I get these various reports on the California citrus industry which show the cost of production of their fruit from year to year and the changes in their fruit production records, and we have these meetings in Washington where we sit down with representatives of the Department of Agriculture and California people and exchange a lot of this information.

Q. Mr. Walker, I am talking now about specific information which you got concerning the cost of producing or processing single-strength Valencia orange juice in California in 1951. I will again ask you the question. From whom did you get such information? That is the first question.

A. I am not sure I was here in 1951.

(Testimony of Marvin H. Walker.)

Q. I thought so. Did you get it at any other time? A. Oh, yes.

Q. From whom and when?

A. Well, I have visited practically every citrus processing plant that they have in California.

The Court: Let's wait a minute. Are you talking about [2635] the processing cost or are you talking about production cost plus processing cost?

The Witness: I am talking about production cost and processing costs, both of them.

The Court: Has Sunkist ever listed what their production cost of growing oranges is, to your knowledge?

The Witness: No, not Sunkist. I have seen the composite average California figures that are compiled and reported.

The Court: You mean cost figures?

The Witness: Yes.

The Court: Do you understand what a farmer co-operative is?

The Witness: Oh, yes.

The Court: The farmer gets back for his fruit what eventually it can be sold for?

The Witness: That's right.

The Court: Can you tell me how you can figure the cost figure from that?

The Witness: Yes. These farmers maintain records of what their fertilizer cost is, what the cost is to irrigate, the cost is to fire groves, what their taxes are, and they report those, I think to their state university or state extension service out here. That information is compiled the same way it is compiled in Florida, and each year they come out with a report on the average cost of production in the [2636] state of California for that year.

Q. (By Mr. Dixon): I understand, Mr. Walker, that there is certain statistical data that is available to everybody in the industry that is prepared by the Department of Agriculture. I am not talking about that. I am asking you if you have any knowledge, personal knowledge, apart from anything that is in the government public records, concerning the cost of processing single-strength Valencia oranges in the state of California in the year 1951?

A. No, sir. I don't recall that I was here in 1951 and I would not say that I have any personal direct knowledge of it.

Q. Do you have such information concerning the cost of processing single-strength Valencia juice in California for the year 1950 of your own knowledge?

A. Well, I have had cost information on some of those years and I just can't recall which of those years it was.

Q. I realize it is quite a long time ago, but can you tell us and this jury just where you got it, from what processor you got that information, if you got it from a processor?

A. No. I did not get it from the Sunkist people here.

Q. That isn't my question, Mr. Walker. My

(Testimony of Marvin H. Walker.)

question is, can you tell this jury from what processor you got that information? [2637]

A. I have discussed costs and different items of costs——

Q. My question relates to single-strength orange juice.

A. ——with products like Real Gold or Mutual Orange Distributors at the time that they were in the business, and people like that, just traveling around visiting these plants.

Q. You mean you did this in 1950?

A. I wouldn't say that I was here in 1950.

Q. What about 1949?

A. I know I was here in January, 1949, that I can remember.

Q. Was that the time you got this cost information on which you base your answer that because of the processing cost, labor, and so forth——

A. No, it was not. I might have picked up some of the information at that time, but the impressions that I have and the beliefs that I have——

Q. The jury isn't interested in your impressions, Mr. Walker.

Mr. Strachan: I think it is more correct to say that Mr. Dixon isn't interested.

Mr. Dixon: I certainly am not interested in impressions.

The Court: Let's not argue about it. Impressions, as we all know, don't count. It is knowledge and belief.

The Witness: Your Honor, the knowledge and the belief I [2638] have about the differences in the Florida and the California costs are based on countless conversations I have had with people in the last 20 years.

Q. (By Mr. Dixon): I'm sorry, Mr. Walker, but my question was directed to particular years, because I thought you said that you knew that it couldn't be done because of the labor differential in costs in Florida, and I think there was the cost of fruit or some other item, I don't recall, and the purpose of my question was to determine whether in fact you did have any knowledge that you acquired concerning the cost of processing single-strength Valencia juice in California in the years 1949, 1950 and 1951, and I understand your answer to that is that you do not have any such information.

A. That's right, sir. [2639]

* * *

(The following proceedings were had outside the hearing and presence of the jury:)

Mr. Strachan: I mentioned this morning I was in the process of making a selection of documents from the files presented by the plaintiff and I have here a group of documents which I have selected that I would like to tender to Mr. Dixon. I have no idea when I will put them in. As I select more, I will give them to him.

The Court: All right. [2640]

Mr. Strachan: That's all I have. Thank you.

Mr. Dixon: I understand that you intend to use all of these documents, is that correct?

Mr. Strachan: No, that is not correct.

The Court: Is this the group you spoke of about 40 or 50 documents where you thought you might use 40, but you didn't know whether you would use all of them?

Mr. Strachan: That's right.

The Court: What are they? Mostly letters?

Mr. Strachan: They are all either Anagrams or letters written to or by the plaintiff.

The Court: And they come from the records of the company?

Mr. Strachan: Yes, sir.

The Court: All right. I think that is sufficient. It is preferable if counsel can say he is going to introduce them all, but we don't want to make a lawyer dishonest merely to get over a requirement of the court. Mr. Strachan can say, "I am going to offer them all," and next week he can say, "I have changed my mind. I am going to offer 20 of them. I am not going to offer all of them."

I don't think the burden is onerous.

Mr. Dixon: The only reason is I hate to have to spend a lot of time going into these things unless I am reasonably certain counsel is going to use them. [2641]

The Court: That is why I asked what they were. They are supposed to be letters and Anagrams. If they were contracts or something like that, it would be different, but letters can be looked over rapidly.

Mr. Strachan: I think I have already given Mr.

Dixon practically all of those at another [2642] time.

* * *

CLARENCE C. TAYLOR

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Clarence C. Taylor.

Direct Examination

By Mr. Strachan:

Q. What is your name?

A. Clarence C. Taylor.

Q. What is your occupation, Mr. Taylor?

A. I am the secretary of the Mutual Citrus Products Company of Anaheim, California.

Q. Will you describe briefly that company and the nature of its operations? [2646]

A. We are processors of citrus fruit, making citrus juices, pectin, citrus oil.

Q. How long have you been connected with that company?

A. Since its incorporation in 1928.

Q. What is your professional training, Mr. Taylor? A. I am a chemist.

Q. Have you practiced your profession with respect to the citrus products industry during the time that you have been engaged in that business?

A. Yes.

(Testimony of Clarence C. Taylor.)

Q. During the summer of 1951 were you contacted by Mr. James Finley of Exchange Orange Products Company with a view to working out a processing contract with EOP? A. I was.

Q. Can you fix about the time of that contact?

A. Not definitely, no. It was in the summertime. During the Valencia season is all I can say.

Q. Can you say whether it was in May, June or July?

A. Well, it was probably from July on. I can't place it definitely.

Q. And that discussion was with respect to processing oranges into what product, if you recall?

A. Into orange concentrate.

Q. Frozen, or——

A. I wouldn't say definitely. It may have been either [2647] hot pack or frozen. We make both, and I don't exactly remember.

Q. Did you work out with him the terms of an arrangement under which you would be willing to process the fruit?

A. We did in a general way, but we never packed any. The cans were delivered, and for some reason or other we failed to pack any for them. So there was nothing definite.

Q. You say that cans were delivered; do you mean by that that Mr. Finley had the cans that were to be used, in the event you processed oranges for him, delivered to your plant?

A. That's right.

(Testimony of Clarence C. Taylor.)

Q. And then no fruit was delivered for processing, is that correct?

A. We may have had one or two loads, but I don't—because, as I remember, we were going to establish a processing cost, and we didn't process any—whether it was our fruit or his fruit to obtain the yields, I don't remember, but we didn't pack any in his cans, I do remember that.

Q. So at most you made some trial runs to determine whether you could fulfill the contract, is that it? A. That is right.

Q. And eventually EOP took the unused cans back? A. That's right.

Q. Mr. Taylor, you are appearing here today in response to a subpoena served on you by the defendants in this [2048] case, is that correct?

A. That is correct.

Q. Prior to the service of that subpoena, were you subpoenaed to appear as a witness on behalf of the plaintiff in this case?

A. A subpoena was served in the name of the company, yes.

Q. And did that subpoena call on you to prepare a statement as to your fruit purchases, orange purchases, in the years 1950 and '51?

Mr. Dixon: If the court please, I object to any questioning of this kind. I will admit that we requested certain information, and I got it. Now, if counsel wants the same information, it is coming pursuant to his subpoena. I want that clear in the record. And I object to any further reference to

(Testimony of Clarence C. Taylor.)

any subpoena that may have been served upon this company duces tecum by the plaintiff.

The Court: I don't think it has any part in the proceedings.

You subpoenaed the witness here, Mr. Strachan.

Q. (By Mr. Strachan): Did you prepare from the books and records of the company a statement of the orange purchases by your company for the years 1950 and '51?

A. Our bookkeeping department did prepare such a statement. [2649]

Q. One statement for 1950 and another statement for 1951? A. That is correct.

Q. Do you have those statements prepared by your bookkeeping department with you?

A. I do. [2650]

Mr. Strachan: I will ask that this document headed 1950 be marked as an exhibit.

The Clerk: Defendants' Exhibit BZ for identification.

(The exhibit referred to was marked Defendants' Exhibit BZ for identification.)

Mr. Dixon: May we see it, counsel?

Mr. Strachan: Yes, sir.

The Clerk: And for 1951 I am marking CA for identification.

(The exhibit referred to was marked Defendants' Exhibit CA for identification.)

Mr. Dixon: Is this what you gave me yesterday?

(Testimony of Clarence C. Taylor.)

Mr. Strachan: Yes, sir. I think so.

I will offer Exhibits BZ and CA in evidence.

Mr. Dixon: Just a moment. I think we should know what they are. In this form, your Honor, I certainly object to this exhibit going in, because there is no indication of the price, how it is determined or on what basis. In this form I certainly object to the exhibits as misleading on their face. Nothing whatsoever in the record so far, your Honor, further, to indicate or support any of the price statements contained in this exhibit.

The Court: Well, lay some further foundation, Mr. Strachan. I don't understand them from looking at them.

Q. (By Mr. Strachan): I show you the Exhibit BZ, which is headed 1950, and ask you if in the column approximate cost [2651] you have stated the approximate cost of the quantity and type of navels by month shown opposite those costs.

A. We have, January to April.

The Court: By cost, do you mean what you paid for them?

The Witness: The number of tons and the cost.

Q. (By Mr. Strachan): The cost per ton?

A. The cost per ton.

The Court: What you paid for them?

The Witness: That is correct. [2652]

* * *

Q. With respect to the months from May through December under the column Valencias, you show the tonnage purchased and opposite those in

(Testimony of Clarence C. Taylor.)

August, September, October, November and December, you show the approximate cost per ton, is that correct? A. That is correct.

The Court: Was that price per ton figured on the basis of solids per ton?

The Witness: Part of them may have been. We buy some of them off the groves by the box, some of them from the packing houses, that had no basis of soluble solids, and at the present time we are buying some on the basis of soluble solids. However, these I don't believe were, because when you buy on the basis of soluble solids, it runs into odd [2653] figures.

The Court: That is, cents?

The Witness: Yes.

The Court: You have some cents after the dollar?

The Witness: Yes. It doesn't come out even.

The Court: Go ahead, Mr. Strachan.

Q. (By Mr. Strachan): You show a total of the tonnage of oranges of the navels and totals of the Valencias, is that correct?

A. That is correct.

Q. And you distinguish there between the oranges purchased from Sunkist and those purchased from others, is that correct?

A. That's right.

Q. Now, I show you Exhibit CA and ask you if that is prepared in the same manner, showing by months the purchases of navels in February only, with no cost per ton shown, but as to the Valencias

(Testimony of Clarence C. Taylor.)

showing purchases from May through November and the cost per ton of those Valencias, is that correct? A. That is correct.

Q. And showing, also, that none of those purchases were from Sunkist in 1951, is that right?

A. That is right. [2654]

Mr. Strachan: I now offer, again, Exihibts BZ and CA.

Mr. Dixon: I still object, your Honor, solely on the basis previously given, and just ask the right to ask a question of this witness concerning the cost per ton figure on this exhibit.

The Court: All right. You may inquire.

Mr. Dixon: Mr. Taylor, is it a fact that the cost per ton figures that you have here are based on just the tonnage of oranges delivered without any reference whatever to the soluble content of the orange?

The Witness: I believe that is correct.

Mr. Dixon: In other words, you are familiar, are you, with the Sunkist pricing schedule and the manner in which their price is determined?

I have an exhibit here if you don't know, and I can——

The Court: The witness said he is familiar with soluble solids prices.

The Witness: Yes, in a general way I know what you are speaking of.

Mr. Dixon: These figures, then, that you have in your cost per ton column for '51 for Valencias is not in any way based upon the soluble content?

(Testimony of Clarence C. Taylor.)

The Witness: That is correct.

Mr. Dixon: That is what I want to know.

Subject to that explanation, your Honor, I have no objection [2655] to the exhibits.

The Court: Received in evidence, BZ and CA.

* * *

Mr. Strachan: From the sheet of 1950 I read the following, Exhibit BZ:

Navels:

January—24.59 tons	$20.00
February—382.115 tons	$20.00
March—626.27 tons	$19.00
April—62.17 tons	$18.00

Now as to Valencias:

May—151.04 tons	No cost stated
June—9.44 tons	No cost stated
July—201.60 tons	No cost stated
August—962.155 tons	$38.00
September—897.65 tons	Cost $40.00
October—407.662 tons	$45.00
November—56.79 tons	$45.00
December—67.46 tons	$48.00

Total tons of oranges purchased from other than Sunkist 1,095.145.

Total tons of Valencia oranges purchased 2,753.797 tons.

Total tons of Valencia oranges purchased from Sunkist 39.22 tons. Approximate cost $34.00.

(Testimony of Clarence C. Taylor.)

I am reading from Exhibit CA, which is headed 1951. It covers a period from February through November.

Navels:

February—13.65 tons	No cost indicated

Valencias:

May—95.275 tons	Cost $35.00
June—98.050 tons	Cost $35.00
July—122.440 tons	$35.00 per ton
August—176.120 tons	$30.00 per ton
September—334.755 tons	$30.00
October—1220.98 tons	Cost $35.00 per ton
November—384.68 tons	$35.00 per ton

Total tons of oranges purchased from other than Sunkist:

Navels: 13.65 tons.

Valencias: 2,432.30 tons.

None purchased from Sunkist in 1951.

Mr. Dixon: May the record show, your Honor—I thought [2657] when counsel was offering the exhibit, he was only offering the one on '51. I assume my questions and objections with reference to the figures for '50 also apply to that document.

Mr. Strachan: I will stipulate that they can be applied and pertain to both documents.

The Court: All right.

Q. (By Mr. Strachan): You did actually purchase Valencia oranges during '50, the year 1950, and '51, from sources other than Sunkist, and at prices other than the Sunkist posted price which is related to soluble solids; is that correct?

A. We purchased——

The Court: Now, you have got two questions in one.

Q. (By Mr. Strachan): During the years 1950 and '51 you purchased oranges on a tonnage basis without adjustment or reference to the soluble solid content of the juice? A. That is correct.

Q. And during both years you purchased quantities of oranges at prices other than the Sunkist posted price?

Mr. Dixon: Just a moment. I think that question is clearly improper unless this witness is presented with the price sheet and asked that question, your Honor. Otherwise how could it possibly be related? If I understand his question.

Mr. Strachan: I thought the record was clear here that [2658] in '51——

The Court: There is a question you can ask which does the same thing you want to accomplish, but the question you have asked is, "Did the price" —read the question, Mr. Reporter.

(Question read by the reporter.) [2659]

The Court: There is more to it than that. That is the first question.

The Reporter: That is the last question to which objection was made, your Honor.

The Court: There was more to it, something about posted price with reference to soluble solids.

(Testimony of Clarence C. Taylor.)

Mr. Strachan: You sustained an objection to that and I reput the question in two parts.

The Reporter: Shall I read the record? That was the last question. The question I just read was the one to which an objection was made.

The Court: Read it again.

(Record read.)

The Court: You see, that raises a different question. The Sunkist prices started out in 1940 tied with soluble solids, and on the exhibit we have in evidence it could run up or down depending on soluble solids. Now, how can this witness answer that he purchased at a price other than the Sunkist price unless he knows what the soluble solids were. Maybe by chance some of the oranges he got were at the price just happenstance.

Now, you may inquire whether on these purchases any check was made as to soluble solids or to the Sunkist prices, but as worded, I don't know how anybody could answer it without more information as to the soluble solids of the oranges. [2660]

Mr. Dixon: That was the basis of my objection, your Honor, that the question could not be answered.

The Court: All right.

Q. (By Mr. Strachan): Were the purchases which you made in 1951 at prices that have been indicated made with reference to the soluble solids content of the juice?

A. As far as I know, none of them were.

(Testimony of Clarence C. Taylor.)

Q. Now, will you tell us whether as a chemist it is necessary that a processor of single-strength Valencia juice take into account the soluble solids content of the orange juice in order to pack single strength?

A. No. It is not necessary for single strength, except that insofar as it affects the general flavor.

Q. So if you have an acceptable palatable flavor in the product, the soluble solids make no difference to the single-strength packer, is that correct?

A. That is true.

Q. From what sources did you purchase oranges during the years 1950 and 1951?

A. We buy some oranges direct from growers on the tree. We buy some from Mr. Morgan Ward, who acts as sales agent for independent processors. We raise a few ourselves. And other packing houses. We buy on the open market.

Mr. Strachan: That's all on direct. [2661]

Cross-Examination

By Mr. Dixon:

Q. Mr. Taylor, I believe I was informed Mutual Citrus Products did not make or process any single-strength Valencia orange juice in their processing plant in 1951. Is that correct?

A. That is correct.

Q. These oranges that counsel has been asking you about went into other products that your company was processing, is that correct? A. Yes.

Q. I believe you also stated that with reference

(Testimony of Clarence C. Taylor.)

to soluble solids of oranges, that that is a factor which in a sense determines the flavor of the juice that is processed, if you are processing the oranges into single-strength juice, is that correct?

A. It is one of the factors.

Q. So that if you didn't know what the soluble solids of the fruit were, you would be very likely to take a chance in processing them into single-strength juice, would you not?

A. Would not, you say?

Q. Yes, without knowing the flavor.

A. I believe you would. You would always check the flavor if you were canning.

Q. But you do know that the price schedule insofar as [2662] you are aware of it of Sunkist is based on the soluble solids content per ton, is that correct? A. So I have been informed.

* * *

JOHN A. LYNCH

(Continued)

a witness called on behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Strachan:

Q. Mr. Lynch, I show you a document that has been marked for identification BF and ask you if that document was prepared by you and under your direction and supervision? A. It was.

(Testimony of John A. Lynch.)

Q. Was it prepared by you from the books of account and records of Winckler-Smith Company that were submitted for your inspection and examination? A. It was.

Q. Does it truly reflect what is shown on those books [2663] and records according to usual and accepted and normal accounting practice?

A. It does.

Mr. Strachan: I offer it in evidence, your Honor.

Mr. Dixon: I certainly object to it, your Honor. There is nothing in the record from this witness, according to my recollection, concerning many of these items that are set forth in this exhibit.

The Court: Well, I am going to permit exhibits on the financial statement of the company, but let me inquire.

Is this the type of exhibit such as BC and BD, and BG, where you made adjustments according to what you considered good bookkeeping practice, or is this merely a lifting of figures carried over on a summation sheet for various years?

The Witness: No, your Honor. This is taken from the books and records and is a pertinent part of a balance sheet in all instances and is usually presented in that manner.

The Court: I know, but have you just taken figures from the various balance sheets, or have you made adjustments as to what you thought was good bookkeeping practice? That's a simple question. You can answer that yes or no.

(Testimony of John A. Lynch.)

The Witness: Would you repeat that? I have made ordinary adjustments through the years, but they have all been reflected on the company books through the surplus account. This is an analysis of the surplus account. [2664]

The Court: But there are two different types of exhibits that have gone in here. In one instance, you will recall, they are of current assets and liabilities.

The Witness: That's right.

The Court: You picked up the exact figures from various statements of the company and carried them over, do you recall that?

The Witness: Yes, your Honor.

The Court: Which was in BB, and to make a comparison year by year of what was shown on those balance sheets of the company.

The Witness: That is correct.

The Court: Now, in BC, BD and BE, you, as it were, reconstructed a statement according to what you considered good bookkeeping practice, right?

The Witness: Right, from the books, your Honor.

The Court: From the books.

The Witness: That is correct.

The Court: But you didn't lift certain statements, it was not a compilation of statements from various accounts, it was your inspection of the books with adjustments based upon things you found in the books, adjustments made according to your idea of good bookkeeping practice?

(Testimony of John A. Lynch.)

The Witness: That is correct.

The Court: Now, my question is a simple one. Is BF [2665] the same as BB where you merely picked up the figures on surplus from the accounts year by year and run them into columns, or is BF a case where you have adjusted the surplus account as you as a CPA read the books?

The Witness: It is adjusted for one item, depreciation, which is small.

The Court: But it is an adjusted statement?

The Witness: That is correct, your Honor.

The Court: All right. Now, am I correct in my assumption, Mr. Strachan, that your exhibits BB on current assets and liabilities, and BC on a month by month current assets and liabilities matter, BD on statements of income, BE on comparative balance sheets, BF on surplus, the one we are talking about now, would complete the reconstruction, as it were, as to what you think the books of the company show?

Mr. Strachan: If I understand your question, your Honor, my answer would be that that would complete our showing as to what the books show in regard to the working capital, as to the current assets and current liabilities, as to the profit and loss statement or income account, and as to the assets and liabilities statement——

The Court: Well, let me put it this way, because my question probably isn't fair and it would be hard for you to answer.

The plaintiff has offered in evidence year by year and [2666] at six months intervals statements—the plaintiff offered for the canning years 1949, 1950 and 1951, the fiscal years ended January, 1950, 1951 and January, 1952——

Mr. Strachan: Yes.

The Court: ——offered a balance sheet and statement sheet of assets and liabilities and had a CPA to testify to what they showed.

Now, as to this great number of exhibits, I am going to permit you to show what your CPA thinks the books show, reconstructed as he wants to. My question generally is, is this series of exhibits that I have listed from BB to BF those exhibits on your part which would be, as it were, in rebuttal to plaintiff's showing?

Mr. Strachan: That is right.

The Court: All right. I think the headings on these statements should be corrected, and you can do that by consultation with counsel, for the reason that each one starts with the name of the company at the top, properly so, because that is what is concerned, but I don't want any confusion as to what this is.

As I understand it, BB was worked out on a different basis than BC, BD, BE and BF. In other words, let's get this straight, Mr. Witness. The BB, in order to make a comparison for the various years, you picked up the current assets and current liabilities as shown on the books of Winckler [2667] & Smith as kept by their CPA and merely transferred them onto this sheet as a compilation?

(Testimony of John A. Lynch.)

The Witness: They are not reflected in categories on the books, your Honor. I picked those off the CPA's statements as he presented them. The general ledger of a set of books starts cash, accounts receivable, and keeps on going without a control account called the current assets, and you just pick them off yourself and classify them. I picked those from the statements.

The Court: Then this again, like the others, consists of your interpretation of what should be classified as current assets and what should be classified as current liabilities?

The Witness: No, your Honor.

Mr. Strachan: I think as to BB, which is the comparison for the three years before the Chapter XI and three years after Chapter XI, the testimony was that those figures were taken, for the first period, at least, were taken from the Hodge reports, because we didn't have access to the books and records for that period, at least in time to make our own analysis. I believe the testimony is——

The Court: Well, wait just a minute. I am still confused. I think my first supposition was correct.

Mr. Strachan: Let's ask the witness.

The Court: Mr. Witness, taking your Exhibit BB, let's refer down here to January 31, 1950, where you listed current [2668] assets and current liabilities.

The Witness: Yes, your Honor.

The Court: When I look at Exhibit 61, under current assets I find the same figure.

(Testimony of John A. Lynch.)

The Witness: That is correct.

The Court: That you had picked up from this report and put in here.

The Witness: That is a recapitulation of Mr. Hodge's statements.

Mr. Strachan: Will you speak so the jury can hear you, Mr. Lynch?

The Witness: I beg your pardon?

Mr. Strachan: I don't think the jury heard your last answer.

The Witness: I stated that Exhibit BB is a recapitulation of the current assets and current liabilities as reflected on Mr. Hodge's statements.

The Court: Then I looked under the total given on Exhibit 61 for current liabilities, $99,885, and I find you have the same figure.

The Witness: That is correct, your Honor.

The Court: Then is my supposition correct that as to BB, you went through the reports of the company and took the totals shown on the reports of the company as current assets and current liabilities, and then summarized them on this [2669] Exhibit BB?

The Witness: That is correct.

The Court: Without making adjustments which you as a CPA would think you would have done if you had been running this?

The Witness: That is correct, sir.

The Court: That's what I thought. That is BB. Now, as to BC, which was the month-by-month

(Testimony of John A. Lynch.)

assets and liabilities, and BD, BE and BF, the balance of the series, you, in addition, first of all. took everything you have on there somewhere from the books of the company, right?

The Witness: That is correct.

The Court: But on those exhibits you exercised your judgment as a CPA as to how you would have adjusted certain things?

The Witness: With the exception of BB, I did not adjust my——

The Court: BB we have covered.

The Witness: BC, my error. BC is actually for books unadjusted, but I had to use my opinion as to whether I would include prepaid expenses where Mr. Hodge includes it as other assets. [2670]

The Court: All right. So, therefore, as to BC, BD, BE and BF, these reflect your judgment as to how you would have, in whole or in part, worked these matters out?

The Witness: That is correct.

The Court: Have we got that clear? Are you satisfied?

Mr. Strachan: It seems clear to me, your Honor.

The Court: All right. BF will be received in evidence. The objection will be overruled.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit BF.)

The Court: Going back now to titles. Most of them have the heading of Winckler & Smith, and the other exhibits of the company have the same

(Testimony of John A. Lynch.)

kind of a heading. I think there should be a statement along the nature of what we have just brought out by the witness. In other words, take BD, it says "Comparative statements of income." There should be some statement that counsel can agree upon that properly identifies it.

Mr. Strachan: The jury has heard the testimony, and I think it is probably as clear to them at least, as it is to me.

I wonder if in order to accomplish what your Honor has in mind we might simply mark under the identification "Lynch," or something of that sort.

The Court: We can discuss it later and see what we [2671] should do.

Mr. Strachan: I would like to have copies of the exhibit just received distributed to the jury.

The Court: BF?

Mr. Strachan: Yes, your Honor.

The Clerk: We have multiple copies.

The Court: As to this series of exhibits that we have just been talking about, BB through BF, which is in substance your position in rebuttal to Plaintiff's position on these financial statements of the company, these copies may be passed to the jury, and extra copies may be marked, Mr. Clerk, if you haven't done it.

The Clerk: It was in a set, 14.

The Court: So presently we are concerned with BF.

Q. (By Mr. Strachan): Mr. Lynch, I wish you

(Testimony of John A. Lynch.)

would refer to Exhibit BF and tell us how it was prepared, explain the relationship of the various items appearing thereon.

A. Exhibit BF, the statement of surplus and retained earnings for the period from February 1, 1949, to January 31, 1952, was prepared from the books and records of Winckler & Smith Citrus Products Company. The earnings or surplus as reflected on Exhibit BE at January 31, 1952, in the amount of $76,294.78, is analyzed on this Exhibit BF.

Proceeding from the original date subsequent to the reorganization to January 31, 1952, the amount of the surplus [2672] represents a black figure or a credit, when in reality it is made up of various adjustments which have been carried through the surplus account. It represents the accumulated loss for each month, and the total for the year, adjusted for the forgiveness at the time of the original bankruptcy, and adjusted for the write-up of the assets in the subsequent year, in April, 1951.

It shows the total gain on reorganization, it shows the total earnings from operations, and it shows the total appreciation, the cost of the recapitalization when the preferred stock and the common stock were issued after approval by the California Commission.

The statement reflects the original amount at January 31, 1949, of $215,548.05 as a deficit. This is the amount as reflected on the books, the original amount.

(Testimony of John A. Lynch.)

Q. That is the first figure under the first column "Surplus," is that correct?

A. That is correct. That is made up——

Q. In the next column you show the conditions down to January 31, 1950, is that correct?

A. That is correct. I start——

Q. The first thing under that January 31, 1950, column is that same $215,000 item, is that correct?

A. Well, the next column represents the adjustments of the analysis for that particular year, the year ended [2673] January 31, 1950, so you start with the opening deficit as reflected on the books prior to any transactions. That $215,548.05 deficit as reflected on the books represents the 1947 loss of $11,771.34 as reflected on Exhibit A-3. It represents the 1948 loss of $123,000 shown on Exhibits A-4 and 5. It represents the 1949 loss of $100,000, which is Exhibit 59. And also represents the net adjustments following the period where the surplus reserve of $5,000 was returned and the $15,000 disallowance of salaries by trustee was credited thereto.

Q. All right.

A. That comes to the $215,548.05 deficit.

Q. In the January 31, 1950, that is the opening deficit, isn't it?

A. That is the opening deficit at January 31, 1949.

Q. Yes. Now, you carry that forward into the column headed "January 31, 1950," and reading down that column show what circumstances were made to affect that balance, is that correct?

(Testimony of John A. Lynch.)

A. That shows the continuity of that account, that is correct.

Q. All right. Now, will you show us what affected the surplus deficit as of that year closing January 31, 1950, reading down that column.

A. At the first of the year, February 1st, or January [2674] 31st, '49, starting with a deficit of $215,548.05, the adjustment for the forgiveness of the debts in the first bankruptcy were reflected to show a gain arising from such discharge of the amount of $205,098.52, which was credited to the operating deficit account. Mr. Winckler was allowed $3,512.34 for reorganization expense in the trusteeship. That was handled through the surplus account.

Following the sale of the assets, the repurchase option was set up on the books for $1.00, and that was credited to surplus in the amount of $1.00.

The loss for the year ended January 31, 1950, was $91,220.20 and represents my computation of the loss for that year. It is made up of the amount of $121,000 profit, as shown on exhibit——

The Court: 61?

The Witness: 61.

(Continuing) ——adjusted for the $169,000 loss on the sale of assets, and adjusted for the $38,000 of forgiveness, which were handled through the surplus account.

I could have analyzed that and put those same amounts in here, and I would have come to the same answer, except for one adjustment.

We have adjusted depreciation for all the periods in accordance with the rates as set up by the company. The amount is not too material throughout. I think the greatest amount [2675] was $4,000 in any one year.

But that slight discrepancy between this one hundred five as reflected on our sheets and one hundred three as reflected on Exhibit 61 is due entirely to the depreciation. Exhibit 61 shows $103,000 deficit, and our exhibit shows $105,000. An adjustment of approximately fifteen, sixteen hundred dollars for depreciation.

Q. (By Mr. Strachan): The net effect of all of those transactions as reflected here in the year ended January 31, 1950, was to leave a deficit of a little over $105,000 at the end of that year, is that correct? A. That is correct.

Now, our classification of those items is reflected in the last four columns. The $205,000, which was the gain on the reorganization from forgiveness of the debts discharged were put into the gain on Reorganization column. The $3,512.34, which was the Winckler expense on reorganization, was put in that Gain on Reorganization column. The recording of the option of $1.00 was put in that column. The loss of $91,220.20, loss from the operations, was put over in the Earnings from Operations column, together with the deficit of $215,000, which was accumulated earnings from the inception of the corporation.

Q. Will you proceed and show the changes in this deficit figure occurring in the year ending Jan-

(Testimony of John A. Lynch.)

uary 31, 1951? [2676] You carried that $105,000 deficit up to the head of the next column; is that correct?

A. That is correct. The deficit at the end of one year becomes the opening deficit of the preceding year. The opening deficit of the preceding year or the year ended January 31, 1951, was $105,181.07. To that we have added our computation of loss, which was $14,203.20.

That can be reconciled to Exhibit 63 by taking the $40,000 as shown on that exhibit and deducting therefrom——

The Court: $40,000 profit.

The Witness: $40,000 profit. I am sorry.

(Continuing) ——and deducting therefrom the $50,000 of deferred promotion expense and the unabsorbed factory expense, and the advances to employees, to show a true loss for the year of $14,203.20.

Q. (By Mr. Strachan): So that your footing of that column comes to $119,000 deficit, is that correct?

A. That is correct. And that same item is carried, again, over to the column marked Earnings from Operations, and is shown in red $14,203.20.

Q. All right. Now, will you follow that column down and show how that deficit was converted into an apparent surplus by the end of the year?

A. The earnings or deficit, as shown on the last line of $119,384.27, deficit January 31, 1951, was carried [2677] forward as the opening deficit of the

(Testimony of John A. Lynch.)

subsequent year. To that adjustment the corporation made a $439,546.66 credit by writing up the assets, thus wiping out any deficit.

That item as shown, $439,000, was transferred by us into the column marked Appreciation.

The next amount is the cost of discount on the preferred stock which was sold subsequent to the approval of the State. That amount, $5,105.63, was charged by the company to surplus. We have reflected it therein, but classified it over as the cost of the recapitalization over in the last column.

The next item represents selling expense of additional preferred stock, and was likewise reflected in the surplus account.

That item, likewise, is shown by us as still in surplus, but classified by us as a cost of recapitalization.

The next item reflects a charge by the company to surplus of $74,412.78, which represents the amount by which the par value of the shares was deficient when measured against $240,000 previously carried as capital stock.

The corporation transferred out of this write-up of $439,000, $74,000 and put it in the capital stock account, to bring the capital stock up to $315,110 as reflected on Exhibit BE.

The next item represents the actual operating loss for the year January 31, 1952, as computed by us. It represents [2678] the adjustment for the depreciation that I previously commented on, and it rep-

(Testimony of John A. Lynch.)

resents the reduction from the loss as shown on Exhibit 65 of $184,000 for the item of $50,000, which we previously had classified as being expense of the prior year. Thus it reduced the $184,000 to $136,000 approximately, for the year.

We made the additional charge of $21,000 for the pro rata write-off of that appreciation, which was in conformity with the books of account of the corporation throughout the year until January 31, 1952, when the company reversed the consistent practice.

Q. Now, the next column entitled Gain on Reorganization simply brings over and puts in a single column the items that fall in that classification?

A. That classifies in summary total—it is simply the addition of the items that were classified into the Gain on Reorganization. The total gain on the reorganization is reflected as being $201,587.18.

Q. In the next, the vertical column entitled Earnings from Operations, starts off with the initial surplus deficit, and then shows the adjustments made in that due to the income or loss statements?

A. That shows the total of $478,397.60 loss from the date of inception of that corporation from operations.

Q. And then the Appreciation column is, likewise, a [2679] recapitulation of that one item that is carried across the page?

A. That is right. And the final column shows the cost of recaptialization.

(Testimony of John A. Lynch.)

Q. Getting back to the first column, that is your summary of all of the items shown in a single columnar form, it is a recapitulation of the three-year period bringing together and netting all of the items referred to?

A. Well, it shows that the only profit that this corporation ever had was from the first bankruptcy and from the write-up of the assets. The rest were all losses. [2680]

* * *

Q. (By Mr. Strachan): Mr. Lynch, have you taken from the books of account of the company the profit or loss for the first six months of the fiscal year commencing February 1, 1951, for each month, the first six months? A. I have.

Q. Did you take those off as they appeared on the books, or did you make any adjustment?

A. I made no adjustments.

Q. Will you tell us what the profit or loss statement at the end of the first month, that is the end of February, 1951, was?-

A. The loss for the month was $3,473.20, as shown by the books.

The Court: This is 1951, now, we have gone into?

Mr. Strachan: Yes. [2681]

The Court: All right.

Q. (By Mr. Strachan: What was the loss at the end of March, 1951?

A. The loss was $21,070.83.

Q. What was the loss at the end of April, 1951?

(Testimony of John A. Lynch.)

A. At the end of April, 1951, the loss was $38,066.85.

Q. What was the loss at the end of May, 1951?

A. The loss at the end of May was $49,895.27.

Q. What was the loss at the end of June, 1951?

A. At the end of June, 1951, the loss was $61,997.

Q. And at the end of July, the sixth month of the fiscal year, what was the loss?

A. The loss was $148,307.86, as reflected on Exhibit 64.

Mr. Strachan: I would like to have Exhibit BH.

The Court: I am not going to permit BH to be passed to the jury, but you may identify the exhibit. I mean by that I am limiting you to summaries on the same basis the plaintiff has used the summaries. You can identify the exhibit and see where we go.

Q. (By Mr. Strachan): I show you the document marked BH and ask you if that was prepared by you and under your direction and supervision?

A. It was.

Q. That is entitled "Cost to Corporation of Lease and Repurchase Agreement with Stockholders." Will you tell us [2682] whether the document was prepared from the books and records of account of the Winckler-Smith Company submitted to you? A. It was.

Q. Will you tell us in what manner the exhibit was prepared?

A. The accumulation of rentals for the property——

(Testimony of John A. Lynch.)

Mr. Dixon: Now, if the Court please, I think at this point I want to enter an objection to any questioning along the lines of anything referred to or contained in Exhibit BH as being wholly irrelevant and immaterial to any of the issues of this lawsuit, and not tending to prove or disprove any of the issues of this lawsuit. I think there is no justification for proceeding further with this question or this line of questioning.

The Court: It is immaterial on what ground?

Mr. Dixon: All of these items are reflected in the balance sheets and operating statements that are already before the jury and in evidence, and it seems to me it is wholly immaterial as to what the rental was that was paid. We are willing to stipulate, if it is important, it was $1,800 a month by the lease that is referred to, but I don't see as it has anything whatever to do with the matter unless counsel is going to question those items as being improper items. This is an accountant.

The Court: Does this exhibit show in each of the items [2683] matters that you took from the books and records of the company?

The Witness: Yes, your Honor.

The Court: I will sustain the objection on various grounds, some of which pertain to discussions we had out of the presence of the jury. First of all it is argumentative. They are matters which appear in the record which you can argue to the jury.

The idea of bringing in a flood of exhibits to argue each point, I am not going to permit.

(Testimony of John A. Lynch.)

On the second ground, that would be a recording of the testimony of the witness.

On the further ground that the exhibits were made up and not previously exhibited to counsel pursuant to directions of this Court, except on the evening before, and upon the ground that the material issue in question is the status of this corporation in the calendar year 1951 or its fiscal year ended January 31, 1952, and that segregation of matters which happened in connection with the organization may be argued insofar as it reflects the status of the corporation in 1951, but is not in itself an issue in the case.

Mr. Strachan: Your Honor, as to some of those matters, I want to say first that this document was delivered to counsel, I believe on Tuesday, so it can't come as any surprise.

In the second place, I don't think anywhere in this [2684] record was there brought together a showing as to what sale and lease-back cost the corporation and how it was responsible for an enormous depletion of the assets of the corporation.

The Court: I am limiting myself now to this exhibit. I am not ruling on some other questions you might ask. We discussed yesterday at great length the question of this great number of exhibits. It will be my ruling as far as this exhibit is concerned.

You may inquire of the witness.

Mr. Strachan: To get the lawyers' work out of the way, I will offer the exhibit in evidence.

Mr. Dixon: Objected to on the grounds previously stated.

The Court: Sustained on the grounds stated.

Q. (By Mr. Strachan): Mr. Lynch, did you make a determination from the books and records of the corporation of what the various items of cost to the corporation were of the lease-back from the stockholders of the plant after they had purchased it as a part of the first bankruptcy reorganization?

A. Yes, I did.

Q. Will you state what the cost to the corporation was in direct cash rentals?

Mr. Dixon: Now, if the Court please, I again wish to object and I must object. Does counsel expect by this witness to subsequently go into—is he trying to lay the foundation to show that the rental was unreasonable? Then we will stipulate [2685] as to what the rental was, but certainly this witness has only examined the books and, therefore, cannot express any opinion one way or the other as to whether this rental was reasonable or unreasonable, or enough or not enough, and unless counsel expects to proceed further, and even then I would have to object on the grounds that it was not tending to prove any issue in this case. I renew my objection, your Honor.

The Court: Well, it is a borderline case. I am going to overrule the objection. It is subject to the argument that it is argumentative, that these are matters that you could argue to the jury insofar as you related them to the condition of the corporation

(Testimony of John A. Lynch.)

in 1951, but solely for that reason. We are not going to try ipso facto the condition of the corporation at other times. We are concerned with what was its condition in the year that the damage is claimed. Its materiality on these questions, therefore, is only insofar as it relates to 1951.

Mr. Strachan: I would agree with that.

The Court: All right.

Mr. Dixon: I must confess I am still at a loss to know how this evidence can in any respect be said to be relevant to any issue in this lawsuit unless counsel expects to show, as I suggested, that the rental was unreasonable. Otherwise we admit, the record is clear, and there is no dispute about [2686] it. If we want the lease in evidence, we will be glad to put that in, but I think we have enough in the record at this time without going off on this issue.

I still renew my objection, your Honor, on the ground that I cannot see how this line of questioning can in any way bear upon any of the issues of this lawsuit as to what the rent was or who got it, unless he expects to claim it was unreasonable. If he does that, if counsel expects to do that, then we have to go into the issue by expert testimony as to whether the rental paid was or was not reasonable. Where does it lead us?

The Court: I am going to reverse myself on this. The Court has to put some limitations on how long a trial can go. The issue in this case is what was this corporation in 1951? You will not be foreclosed from showing what assets it had, what liabilities it had in 1951, but here is something that concerns things that grew out of the reorganization and its bearing is remote, if any.

Mr. Strachan: I don't agree with that, your Honor, for this reason, that these three stockholders——

The Court: Let me finish.

Mr. Strachan: Yes, sir.

The Court: Because what happened before by the natural laws of causation brought about the condition which existed in 1951 and, therefore, the ultimate question is what was [2687] the condition in 1951. We can spend months here in the trial of this case going back into and exploring a lot of these other things, when the question the jury wants answered, and I won't refer to my analogy, is what was this corporation's condition in 1951?

Now, that can be shown by what its assets and its liabilities were, and so forth. What went on in the reorganization is reflected in its condition in 1951, and this doesn't take us along the road to resolving the issue.

Mr. Strachan: Your Honor, as to what happened in 1951, I would like to illustrate the importance of this in my view. This lease-back arrangement was continued in effect until, I believe, April of 1951. In April, 1951, as the earnings record just read shows, which was put into evidence by Mr. Lynch, the corporation was sustaining a whole series of losses. Then in that precarious financial condition, the corporation undertakes to exercise its option of repurchase and in that way diverts substantial assets of the corporation to its stockholders when it is on the brink of bankruptcy. [2688]

Mr. Dixon: Well, now, I object to that statement, your Honor, and ask that it be stricken.

The Court: Statements of counsel are not evidence, neither yours, nor Mr. Strachan's.

Which these questions have nothing to do with. You will be permitted to go into the question of reorganization, when it was done. That has nothing to do with this line of questions that you are going into now.

Mr. Strachan: Everything that I propose to go into on this subject happened subsequent to reorganization. The voluntary payment of rent to the stockholders who bought the property. They continued to pay rent down until the company is virtually insolvent, and then they have the corporation exercise the option to repurchase the property for $200,000.

Mr. Dixon: Just a moment, your Honor.

The Court: Are you arguing your case to the jury now?

Mr. Strachan: No.

The Court: Are we ready to rest and have the arguments, Mr. Strachan?

Mr. Strachan: No, sir.

The Court: Then let's stop the argument, and we will have the argument at the proper time, or out of the presence of the jury.

The objection is sustained. [2689]

Mr. Strachan: I shall make an offer at some later time.

The Court: All right.

Mr. Strachan: I would like to have Exhibit Bl.

Q. (By Mr. Strachan): Mr. Lynch, did you make a study from the books and records of account of the corporation of the amounts paid or withdrawn by Mr. Winckler from the corporation on account of salary, bonuses, forgiveness of indebtedness, and expenses, for the three fiscal years subsequent to the first bankruptcy reorganization?

Mr. Dixon: If the Court please, I think this is the proper time for me to enter my objection to any questioning along the line that counsel has just put to this witness, not only concerning this exhibit, but to try and lay any foundation for its introduction, on the ground that, No. 1, the exhibit to which he is obviously referring, is argumentative, contains material that is wholly irrelevant and immaterial to the issues of this lawsuit, and in no way tends to prove or disprove any of the issues of this case.

I have no objection, even, to stipulating what Mr. Winckler's salary was, if counsel wants that before this jury.

I think it was earned.

But to try and inject——

The Court: Now, don't you make a speech either.

Mr. Dixon: I am sorry, your Honor. [2690]

(Testimony of John A. Lynch.)

I make my objection on the same grounds previously made.

Mr. Strachan: Mr. Dixon, will you also stipulate as to the amount of forgiveness of indebtedness, the allowances, and the totals withdrawn?

The Court: Mr. Strachan, we have been all over the forgiveness, it has already been gone into.

The objection is partly overruled and partly sustained. You may inquire from the witness as to what the salaries and withdrawals of Mr. Winckler were in the year 1951. That is year ending January 31, 1952.

I am going to try and keep you, if I can, to the issues of that year.

As to what went on in past years, they will be reflected by the statements of assets and liabilities for the year '51.

You have reconstructed them, and the plaintiff has its view of it.

Mr. Strachan: Your Honor, in my view, dissipation of assets, abstractions of assets in prior years, are just as important as those in later years, because——

The Court: The jury will disregard the remarks of counsel about abstractions of assets or dissipation of assets.

Mr. Dixon: "Dissipation" was the term he used, your Honor. I object to it.

The Court: If your theory was correct, Mr. Strachan, we [2691] could go back and prove every postage stamp that the corporation spent in prior years as proof of what its condition was in 1951.

Now, that isn't, in my opinion, the way to prove its condition in 1951.

It has a balance sheet of assets and liabilities. You can go through and work on that as long as you want to.

It says, "I had (A) a piece of property," or "I had (C) an automobile"; if you want to show the automobile was junk and the piece of ground was in a swamp, you can. But you don't prove that by going back and showing every expenditure of postage stamps spent by this corporation, whether spent soundly or unsoundly in the years preceding.

So the objection will be sustained to the use of BI. You may inquire as to salary or allowances to Mr. Winckler in the year '51.

Mr. Strachan: I can't go into the salary and allowances or withdrawals by him in prior years. is that your Honor's ruling?

The Court: That is my ruling. At least not in the form of this exhibit.

You have already covered the forgiveness of debts, which you have got included in here.

Mr. Dixon: If the Court please, I rise to renew my objection, even with reference to any question concerning the [2692] salary of any of the executives of this company. The jury has in the balance sheet, in Plaintiff's Exhibit 65, a statement of the full amounts paid for executives' salaries during that year, and the administrative expenses. I think it has already been testified to, in part, as to the number of employees that were employed, and so on.

The Court: Overruled.

Mr. Dixon: The reason for my objection—all right.

Q. (By Mr. Strachan): Mr. Lynch, was Exhibit BI prepared by you and under your direction and supervision from the books and records of account? A. It was.

Mr. Strachan: I will offer it in evidence.

Mr. Dixon. Objection.

The Court: On the same grounds?

Mr. Dixon: Yes, sir, on the grounds previously stated.

The Court: The objection is sustained.

We have had so much discussion about these.

It is sustained on various grounds. It is argumentative, it covers a matter of debt forgiveness already covered in the record, which makes this cumulative. It is an attempt to prove by expenditures in prior years what the condition of a corporation was in the year in question, and various other grounds heretofore stated by the objections by counsel to this and similar exhibits. [2693]

Mr. Strachan: In order that I may proceed without overstepping what your Honor intends to be the scope of my examination, I would like to have a brief talk with you and Mr. Dixon at the bench, if I may.

The Court: All right. Approach the bench.

(Testimony of John A. Lynch.)

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Strachan: What I wanted to know is whether I can go into salaries for each year.

The Court: What will that prove?

I am going to let you go into the year '51.

Mr. Strachan: On my theory of the case, your Honor, it is very important to show why the corporation was in its extreme financial condition before the Valencia season of 1951, and in that connection I wanted to show what the lessors, what the lessor-stockholders took out of the corporation in the three-year period, I want to show what Mr. Winckler took out, because that has a very direct bearing.

The Court: Would it make any difference who took it out? What difference does it make who took it out? It is reflected in the books of the corporation as it went into the year 1951.

Mr. Dixon: So that I may again renew my objection about any questioning at all going into the field or question of what Mr. Winckler or any other employee or executive of this [2694] company got the record is not in dispute here, and it is in the balance sheets, that for executive salaries, and so on, those amounts were paid. I don't want to have to be in the position, as I would have to be if counsel were to proceed with this question, to have to justify what Mr. Winckler did, by putting him on the stand and saying, "How many hours did you

(Testimony of John A. Lynch.)

work, what were the duties, and so on, as president of this company?"

This is not a stockholder suit, this is not a suit by creditors; it is an antitrust suit.

The facts here are clearly in evidence for the jury that the executives' salaries paid during the years in question for executives were X dollars. Maybe that is too high from their point of view, but are we to have the jury pass upon that question, or have them hear any evidence on it?

It is just as immaterial, in my judgment, as to what Mr. Armstrong was getting, comparatively speaking.

I can't see the relevancy of it.

The Court: The only relevancy is a contention that defendants might make that the plaintiff suffered, not damage from the defendants, but they suffered damage because they paid too high a salary in 1951.

That issue could be argued—I don't think it will be—that that is what broke the company. But what they paid him in prior years has nothing to do with what the condition [2695] was in '51, any more than what they spent on every other single item that went into the business of the corporation.

If we were going to go into that, we would be here forever showing what they paid out and what they received in prior years, as trying to show what they had in 1951.

I am not limiting you as to what you want to show as to their condition of assets and liabilities

(Testimony of John A. Lynch.)

in 1951, but I am not going to have you go back and prove item by item other matters, expenditures in other years, which by a process of reasoning would indicate what the result would be or the financial structure of the company was in 1951.

I might say this: If this case isn't straightened out, as far as the issues are concerned, I may exercise a prerogative that judges have of pointing up the issues to the jury.

I have done that very, very rarely. I have almost never done it, but I have done it. If you don't get down to the issues of the case, I intend to exercise that prerogative.

Mr. Strachan: May I say something, your Honor?

The Court: Yes, sir.

Mr. Strachan: I don't intend to stay here long proving up each postage stamp, as your Honor indicated to the jury that possibly I did. I intend to show, and I could show, if permitted, within a matter of five minutes, the facts that I think are important in showing that it was improvident management of the corporation which diverted assets of the corporation [2696] to the management, Mr. Winckler, and to its other stockholders, in the amount of some nearly $250,000 over a two and a half year period after the first reorganization that brought about the financial collapse and was in large part, if not entirely, responsible for the failure in business.

As long as we are here I will say that I would

(Testimony of John A. Lynch.)

offer to prove, if allowed to proceed with the witness' testimony, as distinguished from the exhibits, each of the amounts shown as payments to the lessor-stockholders, as shown on Exhibit—was it BH?

The Court: B what?

Mr. Strachan: I think it is BH, your Honor.

(Continuing) ——as shown on Exhibit BH, and each of the payments shown on Exhibit BI, as having been made to Mr. Winckler, and would show those were taken directly from the books and records of account of the corporation.

The Court: How many of these other things do you have that you want to go into?

Mr. Strachan: Just these two.

Mr. Dixon: Just so the record may again show the position of the plaintiff in this matter. We submit that any attack by this witness, or accountant, on the balance sheets, as such, of the plaintiff, or any of its evidence, or any showing that the books or records of this company are fraudulent [2697] or incorrect, might be admissible, so far as they would apply to the contentions of the plaintiff, as demonstrated by the exhibits here and its balance sheets and its income account; but I object to the introduction of any evidence by these defendants which raises collateral issues, such as the question of whether the salary of the manager or any other employee was proper or improper, or whether the rent was proper or improper as being wholly immaterial, because the balance sheet, which is al-

(Testimony of John A. Lynch.)

ready in evidence, shows the total amounts paid for those items, paid out for those items.

The Court: Just a minute.

On Exhibit BH, this cash payment on repurchases is already in evidence, is that right?

Mr. Strachan: Yes.

The Court: $132,000 for preferred stock is already in evidence?

Mr. Strachan: That's right.

The Court: Rentals, query.

These other two—the $50,000 received is in evidence?

Mr. Strachan: Yes.

The Court: Now, with the exception of the rental item the rest of this is purely argumentative. Even if it is admissible remotely on what is the status of the company in '51, it is still argumentative, something that you could argue to the jury if you want to, but you don't use a witness [2698] like this to argue your case to the jury.

As to the item of rent, how many months' period is that? Does the witness know, can he testify?

Mr. Strachan: It was eighteen hundred—it must be 20 and a fraction months.

Mr. Dixon: The lease is the best evidence.

Mr. Strachan: The lease isn't evidence as to what was paid, Mr. Dixon. Let's talk sense.

Mr. Dixon: Now, you know that was paid, counsel.

The Court: Just a moment, now.

As to the salary matter on BI, you may go into

(Testimony of John A. Lynch.)

the salary for the year '51, and I will think about it over the noon hour as to the other two years.

On BF I will let you go into the rental matter, how much was paid for the property during the time it was rented.

Mr. Strachan: As to the other matters in the offer, the objection is sustained?

The Court: Yes. I have already indicated you can bring out the salary and payments to Winckler during the year ending January 31, 1952.

Mr. Dixon: I don't even know what those were from the books, and I certainly would object to that, because we will have to go in and show, by rebuttal testimony, that Mr. Winckler spent those moneys for travel, or whatever it was. I frankly don't know. [2699]

The Court: Your accountant can find out.

Mr. Strachan: Your Honor, in my view, the limitation as to the last year of operation with respect to salary emasculates the whole point that I am making that there was improvident management continuously during the period subsequent to the first reorganization.

The Court: Is it improvident management to pay a man a salary to manage a corporation?

Mr. Strachan: It seems to me, when a man takes out $102,000 for operating a business that lost consistently——

The Court: Your Exhibit BI is, I think, erroneous, because of the fact of what is included in there.

(Testimony of John A. Lynch.)

There was a forgiveness of the corporation in that amount, but that is a long way from saying that Winckler got all of the $38,000, as far as the record in this case is concerned.

Mr. Dixon: I just wish to add this comment to the record: That I have never seen, in all of my 28 years of trying lawsuits, a better effort on the part of counsel, I should say this, to confuse issues, as that I see being directed here.

The Court: Let's go ahead. [2700]

(The following proceedings were had in the hearing and presence of the jury:)

Q. (By Mr. Strachan): Mr. Lynch, what was the amount of cash rentals paid under the lease-back arrangement between the time of the reorganization proceedings in 1949 and the repurchase of fixed assets by the corporation in the spring of 1951?

A. The direct cash rentals were $37,000.

The Court: Is that on some monthly basis?

The Witness: That is correct, your Honor.

The Court: What was the rate?

The Witness: The rate was $1,500 a month, 10 months in the first year, $15,000; and the second year was 12 full months; and then it was sold in the following year, so there is only a balance reflected there.

The Court: All right.

Q. (By Mr. Strachan): Mr. Lynch, have you

(Testimony of John A. Lynch.)

examined Plaintiff's Exhibit No. 39, which is the prospectus? A. I have.

Q. With respect to the statement contained therein that the earnings of the business from the partnership, its inception in the partnership down through the year ended January 31, 1951, amounted to over a half million dollars, have you made any examination of the books and records to determine whether that is a correct statement? [2701]

A. I have.

Q. Now, with respect to the period of the partnership operation that is included therein, I believe it is stated that the earnings of the partnership period amounted to some $95,000. Did you examine the books and records to determine whether that is a correct or an incorrect statement?

A. I did not examine the books and records, but reference to A-1 exhibit in this courtroom reflects that the partnership made $38,897.22 for the period of its operations from March 10, 1945, to January 31, 1946. The item on the prospectus stopped at December 31 and reflects the profit as being $95,377.64.

The Court: Mr. Witness, again, so that we will not be confused, in giving these figures are you giving them as they appear on the books or as you as a CPA would calculate them?

The Witness: No, your Honor, I did not have access to the books of the partnership. All I had was access to the Exhibit A-1, which is in evidence.

The Court: All right. Go ahead.

Q. (By Mr. Strachan): Now, the prospectus

(Testimony of John A. Lynch.)

December 31, 1945, were ninety-five thousand some odd dollars.

No. 2, the earnings before taxes for the company after its incorporation for the period ending July 31, 1947, were 197,000 some odd dollars.

No. 3, the earnings for the 1947 packing season covering the operating period from August 1, 1947, to October 31, 1947, were 54,000 some odd dollars.

No. 4, for the 1948-49 years, which was the date of reorganization, earnings were over $50,000.

5. For the fiscal year ending January 31, 1950, the earnings amounted to 121,000.

6. For the fiscal year ending January 1, 1951, the earnings amounted to $40,845.

So now you know what was said in the prospectus and Mr. [2707] Strachan's questions are related to those quotes. He can frame his questions in such a way he won't have to repeat that whole series. I don't know whether earnings is meant to mean the same as profit or not, but all we want to do is when the question is asked to know what we are particularly referring to when it is asked of a witness. [2708]

* * *

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury absent.

With reference to BI, which I sustained objection to on salary, I have given some thought to the matter over the noon hour and I am going to permit the witness to be interrogated as to the salary and what he terms allowances and bonuses paid to Winckler in the three years in question. The forgiven debt has already been covered.

This opens up in a way collateral issues, but it doesn't open too wide a one in that the records of the company in evidence may not show what was salary and what was bonus and what was allowances. If there is any question about the allowances, it can be covered on cross in a very short period of time. But I am not going to admit BI.

Mr. Strachan: You have already excluded it in your announcement.

The Court: Yes.

Mr. Strachan: You referred to the scope of the testimony that may be given on the subject.

The Court: That's right. As to the year 1951, I think it is clearly proper. As to the two succeeding years it is remotely proper in that the plaintiff has relied on the [2709] financial statements of those years, and if these are figures that come out of those financial statements, they could be shown. The ultimate question is still: What was the plaintiff's condition in the year 1951? I suppose a subsidiary question is: Was the failure of the company or its loss in 1951 due to bad management or due to the allegations of the complaint, or a combination of both?

To the extent that you can make anything out of the amount of salary paid to the man, I suppose you are entitled to do it. It doesn't impress me very states that for the period from February 1, 1946, to July 31, 1947, there was a profit of some $197,000. Have you made an analysis of that? [2702]

A. I have.

Q. Will you tell us what analysis you made and what the result thereof was?

A. I reviewed the statements of the corporation, which are Exhibit A-3, which reflects the first year of operations subsequent to the incorporation. That Exhibit A-3 shows a loss of $11,771.34, which is the company's certified statement.

I inspected the following year's exhibit, which is A-4 which is the company's audited statement, and it reflects a loss thereon of $72,221.28 for the ensuing year, exclusive of an approximately $50,000 inventory adjustment, which brings me to a total from incorporation through the period embraced here of a loss of approximately $135,000, of which thirty-five or forty thousand could be applicable to the six months subsequent to this statement, so that the statements themselves reflect a loss of approximately 100,000, and item 2 of the prospectus reflects the profit of $197,169.51 for the period from the inception of the corporation to July 31, 1947.

Q. Now, what is the stated profit according to the prospectus for the period from February 1, 1946, through the year ended January 31, 1948?

A. Would you repeat that?

(Question read.) [2703]

A. The prospectus for the period from the inception of the corporation, February 1, 1946, through August 31, 1947, which is three months short of two fiscal years, reflects a profit of $252,107.50.

Q. For the two full fiscal years, what do the books show? A. The reference to the——

Mr. Dixon: Would you add, "according to your opinion," counsel, please?

Q. (By Mr. Strachan): According to your examination and according to correct accounting procedure.

A. The books would show $135,341.74 deficit through January 31, 1948, three months subsequent to the reflection of a profit of $252,107.50.

Q. According to the prospectus, Plaintiff's Exhibit 39, there appears to be, there is stated to have been a profit of $50,000. Have you compared that stated profit with the profit or loss stated in Plaintiff's Exhibit 59? A. I have.

Q. What is it?

A. Exhibit 59 reflects $100,503.15 loss for the year ended January 31, 1949, as contrasted to the item 4 in the prospectus, which states for the 1948-49 year, which was the year of reorganization, earnings were over $50,000.

Q. With respect to the year ended January 31, 1950, [2704] the prospectus shows earnings of $121,360. How does that compare with the profit or loss according to the books as you found them?

The Court: According to his computation or how he found it listed?

(Testimony of John A. Lynch.)

Q. (By Mr. Strachan): As you determined it——

The Court: Now, you are going back and forth in these questions. I don't know whether the jury is following.

Mr. Strachan: I don't intend to. I intend to be consistent.

The Court: I don't say that you intend to, but you know that in certain instances he has given certain figures which appear on the books and in other instances he has given the figures which he computed from something in the books.

Mr. Strachan: I will put the question again.

Q. For the year ended January 31, 1950, the prospectus states there was a profit of $121,360. From your examination of the books, applying the principles of accounting that you regard as correct, what was the gain or loss during that year?

Mr. Dixon: Just a moment, your Honor. I want to object at this time because counsel has made a misstatement. The prospectus clearly reads, "For the fiscal year ending January 31, 1950, the earnings amounted to," and counsel uses the word profit. [2705]

Mr. Strachan: You mean the earnings before expenses?

Mr. Dixon: My objection, your Honor, I have no objection to anything that is clearly stated there, but when counsel uses the word profit or loss or depreciation, according to an accountant it may

(Testimony of John A. Lynch.)

have 50 different meanings, and that is the reason for my objection.

The Court: Objection sustained to this extent. You should correctly quote the prospectus when you ask the question. If the prospectus says earnings, it shouldn't be quoted as profit or loss.

Mr. Strachan: Mr. Stark has just called my attention to the fact that this tabulation in the prospectus to which I am referring says, "Mr. Hodge reported the following profit figures."

Those are what I am talking about.

The Court: Let's see the prospectus.

Mr. Dixon: Let's read the whole thing, your Honor. It is in evidence.

The Court: Wait just a minute, now. Let me look it over.

Well, we are going to adjourn for lunch, but we will not leave this with any note of mystery. At the top of page 3 appears the following statement: "Disregarding this non-recurring inventory loss, which was absorbed by the corporation, over [2706] a period of three years, the corporation auditors, Hodge & Company, reported the following profit figures for the business."

Then appear six subdivisions. No. 1 starts out: The earnings of Winckler & Smith, and so forth. Well, that's the partnership.

The earnings of Winckler & Smith Citrus Products Co., a partnership, as predecessors to the corporation from March 10, 1945, date of inception, to much, but that is not the point. It might impress the jury. They might think a corporation that sold over a million dollars a year in goods is wrong in paying a president twelve to fourteen thousand dollars. So get the jury down.

Mr. Strachan: Your Honor, before we get the jury in, I don't want to have a technical discussion in their presence, but you have indicated if there were an offer of BJ, having laid a foundation by the witness Lynch, you would exclude the exhibit as an exhibit.

The Court: Right. BJ?

Mr. Strachan: Yes, sir.

The Court: Yes. [2710]

Mr. Strachan: Then may we construe the record made as if that had been formally offered and excluded?

The Court: The record will so show, it will be excluded on the ground that—I assume the record shows you offered it in evidence and that the witness testified to the various figures on it, and where he got them, and that the objection is made upon the various grounds stated, and it will be excluded, particularly on the ground that it is merely a recording of the testimony of the witness.

And in order to be evenhanded in it, I am going to permit you to use five exhibits—you apparently wanted to make your rebuttal to the financial statements, and of course you will have a chance to have your rebuttal summary on the TreeSweet and Silzle contracts, and your rebuttal showing on the computation matter; however, it seems to me presently that you have three in here, you have AY, and you have BS and BT, and I haven't looked those over too carefully now to know how the thing should be handled, but where the argument grew out of a long cross-examination, and then finally the Court saying he is going to stop the cross-examination and suggest that it be reduced to writing so you can study it, and at the same time give the other side a chance to reduce theirs to writing, then it seems to me there ought to be the two statements, one the plaintiff relies on and another one which is the defendants' computation based on that cross. [2711]

That is the logic behind the rulings I am making, if you follow me.

* * *

The Court: Put the heading on it.

I still think you should discuss the headings on these various documents so there won't be any confusion of plaintiff's documents, which say at the top "Winckler & Smith," [2712] and plaintiff's testimony showed that they were financial statements of the company. And now you have got at the top of yours, "Winckler & Smith." I don't think in a small case the jury would be misled, because they could remember the testimony; but I think the jury ought to know whether the document is a financial statement that came out of the books of the company or whether it is an adjusted statement pursuant to the testimony of a witness, or whether it is a summary statement like BB was. I think that ought to be done for the reason that most of these have at the top "Winckler & Smith," and it is subject to the inference that all of these were just picked up out of the books somewhere.

Mr. Strachan: We don't want it to be misleading, if it would be in the present form. Does your Honor have any suggestion to make as to how it should be done? Would stamping these "Testimony of Witness Lynch," or something like that be satisfactory?

The Court: Offhand, I thought BB should say something like, "Excerpts from Winckler & Smith's financial statements." BB was three or four years put on one sheet and was parts. My suggestion offhand would be that BC, BD, and BF, if I understand correctly the testimony of the witness, they were adjusted statements or statements where all the facts from which he drew his conclusions he found in the books, but then he made adjustments to arrive at another statement. [2713]

Mr. Strachan: I would dislike to be required to brand ours "adjustments" because, after all, Hodge's were adjustments, too. He puts a journal entry through to make a change in the books, and that is an adjustment. Our fellow reverses the journal entries to leave the books stand as they were before that.

The Court: That is true, but all of Hodge's statements were made before this lawsuit came up, although you could argue that the last one was not, but you would have to disbelieve Hodge on that score. Certainly the ones in the year before, no one contemplated that this suit was going to be here. You have a different situation. You are taking statements as they then appeared on the books. True, adjustments are always made in closing the books. But what you have are reconstructed statements as your expert thinks they should be constructed.

Mr. Strachan: Well, the only difference is that Mr. Hodge sat down and changed the books before, and we sat down and reversed the entries later, as I see it.

I wouldn't want to put any designation on my exhibits that indicated that they were inferior to Hodge's statements.

Mr. Dixon: Did you say, counsel, he changed the books?

Mr. Strachan: He reversed the entries. They charge them to expense, and he set up that expense as an asset for the next year. [2714]

The Court: Maybe you could use a phrase something like "computations by Lynch."

You gentlemen talk it over. [2715]

* * *

Mr. Strachan: May it please the Court, I have a witness who is planning to be out of town and I should like to have ~~Mr. Lynch~~ step aside, with the Court's permission, and put this witness on out of order.

The Court: You may.

Mr. Strachan: Mr. Swayne, please.

AMOS SWAYNE

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Amos Swayne. A-m-o-s S-w-a-y-n-e.

Direct Examination

By Mr. Strachan:

Q. Mr. Swayne, where do you live?

A. 1060 West 17th Street, Santa Ana.

Q. In what business are you engaged?

A. Food canning.

Q. What is the name of your firm?

A. Case-Swayne Company, Incorporated.

Q. Are you one of the founders of that company? A. I am. [2716]

Q. How long has that company been in business? A. Since 1941.

Q. Prior to the establishment of the Case-Swayne Company business, had you had prior experience in the food canning industry?

A. I started in the food canning industry in 1931 in Northern California, working for a firm by the name of Schuckl, S-c-h-u-c-k-l, and Company, Incorporated.

Q. What was the nature of your work in that employment?

A. I was in the manufacturing end and it was fruit and vegetable canning.

(Testimony of Amos Swayne.)

Q. Did you continue in that employment until you established your own firm?

A. Yes, sir.

Q. Now, will you tell us briefly the scope of the business of Case-Swayne & Company? First, with regard to the products that it markets.

A. We pack canned fruits, berries, canned vegetable and fruit juices.

Q. Those are all canned at the plant located where? A. In Santa Ana.

Q. In what markets are your products distributed?

A. They were distributed throughout the United States, primarily on the West Coast.

Q. And under what brands or brand names do you distribute [2717] your products?

A. Approximately 70 per cent is distributed under our own brand, which is Case-Swayne.

Q. How long has Case-Swayne been engaged in the packing of citrus products?

A. I believe our first year in citrus products was 1945. It was either 1945 or 1946. I can't be too sure.

Q. Since that time you have continuously packed and sold citrus fruit products, is that correct? A. We have.

Q. What products in particular do you pack and market?

A. We pack only what is commonly known as single-strength citrus juices. We pack orange juice, grapefruit juice, a blend of orange and grapefruit,

(Testimony of Amos Swayne.)

a blend of orange and pineapple juice, and a blend of grapefruit and pineapple juice.

Q. Approximately what part of your total production is represented by these citrus fruits?

A. It will vary somewhat from year to year. On the average, I would say approximately 30 per cent.

Q. And what part of your citrus pack do you ordinarily produce and sell under your own name?

A. Well, generally on all items it would be 70 per cent. Now, whether that would be higher or lower on any one individual item I wouldn't be prepared to say at this time. [2718]

Q. And the remainder of approximately 30 per cent, then, is labeled under brand names of other people in the citrus industry, is that correct?

A. That is correct.

Q. So-called private brand merchandise?

A. Private buyer's label.

Q. Can you tell us whether in general the price at which your citrus products are sold to the trade is above or below the price of, say TreeSweet or Exchange Orange?

A. Generally our prices are lower than TreeSweet and/or Exchange Orange.

Q. Could you, for the purpose of illustration, tell us approximately how much lower they are on a case of 12/46's?

A. That will vary somewhat from year to year. It is our intention, if it is possible, to maintain a

(Testimony of Amos Swayne.)

differential of in the neighborhood of .15 cents a case.

Q. When you are packing citrus products, do you ordinarily pack so as to maintain an inventory of those citrus products, or do you pack only against firm orders?

A. We attempt to maintain an inventory.

Q. Will you explain why it is in your business you pack for inventory?

A. In view of the fact that the dominant portion of our pack is under own own label, controlled label, we feel it is necessary, if at all possible, to maintain stocks 12 [2719] months of the year in order to maintain our position on the grocers' shelves.

Q. And to maintain before the buying public the products which you offer under your own trade name? A. That is correct.

Q. Now, in addition to processing and packing for your own account, has Case-Swayne & Company ever made an arrangement with others to process and pack for them? A. Yes, we have.

Q. In 1950, did you enter into an arrangement with Exchange Orange Products for the processing and the packing of orange products?

A. We did.

Q. Will you tell us how that arrangement was made?

A. It was made purely by telephone, in other words, a very small quantity involved, actually, and Mr. Finley, I am sure it was Mr. Finley who contacted us, asked us if we would pack so many cases

(Testimony of Amos Swayne.)

of blended orange and grapefruit juice for them for their label for their account, and we did.

Q. On that transaction they furnished the fruit and the cans and the cartons and labels, and you did the processing and packing, is that correct?

A. They furnished the fruit. We furnished all the other component parts to make up the finished product, with the exception of the label. [2720]

Q. Now, is that the only time that you have ever had a processing arrangement with any of the Sunkist group? A. That's right.

Q. Calling your attention to the spring of the year 1951, did you have any discussions with Mr. Finley in regard to the possibility of entering into an arrangement to process single-strength juice for the Sunkist people?

A. In the spring of 1951, I could not determine the date, I would guess it would be somewhere in April, there was a telephone conversation with Mr. Finley. He indicated that there was a possibility that there might be some contracts made with various packers that year in view of the fact that there were indications of a more than ample supply of fruit.

Q. Was this conversation before you had made any arrangements with anyone for a supply of fruit for the Case-Swayne Products?

A. Yes, it was.

Q. Did Mr. Finley outline to you the terms of an arrangement that he would like to have you consider?

(Testimony of Amos Swayne.)

A. Not in I would say too much detail, but enough basic information for us to evaluate the possibility.

Q. Could you tell the jury generally what the outline of the basis that he discussed with you was?

A. Generally, the outline was that Mr. Finley would have a contract that would provide a packer so much per case [2721] to pack orange juice which would include all costs, with the exception of the fruit cost itself.

Q. All processing costs, was that?

A. That is correct.

Q. After the juice had been processed and you had been paid for the processing cost, did he tell you what the further steps in the transaction would be?

A. He indicated that there would be a predetermined price at which we could buy the finished merchandise back from them to be marketed under our own label or to customers of ours for their own private label.

Q. Did he give you some figures on the proposed allowances that he had in mind?

A. Yes. There were figures that were given. I can't recall at this time what those figures would be, but there were certain allowances that would be set up. [2722]

Q. After that telephone conversation with Mr. Finley, what did you do?

A. We in our company analyzed it to the best of

(Testimony of Amos Swayne.)

our ability, and after some period of time we decided that we were not interested.

Q. Did you so advise Mr. Finley?

A. We did.

Q. About when was that, in the spring of '51, that you advised him that you wouldn't go ahead?

A. It might be late April or early May. I couldn't be sure of the exact time.

Q. So you didn't have any processing arrangement with Sunkist that year?

A. We did not.

Q. You did during the year 1951 enter into an arrangement with Morgan Ward representing the Independent Growers for processing Valencia oranges into single-strength juice, did you not?

A. We did.

Q. When was it that that arrangement was first discussed?

A. Some time about approximately the middle of May, I would say.

Q. Do you recall whether the subject was one that you first mentioned to Morgan Ward or whether he first mentioned [2723] it to Case-Swayne?

A. I don't recall exactly how it came about. I am of the opinion at this time that it came about during either a telephone conversation or at lunch, or some such situation as that.

Q. Will you describe briefly the substance of the arrangement as it was worked out and carried through during the Valencia season of 1951?

(Testimony of Amos Swayne.)

A. We submitted to the Independent Growers a schedule of what we would consider fixed costs to produce canned orange juice in various sized containers, which would be all the fixed costs with the exception of the cost of the raw product itself, freight, or discounts that would be allowed the ultimate purchaser.

Q. After you had worked out those allowances, how was the fruit delivered, how was it marketed and how was it accounted for to the Independent Growers?

A. The Independent Growers would advise us that there were certain quantities of fruit available at certain of their members' packing houses. We would dispatch trucks to pick the fruit up and pack it and proceed to sell it.

Q. When you packed it you would be paid these agreed upon processing allowances, those direct costs, is that correct?

A. Not as such, no. In the agreement we would agree [2724] to pack the fruit for certain predetermined fixed costs, and then we also sold the finished product, and once a week we would remit to the Independent Growers the returns on the finished product that was sold, from which we would deduct the predetermined costs and discounts, and a mark-up that we took as per the agreement.

Q. After you had sold the product, what margin of profit were you allowed in making your return to the Independent Growers?

A. 3 per cent of the net proceeds of the sale.

(Testimony of Amos Swayne.)

Q. That is, if you sold a case for $2.50, that means that your profit would have been 3 per cent of that gross price, or 7½ cents on the case?

A. No; it would be 3 per cent of the net price after all discounts had been allowed.

Q. Will you work——

A. In other words, if the selling price were $2.50, if you had a cash discount of 2 per cent and a swell allowance of a quarter of 1 per cent, those discounts were deducted from the selling price, and the result thereof, the 3 per cent would apply to. In other words, if that result were $2.45, our return from that operation would be 3 per cent of $2.45.

Q. That is what was allowed for profit?

A. That is correct. [2725]

Q. Mr. Swayne, do you recall, or do you have data with you from which you can refresh your recollection as to the prices of single-strength juice during the summer and fall of 1951?

A. Yes, I do.

Q. Can you tell us generally what the trend of those prices was?

A. On June 9, 1951, our average selling price for a case of 12/46 ounce cans was $2.92; on June 23rd the average selling price was $2.71; on July 7th the average selling price was $2.68; on July 21st it was $2.62; on August 4th it was $2.22; August 19th it was $2.14; September 1st, $2.16; September 15th, $2.23; September 30th, $2.41; October 14th, $2.58;

(Testimony of Amos Swayne.)

October 28th, $2.68; November 11th, $2.73; November 25th, $2.75.

Those figures are to the nearest one cent.

Q. Do you recall what it was that caused the abrupt decline in the price of juice from $2.92 in the early summer to less than $2.15 by the middle of August? A. An overproduction in Florida.

Q. How did the overproduction in Florida affect the prices at which you were selling the single-strength California juice?

A. It was necessary for ourselves, as well as any other packer, if they wanted to sell merchandise, to compete [2726] with Florida prices wherever the market was.

Q. Does that mean that the prices that are obtainable even in Los Angeles for California juice have to be priced competitively with Florida juice offered in that market?

A. That is generally correct, yes.

Q. When you quoted these lower prices, you were not reducing prices just for the sake of cutting prices, but to meet competition with Florida, is that correct?

A. As a matter of meeting competition with Florida, and to move out the merchandise that was being packed. In other words, if we did not meet the competition, the merchandise that we were packing would sit in the warehouse.

Q. Over the years have you had any regular source of raw fruit supply for your packing operations in citrus products?

(Testimony of Amos Swayne.)

A. By and large our supply of raw product on oranges, particularly, has been through either the Independent Shippers, as a group, or through the Exchange.

Q. Are you able to tell us whether there is any consistent relationship over the years between the prices at which you bought fruit from the Independents, as compared to prices at which you bought from the Exchange?

A. I would say for all intents and purposes through the years they have been pretty well parallel. There could be, depending on the particular situation in that particular [2727] year, there might be a variation between the two, if the crop was short or long, one might be slightly below or slightly over the other, but for all intents and purposes they are practically parallel. [2728]

Q. It is not true, is it, that one is consistently above and the other consistently below the other?

A. I don't believe that is correct, no.

Q. Now, in the normal season is there any tendency as to the change in the price of fruit from the beginning of the Valencia season on through to the end?

A. Generally, I believe the trend would be that in the early part of the season the fruit would be at its lowest point and would increase as the season progressed.

Q. That would be the ordinary course of events, would it?

A. That is correct. There are exceptions, of course, but that is the ordinary course.

(Testimony of Amos Swayne.)

Q. You appeared here today pursuant to a subpoena that was served on you by the defendants, is that correct? A. That is correct.

Mr. Strachan: That's all on direct examination. Thank you.

Cross-Examination

By Mr. Dixon:

Q. Mr. Swayne, I believe you testified that the primary business of your company was food processing in products other than citrus juices, is that correct?

A. We pack fruits, vegetables and citrus juices.

Q. By that I mean about 70 per cent of your products [2729] that you process are products other than oranges?

A. Yes, that is correct, in dollar volume. I am referring not to units of production, but the dollar volume.

Q. So that the citrus juice processing part of your business constitutes about 30 per cent, does it, of the total dollar volume of products handled by your company? A. That is correct.

Q. In that 30 per cent of your total sales, I believe you testified you made some products like single-strength juice and blends, juice blends, is that correct? A. That is correct.

Q. Now, I think you mentioned the fact that in 1950 you had a processing arrangement with Sunkist whereby you processed some oranges and grapefruit into one of the blended juices that you

(Testimony of Amos Swayne.)

make, is that correct? A. That is correct.

Q. Do you remember the approximate tonnage that was handled under that arrangement?

A. I would be guessing, but I am sure that it would be in the neighborhood of not under 500 tons and not over 800 tons combined.

Q. That was blended juice?

A. That is correct. That is combined.

Q. By the way, your company doesn't make any frozen concentrated juices, do you? [2730]

A. No, we do not.

Q. And you didn't make any in 1951?

A. No frozen concentrate. We have frozen single-strength, but not frozen concentrate.

Q. Under that arrangement that you had with Exchange Orange in 1950, you just processed and canned the blended juice and it was turned back to Exchange Orange, was it not?

A. That is correct.

Q. And you were paid for performing the processing and canning operations?

A. That is correct.

Q. And you didn't under that arrangement buy any of the blended juice that you processed for Exchange Orange, did you? A. No.

Q. You mentioned some contact that Mr. Finley had with you early in 1951, I think you said the spring of 1951, about making some processing arrangement with Exchange Orange during that year. Do you know Mr. Kelly of Sunkist? A. I do.

Q. He is the head of the product orange depart-

(Testimony of Amos Swayne.)

ment of Sunkist, is he not, or was he, I mean, in 1951.

A. As far as we were concerned, he was the person that we looked to if we were discussing by-product oranges. Whether he was the actual head of it or not, I don't know. [2731]

Q. Do you recall whether Mr. Kelly contacted you in the spring of 1951, also, with reference to securing your views as to what price Sunkist should charge independent processors during the coming season for product oranges sold to them?

A. I don't know that there was ever a discussion as to what the price of the fruit should be. There were probably several discussions as to what the outlook was, what the price structure might be. That might be common in several years.

Q. I am talking, Mr. Swayne, just about any discussions that Mr. Kelly might have had with you in the spring of 1951 before Sunkist announced any selling price to processors for that year of Valencia oranges that they might acquire from Sunkist.

* * *

A. We had discussions with Mr. Kelly, but I can't say that I recall discussions about what the price would be for the fruit.

Q. Well, specifically, do you recall any conversation, Mr. Swayne, with Mr. Kelly in the spring of 1952 as to the price that processors might be able to pay for Valencia oranges in the 1951 season that might be processed into single-strength [2732] juice?

(Testimony of Amos Swayne.)

A. In general terms only. The indications, as I recall, were that there was a big possibility that it was going to be a very competitive situation. No. 1, Florida was packing a considerable quantity of juice. No. 2, California had a very large crop, or the prospect of a very large crop of oranges. I don't think we could have been in a position at that time to intelligently have said what the price of the fruit should have been.

Q. 1951 was a good crop year for Valencia oranges, was it not? A. That's right.

Q. Well, getting back to your discussion, then, with Mr. Finley, you say he called you on the phone and offered your company some kind of a processing deal on Valencia oranges?

A. He did not offer us a deal. He indicated that there was a possibility of contracts for that year and he would like to give us some of the pertinent facts about it and what we would think about it, but actually, as far as a specific offer being made of a contract, at that point there was none. [2733]

Q. I think you mentioned something about a conversation with him when this proposed arrangement was being discussed, in which he suggested that after processing it and being paid for the processing, that you would have the privilege of buying the product that you processed at the Sunkist price?

A. At a predetermined price.

Q. At a predetermined price?

A. Yes; whatever that would have been. There

(Testimony of Amos Swayne.)

was no figure in that, I don't believe, that was mentioned.

Q. Do you recall what the discussion was with reference to the payment to your company under this proposed arrangement for processing costs?

A. Actually, I do not. At the time Mr. Case and I, with the information we had, evaluated it, considering all the elements in the market, and finally decided that we were not interested; we would rather take our chance in the open market.

Q. Now, in any event, you didn't proceed any further with that kind of discussion with Mr. Finley, and nothing came out of it as far as the Exchange Orange and Case-Swayne were concerned?

A. No. There were about two or three discussions, but nothing ever came out of it.

Q. Your company, of course, during the preceding year, [2734] that is, the processing year 1950, had processed some Valencias into single-strength juice, had they not? A. Yes, sir.

Q. And you had some inventories left from that processing operation during the early part of '51; is that correct? A. That is correct.

Q. And those products, that is, what you processed into single-strength juice during the 1950 season, was disposed of, was it not, before the 1951 season opened on single-strength Valencia juice?

A. By and large, but we did have some quantity that was disposed of about the time that the new pack was coming in.

Q. Can you tell the jury approximately how

(Testimony of Amos Swayne.)

many tons of Valencia oranges your company purchased from any source whatever in 1951?

A. When you ask "purchased," are you referring to——

Q. I am excluding the Ward arrangement that you testified to.

A. I couldn't be too sure of the actual amount, but I would say that it was not over 1,000 to twelve or fifteen hundred tons. And that figure might be wrong.

Q. Would suggested figures of 595 tons of Valencias and 486 tons of navel oranges mean anything to you with reference to the purchases of both of those types of oranges [2735] in 1951?

A. From what sources?

Q. From any source.

A. Well, that adds up fairly close to what I have been talking about. I don't have any record here that would point it out.

Q. Do you recall, Mr. Swayne, when the last purchases were made of Valencia oranges by Case-Swayne during the year 1951? I mean were they made in May or did you continue to purchase through the processing season of that year?

A. We made some purchases in May and some—it might have been October or November, the very end of the Valencia season, so I would say that we purchased some at the very beginning and the very end of the season. We did not purchase any during what could be considered the peak of the Valencia season.

(Testimony of Amos Swayne.)

Q. Do you know what Sunkist was offering Valencia oranges to processors on the open market for in 1951?

A. I couldn't be sure of the price, because we were not in the market to buy. And I don't know that we had any discussion at that time with the Exchange as to their price.

Q. Let us assume that it was, say, $40 per ton for 120 pounds soluble content per ton, does that refresh your recollection any as to what it might have been, if you know?

A. Do you mean does $40 mean that might have been the [2736] price?

Q. Yes.

A. Well, I would say that it could have been in that neighborhood, but I again say that as far as any direct quotation is concerned, we did not have any.

Q. In any event, you didn't buy or purchase any oranges from any source in 1951, did you, for the purpose of processing them into single-strength orange juice at any $40 price?

A. I don't believe we did; no. Unless—I don't know what we paid for the oranges that we bought at the very end of the season. It was necessary for us at that point to build our inventory up to be sure that we had sufficient inventory to carry us to the beginning of the next season. Now, what we paid at that point I couldn't be sure, but I—I don't know whether we paid $40 or $30. I know we bought

(Testimony of Amos Swayne.)

some from the independents at about a $30 level late in the season, after we had terminated our agreement with them.

Q. Let me ask you this question, Mr. Swayne: Assuming that you would have to pay that price for Valencia oranges during the processing season of 1951, based upon your knowledge and experience as a processor of Valencia oranges into single-strength juice, could you have purchased oranges, and paid for them at that price, and sold them in the market at any time during the year 1951, at anything except a loss? [2737]

A. I am afraid that 90 per cent of the time of the year it would have been at a loss.

Q. You mentioned that you had some arrangement with Mr. Ward who represents the Independent Growers—does he? A. That is correct.

Q. And pursuant to an arrangement made with him as representative of the Independent Growers, you did handle some Valencia oranges for that organization in the year 1951 under some kind of arrangement that you testified to; is that correct?

A. It is.

Q. I believe you also testified that you not only processed oranges turned over to you by Mr. Ward under this arrangement into single-strength Valencia, but you also acted as marketing agent for this organization in selling the juice so processed; is that correct? A. That is correct.

Q. Do you know whether the Independent Growers, represented by Mr. Ward, has any marketing

(Testimony of Amos Swayne.)

organization of any kind for any juice products of the kind that you processed under this arrangement? A. Not to my knowledge.

Q. They have none?

A. They have none to my knowledge.

Q. You do know, do you not, that Sunkist is the marketing [2738] agent for all juice products processed by Exchange Orange, which are turned out into canned juices, do you not?

A. As far as I know; yes. [2739]

Q. So that in processing these oranges that were made available to you, that is to Case-Swayne, into single-strength juice, you not only processed them, but you acted as marketing agent for the association, and paid the balance remaining, after having performed the selling operation and deducting your selling commission, to that organization; is that correct? A. That is correct.

Q. And in determining the processing costs that this organization paid you for processing the oranges into single-strength juice, did that include any profit of any kind at all on the processing operation? A. No; it did not.

Q. So that under the arrangement that you had, your profit from this operation, after having paid all operating and processing expenses, was the amount which you have mentioned which remained, I think it was some three per cent, of the net proceeds from the selling price; is that correct?

A. That is correct. In this cost we had our factory overhead and general administrative cost as a part of the cost to produce a unit.

Q. Now, I want to ask you one question about this Florida price situation, Mr. Swayne. By the way, this processing operation was started for the Independent Growers when? [2740]

A. Well, I believe that the first that we produced would have been the last day or so of May or the first day of June.

Q. Rather early in the season?

A. That is correct.

Q. That is about the end of the Florida season, I mean as far as Florida juice appearing in the market is concerned?

A. No; not as far as the Florida juice appearing in the market. As far as their processing period, there is no fruit available generally after that time. They have put up the pack and it is in their warehouses or wherever it may be, but it is still available to the market, the finished juices.

Q. Your job was to get rid of what you had processed? A. That is correct.

Q. And to pay the net, after deducting your expenses, to the Independent Growers who supplied the fruit? A. That is correct.

Q. And they did not have any processing facilities except as they were performed through your organization; is that correct?

A. To the best of my knowledge, that is correct.

Q. Do you recall just what the Florida price was

(Testimony of Amos Swayne.)

in the western market at the time you first came out with this product under this arrangement?

A. I don't recall what the exact price would be, no. [2741] The only thing I could say is that we were meeting, in all instances at that time we were meeting what we would consider Florida competition in selling, and established our price accordingly. So the prices that I read off awhile ago in theory might have been the Florida prices.

Q. Your instructions were, were they not, Mr. Swayne, under this arrangement with Mr. Ward to move the juice and get the proceeds to the grower, not to hold any inventories; is that correct?

A. Our instructions were to pack and sell and get the best possible price under the existing condition.

Q. About how many tons did you process under this arrangement, do you recall?

A. I would say it would be approximately 5,000 tons.

Q. I think you testified that there are two sources of fruit available to the independent processor in this area, that is the Independent organization, for whom you processed in 1951 under the arrangement you have mentioned, and Sunkist; is that approximately correct?

A. Those are the two sources of supply that are available to us largely; yes.

Q. While you were processing these 5,000 tons, or whatever it was that you secured from Independent Fruit Growers Association, was your company

(Testimony of Amos Swayne.)

also carrying on other food canning and processing operations? [2742] A. Yes.

Q. And what were they?

A. It would depend a little on the time of the year, but during that particular period we could have been packing boysenberries and apricots, peaches, perhaps fresh Fordhook lima beans.

Q. So that this was just one part of the food processing operation that your company was carrying on during the season; is that correct?

A. As it has always been; yes.

Mr. Dixon: Thank you very much.

Redirect Examination

By Mr. Strachan:

Q. Just a question or two, Mr. Swayne. Of the various products that your company packs, I think you said citrus represented about 30 per cent of the output? A. Yes.

Q. What is the product which is the largest single product produced?

A. By variety, if you are speaking of by varieties, of any individual variety, citrus juices as a variety would represent the largest single variety that we produce.

Q. After you had completed the production for Mr. Finley of the blend, I think you said it was, did he ever express any dissatisfaction with the quality of your product, [2743] such as that there were specks in it or any other infirmity?

(Testimony of Amos Swayne.)

A. No; not to my knowledge.

Q. In cross-examination you said that you did not believe the Florida processor in the season of 1951 could pay $40 for fruit and process it into single-strength Valencia juice at a profit; is that correct? A. Florida processor?

Q. I am sorry. I will restate it.

I think you testified California processors could not buy $40 fruit in the 1951 season and process it and sell it at market prices and make a profit; is that correct?

A. I believe I said that largely that was correct. There might have been a period in that year when it would have been possible to have done it. I don't know. But for all practical purposes, you could not.

Q. And that was because of the fact, was it not, that the Florida prices had so depressed the market that there couldn't be a profit realized by the California processors?

Mr. Dixon: If the court please, I think that is a question for the jury. Object to the form of the question. It calls for a conclusion.

The Court: Sustained. Reframe the question.

Q. (By Mr. Strachan): Was that because the market price during most of the year was so low that on $40 fruit a processor could not make a profit? [2744] A. That is correct.

Q. Now, you did during the 1951 year pack for your own account and for your own inventory single-strength Valencia juice in addition to that

that you processed and packed under the Morgan Ward processing arrangement; is that correct?

A. We did.

Mr. Strachan: That's all.

Mr. Dixon: Well, now——

The Court: Now, let's end this up.

Mr. Dixon: I have one question, your Honor, only because of the last question by counsel.

Recross-Examination

By Mr. Dixon:

Q. When was that pack, Mr. Swayne?

A. Part of it would have been packed in the early part of the season and part of it would have been packed in the late part of the season.

Q. None during the actual processing season for Valencias? A. That is correct.

Mr. Dixon: That's all.

The Court: Let me ask one question, now. Just one question. With lawyers and judges, you know, it is just one question, and it turns into a string of questions. [2745]

Did you have facilities in 1951 to have packed more single-strength juice without straining the capacity of your plant?

The Witness: Yes; as far as packing is concerned, we could have packed substantially more.

The Court: But whether or not you did pack more, I suppose involved a variety of considerations, the market——

(Testimony of Amos Swayne.)

The Witness: Well, your Honor, I would say that the fruit that we received from the Independents was the fruit that they felt, I guess, was in surplus, at least they wanted it put in the cans by us. Now, whether they had sold fruit in other directions and for other purposes and how much, I don't know. But we were taking at that point what they made available to us.

The Court: I am speaking of what you packed for your own account.

The Witness: Oh, pardon me.

The Court: How much you would pack, I suppose would depend upon a variety of considerations, the state of the market?

The Witness: Yes.

The Court: The price of the raw product, your outlets, and what you had to supply, and other factors?

The Witness: We were only—in carrying an inventory that year, our primary interest was to try to maintain our [2746] position with the customers as far as our own label on the grocery shelf was concerned. We were certainly not anxious to carry any large inventory, because conditions were very uncertain. [2747]

* * *

JOHN A. LYNCH

a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Lynch, when we adjourned this [2748] morning you were still on direct examination, and I was asking you about your analysis of the earnings or profits shown in the prospectus for the Winckler & Smith Citrus Products Company from the time of its organization until the end of the year January 31, 1951, which prospectus stated it at approximately $560,000. Based upon your audit, what have you determined the earnings or profits for that period to be?

A. Based on our examination the total earnings of the co-partnership and the corporation since its inception resulted in a deficit of $302,371.07, as contrasted to the $559,690.88 profit as reflected on the prospectus, a difference of $861,000.

Q. Now, the prospectus makes reference to there having been non-recurring losses on account of inventory losses prior to the first bankruptcy reorganization proceeding; have you examined into the amount of the inventory losses as recorded in the books and records of the business prior to that first bankruptcy proceeding to determine the amount thereof? A. We did.

Q. And what did you determine from the books

(Testimony of John A. Lynch.)

and records to have been the amount charged off on account of non-recurring inventory losses referred to in the prospectus?

A. The analysis of the books for the prior period reflected that at January 31, 1947, journal voucher 201, a [2749] write-off of $142,122.53 was made against the inventory for the year ended January 31, 1947; for the year ended January 31, 1948, the inventory write-off included a write-down July 31, 1947, of $38,083.12, and the year-end write-down of $9,766 as reflected on the books of account. This aggregated approximately $190,000 write-down from February 1st, 1946, to January 31, 1948. [2750]

Q. Those are the only inventory write-downs appearing in the records for that period?

A. That is correct.

Q. Now, turning to the subject——

The Court: Now, before we leave that subject, ladies and gentlemen, this evidence is offered in rebuttal to representations or statements appearing in the prospectus. There is no issue in this case that anyone was defrauded. We are not trying a mail fraud case and we are not trying a case of an investor who invested money on some representation. It has been stipulated that the defendants had no knowledge of the contents of these financial statements of the plaintiff prior to the year in question. I think that was agreed upon.

Mr. Strachan: I don't recall such a stipulation.

The Court: I recall it in line with an objection made earlier in which Mr. Dixon asked that question

(Testimony of John A. Lynch.)

of counsel, made his objection based upon that ground.

Mr. Strachan: Let's check the record. I don't happen to recall it, your Honor.

The Court: Do you contend that the defendants in this case had any knowledge of the financial statements of this company prior to the end of the year 1951, prior to January 31, 1951?

Mr. Strachan: The question hadn't occurred to me. I don't know whether they had or had not. I can check the fact, [2751] and if we can agree on the fact, I have no objection to a stipulation.

The Court: Well, we will leave that subject to check, but the main point is that this is admitted for a limited purpose and not for the purpose of showing fraud on the part of any investor or buyer, matters of that sort. Again, the evidence must be considered in connection with the issue in the case, what was the status of the company in 1951, and the ultimate issue is not what its status was in 1946, 1947, 1948, 1949 or 1950. But any way in which that has any bearing in determining its status in 1951, you may consider it.

All right, proceed.

Q. (By Mr. Strachan): Mr. Lynch, have you determined what amounts were paid to Mr. Winckler during the three fiscal years following the first reorganization? First, in salary——

A. I have.

Q. By the years and in total? A. I have.

(Testimony of John A. Lynch.)

Q. What is the amount by years and the total paid in salary?

A. For the year ended January 31, 1950, salary was $12,319.02.

For the year ending January 31, 1951, the salary was $14,619.30.

For the year ending January 31, 1952, the salary was [2752] $14,458.88.

A total of $41,397.20.

Q. That is salary alone?

A. That is stated in accordance with our examination.

Q. How much was paid in bonus in any one of those years?

A. We have classified the bonus in the year January 31, 1951——

Mr. Dixon: You mean the year ending that time?

The Witness: That is true, the year ending January 31, 1951, as being $3,550.

Q. (By Mr. Strachan): With respect to allowances paid to Mr. Winckler in each of the years——

Mr. Dixon: If the court please, I am going to object to any evidence on this unless this witness specifies in detail what the amounts are that he calls allowances and for what the records of this corporation show they were allowed.

The Court: I think we should have the term defined, allowances. What do you mean by allowances, Mr. Witness?

The Witness: The allowances were for automobile and travel charged to the account monthly, and I believe it was $200 a month granted to Mr. Winckler and it was charged to automobile, and $120 a month charged to travel. Not in every month, but to the extent that these totals reflect here. There were other items. I can be specific. But there were other items for various reasons, and they were charged to these [2753] various accounts. I have the detail.

The Court: Travel and auto and other items were considered by the company as expenses?

The Witness: That is correct, your Honor. These represent——

The Court: Do you have the breakdowns of these amounts and what they were for?

The Witness: Yes, your Honor.

The Court: In subtotals?

The Witness: Yes, your Honor.

The Court: I don't mean penny by penny, but do you have an itemized statement in sub-totals?

The Witness: Yes, your Honor.

The Court: All right. Let's take up the year ended January 31, 1950. Go ahead, Mr. [2754] Strachan.

Mr. Strachan: Does your Honor have a question pending?

The Court: I just said, let's start with the year ending January 31st, '50.

I said go ahead. I didn't really ask a question.

Mr. Strachan: I see.

Q. (By Mr. Strachan): What was the amount of the allowances, in the aggregate, for the year ending January 31, 1950?

A. I don't have them in the aggregate, because these are just checks to Mr. Winckler. Checks made to any other individual, or any other agency, are not in my total.

The Court: That is what he is asking you, Mr. Witness, the allowances made to Mr. Winckler that you are talking about.

The Witness: I only recorded the cash checks to Mr. Winckler.

If a check was paid to Pennsylvania Railroad and charged for Mr. Winckler's account, I didn't record those.

Mr. Dixon: If the court please, just a moment. I think that if that is all this witness has, and he can't tell this jury and the court what these amounts that he claims were allowed for——

The Court: Just a minute.

Overruled.

He said he is going to give the breakdown of this amount [2755] year by year of amounts paid to Winckler, and what they are generally for.

The Witness: That is right.

The Court: What do you have for the year ending January 31, 1950?

The Witness: For the year ended January 31, 1950, I have $340 charged to rent; for the year ended January 31——

The Court: What was that?

(Testimony of John A. Lynch.)

The Witness: That was check No. 4472, on June 9, 1949, to Mr. N. J. Winckler, charged to rent.

The Court: Just rent?

The Witness: That is correct.

I have a total of $750 charged to telephone and telegraph; I have a total of $21.33 charged to gas; I have checks totalling $1,530.15 to traveling; I have checks for $249.90 charged to other ingredients used; I have checks for $300 charged to selling; I have checks for $420 charged to auto expense; I have checks for $93.39 charged to interest; I have a charge for $16.66—it is a check—to bank charges. That totals $3,721.43 for the year ended January 31, 1950.

Juror Berger: The $300 rent, is that personal rent or hotel expenses?

The Court: I asked the witness, and he is going by the books and all he knows is that it says, in the books, "Rent." [2756]

You don't know, do you?

The Witness: No; I don't, your Honor.

The Court: It can be inquired into later by counsel. The year ending January 31, 1951, what was the total of allowances that you calculated?

The Witness: $9,306.86.

The Court: What were your subtotals of that?

The Witness: I have $1,961.04 charged to traveling; I have $10 charged to interest—excuse me—$10 to accrued interest; $5.00 to interest expense; $120 to miscellaneous expense; $6,450.82 to executive travel expense; $760 to executive auto expense.

(Testimony of John A. Lynch.)

That is the total for the year ended January 31, 1951.

The Court: What is your total for the year ending January 31, 1952?

The Witness: My total for the year ended January 31, 1952, is $6,219.37.

The Court: What is your breakdown on that?

The Witness: My breakdown is $4,933.37 to travel expense; $1,230 to auto expense; $56 to advertising; totaling $6,219.37 allowances for the year ended January 31, 1952.

Q. (By Mr. Strachan): Mr. Lynch, one of the claims of the plaintiff is that there was a loss of good will incurred by Winckler & Smith Company. Have you made any studies to determine whether at any time after the first bankruptcy there [2757] existed——

Mr. Dixon: If the court please, I am going to object——

The Court: Let him ask the question first.

Q. (By Mr. Strachan, continuing): ——there existed any good will?

The Court: Mr. Dixon.

Mr. Dixon: If the court please, I am going to object to the use of the word "bankruptcy" by counsel. This corporation was never in bankruptcy, and he well knows it. Unles your Honor will so instruct the jury. It is misleading.

Mr. Strachan: Since——

The Court: Let's not quibble about these things.

Mr. Strachan: Chapter 11.

(Testimony of John A. Lynch.)

The Court: The reorganization proceedings under Chapter X or XI aren't bankruptcies in the sense that the layman uses the term, but they are proceedings under what we speak of as the general bankruptcy statutes. The purpose of them is to avoid ultimate bankruptcy as the layman uses the term. A company may come out of reorganization and succeed. It may never come out of reorganization and go into liquidation, which is, in the layman's term, what a bankruptcy is. So we know at all times that we are talking about the reorganization proceedings, the first one being under Chapter XI.

So the objection is overruled, and reframe your question, if you will. [2758]

Mr. Strachan: Surely.

The Court: First, though, Mr. Witness, can you ascertain from books of a corporation, alone, without investigation of its customers and their business contacts, what good will is?

The Witness: I would say yes, your Honor. It is customary to make a calculation of good will based on the earnings history of a corporation. The earnings history, after careful study should yield a return——

The Court: Your answer to this question, if it were made, then would be based entirely on earnings history?

The Witness: And capital invested in the corporation.

(Testimony of John A. Lynch.)

The Court: But you would not take into account in that answer any other factors?

For instance, if I had a hamburger stand on a busy corner where 10,000 people had to pass every day, I think in at least a layman's sense of the word my prospect of business would be called good will, would it not?

The Witness: It would be reflected in your earnings, your Honor. Your location is reflected in your earnings, your position in the industry, the character of your customers and the ability to retain them, have repetitive customers, the morale of your personnel, all are reflected in your earning power.

The Court: What was the question again, now?

You were going to revise your question. [2759]

Q. Have you made any studies, Mr. Lynch, to determine whether or not there existed any good will attaching to the business of Winckler-Smith Citrus Products Company after the time—no—at any time during its business life? A. I have.

The Court: Well, now, ask your next question, but I think we have got a problem.

Q. (By Mr. Strachan): Will you tell us on what you based your studies?

The Court: Well, counsel, to save time, I don't think the question is proper, because I think it is an ultimate question for the jury and it is not proper for a witness to characterize it either for the plaintiff or the defendant in the sense of saying that there was none or there was so many dollars' worth, any more than if I was trying a criminal case a

(Testimony of John A. Lynch.)

witness could get on the stand and be asked the question, "Was the defendant guilty of this offense?" or if I was trying a negligence case, could you ask the witness, "Was the defendant negligent?"

Mr. Strachan: Your Honor, there are various formulae used for calculating the existing or nonexistence.

The Court: I will not object to a description to the jury of how an accountant would formulize it or the formula he would use, but your first question, and then you reframed it, went into some other matters. You asked the ultimate [2760] question. If you want to ask the witness what formula he would use as a CPA in calculating good will, you may do so. I am talking about the ultimate question which was involved in your first question, although it was not in your later one, but I figured we were going to get back to it again.

Q. (By Mr. Strachan): Mr. Lynch, are there any recognized formulae or formulas which are ordinarily used by people in the accounting field for determining the existence or nonexistence of good will and the value of good will, if it exists?

A. There are several basic formulas.

Q. Give me one.

A. Well, one basic formula, and I believe the most common one, is the one used by the income tax unit known as Formula ARM-34.

Q. What does ARM-34 mean?

A. ARM is a symbol for appeals and review

(Testimony of John A. Lynch.)

memoranda of the Treasury Department. 34 is the number that was applied to that formula, to the bulletin, ARM-34.

Q. Does that bulletin set up criteria and means for determining the existence and extent of good will? A. It does.

Q. Will you describe the general principle of that ARM-34 formula?

The Court: Now, let me ask this question again to save [2761] time. Is this formula that you are going to tell us about now one that is applied particularly in tax cases? You say there are several formulas: Is there another formula that is applied in standard bookkeeping practice aside from tax purposes?

The Witness: They are all used, your Honor, for every purpose. There is more than one basic formula. The ARM formula appears to be the most popular.

Patton and Patton, a well-recognized accounting text book, and Kennedy, and even the Supreme Court, have followed those formulas as presented by ARM-34 and as presented by applying a percentage return to assets invested in a business and capitalizing the excess earnings attributable to those assets.

The Court: In other words, although it grew out of the tax field, it is a generally recognized formula that could be applied and is applied by CPA's in determining the facts to reach the question of good will?

The Witness: That is correct, your Honor.

(Testimony of John A. Lynch.)

The Court: All right. Go ahead. Tell us what the formula is.

The Witness: The formula ARM-34 presupposes that good will necessarily embraces a return to a corporation of an amount over and above that which would normally be returned by another similar corporation in the same industry. It [2762] takes the position that any prudent investor would secure a favorable return on his money. Any return over and above that amount would be considered attributable to some other factor, such as location, reputation of the product, ability to keep the demand for the product, the executive ability of the corporation, the corporation's integrity and longevity.

Under ARM-34, they apply a 10 per cent return as normal to the net equity of the corporation or the net worth of the corporation. Any return over and above the 10 per cent return is attributable to a factor other than just being in business.

The 10 per cent is applied to the results of an average of five years' operations, never less than three years. The five years' operations are averaged and the net worth invested for the period is averaged.

Application of the 10 per cent rate to the net worth of the business and the subtraction therefrom from the actual earnings gives the amount which ordinarily would be capitalized as good will. This amount under ARM-34 is then usually capitalized over a five-year period.

(Testimony of John A. Lynch.)

That in substance is the ARM-34 formula.

Q. (By Mr. Strachan): Now, will you tell us what result you reach if you apply to the Winckler & Smith financial records and its earnings and its net worth the formula that you have just described?

A. Averaging the five years' earnings per the exhibits [2763] here, without any adjustment by me, for the period ended January 31, 1951, results in an average annual deficit in earnings of $1,398.64. Applying the ARM-34 to that negative figure would give me a negative capitalization of earnings, and considering the fact that the return at 10 per cent should have been made on the net worth as invested, adding the net worth of the business as specified on those exhibits without adjustment by me, the net result is a negative good will at that date of $96,018.40.

If I carry the computation through the year ending January 31, 1952, the computation results in a negative good will of $444,633.70.

Q. Now, were there any other——

The Court: Of course, you did indirectly what I said you couldn't do, but nobody objected.

Mr. Strachan: I didn't think it was objectionable, either, your Honor.

Mr. Dixon: I did, your Honor. I am going to object.

The Court: It doesn't make any difference. I think you did indirectly what I said you couldn't do, but nobody objected, and so here we are. Go ahead.

Q. (By Mr. Strachan): Were there any other

(Testimony of John A. Lynch.)

means recognized for attempting to evaluate what is called the good will of a business?

A. There are several other basic formulas. [2764]

Q. Will you mention another?

A. One presupposes that every asset invested in the business, whether it is borrowed capital, creditors' capital, will result in earnings. You may start a corporation with $100,000, but borrow 400,000, and in that case you would have $500,000 worth of assets. This basic formula presupposes that that $500,000 worth of assets should produce results notwithstanding they are borrowed.

They apply the percentage to those $500,000 worth of assets and capitalize any excess earnings resulting from those.

If we utilize that formula in this instance, we would have a much greater negative good will, because the results of the average earnings come out negative.

Another method of computing good will is to take the straight arithmetical average on five years' earnings and capitalize it at a given percentage at which those earnings will—capitalize the arithmetical average of five years' earnings over a specified purchase period. If you are willing to buy the business and pay five years' earnings to purchase it, that is a straight capitalization of earnings.

Q. Well, would you tell us how you applied that to the Winckler-Smith operation?

A. I did apply it. If I apply that straight arith-

(Testimony of John A. Lynch.)

metical average to the net worth of the business as reflected [2765] on these exhibits——

The Court: According to your computation.

The Witness: No. Unadjusted, your Honor.

The Court: All right. Make it clear what you are talking about.

The Witness: At January 31, 1951, the net worth of the operation, of the corporation here, unadjusted by me, was $178,050.40. The average annual loss was $1,398.64, as reflected by these statements, unadjusted by me.

The capitalization of those earnings over an eight-year period would give a deficit earnings of $11,189.12 which, added to the net worth, gives a negative good will of $189.239.52.

Considering another year addition, taking a six-year average, for the subsequent year, January 31, 1952, using the same formula, the negative good will would be $825,428.64. [2766]

* * *

(Whereupon, the jury left the courtroom and the following proceedings were had in the absence of the jury:)

The Court: The record will show the jury absent. I suppose you are going to use another witness as to BS, [2767] or whatever exhibits you propose to use on the mythical 12,000 tons?

Mr. Strachan: Just between us, your Honor, I wish we could have a different designation on that exhibit.

The Court: You worked yourself into a hole by your numbering system.

Mr. Dixon: I think it is properly lettered, your Honor.

The Court: I hadn't noticed that. You are much more observing than I am.

As I look at the matter, BS and BT are worked together, BT depending on BS. I think you have to revise the exhibit for this reason. Let's go back over it again. I permitted a calculation to be filed on what Winckler & Smith would earn, following this cross-examination, and you cross-examined and you were given the right to make a computation based on your figures, or the figures you brought out. I am not going to hold you too closely as to whether you brought those figures out in cross, or not, as long as your computation is directed to that issue that we meet, what would Winckler & Smith earn, from their standpoint, on the basis of the 12,000 tons added to their other production.

Now, you have in here this oil return that we discussed the other day.

You are entitled to show by other evidence that had Sunkist given 12,000 tons to Winckler & Smith they wouldn't [2768] have got as much from the oil as they got if they gave it to TreeSweet. That is your point. But you have got it worked in here, and it doesn't match up with the other computation, and it injects this other issue in from Sunkist's standpoint, how much would Sunkist have gotten. And I don't think that is the way to do it, in view of what happened.

I was going to permit you to make the compilation in contradiction to the one the plaintiff made.

I have been over this pretty carefully, and as I read it, unless I am wrong, it involves a figure here which properly belongs in the evidence somewhere, but I don't think it belongs as part of this exhibit.

Mr. Strachan: Your Honor, this exhibit isn't directed toward rebuttal of Hodge's computation alone. I brought out, I thought, in cross-examination of Mr. Hodge, what we regarded as matters which have been ignored, overlooked, or understated.

This exhibit, instead, is predicated on what we compute would have been gain or loss to Winckler had he obtained his fruit and processed it with the same allowances, and returned to Sunkist the same dollar value for the fruit which the TreeSweet contract yielded.

I would like to look the exhibit over and see if there is improvement I can make in the form of it.

Basically, I think we will come out with the same result [2769] because accepting for the sake of the argument the premises that Mr. Dixon supposes, that is, that what Sunkist got in return from juice and from oil was the cost of fruit, and your Honor in recognition of that proposition required that the two exhibits analyzing the Silzle and the TreeSweet contracts show the aggregate of those returns, so accepting the assumption that what was returned was cost of fruit, we take the position that if the Winckler-Smith operation were to be conducted with the same allowances, under the same conditions, as the TreeSweet arrangement was performed, the cost of fruit should be the same, and that we should be under no obligation to accept $7.00 a ton, or thereabouts, less from Mr. Winckler's contract than we should from TreeSweet, particularly when Mr. Winckler's claim is that he is entitled to have the same allowances.

As I say, I will look the exhibit over and see if I can cast it——

The Court: You are mixing the two things together. It is true on the computations of Silzle and TreeSweet contracts, which were different from a mythical ton proposition—now, we have two or three different propositions here—it is true on those when plaintiff was offering a computation as to what fruit was costing TreeSweet and Silzle, we made them compute the oil proposition, that is right. Now, the mythical ton proposition is another problem. This case is [2770] confusing enough without adding to any other confusion, and it sort of looks in this exhibit, which speaks of the 12,000 tons, that this exhibit is slanted towards the Silzle exhibit, the TreeSweet exhibit, the mythical 12,000 tons, and the further contention that Sunkist was right in not giving any oranges to Winckler & Smith, because they would have got a better oil return from TreeSweet than from Winckler & Smith.

But we had two days' cross-examination on a mythical ton computation, as a result of which the court permitted a written computation of that to be made, and I will permit you to make a computation

12

on 12,000 mythical tons, but the oil doesn't belong in there.

You may also put your proof on that there would have been a bigger return from TreeSweet for oil. But I can't be convinced why oil enters into this 12,000 mythical tons. And your title is the Projected Results of Operations. You start out and you get a cost of juice product of $170,000. Now, to make up your total here, you use three items. You use this oil figure of $70,000, you use a processing figure, and then you use selling expense.

As far as your selling expense, if you want to draw a computation where you took 8 per cent and Hodge took 3, have your accountant explain why you took 8; if you want to explain why you took a certain processing cost, rather than another cost, I have no trouble following that. I have trouble [2771] following what Winckler & Smith would have made as a total profit or loss, had it had 12,000 additional tons. Can you explain it?

Mr. Strachan: I think the difference between us is this. When our accountant is through explaining how he prepared that, it will appear that for the purpose of this exhibit he has assumed that the cost of the fruit to the processor under the TreeSweet contract was the aggregate of the oil returned and the return from the sale of juice——

The Court: Wait just a minute. Aggregate cost to the processor?

Mr. Strachan: What he had to pay the seller was the combination of those two.

The Court: He had to pay what juice he got and what oil he got?

Mr. Strachan: The total cost of the fruit under the TreeSweet contract was, say, $25, because that was made up of $10 worth of oil and $15 return on juice.

Now, anybody who wants to have that same deal should have to pay the same price for fruit.

That is basically what our accountant has assumed in preparing those two exhibits.

It may be that it is not reflected as clearly as it could be, and in that event I would like to see if we can't improve on the statement of the thing, so that it doesn't [2772] confuse your Honor, or the jury, or me, or anybody else.

I think I know what your Honor has in mind and I will review the whole problem over the week end.

The Court: You review it.

It just sort of sticks out like a sore hand that you are injecting something in there that doesn't properly belong, if this is the computation which I said you could file in connection with the 12,000 mythical tons.

You are entitled to put a witness on and develop your figures on oil return, make your showing that from your accountant's figures that had you done business with Winckler & Smith you would have got less oil returned.

I would just prefer, unless it belongs in here, that it wouldn't get mixed up with two exhibits that were permitted in connection with the 12,000 mythical tons following two days of cross-examination.

Mr. Strachan: Your Honor, it seems to me that perhaps this is the difference between us: You say we are mixing two things up, because we deal with the juice return and the oil return as an aggregate. From our point of view, the thing was improperly separated in Mr. Hodge's computation. We have a single yield for the whole fruit, and he used only a part of the picture.

The Court: It can be resolved by a matter of logic. If we start to follow it up that way, of course I may wind up on [2773] your side or you may wind up on mine. But we start out with the premise of this experiment, and the premise and all this cross-examination, all this time was spent on this problem, suppose Winckler & Smith had got 12,000 tons of fruit from Sunkist on the same terms that Tree-Sweet got it, during that year, added to their profit, would they have a loss or profit, what would they have had. So you say we start with the TreeSweet contract. The TreeSweet contract gave certain allowances, and so forth, down the line. Now, it seems to me that where you and I part company is this: If we also assume TreeSweet's facilities in extracting oil, maybe we get this result. But I don't see how we can assume TreeSweet's facilities. We have got to assume Winckler & Smith's facilities, which weren't as efficient, from what I have heard, as TreeSweet's in extracting oil.

Now, let's leave out the other exhibits, TreeSweet and Silzle, as to what fruit would have cost under those contracts. Under the TreeSweet contract the oranges were delivered to TreeSweet, and under our supposition to Winckler & Smith, the oranges remaining under the title of Sunkist. Therefore, the juice is extracted, and we arrive at a figure for the juice. The oil is extracted, and the oil belongs to Sunkist and goes back to Sunkist. Now, when we made the comparison between Silzle and the TreeSweet contracts with plaintiff's set-up, we took the oil because there we were [2774] comparing what fruit would cost, and the plaintiff couldn't merely say, "I will just take the cost of the juice," because in comparison with the $40 price, if the plaintiff had paid the $40, it would have got the whole orange and would have been entitled to the juice and the oil. So to compare with the $40 figure, in fairness, we had to say, "You can't just take the cost of the juice, because if you got the oranges, under the TreeSweet arrangement you would get a certain figure that represents the cost of the juice, and you get another figure which represents the return of the oil, but you don't get to keep the oil," so we had to figure the oil in with the juice when we are comparing with the $40 price, for the reason that when the plaintiff bought the $40 oranges he got the works, he got the orange, the seed, the pulp, the whole business, and when you compare that with the TreeSweet and Silzle, he didn't get the oil, so we had to make a comparison.

Now, we are not here comparing, in the 12,000 mythical tons, we are not comparing anything with $40 oranges, we are merely saying what would plaintiff have made had it had the 12,000 tons of oranges under the TreeSweet contract.

It is true we are calling the same contract into play, but the comparison we are trying to make is a different one. So when we get to adding this one to Winckler & Smith production, we figure out what this juice would have cost them, and [2775] we know they have to give the oil back to Sunkist, but since we are not comparing with $40 oranges, we don't have this problem.

So it is true that there is this differential in return, but it is not related to this problem.

I may have gotten off the track there, but I think I have got my finger on the difference if you analyze it. I think we can see it. I think the difference is when we compare the Silzle contract and TreeSweet contract with the $40 oranges—that is what plaintiff was trying to do, they are trying to say we had to pay $40 for oranges, look at what TreeSweet and Silzle had to pay—so there was a comparison being made between the $40 a ton oranges, how much per ton was Silzle and TreeSweet paying.

When we get to the 12,000 tons we have got to put that behind us, we are not now making any comparison with $40 oranges; we are merely saying, supposing we had a contract for 12,000 tons of oranges under TreeSweet's arrangement, we take the TreeSweet contract as to allowances and various things, and when we come down to oil we then say the oil has to go back to Sunkist. So, however it works out on Winckler & Smith's figures on oil. But we don't take Winckler & Smith's figures on oil. [2776]

Now, your point comes in, not in this comparison, but later, where you say Sunkist wouldn't have sold the oranges to Winckler & Smith because TreeSweet could make a lot more oil for them than Winckler & Smith. I don't think it belongs in here. I think if you try to analyze that, you may see what I am thinking about.

Mr. Strachan: I will certainly try. I will say this, your Honor. I am not bothered by the computation, with the way we have made it, but I am bothered by the fact that you are bothered by it, and with this transcript I would like to go over the thing again and see if there should be some changes made.

The Court: I will try to work on it myself, but I think at least from my own thinking, I think I have got my finger on it now in that one sheet where we added oil, and we were right when we added the oil, this is, because we were talking about the $40 oranges.

We say, "Winckler & Smith, if you pay $40 for your oranges, you have the juice and the whole business.

"If you are going to compare that to TreeSweet and Silzle oranges, you have also got take into account the oil."

This is not that kind of comparison.

Mr. Strachan: I don't want to chew over old fat, but it seems to me plaintiff's basic position is, in the TreeSweet computation, if given fruit at the same price they let [2777] TreeSweet obtain the fruit, we would have made money.

TreeSweet obtained fruit at a $25 price, paid part in return of oil in kind and part in proceeds of sale of juice in kind.

So we start computing hypothetical results and the 12,000-ton deal would have resulted in certain things had Winckler & Smith gone through with it. Given the $25 fruit made up of two parts, I don't care whether they pay it in oil or whether they pay it in some other way, but they have got to pay the $25 for fruit if they want the TreeSweet deal, and when you get through with that, they come up with a loss.

The Court: Well, the result may be the same but, of course, neither plaintiff's computation nor yours is made on the basis of the $29 fruit. You didn't use that figure in making the computation.

Mr. Strachan: Maybe I will have to do that.

The Court: You took allowances and worked on it that way. Maybe the result comes out the same and maybe it doesn't. As you state it, it sounds plausible, but the fact remains that although you state it that way, that isn't the way it was done. You didn't take $29 fruit to figure that out. You went at it the other way. Maybe it comes out the same and maybe it doesn't.

Mr. Dixon: If the court please, I have been listening to this discussion. I might say at the outset that after I [2778] had had a chance to examine this proposed exhibit, before any comments were made by your Honor or anything else, I had put a line on page 2 between the I and the H, and I still intend to object if this exhibit is offered on that basis, that the H should be removed from the exhibit, The Court: Well, it goes out or stays in largely on the basis of the logic of this thing, and the logic of the comparison. If it belongs in there to make a comparison with the plaintiff's calculations, that is one thing. If it doesn't, that is another.

It, however, may be calculated in some other calculation.

Mr. Dixon: Yes.

The Court: In which event, it shouldn't be in here to add confusion.

Mr. Dixon: But there are certain things necessary to make that admissible in this case that I think the defendants would have to first show, your Honor, insofar as the theory under which this is being offered is concerned. I am not going to state what they are at this time. That is up to them to determine. [2779]

* * *

JOHN A. LYNCH

called as a witness by the defendants herein having been heretofore duly sworn was examined and testified further as follows:

Cross-Examination

By Mr. Dixon:

Q. Mr. Lynch I believe you testified that you were first called into this case in May of last year; is that correct? A. Approximately.

Q. And you have been working on the books of the plaintiff corporation ever since that time, have you? A. That is correct.

(Testimony of John A. Lynch.)

Q. What instructions did you receive from Mr. Hurd when you were called into this case? [2783]

A. The only instructions we received were to examine the books and records that were presented to us and make an examination and prepare financial statements in accordance with sound accounting principles.

Q. Were any copies of the plaintiff's books turned over to you by anyone from the defendant at that time? A. Yes, sir.

Q. So that from May of last year you have had complete access, have you, to the accounting books and records of the plaintiff corporation?

A. That is correct.

Q. Now, had you ever done any work for Sunkist prior to this case? A. No, I had not.

Q. You have never examined their books or done any accounting work in connection with the preparation of any returns for Sunkist? A. No, sir.

Q. Or any other citrus processing company?

A. No, sir.

Q. Now, I think you said that because of the magnitude of the assignment that you took on in May you had to have Mr. Regan help you.

A. Mr. Regan is an employee of mine. He works on all my cases. [2784]

Q. Is he the only one who has worked on this, shall we say audit? A. No, sir.

Q. Who else has been working with you in addition to Mr. Regan on the examination of the books of the plaintiff?

(Testimony of John A. Lynch.)

A. Well, I had Miss Ruth McNamara.

Q. Who is she?

A. She is a senior accountant employed by me for the last ten years.

Q. Where does she reside?

A. She resides in Illinois, Chicago.

Q. Has she been out here working with you on this case?

A. She has been out here at the time we were to have access to additional records, and I don't recall the duration of her visit, but I believe it was short, about a week or two weeks. I also had Mr. John R. Christoph work on this case. [2785]

Q. Who is he?

A. He is a senior accountant who has been employed with me for about six years, seven years.

Q. What duties did you assign to these two persons that you just mentioned?

A. I had one other working on it, too.

Q. Let's have his name, too.

A. I had Mr. James A. Lynch, who also resides in Illinois, perform on this engagement.

Q. Anyone else?

A. No; I believe that would include everyone except the stenographers.

Q. That makes a total of five people, including yourself, from your firm that worked on these books?

A. That is correct.

Q. Since last May?

A. Well, not continuously. We had access to them since last May. We had our regular work to perform.

(Testimony of John A. Lynch.)

Q. You have been out here a good part of that time since then, haven't you?

A. No, sir. I came out on Christmas Day.

Q. Is that the first time you came out here?

A. That is correct.

Q. Was anyone else from your firm out here before Christmas? [2786] A. Yes.

Q. Who? A. Mr. Regan.

Q. Who else?

A. Well, as I stated before, I had Miss McNamara come out to examine some records, and with her was Jim Lynch. They were here approximately a week or 10 days.

Q. Did you have a discussion with anyone from Sunkist about the records that were turned over to you in May of last year which related to the books of the plaintiff? A. No, I did not.

Q. Do you know whether any work had been done previous to that time by any other accountants in connection with the examination of the books of the plaintiff? A. Not to my knowledge, no, sir.

The Clerk: May I interrupt? Didn't you mean, instead of E and F, didn't you mean BE and BF?

Mr. Dixon: Yes. I am sorry.

Q. (By Mr. Dixon): Would you mind telling the jury how much compensation your firm has received for the work done in connection with the examination of the plaintiff's books since you were assigned or took over the work in connection with this case? A. No, I would not mind.

Q. You might tell what it was. [2787]

(Testimony of John A. Lynch.)

A. As of the date I left Chicago we had not received any, although I had made a billing at November 30th. I understand that subsequent to that time the bill has been paid. The billing, as I recall it, including the traveling expense and subsistence, for——

Q. Now, I am just concerned at the moment with how much your firm has been paid for the five employees that you mentioned.

A. That is what I am getting at. Our bill, as I recall, included all traveling and subsistence.

Q. Did you break it down?

A. No. That is what I am getting at. The bill just was a flat bill including all those, cumulative, and if I recall it was approximately $39,000.

Q. That was last December?

A. That is correct.

Q. As of December 1st?

A. That is correct.

Q. Of course you and Mr. Regan, and others from your office, have been working on the matter substantially continuously since that time?

A. Mr. Regan has been devoting his full time to it. I have, also, since Christmas.

Q. But you haven't billed them for that yet?

A. No. [2788]

Q. Can you tell the jury how much of that amount represents expenses incurred, travel and hotel here in Los Angeles?

A. It would have to be an approximation.

Q. That is all I want, an approximation.

(Testimony of John A. Lynch.)

A. About $4,000.

Q. So that $35,000 represents the payment to your firm for work done up to December 1st?

A. That would be about it.

Q. And you have not billed them for any services or expenses since that time?

A. That is correct.

Q. Mr. Lynch, most of your work before you went into business for yourself—that was back in 1945, wasn't it? A. Yes.

Q. Was in connection with the tax matters, accounting and tax matters, was it not, while you were with the Bureau?

A. I had experience with a public accounting firm prior to that. [2789]

Q. Yes. I recall that, but you were with the government, were you not? A. That's right.

Q. The Bureau of Internal Revenue.

A. Right.

Q. For how many years?

A. Approximately three.

Q. And most of that was investigating returns to determine whether some fraudulent return was made or something was wrong with the return to recover some amount to the government, is that correct?

A. Well, income tax examinations, and they were not fraudulent returns, however.

Q. They were audited?

A. Auditing income tax returns, corporation income tax returns.

Q. In connection with your work with the Bu-

(Testimony of John A. Lynch.)
reau and going into renegotiation work, the contracts, that is, during the war, was that about the same type of work you were doing, to determine whether some costs or something had been blown up, shall we say?

A. Well, I wouldn't define it as being that type of investigation. It was merely the isolation of costs incurred by a corporation on a specific contract which they were performing for the government, and the allocation of overhead [2790] and burden to those contracts.

Q. When you took over this large assignment, you called magnitude assignment, I believe, you assumed one of the jobs you took on was to find something wrong with the books of the plaintiff from an accounting point of view, insofar as your opinion was concerned?

A. Not necessarily. Otherwise, we would have delved into the vouchers and the support for such vouchers.

Q. Didn't you do that in some instances in your audit?

A. Only since we have been here and had access, since December 8.

Q. But you did do that?

A. From May until December, until Christmas, we had never probed into the support for any spread which was made. We just accepted it as such.

Q. You mean since December you have, however, done that?

A. Since December out here, the books and rec-

(Testimony of John A. Lynch.)

ords were made—when the supporting records were made available, we have analyzed certain accounts and tested the support for the charges which were made in the books of account.

Q. One of your assignments and one of your instructions, was it not, was to check and see what Mr. Winckler as president of this company had received as salary and other items you testified to last [2791] Friday?

A. No assignment, no specific instructions to make any particular investigation. We have had experience in this type work before.

Q. This type of work? What do you mean by "this type of work"? A. Antitrust suits.

Q. An antitrust suit from an accounting point of view is no different from any other suit, is it? Your job as an accountant, Mr. Lynch, was, was it not, to go in here and find something wrong with these books?

A. No, sir. We had no such instructions.

Q. Then were your instructions to make a complete audit, and I mean complete audit of the books of the company to see whether you could find anything wrong with them?

A. We were advised to make the proper financial statements with the information we had available.

Q. And in connection therewith, you did finally go into such things as how much Mr. Winckler had received as president of the company, and so forth?

A. Well, the examination of the minutes and the

(Testimony of John A. Lynch.)

manner in which these transactions were reflected led us to believe we should go into those items.

Q. I believe you testified here last Friday concerning some of those statements.

A. That is correct. [2792]

Q. And checks made to Mr. Winckler?

A. That is correct.

Q. And you fully ran those checks down and satisfied yourself that those items represented what you testified to last Friday? A. No, sir.

Q. On the books of the company.

A. No, sir. We did not have those checks. They had been pulled and they were not available for our examination.

Q. I believe you stated to the jury last Friday that in going over the amount Mr. Winckler received, I think, in addition to salary, you mentioned some check for $340 charged to some rental account, is that correct? A. That is correct.

Q. How did you determine whether that amount was charged to rent?

A. The accounts, the books of account, the cash disbursements book reflected the check, the date, the number, the amount, the account to which it was charged.

Q. Yes.

A. We had no access to the voucher.

Q. You had the check, didn't you?

A. No, sir.

Q. The check number? A. No, sir. [2793]

Q. You told the jury what it was.

(Testimony of John A. Lynch.)

A. The check number is indicated in chronological order on your cash disbursements book. It is very easy to isolate that item.

Q. This check of $340 that you were talking about last Friday as being charged to some rental account, while the check was payable to Mr. Winckler, you had that check, didn't you?

A. No, sir.

Q. You did not? A. No, sir.

Q. In other words, you want this jury to believe that your staff didn't have access to all these checks?

A. I hope they believe it. We did not have them.

Q. Then how was it you determined the $340 was paid to Mr. Winckler and charged to rent?

A. Well, I will explain that.

The Court: Let's not have a misunderstanding.

The Witness: The cash disbursements book——

The Court: Just a minute. I don't think the witness said it was charged to rent. Maybe I am in error.

The Witness: Yes, I did.

The Court: I think he said it was charged to Winckler's account but there was an indication it was for rent.

The Witness: No, sir, your Honor. I said it was charged [2794] to rent.

The Court: A rent account?

The Witness: That's right.

The Court: And not charged to his account?

The Witness: That's right.

The Court: Then I am mistaken. The witness has

(Testimony of John A. Lynch.)

straightened me out, Mr. Dixon. That is my error. I thought you were putting words in his mouth that he hadn't said.

Q. (By Mr. Dixon) You stated that was for the year ending January 31, 1950. I have $340 charged to rent.

"The Court: What was that?

"The Witness: That was check No. 4472 on June 9, 1949, to Mr. N. J. Winckler, charged to rent.

"The Court: Just rent?

"The Witness: That is correct."

Now, I want you to tell this jury, Mr. Lynch, how you determined that this $340 was charged to any rental account.

A. All right. I took the cash disbursements books, and your cash disbursements book records in chronological order and in numerical sequence each check that is issued by the company, the date in the first column, the number of the check, the payee of the check, the credit to the bank, and then the spread to which account it was charged. [2795]

On Winckler & Smith's books, because of the number of those checks, they got a sheet and prepared a recap and entered those checks in toto. We were furnished with the recap sheets or cash distribution sheets, as they refer to them, and such items were reflected there, and the accounts to which they were charged were reflected thereon without access to the checks or vouchers or anything. [2796]

Q. Did you ask, when you saw what you thought

(Testimony of John A. Lynch.)

was rent, or what you said was rent, for the voucher? Did you check your own investigation?

A. Yes, sir.

Q. And what did the voucher show on this check No. 4472, Mr. Lynch?

A. The vouchers and check were not presented to us.

Q. I asked if you asked for the voucher?

A. I didn't see them.

Q. Did you ask for them? A. Yes, sir.

Q. Were you refused them?

A. No, sir, we weren't refused them.

Q. Did you get them? A. No, sir.

Q. Why not?

A. As I understand it, Mr. Smith didn't know where they were.

The Court: Let's identify Smith. Who is Smith?

The Witness: Mr. J. A. Smith.

The Court: Who is he?

The Witness: He was an accountant for Mr. Walker, I believe was his title.

Q. (By Mr. Dixon): He has been working with you and furnishing you material that you asked for? [2797]

A. No, he wasn't working with us. We asked him for anything.

Q. I mean furnishing with whatever you asked for? A. That is correct.

Q. In connection with this audit that you were making? A. That is correct.

(Testimony of John A. Lynch.)

Q. In connection with the books of the company there is a key system, is there not, numbers for various accounts, which you had access to?

A. Well, the ledger accounts have a number on them. Is that what you are referring to?

Q. Yes. A. Code of accounts.

Q. You had the code account to the rental account of the corporation, didn't you?

A. The rental account would be a code number.

Q. Yes. A. That is correct.

Q. Did you run that through to see whether the $340 represented by check 4472 was charged to any rental account of the corporation?

A. Yes, sir.

Q. And what did you find?

A. It was charged to rent.

Q. It was? [2798]

A. Yes; the same with Mr. Wallenstein's $1500.

Q. And you are certain of that?

A. Fairly certain.

Q. Are you certain, Mr. Lynch? You made the statement here. I want you to now state to the jury that that is a fact insofar as you are concerned.

A. That is a fact, yes, sir.

Q. All right.

Mr. Dixon: Mark this for identification, please.

The Clerk: Plaintiffs' Exhibit 79.

The Court: 79 marked.

(The exhibit referred to was marked Plaintiff's Exhibit 79 for identification.)

(Testimony of John A. Lynch.)

Mr. Strachan: Has the rule broken down that we are supposed to show documents to opposing counsel?

The Court: No, it has not.

Q. (By Mr. Dixon): I hand you, Mr. Lynch, what has been marked as Plaintiffs' Exhibit 79, the same being a copy of check No. 4472, with attached voucher; and ask you to state to the jury whether you know what that is in connection with the auditing of the books of this company?

A. I have never seen this before, but this is a voucher check of Winckler & Smith Citrus Products Company, No. 4472, dated June 9, 1949.

Q. Will you tell the jury what it shows on the voucher, [2799] which is attached to the copy of this check?

A. It shows on the voucher, which is a duplicate of the original check, an amount payable to N. J. Winckler $340, with the detail, description: General expenses for the month of April, parking, telephone, entertainment, et cetera, $50. Car expense for April $120. General expenses for the month of May, parking, telephone, et cetera $50. Car expense for May $120. Total $340.

This voucher reflects the account charged was account 739, $100, and account 628, $240.

Q. From your key to the account books of this company can you tell this jury what No. 739 account is?

A. I believe so. It is an administrative account. Miscellaneous expenses.

(Testimony of John A. Lynch.)

Q. And that isn't a rental account, is it?

A. No, it isn't.

Q. Will you tell the jury what account 628 is?

A. 628 is automobile expense, selling.

Q. Selling? A. Right

Q. Do you find anything anywhere on Plaintiffs' Exhibit 79 which indicates that any amount of this check was charged to rent or the rental account of the company in any way?

A. Not on that voucher there.

Q. All right. Now, you still insist, do [2800] you——

A. I would like to see the cash disbursement book.

Q. We can furnish that to you. Glad to do it.

A. All right.

Mr. Dixon: By the way, plaintiff offers 79 in evidence, your Honor.

Mr. Strachan: I will ask that ruling be reserved until after redirect.

The Court: I will reserve ruling.

Q. (By Mr. Dixon): I will hand you what you have requested, Mr. Lynch, the cash disbursement book; do you find the $340 right at the top, check 4472, dated June 9th? A. Yes.

Q. Will you state to the jury whether you find any rental reference there?

A. No. It reflects the proper posting and the proper distribution. I was in error in putting it in the rent. It should have been included in auto expense and miscellaneous expense, as recorded.

(Testimony of John A. Lynch.)

The net effect, however, is still zero. The check was drawn to Mr. Winckler as I testified.

Q. That shows on its face, there is no question about that.

A. My classification was just erroneous; to rent, instead of auto expense.

Q. You now want to change your story, do you, Mr. [2801] Lynch, concerning this $340 disbursement that you said was charged to, somehow, rent, and Mr. Winckler got the $340?

A. He got the $340.

Q. And he paid his rent with it, is that what you want this jury to understand?

A. I didn't testify to that. I just said the account that was charged was rent. The only difference in my testimony is the account charged is automobile expenses and miscellaneous expense.

He has got the $340.

Q. In any event, you were in error, is that correct?

A. On the classification nature of the expenditure.

Q. Is that the only place that you think you have been in error in this audit?

A. I would say that's all.

Q. By the way, when you started to go over the books here for the year ending January 31, 1950, which was the first year of operations after the plaintiff came out of the Chapter XI proceedings, it is a fact, is it not, Mr. Lynch, that at that time the only assets which the company had, that is the plaintiff had, was the plant and equipment contained

(Testimony of John A. Lynch.)

therein, and the lease containing the option to purchase it; that is a fact, is it not?

A. If they owned the land, plant and equipment, they wouldn't have an option to buy their own land, plant and [2802] equipment.

Q. Did it have any cash in the bank?

A. It had no cash, as I recall. It had an inventory of cans, labels, and containers of roughly $22,000. It had a bona fide account receivable from Mr. Winckler of $38,140.33. It had——

Q. It didn't have any cash in the bank did it?

A. No, sir.

Q. Did you make it your business, in connection with this audit, to find out where they got any cash to run this business until they started to get some money from the products they sold?

A. Yes, sir.

Q. What did you find?

A. Well, we found that they sold the plant, land and building for $50,000.

You asked me where they got the cash to start after reorganization.

They got $50,000, of which $40,000 went for the plan of arrangement and $10,000 was paid into the corporation.

Q. No. Did you check that, Mr. Lynch, to see whether that was in connection with the confirmation of the sale approved by this court, and as part of the reorganization of this corporation in 1949?

A. I definitely did, and there was no such plan—— [2803]

(Testimony of John A. Lynch.)

Q. You know as a fact——

Mr. Strachan: I think the witness ought to have an opportunity to finish his answer.

The Court: Finish your answer.

The Witness: There was no such plan recorded in this court. The plan of modification merely stated that $40,000 should be paid to the trustee. And such $40,000 was to discharge the obligations of the reorganization.

The second plan of arrangement did not embrace the sale of the plant. The third one did. It was up to the debtor corporation to raise that money any way they saw fit. And our audit reflected that as of February 14, 1949, the third plan of arrangement was filed with this court. And, in fact, the court order revested in the debtor corporation all the land, buildings, and equipment, free and clear of all encumbrances. And then they were sold on April 3, 1949.

Q. Do you mean the court approved the sale?

A. No, the court did not approve any sale. The court just approved the plan of modification, if they came up with $40,000. How they get it, that is their business. The court had nothing to do with the sale of the plant. [2804]

Q. I see. Well, just so the record may be clear, Mr. Lynch, you want this jury to believe that while the creditors weren't paid in full out of the reorganization plan, that the corporation itself, the plaintiff here, ultimately got and used in its business, after it resumed operations following the confirma-

(Testimony of John A. Lynch.)

tion of the plan of reorganization and sale of assets——

A. I certainly do want them to believe that and that is in the court record.

Q. All right. So that some of this money, then, went to the corporation, not to the creditors, pursuant to the court's order?

A. $10,000 of the money went to the corporation net of expenses. I believe they got a check for $7,300 after expenses.

Q. Did you find out whether this corporation was loaned any money by the stockholders after it resumed operations with which to carry on its operations?

A. They were loaned money by Rubin, Wallenstein and Parvin, if I recall, or Rubin and Parvin, upon the sale of the stock of Mr. Winckler which was in the $38,000.

Q. And in connection therewith and your audit, the preliminary bills after this company resumed operations following the reorganization in 1949 were either paid for by somebody associated with the company and subsequent reimbursement, [2805] or paid for by the company itself, that is true, isn't it?

A. I would like the question repeated.

Q. All right.

The Court: Read the question.

(Question read.)

The Witness: The preliminary bills were paid out of the proceeds of the assets, the $7,000 received on March 4, 1949.

(Testimony of John A. Lynch.)

Q. (By Mr. Dixon): Well, what about this $21.33 that you testified here last Friday Mr. Winckler got from this company that was charged to gas, I think you said? A. To gas?

Q. To gas, yes.

A. Well, what about it, sir?

Q. Do you want this jury to believe that the plaintiff was paying Mr. Winckler's gas bill with this amount?

A. I happen to have made an analysis of the Union Oil Company yesterday.

Q. Will you kindly answer my question?

A. And they paid his gas bill or at least the gas purchased on Mr. and Mrs. Winckler's credit card for a year.

Q. I am speaking of——

The Court: Wait a minute. You are both talking about gas. Gas might mean something piped in by pipe and it might mean gasoline. Let's be more specific, both of you. [2806]

Mr. Dixon: I thought I had, your Honor. I thank you for your suggestion.

Q. I think you testified last Friday, Mr. Lynch, that included in the items you said ~~Mr. Winckler~~ was paid or got money for was, "I have a total of $21.33 charged to gas." Did you find out whether that was the personal gas bill of Mr. Winckler?

A. No. I had no voucher available at that time to make any analysis. That is the way it was recorded on the books.

(Testimony of John A. Lynch.)

Q. What did you want this jury to believe when you testified with reference to $21.33 being paid to Mr. Winckler for gas?

A. I wanted that jury to believe, or this jury to believe that all these checks that I quoted were made payable to N. J. Winckler and they were so made payable, according to the books, and that the charges were in substance what I testified to. My statement that the $340 was in there may have been erroneous, but it was still charged into the books and records and he got the money. That only included checks payable to him. Any $25 a week account out of petty cash for L. A. expenses every week were not in there because they were not checks.

Q. Mr. Lynch, I am asking you specifically with reference to your testimony concerning this $21.33 that you testified [2807] to as being charged to gas?

A. Yes, sir.

Q. Will you tell the jury as an auditor what you wanted this jury to believe that $21.33 was?

The Court: He has answered that question. You asked it before. Did the books that you picked that up from use the word gas or use the word gasoline?

The Witness: Well, your Honor, if I may see the cash disbursement book again, I can refer to the exact title.

The Court: The cash disbursement book?

The Witness: No. 4415.

Mr. Dixon: Will you mark this for identification next in order, please?

(Testimony of John A. Lynch.)

The Court: Exhibit 80 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit No. 80 for identification.)

Mr. Dixon: Let the record show the witness is being shown the cash book he requested.

The Witness: Account No. 523.

The Court: In other words, in the books that expense was charged to account 523?

The Witness: That is correct.

The Court: What is that account?

The Witness: Gas, according to us, 523 is gas.

The Court: Is that gas or gasoline? [2808]

The Witness: Well, your Honor, that is a transcript of the account as reflected in the books. They just have it headed gas.

The Court: Did you check that account to see what items were in that account, whether they are checks payable to oil companies generally or people who supply gas for house and plant?

The Witness: No, we didn't check the account because we had no voucher.

The Court: You had the ledger, did you?

The Witness: We just had the ledger and the cash disbursement book and the monthly journal entries, together with some work papers prepared by the company.

The Court: Then you can't tell me.

The Witness: No, sir.

Q. (By Mr. Dixon): I hand you what has been marked Plaintiff's Exhibit 80 for identification, the

(Testimony of John A. Lynch.)

same being check No. 4415, dated May 4, 1949, payable to Nicholas J. Winckler in the amount of $21.33, and voucher attached thereto, and ask you to tell the jury what the voucher indicates.

A. The voucher is a copy of a check and indicates that on May 4, a check was made payable to Nicholas J. Winckler for $21.33, and charged to account for gas, 523. The voucher itself reads: "For gas bill paid to Southern Counties Gas [2809] company."

Q. And is the bill from the gas company attached thereto, some of that amount or the whole amount? A. That is correct, it is attached.

Q. So that this was not in payment of any gas bill incurred by Mr. Winckler personally, was it?

A. No, sir. I did not so testify, either.

The Court: Who was the bill to?

The Witness: Winckler & Smith.

The Court: You say the gas bill is attached?

The Witness: Winckler & Smith, your Honor.

The Court: The corporation?

The Witness: For gas, sir.

The Court: All right. That solves the question. It is fluid gas and not gasoline.

The Witness: That is correct.

The Court: And the billing was to the corporation.

Mr. Dixon: The plaintiff offers 80 in evidence.

Mr. Strachan: I will ask that ruling be reserved.

The Court: It may be reserved.

Q. (By Mr. Dixon: You testified last Friday

(Testimony of John A. Lynch.)

that you had a check for $249.90 charged to other ingredients used. A. That is correct.

Q. Can you now tell the jury what that item represented? [2810]

A. No. I told you I had no vouchers to run these down. They were just a recap of checks made payable to Nicholas J. Winckler.

Q. You never asked for the vouchers to determine what they were actually for?

A. We asked for the vouchers, and all records were supposed to have been turned over to us. We didn't have them at the time.

Q. Did you ever ask for these vouchers and were refused them, Mr. Lynch, in making this check and preparing yourself for testimony that you gave here last Friday with reference to these items?

The Court: Now, wait. By that you mean these specific vouchers?

Mr. Dixon: Yes.

The Court: The two you have marked for identification?

Mr. Dixon: That I have referred to.

The Witness: As I understand, all vouchers, all writings, all supporting records, all books and records, all journal entries, were requested by us. We never got them all. We got the books of account, we got the journal entries, we got the monthly work sheets. We did not have the vouchers which you are referring to there. They may have been made available to us since this trial started,

(Testimony of John A. Lynch.)

but this is an accumulation of work for ten months. It is impossible in a [2811] short time to check all those items after we get the information, if it was made available.

Q. (By Mr. Dixon): Mr. Lynch, I am asking you, before you testified concerning the check of $340 that you said was charged to rent and the check for $21.33 which you said was charged to gas, whether you followed through to determine whether those items were for reimbursement to Mr. Winckler for amounts actually paid by him at the time this corporation resumed business and for which he was being reimbursed.

A. I so testified we had not run those down. They were merely checks to Mr. Winckler for allowances. We were not passing on whether they were legitimate or not.

The Court: The specific question was asked, which you never have answered——

Mr. Dixon: I was going to ask that again, your Honor.

The Court: Just a minute, Did you ever ask specifically for these vouchers involved in Exhibits 79 and 80?

The Witness: Not specifically, your Honor. We asked for over-all records and we didn't get them. I did not ask specifically for this account or this gas bill, or Winckler's accounts or Wallenstein's accounts.

The Court: Let me say this.

The Witness: Excuse me. We did ask for these

(Testimony of John A. Lynch.)

specific checks for Winckler, your Honor, and we didn't get them. We did ask for them. [2812]

The Court: I don't know whether we should go into that or not. As the jury knows, there has been a lot of discovery in this case, but this corporation was under the control of Walker as trustee and during a good part of this time it was not actively in business.

This man Smith apparently, from the testimony, was some auditor hired by Walker. The problem of both sides was in trying to find access to the material. If you have a going business where you have got a bunch of files and secretaries and you want something, you can put your hand on it. When you haven't got a going business and you have got a bunch of files stacked around somewhere, trying to go through those files is like trying to find a needle in a haystack.

This is said partly in justification of the witness here and his problem, and partly in justification of the plaintiffs and their obligation to supply material. It has nothing to do with the merits of this case except that we don't want to have any confusion in the jury's mind about what went on.

Both sides were as cooperative as they could be under the facts of this case in making material available one to the other. I think that is a fair statement.

But under the conditions as they were presented problems were present. It presented a problem to the defendants, because instead of being able to go

(Testimony of John A. Lynch.)

to an organization [2813] that was a going business and saying, "Where do you find this?" that was not available. They had to go to Mr. Walker and he had in turn to refer to some auditor who apparently had never worked for the company, as I understand the situation, but had been hired by Walker, and try to find the material.

It presented a problem to the plaintiffs, because when they were asked for material, they had the same problem, and all they could do was say, "Here is some material. We don't know any more than you do where it is."

One time later in the case a large amount of this material was moved over to some room nearby the defendants, but again that didn't any more solve the problem, because you can imagine what the books and records of a company would be like after it had gone out of business.

All I am trying to say is that, No. 1, as far as the counsel in this case are concerned, I think both sides have been cooperative. Under the circumstances of the case the plaintiff had problems and the defendants had problems.

The Witness: May I add to my statement, your Honor?

The Court: Yes.

The Witness: With reference to these specific items Mr. Dixon is questioning, we specifically asked for those vouchers and the checks on Winckler and they had all been pulled. [2814]

The Court: Pulled or polled?

(Testimony of John A. Lynch.)

The Witness: Pulled. Somebody had pulled them. We had questioned Mr. Smith relative to them and he didn't know where they were.

So all this that you are asking me, we had specifically asked for those vouchers and we never got them, so we had no knowledge of what was on those vouchers. [2815]

Q. (By Mr. Dixon): So all you did, then, was to take the amount set up in the books that you saw was charged to Winckler, without following through further?

A. That's right. And I so testified Friday on that, that we weren't passing on whether they were meritorious charges, or not.

Q. These items in '49 were charged shortly after the company resumed operations, were they not?

A. That is correct.

Q. And the cash with which these expenditures were met had to be supplied by somebody, didn't they, Mr. Lynch?

A. It came from the proceeds of the sale of the assets.

Q. That is the only source?

A. That is the original source.

Q. That is your opinion?

A. No, it is not my opinion; that is a fact. Then they secured additional working capital by loans from Rubin and Parvin to the extent of $22,500, provided Winckler put in his $2500 which they gave him for his stock.

Q. This is my question, Mr. Lynch: In other

(Testimony of John A. Lynch.)

words, the stockholders of this company, after it resumed operations in '49, did loan and furnish money to the company with which current expenditures were paid and met, did they not?

A. There is no question about that.

Q. And your audit so showed at the time you made it? [2816] A. That is correct.

Q. You are now satisfied, are you, that the items that you mentioned were for reimbursement to Mr. Winckler were amounts that he advanced the corporation to pay the bills in question?

A. On those listed I never questioned it, because we had no information to doubt it.

Q. I thought you did. If I didn't, I wasted a lot of time here, Mr. Lynch.

A. You surely have.

Mr. Dixon: Will you distribute to the jury, please, those sets.

The Clerk: Exhibits BD, BE, BF, 61, 63, and 65.

Q. (By Mr. Dixon): While the bailiff is distributing those, Mr. Lynch, I would like to ask you when you requested Mr. Smith specifically to secure for you or to make available to you the vouchers that you have said you requested and didn't get.

A. Mr. Regan, my employee, through me, asked for them and was advised——

Q. You didn't ask yourself?

A. I personally didn't, but my office did, and I am responsible for the presentation here.

(Testimony of John A. Lynch.)

Q. Do you know of your own knowledge that the request was made of Mr. Smith and [2817] refused?

A. Mr. Regan so informed me. I have no reason to doubt that.

Q. Maybe I didn't get your testimony here a few minutes ago, but I thought you said you had requested.

A. I said "we." My office. Our office requested it, not I specifically.

Q. You, yourself, had never requested them of Mr. Smith, then, and been refused?

A. No, sir.

Q. Directing your attention, Mr. Lynch, to Exhibit BD, this exhibit purports to represent your view, does it, of the income of Winckler & Smith during the fiscal years ending January 31, 1950, '51 and '52? A. That is correct.

Q. By income do you ever distinguish between income received during the course of operations of a company in the normal course of business, and income that may be derived from casual transactions or extraordinary transactions?

A. Oh, yes, sir.

Q. Do you regard both as being within the income category, according to your statement?

A. No. If I could define it. There is an operating income which represents all revenue minus the costs of obtaining that revenue, to arrive at an operating income. From that is deducted all the miscellaneous income and miscellaneous [2818] expense and casual sales or extraordinary sales, gains and losses, to arrive at net income. That classification I will agree is right.

Q. Do you ever distinguish in your accounting between operating income, which represents the income and profit arising out of the ordinary course of business operations, and income which may be chargeable as an accounting matter during the year, such as from the sale of assets, profits from the sale of assets? A. Oh, yes.

Q. You regard that as operating income?

A. Operating income is the income from operations.

Q. Will you tell the jury, Mr. Lynch, whether this statement BD, headed Statements of Income, covers what you regard as income from all sources, or does it limit itself to what accountants call or sometimes people refer to as operating income?

A. No, I would say it is net income for the entire year from all sources.

Maybe I could refer to it as an all-inclusive term, net income for that year, which in this case was a net loss.

Q. Will you refer to Plaintiffs' Exhibit 61, the income account for that year ending January 31, 1950.

Mr. Fisher: I don't think the witness has 61 in front of him. [2819]

The Court: The jury has. I will lend the witness my copy.

Q. (By Mr. Dixon): You have under Admin-

(Testimony of John A. Lynch.)

istrative Expenses for that year $94,722.63, and Plaintiffs' Exhbit 61 has under Administrative Expense $56,417.38, I believe. A. Yes, sir.

Q. As I understand it, this additional amount, or the difference there being some $38,000 or more, is represented by this item that has been frequently referred to in this case as the forgiveness item?

A. That is correct.

Q. Arising out of the time of the reorganization, during that period?

A. Not out of the reorganization; I will differ with you on that.

Q. That is your opinion, at least?

A. That is correct.

Q. It doesn't at all arise out of the reorganization? A. No connection with it.

Q. So you want the jury to regard that $38,000, plus, as part of the transactions of the operations of this company after it came out of the reorganization; is that correct?

A. 10,000 of the money was paid during this period for that $38,000, and it is a proper charge against income for this year.

Q. Well, I think there is evidence here that based on [2820] minutes back in January, and so forth; but at least it is your view, and you want this jury in considering Exhibit BD, to consider that item $38,140, plus, whatever it is, the forgiveness item, as part of the administrative expense of this corporation for the year after they resumed opera-

(Testimony of John A. Lynch.)

tions following the termination of proceedings under Chapter XI, is that correct?

A. As either additional compensation or as a bad debt, that is correct.

Q. Going to the next column, you have miscellaneous expense, and so forth——

The Court: It is not a column; it is an item.

Q. (By Mr. Dixon, continuing): ——depreciation on appreciation and loss on sale of assets, in the amount of $170,579.56. That item is not contained in Plaintiffs' Exhibit 61, is it, Mr. Lynch?

A. No, sir; it is not.

Q. And this $170,000 that you have put in the income account for Winckler & Smith during the fiscal year ending January 31, 1950, represents the loss, does it, to this corporation on the reorganization and sale of the assets?

A. That is correct, the loss on the sale of the fixed assets in April.

Q. You think that didn't come out of the reorganization and should be charged against this corporation as part of [2821] its operating loss?

A. I know it didn't come out of the reorganization.

Q. You say it didn't come out of the reorganization?

A. No, sir. It was an actual sale of the land, buildings and plant on April 3rd and had nothing to do with the reorganization.

Q. You mean, then, that the sale of the plant under the reorganization proceedings in Chapter

XI had nothing whatever to do with the reorganization proceedings?

A. There is nothing in the reorganization proceedings relative to how the funds are raised for the creditors. Nothing compelling them to sell the land, buildings and equipment.

Q. That is your view, anyhow?

A. That is my understanding of the record that I have referred to and read.

Q. So, including that you come up with a net loss for the fiscal year ending January 31, 1950, of some $91,220.20, as against a profit shown on the income account statement of the plaintiff, Exhibit 61, of $121,360.21; is that correct?

A. That is correct.

Q. So that by including the $38,000 items that you referred to as administrative expense, and including this so-called loss on sale of assets of over $170,000, as part of the income chargeable to this corporation or against it during the year, you come up with this difference of about [2822] $212,000, or more, over the statement indicated in Plaintiffs' 61, is that correct? A. That is correct.

Q. Now, if this loss is chargeable, that is, $170,000 loss is chargeable to income, Mr. Lynch, what about the amount which the corporation, say, under this theory might have realized from the savings of not having to pay the creditors in full under the reorganization; do you anywhere in BD show any income to that amount in that statement?

A. The $205,000 forgiveness of creditors?

(Testimony of John A. Lynch.)

Q. Yes.

A. No. That was not voluntarily forgiven. That was a paid in capital, because they were compelled to do it. This was voluntary and happened subsequent to the reorganization and was an ordinary transaction. I shouldn't say "ordinary"; it could have been extraordinary, to sell all your assets, but it was a transaction within the managerial scope of the corporation.

One dollar loss, whether you are selling orange juice or whether a one dollar loss selling a fixed asset is still a dollar out of that corporation and a loss for the year.

Q. But somewhere in this transaction I thought you said that the corporation had some kind of a gain here of this $205,000?

A. $205,000 forgiveness. There was no cash passed [2823] into the corporation.

Q. I understand there was no cash. I am asking you about the item, Mr. Lynch.

A. That is correct, there was 205,000 gain on the reorganization by the payment of 25 cents on the dollar to the creditors.

Q. But you don't put the gain, then, of $205,000, this bookkeeping gain, as income during the year ending January 31, 1950, do you?

A. No, sir. It is not——

Q. But you do charge the corporation, in your accounting procedure here in BD, with the loss from the sale of the assets?

(Testimony of John A. Lynch.)

A. There is no relationship. The first was the reorganization effect, and the second is an actual loss of assets sold by the company. They could have borrowed the money and they wouldn't have had to dispose of their assets.

They probably would have been better off.

Q. Do you think this sale of assets was made after the Chapter XI proceeding was terminated and the trustee in that proceeding discharged, and so forth?

A. Definitely. The escrows weren't terminated until March 4th.

Q. So that sale, then, of the assets was wholly independent of the trustee control of the property under [2824] Chapter XI, and was an independent transaction entered into by this corporation after it came out of the Chapter XI proceedings; is that your view?

A. That is correct. And it is in accordance with Mr. Hodge's own statements. March 1st was the sale.

Q. We will talk about Mr. Hodge a little later. Based upon that view you have excluded as income the $205,000 from this statement, but have set in the loss of $170,000?

A. The loss was a corporate matter. The loss was within the power of the corporate officials. The gain——

The Court: Wait just a minute. You are just like Mr. Hodge. I had the same trouble with him. First answer the question, then give your explanation.

(Testimony of John A. Lynch.)

All you accountants, and lawyers when they are called as witnesses, do the same thing.

Read the question back.

Then answer the question, and then give any explanation you want to give.

(The question was read by the reporter.)

The Witness: That is correct. [2825]

Q. (By Mr. Dixon): All right. You have answered my question. Now——

The Court: All right. Now, wait a minute. He said that is what he had done.

The Witness: The 205,000 was a capital transaction. It was an involuntary act on the part of the creditors. They certainly didn't want to put the money in the corporation. So it is not income to the corporation. It was a capital transaction. The 170,000 loss could have been avoided. It was a managerial problem. They sought to take the loss and they were charged with it. The loss is a loss to the corporation.

The Court: Now, it's time for recess. We have been over this and the questions have been asked. Can we wind this up and take the recess before we go to the next one?

Mr. Dixon: Yes, your Honor.

The Court: All right.

Q. (By Mr. Dixon): But if you wanted to include this $205,000 item in the account for this year, even under your own method here, there would have been a profit of over $104,000 for this year, that is a fact, isn't it, Mr. Lynch?

A. If I had assumed 205,000 additional income?

Q. Yes.

A. That would show $115,000 profit. [2826]

* * *

Q. Mr. Lynch, again directing your attention to BD, and will you kindly refer to Plaintiff's Exhibit 63, the income account statement for the fiscal year ending January 31, 1951, and directing your attention specifically to selling expense in the amount of $154,630.83 on BD as against $128,294.91 on Plaintiff's Exhibit 63——

The Court: Where is the selling expense on BD?

The Witness: Right here (indicating).

The Court: All right. I find it.

Q. (By Mr. Dixon): ——there is a difference there of some $26,000, is that correct?

A. That is correct.

Q. If I understood your testimony on direct, you have included in that $154,000 the $24,000 plus that Mr. Hodge [2827] testified he allocated to this year in addition to a like amount for the following year to selling expenses because of the approximately $48,000 that was spent by the plaintiff in promoting these other products, is that correct?

A. That is correct.

Q. How do you account for the difference? What is the small difference there?

A. As I explained earlier, we had made an ad-

(Testimony of John A. Lynch.)

justment throughout each year for depreciation on assets. I believe Mr. Hodge depreciated during the rental period over a ten-year period, and we depreciated the property under the leasehold where the lease was to expire, we depreciated the property over the life of the lease, which is proper accounting for items of leasehold improvements. That is a technical adjustment.

Q. That is a technical adjustment, you say?

A. That is correct.

Q. On depreciation? A. That is correct.

Q. But the substantial part of the difference——

A. The $25,000.

Q. In other words, you took all of the 48,000 and put it in 1951 insteead of breaking it down in half and carrying half of it to 1952, as Mr. Hodge did.

A. We showed it as the books reflected it until the [2828] year-end adjustment.

The Court: Now, now, wait. Again first answer the question and then explain. You put it all in the year 1951 instead of putting it in two years.

The Witness: That is correct.

The Court: Go ahead.

The Witness: That is as the books reflect until such time as Mr. Hodge made the January 31, 1951, adjustment.

And the further reason why we did it was that the total expenditures for advertising, for instance. subsequent to the July 31 statement of Mr. Hodge and of the corporation, reflected that only $13,270

(Testimony of John A. Lynch.)

had been spent for advertising, and the entry setting that deferred promotion up set up approximately $13,300, a little bit more than they had actually expended, but the expenditures from July 31 on represented items of all types, store demonstrations, Railway Express, California Truck Rental Company, and so forth. We found no foundation for deferring any promotion expenses, and the analysis of sales showed a definite decline in the sale of ades and lemonades and citrus products. That figure, as I testified to earlier, was in excess of the actual sales for the entire year for all the products for which the expense was deferred.

Q. (By Mr. Dixon): So that based on that you put it all in one year rather than two years? [2829]

A. Where we felt it properly belonged.

Q. You didn't regard that as promotional expense that could be deferred over the two-year period.

A. Mr. Hodge didn't defer it two years, either. He charged it off in six months.

Q. It happens to come within the half of the year, doesn't it? I mean half of it comes within one fiscal year and half in the other in Mr. Hodge's statement.

A. No. The amount he deferred he expensed immediately in the following six months.

Q. You mean now Mr. Hodge put all this $48,000 in the operating account or expense account?

A. No.

(Testimony of John A. Lynch.)

Q. Represented in Plaintiff's Exhibit 63.

A. No. You misunderstand me.

Q. That is my question, Mr. Lynch.

A. I was making the statement that the $24,910 which was deferred at January 31, which according to my notes accompanying the statement, were to be deferred over a two-year period, were not. They were expensed immediately within the six months subsequent to that statement.

The Court: Within six months of the succeeding year.

The Witness: That is correct.

The Court: They were placed in two years, but according to the Hodge method, he showed half of them expended in the [2830] first six months of the succeeding year.

The Witness: That is correct.

The Court: All right.

Q. (By Mr. Dixon): Now, directing your attention to the administrative expense item of $96,392.62, Plaintiff's Exhibit 63 shows $90,858, a difference of about $5,534.62. What items have you added to administrative expense, Mr. Lynch?

A. As I recall——

Q. To make up this difference?

A. That is the year in which the checks were issued to Mr. Winckler as a bonus and charged to administrative expense, and then were reversed in the amount of $3,550, thereabouts, were reversed, and set up as prepaid bonus, and then turned around and expensed in the following year. That is

(Testimony of John A. Lynch.)

our difference. We have transferred it into the year in which the checks were taken and as they were originally charged on the books prior to [2831] reversal.

Q. In other words, you took something out of administrative expense in 65 that you thought was improperly charged to administrative expense in 65, and put it back in administrative expense in 63, on plaintiffs' statement, is that correct, to arrive at your figure of $96,392.62?

A. That is correct.

Q. What item in 65 under administrative expense did you take out and charge to the fiscal year January 31, 1951, in your BD to get the $96,392.62 figure?

A. We reversed the $3550 bonus, which was represented by the two checks given to Mr. Winckler in 1950 and charged to operations, that was reversed by the auditor at the year end, we let it stand as reflected on the books.

Q. Just a moment. My question is, is this 5534.62, which you have included in this 96,392.62 contained anywhere in any of the items in Plaintiffs' 64, administrative expense?

The Court: 65, do you mean?

Mr. Dixon: 65, yes, your Honor.

The Witness: Yes, it would be. It is the deferred items which were set up as deferred items. We expensed them. The administrative expense of $1968.40 and the $3550 bonus will account for that difference.

(Testimony of John A. Lynch.)

Q. (By Mr. Dixon): What I am trying to get you to answer, if you can, Mr. Lynch, is where do you find this $5500 item in Plaintiffs' 65 under administrative expense? [2832]

A. The $3500 is included in executive salaries under the $18,008.88 taken by Mr. Winckler in salaries for the year end. We only show $14,000 on our statement. But the $3500 is included in that $18,000 there. We put that back in the proper year.

Q. If my figures are correct, I am talking about $5500, not $3500.

A. I will agree with that. We made two adjustments. One is the traveling expense included in the deferred—in the unabsorbed preseason expense of $22,968.42 on the 63 balance sheet. That is made up of, referring to Exhibit 63, unabsorbed preseasonal expenses, the $22,443.84 is made up of $19,268.42 of factory expense, and 3175——

Q. Now, Mr. Lynch, you completely lost me. I asked a question where do you find this $5500 that you have put in administrative expense here, in your BD for the fiscal year January 31, '51, in Plaintiffs' 65 administrative expense, and if I understand part of your answer I thought you said that you had taken $3500 out of the $18,008.88, it would have to be, of executive salaries in Plaintiffs' 65? A. That is correct.

Q. Well, that accounts for $3500. Now, where is the other 2,000? A. Traveling expense.

Q. Do you mean—— [2833]

A. $1,986.40.

(Testimony of John A. Lynch.)

Q. In other words, you took it out of the travel item in Plaintiffs' 65? A. That is correct.

Q. And charged it to the January 31, '51 statement, is that correct?

A. If I could clarify it a little further——

Q. Answer my question if that is what you did.

A. That is correct.

Q. All right.

Mr. Strachan: I think the witness should be allowed to clarify as he goes along, your Honor.

Mr. Dixon: Yes, counsel. You can clarify it, too, but I think I am conducting the examination.

The Court: If it hasn't been clarified. The trouble with this cross is we get the same question and we get the same clarification over and over again.

Is there something more you want to add now?

The Witness: I want to show that they are on Exhibit 63 reflected in—the $3500 is reflected in the deferred promotion expense, and the $1900 is reflected in unabsorbed preseason expense, which then became expense in the 65 exhibit. We put it in the proper year here.

Q. (By Mr. Dixon): You are talking about the balance sheet on 63. I have been talking about the income account [2834] showing the administrative costs, Mr. Lynch.

When you refer to another item, if you do, in your testimony, Mr. Lynch, will you please tell me when you are referring to the balance sheet and when you are referring to the income statement for these particular exhibits? A. Yes, sir.

Q. I notice that you have set up separate accounts for the Florida business in your January 31, '51 statement. You don't have any amount for allowances there, but you do have in your January 31, '52, item the amount of $4,720.92. Is there any particular reason for that?

A. That is as they are reflected on the books. In 1951 or 1950 year, all——

Q. The 1950 year, or what? I am talking about the fiscal year ending January 31, 1951.

A. Right, that is the one I am referring to.

Q. All right. Proceed.

A. In that year there were no separate accounts maintained on the books of the corporation to reflect these items where we have a zero. In 1952, the year ended January 31, 1952, the books and records reflect that segregation in accounts. If I recall we haven't adjusted those at all.

Q. You didn't adjust that?

A. To my knowledge, without checking. But I don't believe we touched those accounts. [2835]

Q. Well, I notice that you have broken the costs of the sales, however, and you have got for Florida $220,085.98, to which item we must add the above amount $1,267,786.80, is that correct, if we want to get the total cost of sales for all operations?

A. That would be correct.

Q. And if you add those figures together you get $1,487,853.98 as being the cost of sales as against

(Testimony of John A. Lynch.)

the cost of sales in the income account statement, Plaintiffs' Exhibit 63, of $1,464,694.59. Now, there is a difference there of $23,159.39, isn't there, cost of sales? A. That is correct.

Q. How do you account for that?

A. Well, that represents the $19,268.42 of unabsorbed factory expense which was capitalized on the company's statements——

Q. Where do you find that in the exhibits?

A. On Exhibit 63 balance sheet, in the $22,443.84. Nineteen thousand——

Q. Just a moment.

A. Unabsorbed preseasonal expenses, it is in there.

Q. You brought that down, in other words, the unabsorbed preseasonal expense in Plaintiff's 63 balance sheet for the year ending January 31, '51, you have taken that item out and included it in the cost of sales? [2836]

A. Definitely. That is where it properly belongs.

Q. That isn't all sales, is it?

A. No. $19,268.42, I believe, is the amount which we included in plant expense as being the expense of operations of that plant for that year.

Q. Well, then, you have the following differences between Plaintiffs' 63 and your statement of income in BD, if I summarize it correctly: You have a difference in selling expense of $26,335.92, a difference in administrative expense of $5,534.62, and another item of $23,159.39, which you have

(Testimony of John A. Lynch.)

charged to cost of sales, or a total difference of $54,048.93, is that correct?

A. That is correct. [2837]

Q. In other words, you have added those additional items to your BD in arriving at the loss of $14,203.20 which, according to your view, the corporation sustained in its income operations or its operations during the year ending January 31, 1951, is that correct? A. That is correct.

Q. All right. Now——

The Court: Do you have something further you want to say?

The Witness: I want to say these are the same items which we expensed from that balance sheet we have been referring to. The 50,000 is made up of 24,910 deferred promotion expense and 22,443 of unabsorbed factory expense. It is the same amount. We put them in as expense rather than on this balance sheet.

Q. (By Mr. Dixon): Directing your attention again to BD and your views of operations for the year January 31, 1952, there is a difference there in operations between Plaintiff's Exhibit 65, income account, and yours, in the amount of 27,097 and some five cents, is that correct?

A. That is correct.

Q. That reduces the loss which you think the plaintiff suffered in 1951 from the $184,523.20 set forth in the income account statement of the plaintiff, 65, for the fiscal year ending January 31, 1952, to $147,135.33, is that [2838] correct?

(Testimony of John A. Lynch.)

A. That is correct.

Q. That difference is made up primarily of the fact that in your summary for January 31, 1952, you do not include $24,000 which was half of the $48,000 item that Mr. Hodge put over in his January 31, 1952, income statement.

A. That is part of it, that is correct.

Q. Now, directing your attention to BE, I believe you stated that this merely reflects your views of the operations of the plaintiff as shown by their balance sheets, and so forth, with the adjustments on depreciation and operating expenses and so forth, that you have previously dealt with in your BD, is that correct?

A. That is correct.

Q. In other words, if we were to take the time to compare your BE items with the plaintiff's Exhibits 61, 63, and 65, we would find the same differences reflected here that we have heretofore discussed, is that correct?

A. That is correct, restricted to the deferred charges and the surplus, I believe.

Q. Directing your attention to BF, this purports o reflect your views as to the retained earnings or urplus of the plaintiff, does it, for the period February 1, 1949, to January 31, 1952?

A. That is correct. [2839]

Q. I notice you have put in here the item 205,098.52 as income, or at least it goes into the ot somewhere for the corporation, is that correct?

A. This is as per the books classified by us. It

(Testimony of John A. Lynch.)

has been recorded as a credit to surplus, capital surplus, and I thing properly so.

Q. But you didn't include it in your statement of income for the fiscal year January 31, 1950, in your BD exhibit, did you?

A. No, because it was not income.

Q. Here we do find you regarded it somehow as a rather substantial asset.

A. That's right, but this is not an income statement. This is a surplus analysis.

Q. And this again, Exhibit BF, reflects, doesn't it, in substance your views that you have previously expressed and which are set forth concerning the books of this company and its operations in plaintiff's Exhibit BD? A. That is correct.

The Court: In that connection, you have carried over from BD your figures of loss for the respective years, such as the 91,000 in the year ending January 1950?

The Witness: That is correct.

The Court: The 14,000 in BD in the year ending 1951.

The Witness: That is correct, your Honor. In fact, [2840] there are three statements relating to that.

Q. (By Mr. Dixon): Now, Mr. Lynch, during the course of the rather extensive audit that you conducted of the books of this company, you also went into the application of this corporation which was filed with the Corporation Commission of the State of California in 1951 for authority to issue

(Testimony of John A. Lynch.)

stock for the purpose of securing additional capital, is that correct? A. That is correct.

Q. Now, in connection with this exhibit, plaintiff's Exhibit 39, do you accept the statement of fact contained therein that there was a loss of $519,155.55 based on inventory, at least accept the figure of the loss, that's all? A. Definitely not.

Q. You don't accept that? A. No, sir.

Q. You think the Corporation Commissioner of California erred in accepting that figure, do you, in this prospectus?

A. I am not at liberty to pass on that.

Q. At least you don't accept it.

A. As far as I am concerned, he erred.

Q. In other words, you don't accept the statement, then, that this corporation had this loss that Mr. Winckler has testified to and which has been referred to during the course of testimony of witnesses in this case in this amount, is that [2841] correct?

A. That is correct. hTe books fail to reflect any such loss.

Q. The books?

A. The books do not reflect any inventory losses except those I quoted the other day.

Q. Then you think that this statement is incorrect? A. I definitely do.

Q. The Corporation Commissioner in checking the application should have disregarded it?

Mr. Strachan: There is no indication that the Corporation Commissioner ever checked it, your

Honor. These are representations that were made to an officer.

The Court: We are not trying what happened before the Corporation Commissioner. That is another issue we are not trying. We don't care whether he is right or wrong. That is not an issue in this case.

Q. (By Mr. Dixon): Did you accept the statement contained in this Plaintiff's Exhibit 39 in making the various computations, Mr. Lynch, that disregarded this non-recurring inventory loss in the amount of $519,155.55, which was absorbed by the corporation over a period of three years, that the corporation would have had total earnings during the period, and including those of the partnership, of $559,690.88? A. I did not. [2842]

Q. So I take it you did not accept as a fact any of the statements contained in Plaintiff's Exhibit 39 here with reference to the loss or with reference to the total earnings of the corporation and the partnership during the period referred to in Plaintiff's Exhibit 39, exclusive of that loss?

A. I did not accept that as a fact. The exhibits we had differed materially from these.

Q. You did check thoroughly through the files of the Corporation Commission, did you not?

A. I did.

Q. In connection with this application?

A. I did.

Q. And did you examine the stock book of this

(Testimony of John A. Lynch.)

corporation to see how much stock was offered and sold under this prospectus? A. I did.

Q. And can you tell the jury how much approximately and how many stockholders purchased stock pursuant to this authority?

A. I can tell you exactly, yes, sir.

Mr. Strachan: Are these some of your working papers, Mr. Lynch?

The Witness: Yes, sir. There were 7,578 shares sold to the public, and 26,535 shares issued to Rubin, Friedman [2843] and Rubin for the purchase of the plant. Preferred stock. The common stock was just exchanged, so many shares for so many shares held. They weren't sold. [2844]

Q. (By Mr. Dixon): Now, referring to Plaintiffs' 61 and 63, balance sheets on those exhibits, I direct your attention to the valuation or the amount placed on the balance sheet with reference to the lease and option to repurchase at $1.00. I take it that is one item in these documents that you would agree was properly on the balance sheet and properly valued?

A. I don't know. It was referred to as patents once.

Q. I beg your pardon?

A. It was referred to on one statement as a patent and formula.

Q. I am not referring to any patent or formula. I asked you about the valuation placed on the balance sheet of this company in Plaintiffs' 61 and 63 of the lease and option to purchase at $1.00.

(Testimony of John A. Lynch.)

A. That is a nominal value.

The Court: Again, the question is, do you agree or disagree with that figure of $1.00?

The Witness: I agree with $1.00.

Q. (By Mr. Dixon): You don't think that is overvalued? A. No.

Q. In connection with the reacquisition of assets when that option was exercised, there was some money paid out, was there not, by the corporation, and some preferred stock of the corporation issued for the plant property covered [2845] by the option referred to in the balance sheet just mentioned, is that correct?

A. $21,000 worth of preferred stock was sold and netted the corporation——

Q. Mr. Lynch, if you would please answer my question, if you will. Can you answer the question?

The Court: Read it.

The Witness: $17,325 cash——

The Court: Just a minute, now.

Read the question.

Some of these questions, Mr. Lynch, you can answer yes or no, and if an explanation is required you will be permitted to make it. But this is a simple question and it is apparently a preliminary question to something else.

Read it, Mr. Reporter.

(The question referred to was read by the reporter, as follows: "In connection with the reacquisition of assets when that option was exercised, there was some money paid out, was

(Testimony of John A. Lynch.)

> there not, by the corporation, and some preferred stock of the corporation issued for the plant property covered by the option referred to in the balance sheet just mentioned, is that correct?")

The Witness: Yes.

Q. (By Mr. Dixon): And the amount paid out in cash was [2846] how much? A. $17,325.

Q. And the prefered stock?

A. 26,535 shares.

Q. Now, in your examination of the books of this company can you tell this jury how much this corporation spent from the time it resumed operations after the Chapter XI proceedings through the period ending January 31, '52, on new equipment used at the plant of the plaintiff corporation?

A. I believe I could.

Q. About how much was it?

A. $97,834.71, I believe.

Q. That was equipment that was added to the plant which was not covered or included in the appraisal in 1946, is that correct?

A. That is correct.

Q. Now, in setting up the books here, I mean your view of the books, when the company exercised its option did it realize a profit which should have gone into the income account according to your view? You took the loss, you remember. Now, did you put the profit on this transaction in the income account of the corporation during the year in which it was exercised and realized according to your view? A. A profit on a purchase?

Q. Yes, in the income account? [2847]

A. They had a $100,000 loss. They had to pay $100,000 more to get it back.

Q. Please answer my question.

A. I can't visualize a profit on an ordinary purchase.

Q. That is not my question, Mr. Lynch. Do you understand my question?

A. No, I do not.

Mr. Dixon: Will you read it, please?

(The question referred to was read by the reporter as follows: "Now, in setting up the books here, I mean your view of the books, when the company exercised its option did it realize a profit which should have gone into the income account according to your view? You took the loss, you remember. Now, did you put the profit on this transaction in the income account of the corporation during the year in which it was exercised and realized according to your view?")

The Witness: There was no profit on that transaction to be placed in the income account.

Q. (By Mr. Dixon): You mean you don't think there was any difference between the one dollar at which this was valued on the books and the write-up, or whatever valuation it might have been carried at on the books, you don't think that was

(Testimony of John A. Lynch.)

income, from your accounting point of view, is that [2848] correct?

A. As I look at it, it would be a $99,999 loss. They had to pay $100,000 more to get it back. I would see no profit in that transaction.

Q. So that from your point of view, you took the loss in '49 and charged it to income?

A. That is correct.

Q. But you thought there wasn't any profit that should be charged to income when they bought it back in 1951?

A. There certainly would not be a profit to buy it back.

Q. In your opinion? A. That is correct.

Mr. Dixon: That is all. Thank you.

The Court: Let me ask this question: When you took the loss on the sale of the assets, in computing that loss did you figure that $1.00 in there?

The Witness: No, your Honor.

The Court: After the property was sold there was $1.00 carried on the books, which I suppose is a way of putting a nominal value upon some right, just in order to keep it on the books?

The Witness: They just recorded $1.00 entry.

The Court: Did you calculate the difference between that $1.00 and what the property was worth before?

The Witness: No, your Honor. [2849]

The Court: You ignored the dollar?

The Witness: That is correct.

The Court: But you took the loss on what the

(Testimony of John A. Lynch.)

property had been set up before and now the corporation didn't have it, so you showed a loss?

The Witness: That is correct. The dollar was set up subsequently as a value, a separate transaction, a separate entry.

The Court: Set up later?

The Witness: It may have been simultaneously, but it was a later entry in the books. It may have been the same day.

* * *

The Court: The record shows the jury absent.

Have you made any determination as to RS and RT?

Mr. Strachan: BS.

The Court: BS and BT.

Mr. Strachan: We went over it at length, and the accountants say they can support every item in that. [2850]

The Court: You haven't resolved the conflict as to whether oil should be in or out?

Mr. Strachan: We feel the oil should be in there and it should have been in Hodge's exhibit.

The Court: I have been over it again, and my thinking is very clear on it, and I will tell you again the logic of it.

In Exhibits 66 and 67 the plaintiff was offering an exhibit to show what Silzle and TreeSweet were paying for—they were drawing a comparison between the $40 they claim they were charged for oranges, if they bought them, and what TreeSweet and Silzle were charged for oranges, and therefore

(Testimony of John A. Lynch.)

to make that comparison you had to see what Sunkist got, because Sunkist was getting $40 from plaintiff, and plaintiff says Sunkist was getting less money on the oranges they gave to Silzle and TreeSweet. Therefore oil became important, because the comparison was on the basis of what was Sunkist selling for or what was Sunkist getting for the oranges that went to TreeSweet and Silzle. Oil is, therefore, involved.

In the comparison made by the plaintiff on the mythical 12,000 tons, there is a different comparison. The problem involved was what would the plaintiff have made had it had 12,000 additional tons. Therefore, there should have been taken into account, in what the plaintiff made, what it made on oil, and what it cost them to make the oil. Oil should [2851] have been considered. But what Sunkist would have got for the oil has nothing to do with that comparison. I am certain of that.

You are certainly entitled to show elsewhere the difference in the oil return to Sunkist, but there is no problem involved on this comparison of Plaintiff's 69 and whatever you offer in rebuttal, as to what Sunkist would have gotten.

It is what the plaintiff would have made.

I think there is your fallacy.

Mr. Strachan: In our exhibits we intend to do more than strictly rebut on the assumptions and only the assumptions that Hodge made in his computation on 69. [2852]

(Testimony of John A. Lynch.)

The Court: Well, then, your exhibit you use in rebuttal to 69.

Mr. Strachan: This is more than in rebuttal. This is a part of our affirmative showing as to what the gain or loss would have been had Winckler & Smith paid what Sunkist got from TreeSweet in order to get this fruit. So I think that what we are proposing to show in this Exhibit BS is what your Honor says we are entitled to show affirmatively.

The Court: Now, I am not going to limit you in certain of these things you want to prove. I do have some discretion on how you prove them. I am not going to have the record confused with an exhibit purportedly for one purpose used for another purpose.

Mr. Strachan: I am frank with you. I am not doing it for the purpose of rebuttal only. I am doing it as part of our affirmative showing as to what the gain or loss should have been.

The Court: Whether I will let that exhibit be used or not will be a question answered on what you show to me later. If you leave the oil in there, you can't argue to this jury it is in rebuttal to Plaintiff's Exhibit 69.

Mr. Strachan: It is our own independent computation.

The Court: It is not a comparable computation. It is taken from an entirely different standpoint. It is an unfair way to make a comparison. [2853]

Mr. Strachan: As to whether it is fair or un-

(Testimony of John A. Lynch.)

fair, I think Mr. Hodge was unfair in that he ignored the fact that TreeSweet paid this and if Winckler & Smith had a comparable deal Winckler & Smith could have made this at $25 a ton. He has assumed $16 or $17 a ton, which we don't think is a proper comparison and we intend to criticize the comparison on that basis as a part of our affirmative defense.

The Court: Well, you have got my views on what type of exhibits you are going to use and what we will do with the exhibits. I want you to bear in mind in connection with any showing you may make——

Mr. Strachan: It is my thought if Mr. Hodge was entitled to make his assumptions and put in an exhibit based on his assumptions, we should be allowed to apply our theory, too.

The Court: What do you think I read the record to you for the other day? I pointed out that Exhibit 69 came in following two days' cross-examination, and in a way it was at the court's request that the thing be reduced to writing so we would have something to look at, and at the same time I said you could make a comparable exhibit based upon your cross-examination in the matter. If it hadn't been for that, the exhibit wouldn't be in at all. So both exhibits, if you make one, will be limited to what this record shows up to date on that. [2854]

Mr. Strachan: At the time the exhibit will be offered, we will have some of our affirmative evidence on the matter before the court and jury, I expect.

The Court: And at that time I will see what will be done. Don't be misled.

Mr. Strachan: I don't think I am, your Honor.

The Court: 2:00 o'clock.

(An adjournment was thereupon taken to 2:00 o'clock p.m.) [2855]

Tuesday, January 24, 1956—2:00 P.M.

The Court: The record will show the jury present.

Proceed.

JOHN A. LYNCH

called as a witness on behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows:

Redirect Examination

By Mr. Strachan:

Q. Mr. Lynch, I wish you would describe for the jury what books and records you did, and what you did not have access to during your investigation, rather, the investigation conducted by your firm?

Mr. Dixon: If the court please, I object to that broad question, unless it is directed to some particular book that this witness has testified was denied him.

(Testimony of John A. Lynch.)

The Court: Is this going to take very long?

Mr. Strachan: No.

The Court: All right. Let's go on. Overruled.

The Witness: Our firm had access to the corporate books of account of Winckler & Smith Citrus Products Company for the year ended January 31, 1950; January 31, 1951, and January 31, 1952. It embraced the general ledger and the journals. We had the journal entries and monthly trial [2856] balances and bank reconciliations, and accountant's work papers.

The Court: And you had access to the financial balance sheets from the Corporation Commissioner's file for prior years?

The Witness: I was going to go into that.

We had available the file of the Commissioner of Corporations for the State of California, which included the statements and extractions of the minutes up to approximately April, 1951. That included the financial statements for the preorganization period and January 31, 1950, and January 31, 1951. We also had available transcripts of testimony, which were before the court in various hearings that were held prior to and subsequent to the reorganization.

Sometime in October or thereabouts, vouchers and checks were made available to Mr. Regan out here in California for the period subsequent to the reorganization, and after the trial started there were made available the books and records of the company, together with vouchers for the period

(Testimony of John A. Lynch.)
year ended January 31, 1947, and the year ended January 31, 1948.

We never had access to the year ended January 31, 1949.

Q. (By Mr. Strachan): As I understand it, you never had access to the vouchers or copies of checks payable to Winckler and had never seen any of those until this morning when you were shown two or three; is that correct? [2857]

A. That is correct.

Q. Now, in your analysis of the facts represented in the prospectus filed with the Commissioner of Corporations, is there anything in that analysis which in any way conflicts with anything done by the Commissioner of Corporations?

A. No, there is not.

The representations in the prospectus were never in any—what is recorded in the prospectus are merely representations made by the client, by the plaintiff, and as the permit itself states on the back, "This permit does not constitute a recommendation or endorsement"——

Mr. Dixon: If the court please—well, all right.

The Court: Go ahead.

The Witness (Continuing): ——"of the securities permitted to be issued, but is permissive only."

These were just representations of the plaintiff and in no way—that is it, period. [2858]

Q. I think that you said that in the order of the court in connection with the approval of the third plan of reorganization under the Chapter XI

(Testimony of John A. Lynch.)

proceedings, the order directed that the assets revest in the corporation free and clear of all liens. I believe it was subject to the RFC's first mortgage lien.

A. That is correct. The assets were always subject to the RFC mortgage and during the period of the lease the corporation was subject to the RFC mortgage.

* * *

FRANCIS A. REGAN

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Francis A. Regan.

Direct Examination

By Mr. Strachan:

Q. Where do you live, Mr. Regan? [2859]

A. Chicago, Illinois.

Q. What is your business or occupation?

A. I am a certified public accountant employed by the firm of John A. Lynch & Company, Chicago, Illinois.

Q. How long have you been licensed to practice as a certified public accountant?

A. I have been licensed in the State of Illinois since 1946.

(Testimony of Francis A. Regan.)

Q. Do you belong to any associations or societies of your profession?

A. I do. I belong to the American Institute of Accountants and the Illinois Society of Certified Public Accountants.

Q. What was the education that you had for the practice of your profession?

A. I attended Marquette University, Milwaukee, Wisconsin, from 1934 to 1937; Georgetown University, Washington, D. C., from 1937 to 1940; majored in accounting and received my degree in Business Administration, Bachelor of Science Degree.

Q. From what institution?

A. From Georgetown University.

Following that, in later years, I took postgraduate work at Loyola University, Chicago, and Northwestern University, Chicago. [2860]

Q. And the postgraduate work was all done in accounting fields, was it? A. That's right.

Q. Will you describe the history of your employment and your experience as a professional accountant?

A. From 1937 to 1940, I was employed in Washington as a junior accountant by the Federal Deposit Insurance Corporation. From 1940 to 1951, I was employed as a Special Agent of the FBI.

Q. What was the nature of the work you did when you were employed by the Federal Deposit Insurance Corporation?

Mr. Dixon: Pardon me. What was the year,

(Testimony of Francis A. Regan.)

counsel? 1940 to what? I didn't get the answer to the previous question.

The Court: Read it.

(Answer read.)

Q. (By Mr. Strachan): What was the nature of the work you did while you were an employee of the Federal Deposit Insurance Corporation?

A. With the Federal Deposit Insurance Corporation my work generally concerned the maintenance of records within the offices at Washington related to the liquidation of banks which had been closed and were being liquidated by the FDIC.

Q. What kinds of experience did you have during your [2861] services with the FBI?

A. My work as an agent of the FBI was generally and predominantly in the accounting field. Among the type of cases that I would investigate and did investigate were Court of Claims cases, which in substance concerned suits that had been filed against the federal government, and my work concerned generally an analysis of the records related to the defense of the government in preparation of such suits. These cases generally concerned contracts of various types and the detail work included an analysis of costs as related to the particular contracts in the suits.

Q. Allocating of costs of the claimant to the government contract as distinguished from costs pertaining to other items? A. That's right.

Q. In addition to the Court of Claims cases,

(Testimony of Francis A. Regan.)
what other sort of matters did you work on for the FBI?

A. I also conducted an accounting investigation relative to Renegotiation Act cases. These cases generally resulted from the endeavors by the government and the contractor to reach an agreement as to the amount of profit that was made on contracts. When an impasse resulted or the government and the contractors could not agree as to the amount of profits resulting from a particular operation, the cases were referred to the FBI, where we would make our analysis of the accounts [2862] to determine on behalf of the government the profits or losses that might have resulted from the particular contracts.

In connection with this work, it was necessary to analyze and allocate costs as between contracts and types of operations. Most of these contractors would have civilian work flowing through their plant at the same time these government contracts would be flowing through the plant, so our analysis then would have to include allocation of costs between the different phases of operations of the contractor. [2863]

Q. Are there any other sorts of matters that were assigned to you during your services with the FBI?

A. I also conducted investigation in the bankruptcy cases. Matters that would be referred to the FBI for investigation, which on many occasions necessitated a determination of a depletion in the

(Testimony of Francis A. Regan.)

net worth of a company within a particular or specific period of time. The investigation was for the purpose of determining whether the depletion in net worth was caused by acts which would be a violation of the National Bankruptcy Act. To resolve many of these investigations it was necessary to determine a complete cause or the causes of failure of a company.

Q. Were there any other types of matters that you worked on when you were working for the Government?

A. Investigations also concerned violations of the Federal Reserve Act, the National Bank Act. Generally these were concerned with bank embezzlements and bank frauds, in which through the investigation records would have to be analyzed for the purpose of assembling evidence of the particular violation that may have occurred. It was an analytical study of the accounts for that purpose.

Q. Have you ever had any experience working on antitrust cases?

A. I have, in the accounting phases of antitrust cases.

Q. That is when you were with the Bureau, was it? [2864]

A. When I was with the FBI.

Q. After you left the Federal employment, what experience have you had?

A. From 1951 to 1954 I was employed by a public accounting firm in Chicago under the name of Doty & Dawson. This is a Certified Public Account-

(Testimony of Francis A. Regan.)

ing firm then engaged and still engaged in Chicago in the general practice of public accounting.

Q. In what capacity did you work for Doty & Dawson? A. As a senior accountant.

Q. After leaving Doty & Dawson what did you do?

A. I went into the employ of John A. Lynch & Company in about November of 1954.

Q. What has been the scope of your activities in that employment?

A. Generally our practice is related—is a general accounting practice. We conduct audits, we handle tax matters, and in general, financial inquiries of various types.

Q. You were present and heard the testimony given by Mr. Lynch in this cause, is that correct?

A. That's correct.

Q. He correctly described, did he not, how the work was divided within the Lynch organization, how you did a part and he did a part, primarily?

A. Yes, sir, I heard the testimony, and it was correct. [2865]

Q. And that correctly stated the way in which the work was done and in which each of you cross-checked and confirmed the work of the other; is that correct? A. That is correct.

Q. When did your personal connection with the investigation in this case commence, Mr. Regan?

A. Approximately June or July of 1955.

Q. When and where did you commence work?

A. In our offices in Chicago, Illinois.

(Testimony of Francis A. Regan.)

Q. At what did you work?

A. At that time we had in our offices photostatic copies of records of the plaintiff covering the period from February 1, 1949, through January 31, 1952. These records included the general ledger, the basic record of the company, and the supporting journals, cash receipts, cash disbursement journals, the general ledger. It included work papers, during that period, of the plaintiff, which contained monthly trial balance figures, and in some cases a few computations supporting entries that were made in the company's records during that period.

Q. Aside from the financial records that you described, what other records did you refer to?

A. We had a record entitled the Fruit Receiving Record.

Q. Specifically, did you make any examination of the records of the Chapter XI and Chapter X proceedings in this [2866] case, involving the Winckler & Smith Company, I mean?

A. After I came to Los Angeles.

Q. When was that?

A. Within the past two months.

Q. What other books and records were examined by you in the course of your investigation?

A. In about October, the latter part of October, in order to complete our audit to the extent that we considered additional work necessary, I came to Los Angeles for the purpose of examining supporting records, such as vouchers and cancelled checks of the company. Those records were partially produced in October and November, and generally my recollection now is that we received all the records necessary to complete our investigation with the exception of a few vouchers.

After the first of December the general ledger and supporting journals relating to the period prior to 1949 were made available. I examined those.

Q. In particular were there any vouchers or carbon copies of checks issued by Winckler-Smith Company, which were not made available to you on your request?

A. There were some vouchers not made available, yes, sir. [2867]

Q. What vouchers were those?

A. All vouchers made out to Nicholas J. Winckler.

Q. Did you specifically ask to have access to those vouchers? A. I did.

Q. Was access to those vouchers ever given you?

A. No, sir.

The Court: Well, let's not have legal conclusions. Who did you ask and what did you ask and what was the result?

The Witness: I asked Mr. Walker and Mr. Smith. Mr. Smith, Mr. James Smith, as I understand, is in the employ of Mr. Walker. Mr. Walker was the receiver of the bankruptcy estate.

The Court: What did you say to each of them and when?

The Witness: My visit out here had been arranged by the attorneys for the specific purpose

(Testimony of Francis A. Regan.)

of examining these supporting records. When I arrived out here, there was a slight delay and eventually certain records were made available, but they were not all-inclusive. They did not include all the vouchers that we needed.

I prepared a list of the vouchers that I felt were necessary to complete the examination, and on this list particularly were listed vouchers to Rubin, Wallenstein, Parvin, and Winckler.

I presented that list specifically to Mr. Smith. I [2868] asked him in substance for those records, and in substance he told me he would attempt to locate them, and shortly thereafter he did produce records and vouchers made out to Wallenstein, Rubin and Parvin.

I then asked him for the other vouchers which were those made out to Mr. Winckler. Mr. Smith advised me he could not locate them.

I later had a conversation with Mr. Smith, which occurred today, and Mr. Smith told me that those vouchers had been found in the files of Mr. Walker, the vouchers that I had specifically asked for previously and had not been produced.

The Court: Did you have any conversation with Walker about these matters previously?

The Witness: I had several conversations with Mr. Walker about the production of records, yes, sir.

The Court: What did he say? What did you say and what did he say?

The Witness: I asked Mr. Walker originally on

(Testimony of Francis A. Regan.)

first meeting him for the records related to the period 1949 to 1952, the supporting records.

He advised me that they would be available and told me Mr. Smith would arrange for the records to be produced.

I then asked for the records, to make the records available covering the period prior to 1949.

Mr. Walker stated he could not produce those and [2869] would have to leave that matter up to the lawyers in this case.

The Court: Did you have any conversation with Mr. Walker specifically about these Winckler vouchers that you are talking about?

The Witness: No, sir. The reason I did not was that——

Mr. Strachan: Will you speak up so the jury can hear you?

The Witness: I did not have a specific conversation with Mr. Walker relating to the Winckler vouchers, because he had previously referred me to Mr. Smith, who was to produce the records, and I therefore assume that Mr. Smith acted for Walker and was the proper person for me to talk to.

The Court: I don't know, but I think we ought to have some description of this. Where were these records of the Winckler-Smith Company kept previously, when you first came out here?

The Witness: Well, that is a little bit difficult to understand, your Honor.

Mr. Strachan: A little louder, please, so we can hear you.

(Testimony of Francis A. Regan.)

The Witness: I believe some were located in town, some warehouse. The bulk of the records I found when I visited the plant, the former plant of the plaintiff, out at Anaheim.

The Court: Were they in one or two rooms down there? [2870]

The Witness: Principally in two rooms.

The Court: Were they in cabinets or boxes or what?

The Witness: Generally in boxes.

The Court: In other words, they weren't in any order?

The Witness: No. They were in complete disorder.

The Court: Now, subsequently some mass of this material was turned over to the defendants and moved over into some office building of theirs in town, were they not?

The Witness: No, sir, your Honor. As I understand——

Mr. Strachan: I can't quite hear you.

The Witness: When the arrangements were made, I asked for space in which I could examine these records. Mr. Walker and Mr. Smith both told me they did not have the space, and I contacted attorneys in the matter, who then offered to make space available in the Sunkist Building, where these records might be placed.

The Court: Defense attorneys?

The Witness: But as to whether they technically

(Testimony of Francis A. Regan.)

The Witness: Yes.

The Court: All right.

Q. (By Mr. Strachan): You had never made an audit or did any auditing work for a company engaged in processing citrus fruits, had you?

A. No, sir.

Q. What, if anything, did you do to familiarize yourself with the industry and the manner of operation from the raw materials to the finished product?

A. During the course of my examination of the records, and while in Los Angeles, I did visit the plant of the plaintiff, the former plant of the plaintiff, at which time Mr. Smith took me through the plant, generally described the operations of the plant. I visited the plant of Exchange Lemon Products out at Corona.

At all times during our examination of the records whenever in our discretion we felt that we needed more technical knowledge, we called upon the facilities of either Exchange Orange Products or Sunkist, or Exchange Lemon Products to acquaint us with any technical knowledge that we thought, as accountants, we needed to properly examine these accounts.

Mr. Dixon: Mr. Regan, may I interrupt for just a moment? [2874]

You used the word "we" all the time. Was there someone accompanying you? Was Mr. Lynch accompanying you when you made these trips, or are you speaking just for what you, yourself, did?

(Testimony of Francis A. Regan.)

The Witness: I am generally referring to myself, sir.

Mr. Dixon: All right. Thank you.

The Court: It is the editorial we?

Mr. Dixon: I just wanted to be sure.

The Witness: If I use "we" I mean the firm, myself.

Q. (By Mr. Strachan): You made a number of studies which underlay and were directed toward your ultimate allocation of costs as between various products and operations of the company, did you not? A. I did.

Q. Will you tell us what studies and analyses you made in the course of your investigation?

A. One of the analyses made of the accounts of the plaintiff during the period 1949 to 1952 covered the recorded sales of the company. The purpose of this examination was to determine the types of products that the company sold, in order to determine from such an analysis how the company was utilizing its facilities.

This analysis was made for the three-year period on a comparative basis to determine the possibility of any trends in the production facilities of the company, or in [2875] the type of products it handled.

Q. Did you prepare a schedule which shows the sales of products, excluding Florida operations, by years, from the books and records of account?

A. I have.

Q. Is that the document that has been marked

(Testimony of Francis A. Regan.)

for identification Exhibit BO? A. It is.

Mr. Strachan: I will offer Exhibit BO in evidence and ask that copies be distributed among the jurors.

While we are waiting, Mr. Regan, is that schedule marked BO a true and correct statement of the sales, by products, by years, as shown on the books and records of account? A. It is.

Q. (By Mr. Strachan): And that is without adjustment by you, is that correct?

A. Without adjustment by me.

The Clerk: Mr. Strachan, we at the present time only have the one original. That was in that group that you only had one copy at the time. You were going to bring down copies.

Mr. Strachan: I am sorry. Here they are.

The Court: You didn't believe me, apparently.

Mr. Strachan: I don't think that is true, your Honor.

The Court: We are not going to distribute this to the jury. [2876]

If it goes into evidence it will be passed to the jury.

But if we go through all these exhibits on that basis we will never get done. I said we were going to be even-handed on this. The plaintiff's books and records went to the jury; your analysis in opposition went to the jury. Plaintiff's summaries went to the jury, and you will be permitted to make summaries. But every bit of evidence the witness testifies to is not going to be repeatedly passed to the jury.

Mr. Strachan: He hasn't testified to this. He has identified the schedules as being correctly prepared.

The Court: You have identified it, and you have now offered it into evidence; is that right?

Mr. Strachan: Yes, sir.

The Court: It will be received in evidence as Exhibit BO. But I don't propose that every bit of evidence is going to be made up in duplicate to be passed to the jury as we go along.

We discussed this when we started. I thought you understood.

I want to be even-handed on it. I think it is entirely proper, where the plaintiff used its financial statements in that manner, that you could use yours, as you did this morning. But that doesn't mean that we are going to do it with every exhibit that goes along. Do you follow me? [2877]

Mr. Strachan: I understand what you said, yes, sir.

(The exhibit referred to was marked Defendants' Exhibit BO and received in evidence.)

The Court: Nor are we going to record every witness' testimony in writing. This, I think, is entirely proper, a study to go into evidence. You may examine it with the witness, further, and it may be passed to the jury for inspection, but I am not going to permit every exhibit to be duplicated in 14 copies.

(Testimony of Francis A. Regan.)

turned the records over to the defendants or were just utilizing the space, I couldn't say.

The Court: The point is a number of these boxes, some of these records were moved over into that room, were they not?

The Witness: Yes, sir.

The Court: And who had the key to the room?

The Witness: Well, I presume employees of Sunkist. [2871]

The Court: Mr. Walker was not there every day?

The Witness: No, sir.

The Court: I haven't heard it described. I know counsel have discussed it during pretrial and discovery proceedings. What was moved over there? Can you describe it, give some idea?

The Witness: Oh, maybe 20 or 30 boxes of records, not just relating to my particular examination, but I believe to the plaintiff's examination of the records. During the period of and up to the beginning of the trial, there was a representative of Mr. Walker present whenever I examined the records. I understood that was the arrangement at that time, that either Mr. Smith would be present or someone else representing Mr. Walker was present whenever I examined these records.

The Court: These records that were moved over to the Sunkist room were moved over for the convenience of the defendants, not for the convenience of the plaintiffs? You said they were records the plaintiffs were interested in. I may be wrong, but

(Testimony of Francis A. Regan.)

I understood they were moved over for the convenience of the defendants.

The Witness: It was to the convenience of the defendants, but I believe it was also, your Honor, for the convenience of the plaintiffs, too.

The Court: In other words, it was easier for both sides [2872] to get at them in this building than it was to go to the warehouse or to the plant?

The Witness: That's right, sir.

The Court: Then what did you say finally with reference to the orderly way in which the records were boxed or appeared? Were they in an orderly fashion, or was it what you would expect from a company with closed-up business activity?

The Witness: I did testify they were in disorder, but it was a disorder that could result from the lack of operation of the company.

The Court: In other words, it wasn't like going into a going concern where you had an efficient secretary, where you could say, "Tell me where a certain file is kept," and she could put her hand right on it?

The Witness: That's right, sir.

The Court: It presented problems to you, in making your audit and your examination?

The Witness: I believe my problems in that respect were the same as those of Mr. Smith, who was also interested in the records. [2873]

The Court: You, then, both had problems in connection with what you wanted to get out of these records?

(Testimony of Francis A. Regan.)

Mr. Strachan: As I understand it, your ruling thus far is that the document is in evidence, but we can't have duplicate originals marked?

The Court: That's right.

Mr. Strachan: May I ask whether it will be permissible, in order that the jury can follow the testimony, to have copies passed to them, although not marked as duplicate originals, so that they could follow the testimony?

The Court: I am only concerned with time. I am concerned with two things. First, to be even-handed with plaintiff and defendant in this case. I am further concerned, with the great number of exhibits that have been marked here, in the problems that arise on them. I am also concerned with the time in the matter.

If plaintiff doesn't object, and if you think it will speed up the examination, maybe we can do it. But I don't [2878] think this ought to be done with every exhibit. I don't know whether you intend to do it with every exhibit. Maybe I am anticipating. But this matter of summaries or extra copies, and all, is a procedural matter.

Maybe it would speed things up, and maybe it wouldn't.

Mr. Strachan: I think there will be very little time lost, and I think it would facilitate the jury's following of the testimony, because it is a rather complicated comparative exhibit.

If I had not expected copies to be distributed to the jury, I would have had a large copy prepared.

(Testimony of Francis A. Regan.)

The Court: You may tell me the others that you will have similar problems on, but with your assurances, you may pass them to the jury. We will assume that they are all identical originals, and the clerk may mark them.

Mr. Dixon: If the court please, Mr. Hodge informs me that on comparison of these figures there is some discrepancy, in his judgment, between some of the items here, the totals aren't correct.

The Court: That is a matter of cross-examination. The witness says that he made these computations from the books and records.

The Clerk: Do you want to collect the other exhibits up that the jury has?

The Court: Shall we collect the other exhibits from the jury? [2879]

Mr. Strachan: As far as I am concerned they may be, yes.

The Court: All right.

You can finish marking them later, Mr. [2880] Clerk.

Q. (By Mr. Strachan): Mr. Regan, will you refer, please, to Exhibit BO and explain the manner of its preparation and the way in which the information dealt with is reflected on the exhibit?

A. The information set out in this exhibit is an analysis of the actual sales of the plaintiff in each respective year, excluding the Florida operations or the sales made out of the Florida office.

The total sales as appear at the foot of this exhibit

(Testimony of Francis A. Regan.)

are the sales figures unadjusted as appear in the plaintiff's records.

The detail allocation of the sales as between type of product was compiled and determined by me through an analysis of the several sales accounts which make up the total sales.

Q. Now, in comparing the class of products sold from year to year, are there any particular changes in the nature of the operation, significant changes in the operation in your opinion which appear on that exhibit?

A. There are, and the items I noted were this—and this is generally one of the items that would be considered in any cost study—I noted as between the first two years that the volume, dollar volume of sales increased slightly, approximately $100,000. By slightly, I am not inferring that 100,000 is a slight figure, but slight as compared to [2881] the total sales.

I noticed that the items comprising the sales, though, in the two years differ materially, and the material changes appeared to me to be, first, the drop in Valencia orange juice of approximately $500,000. It dropped in the year ending January 31, 1951, over the year ending January 31, 1950.

I note at the same time that there were increases in items such as ades, lemonade, and in concentrate, and also in navel single-strength juice.

Continuing that trend, I noticed a similar drop in the third year as compared to the second as far

(Testimony of Francis A. Regan.)

as the single-strength juices are concerned, and a rise in the proportion of concentrate products.

In analyzing this, I have determined from the records that the drop or the change in the quantity of fruit processed during the three-year period was from approximately 18½ to 19,000 tons in the first year, about 16,000 tons in the second year, and 8,000 tons in the third year. So proportionately in considering that tonnage, there was a marked shift to the concentrate from single-strength juices.

Q. What other studies did you make in connection with your cost analyses?

A. I then examined the raw fruit purchases or the raw fruit receipts that went into the operation which resulted in [2882] the sales to which I have previously testified and as are set out on Exhibit BO.

To make my analysis of the type of fruit that was received, I made my analysis by month and by type of product, determined from the records how many tons of Valencia oranges, navel oranges, grapefruit and lemons were received at the plaintiff's plant in each month of the three-year period.

Q. Did you prepare a schedule showing the tonnage of raw fruit purchased by months for each of the three years? A. I have.

Q. Broken down according to the kind of fruit?

A. I have.

Q. Is that schedule the one that has been marked BP in this record? A. It is.

Mr. Strachan: I will offer it in evidence.

Mr. Dixon: I object, your Honor, on the ground of immateriality and no proper foundation laid.

The Court: Overruled. BP in evidence. [2883]

* * *

Q. (By Mr. Strachan): Mr. Regan, will you please explain Exhibit BP and the manner of its preparation?

A. This exhibit was prepared from the records of the plaintiff and in particular a record that I recall as being titled "Fruit Receiving Record." The figures set out in this exhibit are of the figures that appear in the books of the plaintiff.

The Court: You have grouped them by commodity and by year and by month.

The Witness: Generally that was done in the records of the plaintiff.

The Court: Yes, but I mean this exhibit does that. [2885]

The Witness: That's right, sir.

The Court: It was made without adjustment as taken from the records of the company.

The Witness: That's right, sir, except during the course of examining this record, why, we would—I would add each of the columns in the record before I would use the total in order to avoid using an incorrect total. I don't recall specifically right now any particular total I might have corrected. The detail is the same as appear in the records, however.

The Court: What you are saying is you don't guarantee that your totals are the same, there might be an error in some of their totals?

The Witness: Yes, sir. If there is a difference, it would be due to the fact that the record was incorrectly added on the company's books.

The Court: All right. Go ahead.

Q. (By Mr. Strachan): Now, will you point out to the jury and to Judge Carter any matters which have a direct bearing on your studies of cost here with respect to the production of one year as compared to another?

A. Generally, from an examination of the results of this particular analysis, I find that the Valencia orange processing operation was generally restricted from the months of July through November. In other words, those months, those [2886] five months would embrace practically all the Valencia production of the plaintiff.

I determined through this analysis that while the total tons processed by the plaintiff changed from one year to the next, the total change was not representative of the change that occurred in the particular type of product that was processed.

I found that during this year the largest——

Q. During which year, Mr. Regan?

A. During the three-year period covered by this exhibit the largest receipts of Valencia oranges occurred during the first year when the total of 12,739.98 tons were received at the Winckler & Smith plant.

This tonnage of Valencias decreased in the sec-

(Testimony of Francis A. Regan.)

ond year to an amount that was approximately 66 per cent or two-thirds of the previous year.

In the final year, the year ending January 31, 1952, there was a corresponding decrease in the amount of Valencia oranges. [2887]

Q. By that do you mean that the year ended January 31, 1951, was a year in which there had been about a one-third reduction in the quantity of Valencias purchased as compared with the prior year? A. That is right.

Q. And that taking the next succeeding year, the year ended January, 1952, there was, again, another 33⅓ per cent decrease in the number purchased?

A. That is right. And in that second year the decrease in tonnage of Valencias was in part offset by an increase in navel tonnages, and to a very minor extent by an increase in the lemon and grapefruit tonnage.

Q. Did you, likewise, make a study of the distribution of the raw fruit purchases among various sources of supply? A. I did.

Q. Did you prepare a schedule of that showing purchases of the principal varieties of fruit by sources of supply and by year? A. I did.

Q. Is that the schedule that is identified in this record as BQ? A. It is.

Q. Was that prepared by you from the books and records of account without adjustment?

A. It is prepared from an analysis of the ac-

(Testimony of Francis A. Regan.)

counts. [2888] These figures are not set out in these totals in the books.

Q. But they are taken from the books and then combined, is that correct?

A. That is right, sir.

Q. Directly from the books? A. Yes, sir.

Mr. Strachan: I will ask that that exhibit be received in evidence.

Mr. Dixon: A general objection.

The Court: The objection is overruled. It will be received in evidence.

* * *

Q. (By Mr. Strachan): Will you describe the manner of preparing Exhibit BQ and explain the indications appearing on the face of it?

A. This exhibit was prepared through an examination of the fruit receiving records of the company, along with the [2889] cash disbursements records of the company. The purpose of this exhibit was to determine where the plaintiff obtained its fruit during the three-year period. And it is a further analysis of the total of fruit received as appears in total on Exhibit BP. BP analyzes the total fruit received by month. BQ then presents that total analyzed by source of supply.

Q. Will you point out what in your opinion are significant indications on the face of that exhibit?

A. Directing my attention to the percentages that are set out on this exhibit, I find that as to Valencia oranges the fruit received from Morgan Ward during the three-year period represented the major part of the Valencia orange receipts of the company. The lowest percentage being in the first year, in which 73.28 per cent of the total supply was received from Morgan Ward.

Q. The classification "Other" that appears on the tabulation means sources other than either Morgan Ward or Exchange; is that correct?

A. That is right, sir.

Q. That would represent any purchases made direct from growers or from other so-called independent sources?

A. Other than through Morgan Ward and Exchange. I believe that generally, while this exhibit sets out the source of purchases by source as to the tonnage involved, the records of the company for the last of the three years carried an [2890] analysis of the purchases as to dollar amount by source. The records did not present this type of detail in the previous years, the general ledger itself. So going to the supporting records I then built up the totals as appear in the other years, in order to compare it with the third year. [2891]

* * *

(The following proceedings were had outside the hearing and presence of the jury:)

Mr. Strachan: Judge, I thought when I asked to speak to you without the jury present perhaps we could have some sort of understanding about these two exhibits, BS and BT, and discuss this so we wouldn't have a scene before the jury.

What I propose to do is to have this witness show that he has made a computation of the profit or loss Winckler & Smith would have had if they had obtained fruit, processed and sold the fruit on the same proportional terms as the TreeSweet contract. That some proportional terms is, I believe, the allegation that is made in the complaint as to what the loss or profit is computed from.

It is our position and our accountant's computation is based on the proposition that in order to obtain the fruit and pay for it and make the same return for it that TreeSweet did, it is necessary to take into the computation of profit or loss the oil derived from the processing and returned as part of the purchase price, so to speak.

His testimony will show that his computation differs from Mr. Hodge's in that respect. He will explain why it is that he included that and how he computed the amount of cost which should be charged to Winckler-Smith's hypothetical operation in order to make it comparable to the TreeSweet operation. [2892]

Then I will eventually ask him whether he has prepared a schedule showing the computation as he made it, that is Exhibit BS, with the two attached pages showing the schedules of supporting analyses, computations, and I would then offer it in evidence. I would ~~like~~ also to offer to have it distributed to the jury at that point. [2893]

The Court: Let me say this. I have a lot of respect for these two young men here. Outside of their intelligent and good-looking appearance, their service with the FBI is a good stamp of indicia. But no one is infallible, and these men aren't. They already misled you, or somebody here, in the contention that you had in connection with Hodge's exhibit. I assume they had some part in it. And, as I said before, I claim to be no specialist, but it seemed to me that I could see that in the little study I gave it on the bench.

Mr. Strachan: That wasn't their responsibility. It was a blind spot I had.

The Court: It is their responsibility, it seems to me, if they were paid $39,000 to date, and are going to be paid additional money, to advise and keep counsel in line. And we don't claim to be accountants, Mr. Strachan. It is all we can do to keep up with the cases that come down, let alone accounting principles. You are approaching another similar problem.

You talk about a comparison with TreeSweet. There is no comparison with what TreeSweet made or Winckler & Smith made, in this problem.

The problem was what would Winckler & Smith have made had they had 12,000 tons available. Now, whether you would have given them the 12,000 tons, because of this oil computation and other things, is another problem. [2894]

I can't keep you from making computations, but if this exhibit is used I will instruct the jury that it is not to be considered as a rebuttal exhibit, as permitted by the court to be made with reference to 69. Because it isn't. It would only lead to confusion on that score. Because you are not making a comparison between what Winckler & Smith would have made and what TreeSweet would have made. The point was raised by the contention, what would Winckler & Smith have made, and it was predicated on the assumption that they could have got the 12,000 tons.

Now, you can work on that assumption, and you can make your computations on oil, and that assumption might be destroyed by a showing that the small amount of oil that Winckler & Smith would get would destroy any value on the assumption, or it would have an impact on that point.

But it is not the type of exhibit that the jury were told would be forthcoming. If it comes in, then it is confusing, because it is on a different basis.

If you want to make some computation from the standpoint of what Sunkist would have made by giving them these 12,000 tons, and that is really in a way what you are slanting at here——

Mr. Strachan: That is what we are trying to get at.

The Court: Then you have it tied in with what Winckler & Smith would have made or lost. So you are confusing the [2895] two things.

Mr. Strachan: Perhaps I haven't made myself clear. This is a computation of what Winckler & Smith would have made had they obtained fruit under the same proportional terms as TreeSweet obtained fruit, and had they processed it and incurred not the TreeSweet costs, but Winckler & Smith's costs of processing. This is what this and Exhibit BT are aimed at.

The only thing in common here is that we are determining the cost of raw fruit to Winckler-Smith on the same comparable basis, directly comparable basis as the cost to TreeSweet. But we are not determining here what TreeSweet would have made. We could find that out by going to their books. We are finding out what Winckler-Smith's profit or loss position would have been on the 12,000 tons had they paid for the raw fruit just what TreeSweet yielded for it in kind and in dollars.

The Court: Of course that wasn't and is not plaintiff's contention.

Plaintiff has counted on, has complained of two contracts. One to Silzle and one to TreeSweet. The evidence shows that the return of oil, the net return to Sunkist of those two contracts were different. They weren't the same. In other words, Sunkist was giving contracts to competitors, one of which brought in Sunkist a larger return than the [2896] other one, and the plaintiff's position is had we had fruit available, and assume that our oil return wasn't the same, either, what would we have made.

On that kind of a basis, rebutting Exhibit 69, which I let in, and availing yourself of a privilege which I gave you of offering a rebuttal exhibit to 69, and overlooking for the minute that at the time that arrangement was made it was to be based upon this cross-examination—and this of course would not be that, but passing that up—a comparable exhibit to 69, as far as 69 went, would take into account income Winckler & Smith got from oil and what it cost them to process the oil. It would not take into account income Winckler & Smith got from oil and what it cost them to process the oil. It would not take into account what Sunkist would have got, or how good the deal was to Sunkist.

Now, that is the confusing part of it, and I don't intend to have the jury confused on that point.

If you want to make some calculation as to what Sunkist would have got from the fruit, go ahead and make some computation. [2897]

Mr. Strachan: That is what that is, your Honor.

The Court: But it isn't. Then you have mixed up in here Winckler-Smith's selling costs and their additional expenses and what-not, and you wind up with the net result as a loss to Winckler & Smith.

Mr. Strachan: All we have done here in that computation was to take as the cost of raw fruit the same price which TreeSweet in effect paid for the juice and the oil as the cost of the fruit, and then we have made adjustments to that by applying Winckler & Smith's operating costs. We have also given them credit for the oil return which would have been realized from their method of operation.

The Court: Then it is not in rebuttal to what plaintiff attempted to prove by 69.

Mr. Strachan: I will say it is rebuttal in the sense that they are two different computations with two different underlying theories. But on direct rebuttal of 69, I propose to have the witness show where the can, carton and label costs have been understated, the selling costs have been understated, where the general and administrative costs have been understated. Those will be direct rebuttal.

The Court: I will instruct the jury, if you use it, it has no relationship to 69 and it doesn't comply with the offer made you.

What is plaintiff's view on this? [2898]

Mr. Dixon: May it please the court, I think I have previously stated the position of plaintiff with reference to this exhibit, which again is that the item H, oil factor, attached to this exhibit, has no place in the exhibit insofar as the plaintiff is concerned. Your Honor has already stated the basis under which 69 went into evidence and the contention of the plaintiff in this case with reference to the TreeSweet contract, which again is that the plaintiff should have had oranges made available to it on the comparable basis to that on which they were made available to TreeSweet.

Now, TreeSweet did not buy the oranges apparently nor did they buy any oil, but they did get, on the computation in 69, oranges for processing into juice, and which, when processed into juice and canned ready for the market, with all costs paid therefor, exclusive of the oil and peel, were around. I have forgotten the amount, about thirteen or fourteen dollars a ton.

Now, the additional factor of the oil, of course, added to that will bring the return in a sense to Exchange Orange under the TreeSweet contract to about $24 or $25 a ton, whatever the amount is, but that is not the basis of the comparison which the plaintiff has made in this case and is not involved in the claim of the plaintiff with reference to like treatment to that given TreeSweet by Exchange Orange under the contract. [2899]

Now, the fruit figure, it is true, does not show—I mean in 69—that the net result was that oranges that would have otherwise cost any other buyer $44 a ton, if they had bought them, were made available to TreeSweet, if TreeSweet had bought them on that assumption, the same oranges, at $25 a ton. That is an entirely different proposition.

The plaintiff contends with reference to the Silzle contract, for example, that the defendants made some oranges available to Silzle at $22 a ton which, of course, included oil and the peel, but there was no oil and peel made available here to TreeSweet under the TreeSweet contract and it is not in the picture.

To complete the comparison, the plaintiff added the additional factor and ran the oil through to show what the whole fruit would have been or what it would have been sold for by Sunkist to TreeSweet if there had been an actual clear-cut sale of the oranges.

Then we go on from there to show that——

The Court: That is because on those exhibits the comparison was to be made between $40 a ton for the whole oranges——

Mr. Dixon: That is correct, your Honor.

The Court: And TreeSweet's and Silzle's deal for the whole oranges.

Mr. Dixon: For the whole oranges.

The Court: I am satisfied with my analysis of this. You [2900] are nicely muddling two problems. I don't think it is done intentionally, but it definitely muddles two problems. You will not be precluded from showing what you estimate Sunkist's return would be had it sold to Winckler-Smith and arguing to the jury that is why you didn't sell to Winckler-Smith. That is your point.

But using this 12,000 tons here and winding up with what you figure to be a loss figure for the net figure of that operation completely muddles two problems.

Mr. Dixon: May I suggest further, your Honor, that this oil factor which is referred to in this exhibit would not be admissible in my judgment, certainly, and plaintiff would object to it under any theory until the defendant had previously indicated by testimony from the stand of a witness from Sunkist that they knew of this difference and that that was the reason they did not make them available, but they can't do that, I know they can't and they know it. So this would be getting in through the back door again something they couldn't get before the jury by direct evidence.

If this exhibit is going to be used at all, the paintiff would have to object to it, at least to the extent that the H oil factor part of it be removed from the exhibit for the reasons previously given.

Mr. Strachan: I wonder if it would clarify the matter at all if I would ask this question? What if any return does [2901] the plaintiff assume Winckler & Smith would have made on a processing arrangement if it had had one with respect to the oil? Anything? A dollar? $2.00? $3.00?

The only thing that enters into their computation is how much they would have returned for juice.

Mr. Dixon: That is correct, because we are comparing the TreeSweet contract, counsel.

Mr. Strachan: Let's say $170,000. That is less than $15 a ton. The complaint alleges an acquisition of fruit at proportionally equal terms with TreeSweet.

The Court: This other point I hadn't thought about; but I think counsel has a point, Mr. Dixon has a point there. In other words, you are accused of certain acts which caused damage. Now, you can't defend against those acts by what you may decide after you did the acts would have been the effect if you had done or not done something before.

For instance—well, I am trying to think of a simple analogy. I will have to think about that one. But I think counsel has a very definite point there.

Unless you are prepared to prove that you turned down Winckler-Smith's request because of that reason, then I don't think that computation of the accountants is admissible, and I think it comes in this way in the back door when it otherwise couldn't come in the front.

Mr. Strachan: This comes in on the question of damages. [2902] They say if they had had this, they would have made a profit. Now it appears that they figure the only cost of the fruit to them would have been the cost of the juice end of it, because nothing else enters into their computation. That results in their figuring a cost of raw materials of $172,000, which is less than $15 a ton on the 12,000 tons, whereas their own exhibits show that the TreeSweet deal, with which they want to be compared, was a deal under which all fruit cost TreeSweet $25 a ton.

Mr. Dixon: We don't make that contention at all, your Honor. I don't see how counsel constantly seems to be confused with reference to the contention of the plaintiff in this case, because that is not the contention of the plaintiff. I think we are entitled to use and to show the effect of the discrimination. Now, they take the oil in as part of the deal to Sunkist. In spite of that fact TreeSweet, even under that arrangement, was getting $44 oranges, and that is already in this record, your Honor, and that is the purpose of its being there, as against a sale price of the oranges, if they sold the oranges to TreeSweet, of $24 or $25 a ton. It would still be discriminatory. [2903]

But that isn't the contention of the plaintiff with reference to the TreeSweet contract.

The contention is that oranges would be made available, and that is the language I want emphasized, made available under an arrangement comparable to that which they were made available to TreeSweet.

And I don't care whether you call it a sale or processing contract or what you call it. The fact remains that they were made available to TreeSweet.

Our Exhibit 69 shows the basis under which they were made available, and our computation of what the plaintiff could have realized on a comparable deal. There is nothing whatsoever that is related to the price of oranges; the $25 oranges to the plaintiff is another question.

We have no computation in this case thus far that deals with the processing of $25 oranges, and I don't know whether they could have even been processed at $25 a ton in 1951, at a profit.

But if that is what he is trying to prove, that is not the purpose of the comparison, your Honor, that we have set forth in Exhibit 69, and that is not the purpose of Mr. Hodge's testimony, on that exhibit.

The Court: I am satisfied in my own mind, counsel.

What do you want to do to make a record? Do you want to call this witness and in general terms, without going [2904] into this matter by name and so forth, lay a general foundation that this exhibit was made from the records——

Mr. Strachan: I think we might as well have the jury. I didn't want to have any unnecessary colloquy in the presence of the jury. I was going to say that I think your Honor indicated what your present intention is. I would like to go ahead. I would like to add that I would like to have it understood that in the event your Honor should make a statement to the jury that this exhibit was not rebuttal of Hodge, I think that might give a wrong impression.

The Court: What do you want to do—go ahead before the jury identifying BS?

Mr. Strachan: That's right.

The Court: I am just suggesting, if you want to do it before the jury, I want you to lay a foundation in general terms, to start with, sufficient to make your offer, namely, that this has figures on it taken from books of this or that company, and so forth; that he has made a computation, without describing what the theory of this is; and then you offer it, and I am going to sustain an objection to it.

If you want to do it before the jury, all right. Or if you want to do it out of the presence of the jury, you may.

Mr. Strachan: I think it would take a little more time, and I am going to lead up to that gradually.

Mr. Dixon: May I make this suggestion for whatever it [2905] is worth, your Honor?

If H Oil Factor is deleted from this exhibit, that is the part that the plaintiff is objecting to.

The Court: That is all that concerns me in this comparison. But it appears as a part of the third sheet, numbered 2, and it also appears on the first page.

Mr. Dixon: That is correct. I hadn't noticed that, either, your Honor. I am sorry.

Mr. Strachan: I missed something there, your Honor.

The Court: Mr. Dixon said that if this computation on the oil factor were eliminated he has no objection.

Well, the computation of the oil factor is half of the last sheet, but it also appears on the first sheet.

Let's get the jury down.

VOLUME VI

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States Court of Appeals for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record

In .... Volumes

Volume VI

(Pages 2425 to 2900)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

Mr. Strachan: Let me talk with the witness just a moment so we won't overstep what your Honor has said about describing this in general terms.

The Court: All right.

Mr. Dixon: Before the jury comes down, your Honor, may I raise another question? We have this BR here——

The Court: Wait just a minute until Mr. Strachan can hear you.

Why don't you let me lay your foundation? Since I have told you that I am going to sustain an objection, why not let me lay the foundation, and we will have no problem? [2906]

If you don't think I do it right——

Mr. Strachan: I think I have the responsibility to do it. I am just outlining a method.

The Court: I am not intimating that you can't do it properly, but I thought we would save some time.

You want to do it?

Mr. Strachan: Yes, I think I would.

The Court: Mr. Dixon has a question he wants to raise with you.

Mr. Dixon: Counsel, do you intend to offer BR in evidence?

Mr. Strachan: We didn't have enough copies. I am going to offer it in evidence, but I am not going to distribute them to the jury.

Mr. Dixon: I am going to object to it, your Honor, and I might say at this time that I will state the grounds of my objection, unless your

Honor wants it to be made in the presence of the jury.

There is no identification——

The Court: I assume the identification will show that this came from some of the records of the Winckler & Smith Company.

Mr. Dixon: All we know about this exhibit is what is on it. There is no identifying mark of any kind as to who made it, what it relates to, or anything else, other than what is on the face of the exhibit. [2907]

Now, whether this was an estimate, whether this is an actual cost analysis based upon a run record, or what it is, the plaintiff does not know.

As I stated, there are no identifying marks anywhere on the copy of this exhibit that has been handed to us, which would indicate who made it, or would indicate when it was made, or what it is based on, whether it is single-strength——

The Court: In other words, your objection would be on the lack of foundation?

Mr. Dixon: Absolutely.

The Court: We don't know what foundation defendants will lay.

Mr. Strachan: The foundation is that it is one of the documents that was furnished us by the plaintiff pursuant to the discovery orders of this court.

The Court: That wouldn't be enough.

Mr. Dixon: From what file?

Mr. Strachan: They ought to know what file.

Mr. Dixon: No, we don't.

Mr. Strachan: I could find out.

I am very much surprised at this attitude. They ought to know what file they picked the things out of that they furnished to us.

Mr. Dixon: Counsel, be sensible.

The Court: That is not the particular point. The [2908] particular point is what significance does it have.

What do you expect this will prove, Mr. Strachan?

Mr. Strachan: This is a cost analysis found in the books and records of Winckler & Smith corporation.

Mr. Dixon: What book, counsel?

Mr. Strachan: It is File 50.

Mr. Dixon: There isn't any File 50. That is the mark put on there by Mr. Williams, who may have got it somewhere. Whether he got it from the wastebasket, or where he got it, I don't know.

The Court: What do you expect it will prove?

Mr. Strachan: It shows what the actual cost of cans, cartons, and labels was as recorded in the books and records as of the month of September, 1951.

Mr. Dixon: Then tell us from what books and records they came, counsel. That certainly is not a book, and it certainly is not a record of this company that we would ever agree could be charged against this company, or the authenticity of which we could concede or admit.

As I previously stated, there are no authentication marks on the document showing when it was made, by whom it was made, or to what it relates.

Mr. Strachan: Let's get the original document in here. This is a photostat of an original, which is in your possession. [2909]

Mr. Dixon: We don't have it, counsel. I don't know.

Mr. Strachan: I don't know where we got it if the officers of this court in charge of the plaintiff's affairs didn't furnish it, your Honor.

The Court: You apparently made the photostats, so you must have had the original when you made the photostats.

Mr. Strachan: And returned it to them.

The Court: Who did you return it to, and who returned it? Let's find out where the original is.

Mr. Strachan: If I could get Mr. Williams over here I could probably find that out.

The Court: Look into it tonight. Let's get the jury down.

Mr. Strachan: Can we use it subject to its being connected up?

The Court: Start in and lay what foundation you can, but if there is an objection to the foundation, you can't pass it to the jury until a foundation is completed.

Mr. Strachan: We are going to hit this right away.

Mr. Dixon: That is why I am raising the question.

The only information that we have with reference to this—and that number is apparently Mr. Williams' number for his own information—it is purported to be work papers for the month of September, whatever that means, 1951. Work papers. It is not part of the books or records of this [2910] company.

Mr. Strachan: Where does it say work papers? It says Cost Analysis Month of September.

Mr. Dixon: This is Mr. Smith's record of what was made available to Mr. Williams.

Mr. Strachan: I am talking about the face of this document. Winckler & Smith Cost Analysis Month of September, 1951.

Mr. Fisher: One of the items of the discovery was cost analyses prepared by the plaintiff Winckler & Smith. I think, given a few moments, I will be able to identify that file.

Mr. Dixon: We want to know who made it, the source of it——

Mr. Strachan: Ask Mr. Winckler.

Mr. Dixon: I am not asking Mr. Winckler, counsel. I am asking you. You are offering it. You tell us, will you, please?

The Court: The point is this: First of all, it is not books, and probably not records. It is out of files. If it is a work paper, that is one thing. If it has been used for some purpose, that is another.

Plaintiff is at a disadvantage here in connection with this matter. At least Mr. Dixon is, in not being able to say particularly what it is. But take a work sheet, you are working on your income tax, and you have made a work sheet out, but you didn't use it, you found something you wanted to [2911] change, so you made another work sheet out; it is possible that eventually you might be able to hook one of those earlier work sheets up if you are trying to prove fraud, or something, and they might all wind up admissible to show intent. But without being hooked up, they couldn't be used, just a work sheet.

If this has been used by the company, is considered by it as a record, or something, that is one thing. If it is some calculation which did not become final, was not used, that is another thing.

Of course I think the plaintiff has some obligation to try to find out what it is, if it can be found out, if Mr. Winckler knows what it is. He is not here today, and neither is Mr. Williams. If Mr. Winckler knows what it is, and how it was used, that is one thing. Or if somebody who knows what it is is available.

Mr. Dixon: If the court please, Mr. Williams, this is his number, I am informed, this 50. Mr. Williams is the one that got it. And what he got it from, or when he got it, I don't know. No one here can tell me anything about it—and where he got it—except that apparently when thousands of other documents, material, was made available to him back in 1952 or '53, this work sheet—that is what it is referred to as—is listed in Mr. Smith's report. [2912]

The Court: Let's go ahead.

Mr. Strachan: Mr. Fisher is trying to look this up, your Honor. I am very much surprised at this turn of events.

Mr. Dixon: You shouldn't be, counsel.

Mr. Strachan: Because a copy of this was given to Mr. Dixon five or six days ago and I had never heard of any objection up until now. Papers that came from the files of the plaintiff corporation have not required foundation to be laid other than that.

Mr. Dixon: Until you use it, I can't object.

Mr. Strachan: I assumed until this very moment, and I still think it is a fact that this document is precisely what it shows on the face of the record. It is a cost analysis in the month of September. This is a regular form. September has been put in by handwriting. It shows standard costs, referring back to certain accounts accumulated up to August 31, the total accumulated up to September 30. It has many indications right on its face that it is a regular record kept in the ordinary and due course of business. I am quite sure that is what it is.

Unless somebody comes in and says it isn't, it is just a piece of scratch paper, I think it is presumed to have come from their records and to have enough authenticity to be received in evidence, and if there is anything about it that it appears to be that it doesn't prove, it seems to me the [2913] burden is on the plaintiff to qualify what appears on the face of this record.

Mr. Dixon: That certainly is novel, counsel. An unsigned document from which—I don't know what use you are going to try to make of it, but you are certainly not going to charge the plaintiff with anything contained in this unsigned document unless it is done over my objection.

This document, along with, I might say, hundreds of others, your Honor, was apparently secured by Mr. Williams October 13, 1952, in the early part of this case, and the copy which we have to which we are referring, and from which we identify the note at the right-hand corner of this document with the initials for 50, Mel Williams file entitled working papers for the month of September, that is the basis under which they now try to introduce an unsigned document into the record as evidence of the costs of this corporation. Work papers made by whom and for what, and were they ever used or relied upon by the corporation?

The Court: Bring the jury in.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: Let the record show the jury present.

FRANCIS A. REGAN

Direct Examination

By Mr. Strachan:

Mr. Regan, are you familiar with the computations which the witness Hodge made as the basis of his estimate of the loss or profit which Winckler & Smith might [2914] have had if they had obtained 12,000 tons of Valencia oranges in the processing season of 1951 and processed those under the same terms as the TreeSweet Company processed Valencia oranges in that year? A. I am.

(Testimony of Francis A. Regan.)

Q. Have you made any studies to determine whether or not that estimate would be correct or incorrect as a result of having assumed that the processing costs for the year 1951 would have been the same as they were in the processing season 1949?

A. May I have that read back?

Mr. Strachan: I will put the question again.

Q. Have you made any studies to determine to what extent, if any, the estimate was affected by having used 1949 costs instead of 1951 costs?

A. I have.

The Court: By 1949 costs, you mean the year ending January 31, 1950?

Mr. Strachan: 1950; yes. I was using the processing year 1949 as being the year ending with January, 1950.

The Court: All right.

Q. (By Mr. Strachan): What studies did you make in that connection?

A. I examined the costs to the plaintiff for cans, cartons, and labels for the year 1951 and compared such costs [2915] with the amount set out in Exhibit 69.

Q. In order to arrive at an estimate or a computation of the cans, cartons and labels cost, did you make an analysis of the various sizes of cans that were packed by TreeSweet under its contract?

A. I did.

Q. And did you then assume that the canning of juice of this mythical 12,000 tons by Winckler-Smith would have been in the same proportion as

(Testimony of Francis A. Regan.)

the sizes which you found that TreeSweet had used?

A. I did.

Q. Will you tell us how you went about that computation?

A. I determined first of all that under the TreeSweet contract TreeSweet ultimately delivered a total of 2,382,744 gallons of juice, which yield was obtained from a total of 24,148.19 tons.

I then determined from examining the results under the TreeSweet contract the sizes in which the juice was ultimately packed.

As a result of this analysis, I found that .7 per cent of the total gallons was put up in size 48/5½ ounce cans. I determined that 6.19 per cent of the gallons was put in 48/6 ounce cans. I determined that 5.75 per cent of the gallons was put up in 24/12 ounce cans. 19.7 per cent [2916] was put up in 24/18 ounce cans, and 67.66 per cent of the total gallons was put up in 12/46 ounce cans.

Q. What was the next step in your computation after having made that determination?

A. I then determined the manner in which the actual tonnage was packaged. I applied those percentages to the mythical 12,000 tons to determine how many tons would be used of the 12,000 mythical tons in the 5½ ounce and the 6 ounce sizes, and so on. I then used, having been determined the——

Q. How many tons would that be for each of those sizes?

A. This analysis resulted in determining that under that basis 84 tons would be used for the 5½

(Testimony of Francis A. Regan.)

ounce size; 74.8 tons in the 6 ounce size; 690 tons in the 12 ounce size; 2,364 tons in the 18 ounce size, and 8,119 tons in the 46 ounce size. Those individual items total 12,000 tons.

I then used the yield of 100 gallons of single-strength juice to each gallon——

The Court: Each ton.

The Witness: Each ton of raw fruit. I determined then how many gallons would be distributed and packaged in the respective sizes.

The Court: Then by formula reduced it to cases?

The Witness: Then by formula determined the number of [2917] ounces in each size. I determined how many ounces in a case and determined then how many cases would be packaged in each size.

I then determined from the plaintiff's records how much the cans, cartons and labels would cost in each size for each case. Having the number of cases, I then applied that to the cost per ton for each item and determined thereby how much the cost of cans, cartons and labels would be under the contract.

Q. (By Mr. Strachan): And what did that amount to according to the computation?

A. I determined that the total cost of cans, cartons and labels would be $288,992.48.

Q. How does that compare with the amount allowed for those items in the computation by the witness Hodge?

A. Mr. Hodge in his testimony stated that in his computation he used $15.17 per ton for cans, $2.01

per ton for cartons, and $1.17 per ton for labels, a total of $18.35.

Applying that to a volume of 12,000 tons results in a figure of $220,200 even, or $68,792.48 less than I have determined Winckler & Smith would have had to pay for cans, cartons and labels in the respective sizes.

Q. That is your computation as to the amount by which the use of 1949 costs reduced the estimated cost in the Hodge computation; is that [2918] correct? A. That is correct.

Q. Now, have you made any studies to determine the selling expenses that should be allocated to the sale of the product of this hypothetical 12,000 tons had Winckler & Smith processed and sold that tonnage? A. I did.

Q. Will you tell us what studies you made in that connection?

A. My study included a review of the selling expenses as appear in the books of the plaintiff for the years 1949 through 1952, and also for the years 1946 and 1947—rather, the year ending January 31, 1947, and the year ending January 31, 1948.

Q. Will you tell us what kind of a review and study you made?

A. As to the years February 1, 1949, through January 31, 1952, I determined what accounts were included among the sales expenses.

Q. And what accounts did those include?

A. I do not have that paper on the stand with

(Testimony of Francis A. Regan.)

me at the present time, but generally from memory, the accounts, the expenses included salaries and commissions to salesmen, brokerage, freight out, advertising discounts and probably 10 more accounts, all of the type that would be related to the distribution function of a business, the selling effort [2919] of the business.

Q. Based on that review of the accounts, what conclusion did you reach?

A. Reviewing the sales accounts and sales expenses over the years I noted the relationship between the sales expenses and the amount of sales that that sales effort covered by the expenses produced.

I noted that in the year ended January 31, 1952, the expenses, included none related to the sale of single-strength juice. [2920]

Q. That is the expenses actually incurred?

A. That is right.

I found that over the years the company averaged about 8 per cent of its sales in selling expense.

I also recall that Mr. Winckler testified that that was the amount of sales expense to anticipate in the distribution of single-strength juice.

I had previously calculated the 8 per cent prior to that time, however.

Based upon the review of the expenses it was my opinion, based upon that examination, that the company would experience an 8 per cent ratio to sales in selling expense to market additional product.

Q. Is it your opinion, based upon that study, and also upon your experience as a public accountant,

(Testimony of Francis A. Regan.)

that sales expense does vary in practically direct proportion with the volume of sales?

A. I have found that within my own experience. And I have also known that often sales expense increases as volume goes up, as the result of the amount of effort that must go in to produce the last dollar of sale. To increase demand, often sales expense will increase in volume and in percentage to the amount of sales that are produced.

Q. Then, I take it, that based on your examination with respect to this particular case, and upon your experience [2921] generally, your study of this subject of selling costs, you think that an allowance of 8 per cent for Winckler & Smith's selling costs on this additional volume would have been experienced, is that correct? A. That is correct.

Q. Now, as a result of that, what is the difference between the selling expense that you would attribute to this additional tonnage over and above what was allowed in the computation of the witness Hodge?

A. Mr. Hodge in his computation included an item of 3 per cent for brokerage, or $22,500, as the additional expense that would relate to the additional 12,000 tons.

Q. Would that brokerage be included in but only a part of this selling expense as you have computed it?

A. That brokerage would be a part of the 8 per cent, the same as the 1½ per cent discount and other related expenses to the distribution of the product, it would be included in my 8 per cent.

(Testimony of Francis A. Regan.)

Q. Now, will you tell us approximately what is the excess by which your computed selling expense would exceed that allowed in the Hodge computation?

A. I determined that the sales expense would be at least $60,229.62 total, which is approximately or should be $34,729.62 more than was allowed by Mr. Hodge in his computation. [2922]

Q. Is it 34 or 37?

A. Pardon me. Thirty-seven thousand.

Q. What is the correct figure?

A. $37,729.62.

Q. Did you, likewise, make a study concerning the general and administrative expense that would have been incurred had this additional 12,000 tons been processed and the product disposed of by Winckler & Smith? A. I have.

Q. Will you tell us what studies you made?

A. I examined the general and administrative expenses for the three-year period, the years ending January 31, 1950, 1951, and 1952, along the same lines as I have testified relative to my examination of the sales expenses.

Q. Now, will you mention some of the accounts included in that general classification which would be increased as a result of the increased production in sales activity attributable to the assumed 12,000 tons?

A. Well, the administrative expenses, as carried in the plaintiff's records, included the expenses related to the operation of the office of the company,

(Testimony of Francis A. Regan.)

costs related to the maintenance of records, costs related to the maintenance and preparation of payroll records, correspondence expense relative to correspondence, expenses of that type, anything related to the operation of the office functions of the [2923] company.

Q. Were you able to form an opinion as to the approximate amount which should be allowed for additional general and administrative expenses to provide for the processing and selling of the 12,000 tons? A. I have.

Q. Will you tell us how you did that?

A. I reviewed the records, particularly of that last year, and noted that the company on its books had total administrative costs of $93,000. And during that year they produced and processed 8,000 tons of raw fruit. I then examined those accounts to determine to what extent those costs would be increased if in addition to the 8,000 tons the company processed 12,000 additional tons. Based upon that examination I estimated that the administrative expense that would be increased—the increase in the administrative expense would be no less than $40,000 and somewhere between $40,000 and $60,000.

Q. That is assuming that the operations would have been increased by—well, to about 250 per cent of what actually occurred, is that correct?

A. That is correct.

Q. So the 250 per cent increase in processing and selling activity would, according to your compu-

(Testimony of Francis A. Regan.)

tations, have increased the general and administrative expense from what— [2924] $93,000?

A. Well, if you start with a base of $93,000, it should fall somewhere above 133, putting that 12,000 tons on top of the actual production.

Q. Have you examined the computation of the witness Hodge, as testified to by him, and as illustrated on Exhibit 69, for the purpose of determining how much general and administrative expense he allowed for in his computation? A. I have.

Q. Would you tell us about the study you made and the results of it?

A. Well, examining 69 I first note that—and I am referring to the longhand insert in the upper part of the exhibit—there is a statement in brackets, "Includes $56,417.38 G and A." I add that $56,417.38 to an amount that Mr. Hodge added subsequently in his computation of $37,296.11, and I find a total of $93,714.49, which is the exact amount of the general and administrative expense that the company experienced in that year. However, I then looked at the figures that Mr. Hodge used in arriving at his $34.06 cost per ton. That $34.06 per ton cost is identified on Exhibit 69 as W and S processing cost computed on 1949 basis, and then in brackets follows the statement "Includes $56,417.38 G and A." The total per ton is $34.06.

In his testimony Mr. Hodge included therein an item of [2925] $3.07 for G and A, general and administrative expense. If I multiply $3.07 by 12,000 units, I find a total of $36,840.

I cannot come up with $56,417.38, which that figure is supposed to include.

Q. The consequence of that is that in the Hodge computation there has been omitted approximately $20,000 of the $93,000 of general and administrative expense, which actually was incurred?

A. That is correct. The actual figure is $19,577.38.

Q. So that instead of having increased the general and administrative expense due to the expanded activities in connection with the 12,000, the Hodge computation has actually allowed for less than the experienced general and administrative expense?

A. That is correct. The amount that is included is less than they actually had for the entire year.

Q. It is approximately $70,000, is that correct?

A. About that. About $74,000.

Q. And that differs by how much from what you think would have been the minimum general and administrative expense?

A. It would differ to the extent of $59,577.38.

Q. Now, in addition to those matters have you made any studies or computations to determine whether there was anything omitted from the Hodge computation, as made in the testimony, and [2926] as illustrated on Exhibit 69, by which the actual cost of the raw fruit has been assumed to be less than the raw fruit would have cost or did cost the TreeSweet company under its processing contract?

A. I have.

Mr. Dixon: If the court please, I object to the question, since there was no evidence and no con-

(Testimony of Francis A. Regan.)

tention made by the plaintiff that any cost of Tree-Sweet would be incurred under the contract for the fruit.

The Court: Can we incorporate here our discussion in the absence of the jury? Can there be incorporated here our discussion and positions of counsel made in the absence of the jury?

Mr. Strachan: I think procedurally that is quite acceptable, your Honor.

The Court: Probably this question is not objectionable, but what it leads to I am going to sustain an objection to.

Can you go into something else and take that up as soon as the jury leaves?

Mr. Strachan: I would like to take it up now.

The Court: It is almost 4:30. You will get off two minutes early.

Ladies and gentlemen of the jury, you are excused until 10:00 o'clock tomorrow morning. Remember the admonition of the court. Court will remain in session. [2927]

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury absent.

Mr. Witness, there is one thing I didn't follow you on. You gave what you called an increased processing cost—$200,000, was it?

The Witness: An increase in processing costs over the actual costs, your Honor.

(Testimony of Francis A. Regan.)

The Court: Over the 1949 cost as computed by Hodge?

The Witness: The cost that I was testifying to referred to cans, cartons and labels.

The Court: Yes.

The Witness: And in respect to the cans, cartons and labels cost the increase was $68,792.48 over the cost that Mr. Hodge used. Whether they were the 1949 costs is a question that I did not resolve in my own mind. It is the cost he quoted as the 1949 cost.

The Court: Is that figure shown anywhere in BS for identification?

Mr. Strachan: I think we can derive it, your Honor.

The Witness: It would be, sir.

Mr. Strachan: I believe on Schedule I, which is at the top of the third page, you have the can cost, the carton cost, and label cost by size. I think it is derived from that, is it not, Mr. Regan?

The Witness: What page was that?

Mr. Strachan: On the last page under the Schedule I.

The Witness: That's right.

Mr. Dixon: If that is the source of it, then, counsel, I would like to inquire of this witness where he got that information, as to whether it is based upon this Exhibit BR.

The Witness: BR?

Mr. Dixon: I mean for identification.

The Witness: Yes, sir. It is based in part and

(Testimony of Francis A. Regan.)

in part on the actual invoices appearing in the records of the plaintiff now in the Sunkist Building, the invoices which we have segregated and which are available over there.

The Court: So far I am only concerned with this. I was following some of your matters such as on page 2 of BS, A, TreeSweet Production, B Plaintiff Production, and then you branched off into this matter which I thought pertained to some of your figures on I, but I did not go further.

The Witness: Yes.

The Court: Now, what do you offer to prove, Mr. Strachan? That this witness made a computation involving the oil part of the product and made a computation of what would be returned to EOP under the TreeSweet contract and arrived at the figure of $114,127 as shown on the Exhibit BS, and if Winckler & Smith had processed the same oranges, for the oil product there would have been returned to EOP only [2929] $39,262.50, and that, therefore, there would be less of a return to EOP in the case of Winckler & Smith, the difference being $74,864.

Mr. Strachan: I don't think that is the way I would express the offer, your Honor. I think I would express it this way.

I offer to show that commencing with, I believe it is Exhibit 67, it appears from the plaintiff's exhibits that the cost of raw fruit to the processor under the TreeSweet arrangement was determined by two factors. One is the amount realized from

(Testimony of Francis A. Regan.)

sales of juice after deducting certain allowances and paying certain costs. The other is the value of oil after paying certain costs.

The Court: Now, that is not the cost of the product to the processor. This may be Sunkist's return.

Mr. Strachan: I don't distinguish between the cost of raw fruit to the processor and what the processor gives to the vendor of the fruit for the raw fruit, and because of that I would show——

The Court: Maybe we will save some time. I don't agree with you. You can bring out from this witness his computation on oil return under EOP, but don't have it tied in with 69. When you want to get ready a compilation, you can submit one you have got and you can submit another one. I will sustain objection to the one you have got and you can use [2930] another one.

Mr. Strachan: As long as we are talking about not referring to Exhibit 69, I will make an offer to show, if allowed to proceed with this line of examination with this witness, that the computation as illustrated on 69 and as testified to by the witness Hodge does not include in the costs to the processor the portion of the cost of raw fruit that is represented from the return of oil, but deals only with such part of the cost of the fruit as is met by the return from juice sold, and that therefore the computation of Hodge, both from testimony and in the exhibit, constitutes an erroneous computation of the gain or loss from processing

(Testimony of Francis A. Regan.)

the hypothetical 12,000 tons, and results in a statement of profit according to Hodge instead of a loss if the full cost of the fruit were taken into the computation.

The Court: Just a minute. That offer is made in connection, solely made in connection with your contention that this can be tied in in a comparable computation to Exhibit 69. I am going to permit you to make computations about this oil otherwise, so I take it this offer of proof now is limited to a contention on your part that you may use this computation to make a comparable computation with that of Exhibit 69.

Mr. Strachan: I wouldn't so limit it, your Honor. I would say that that offer of proof is an offer to show that there has been a basic omission from Exhibit 69. [2931]

The Court: Then you are saying the same thing.

Mr. Strachan: I may be.

The Court: You are talking about 69. Mr. Dixon?

Mr. Dixon: Your Honor, I can only repeat what I have said before with reference to this testimony that is being offered on the oil question.

The Court: Well, if you can only repeat what you have said before, then it can be repeated by reference.

Mr. Dixon: Yes.

The Court: You object on that ground?

Mr. Dixon: Yes, I object upon that ground.

(Testimony of Francis A. Regan.)

The Court: Objection sustained to the offer of proof, only insofar as it purports to be some comparison with 69, because I think you and I understand each other that I am going to permit you to make calculations about oil separately, but not talk about that in comparison with 69. The objection is sustained for the reason that 69 was a computation of what Winckler & Smith would have made had they had 12,000 additional tons.

Assume they get it on comparable terms, namely, they had to return the oil to EOP, as did TreeSweet, then whether or not Winckler & Smith's oil recovery was more efficient or less efficient than TreeSweet's is beside the point, and any comparison of this calculation with 69 which takes into account what EOP would have received from the program is [2932] not proper as a comparison with 69 and would be unfair and would confuse the jury.

That it is proper to have in this record, but not as a comparison to 69, what EOP would have gotten out of the deal.

Now, there is still one loose end on it, that is that although I am not going to permit you to show that Winckler & Smith's recovery for comparison purposes—not going to let you show for this comparison purpose Winckler & Smith's recovery was less than TreeSweet's would have been, it still may be a factor of—well, let me understand this. TreeSweet turned the oil back to EOP?

Mr. Dixon: Yes, your Honor.

The Court: Turned the oil recovered back.

(Testimony of Francis A. Regan.)

Mr. Strachan: What's that?

The Court: TreeSweet turned the oil recovered back to EOP.

Mr. Strachan: They were paid a fee for extracting the oil and turning it back.

The Court: Now, my question is, would it be proper to show what Winckler & Smith would have been paid for extracting the oil?

Mr. Dixon: If the court please, if the defendant here can show that Winckler & Smith would have lost money in the operation of extracting the oil under the contract with TreeSweet, [2933] that evidence, I suggest, might be competent to show, along with anything else they can produce, that the contract would have been a losing contract to the plaintiff.

The Court: That is what I have been thinking about.

Mr. Dixon: But the other has no relevancy.

The Court: Defendant would be permitted to show what Winckler & Smith would have been paid for extracting this oil and what it would have cost them to extract the oil.

Mr. Dixon: Right.

The Court: As part of this computation, this comparable computation. That has nothing to do with other proof that you offer independently on the other issue, namely, should Sunkist have given Winckler & Smith this contract for processing, Sunkist's return under the oil would have been less than its return would have been had the contract been given to TreeSweet. That comparison independently of this problem that we have got now——

Mr. Dixon: That would certainly——

Mr. Strachan: I think it would be highly prejudicial to the defense here to allow that Exhibit 69 to go to the jury as if it is a comparison of comparable and similar terms, when actually it has as a basic fallacy underlying it the assumption that Winckler & Smith for some reason that nobody can explain would have been allowed to get 12,000 tons of fruit at about $7.00 a ton less than TreeSweet actually had to pay for it. [2934]

The Court: No. Look, look. I don't follow you at all. The assumption is that Winckler & Smith would have got 12,000 tons. You can attack that assumption, and you can attack that assumption on the basis that they wouldn't have got it, under your contention, because, for one reason Winckler & Smith's—if you can prove this—Winckler & Smith's processing of oil was less efficient, since the oil went back to Sunkist, and therefore Sunkist could have got a better return from TreeSweet, and therefore they wouldn't have given them the contract.

But Exhibit 69 was based upon that assumption. If it is bad, all right, but don't mix the matter up by the difference between the attack on that assumption and a contention that in figuring what Winckler & Smith would have made, which is what you finally arrive at in BS, you can take into account

(Testimony of Francis A. Regan.)

what EOP would have received from the oil transaction.

That is the departure from logic.

Mr. Strachan: Your Honor, I don't think there is a departure from logic, if you take a look at Exhibit 67——

The Court: 67, Mr. Strachan, was a comparison on a different basis. It was a comparison of what the situation would be if plaintiff went out and bought $40 fruit, and what the situation was with TreeSweet, and Silzle, who were not buying $40 fruit but had these contracts.

Mr. Strachan: All right. Now we take the next step. [2935] We are assuming that the plaintiff, instead of buying $40 fruit is buying fruit on the same terms and conditions that TreeSweet bought. So we look at the second page—we look at the last page of Exhibit 67 and we find out, or 66—it is 67, the foot of the second page of 67, the amount per ton Sunkist obtained for oil and peel, $10.81.

The Court: I am not going to talk about this further, because I have made it clear, certainly because there the comparison was what did Sunkist get for their fruit through the Silzle and TreeSweet contracts, what did Sunkist get for their fruit when they sold to the plaintiff at $40 a ton. That is the comparison.

The only thing that I am limiting you on the offer of proof that I sustained an objection to was to make a comparison to 69 by this oil product busi-

(Testimony of Francis A. Regan.)

ness. I am not limiting you from proving what you want to about oil product, but I don't think it is fair to inject that and tie it up with a calculation that is supposed to be comparable to 69.

Mr. Strachan: We both have our views. Perhaps there is room for a difference of opinion, your Honor.

The Court: Maybe. Maybe I am wrong, and maybe I am right. But I haven't made this decision here; I have been over it two or three times. I told you in the record Friday night how I reasoned it out, and I talked to you again about it. [2936]

Is there anything further?

Mr. Dixon: Your Honor, of course, I object, further, to this exhibit on the ground that the foundation has not been laid for some of the figures that are contained in it.

The Court: This exhibit hasn't been offered. He made an offer of proof orally as to what he was going to prove, and the offer was tied up and limited to comparisions with 69. [2937]

* * *

The Court: The record will show the jury absent.

Mr. Strachan: May it please the court, I asked for this conference so we could take up some matters having to do with documentary evidence.

The first matter I would like to have presented is the question of the necessity of foundation for the admission of the document that was identified as Exhibit BR, which was a schedule from the cost analysis records of the company. I have asked Mr. Williams and Mr. Stark, who participated in the discovery procedures, to discuss that matter.

The other matters that I want to take up arise out of discussions we had Friday and at other times yesterday concerning the documents having to do with our analysis of costs and profit and loss on the 12,000 tons, and in particular I would like to discuss with your Honor three new documents that we prepared last night, and I submitted them this morning to Mr. Dixon.

I would like to have those discussed in advance so we won't unduly disturb the jury or delay it. [2941]

The Court: Have they been marked for identification?

Mr. Strachan: They haven't as yet. I can have them marked.

The Court: Mark them. [2942]

* * *

Mr. Stark: Your Honor, with regard to the exhibit identified as BR, which appears to be a cost analysis, I would like to state for the record the background of that exhibit.

On July 9, 1952, a motion under Rule 34 was filed by Exchange Lemon Products Company in which the fourth category requested was, "Cost analyses prepared by or for plaintiff and work sheets used in the preparation thereof." That motion was argued on September 8, 1952, and we took the various items in the motion one by one, and at page

60 of the transcript on that argument we find the only reference to that category, at which time Mr. Reich simply stated that he was prepared to furnish the cost analyses which were requested.

The Court then orderd the inspection of documents in the Winckler & Smith plant on October 13, 1952.

At the time of that inspection Mr. Fisher, Mr. Williams and myself were at the Winckler & Smith plant, and in a room adjacent to Mr. Winckler's room were furnished documents stacked on a table which were in answer to the categories requested.

This particular document, cost analysis, and companion documents of a similar nature were the only ones answering this category which were furnished.

Mr. Williams was actually in charge of the physical inventorying of these documents, did the marking of the documents, [2944] and I think probably can give a little better statement from the time we got to the plant as to how we acquired them and how the documents were found, but they were specifically covered in the discovery order which was entered in 1952.

Mr. Williams: The process we followed, your Honor, was to put a number on the documents that were shown to us so they could be identified in the future as having been displayed to us. That procedure was followed here. Exhibit BR is a part of a general file to which we gave the number 50, and each page of that file was given a sub-number, 50-1, 50-2, and so forth.

That file 50 is one of a group of files of cost analyses running over the years mentioned, 1950, and all of 1951, and the files are similar in nature.

After we put the numbers on the documents, the documents were taken out to a microfilm machine operated by an operator from Remington-Rand who brought the machine down there right in the plant. The documents were microfilmed and then they were reassembled in the same order in which we received them and were turned back to the Winckler & Smith Company.

I find in looking at our files that I have with me today the files from No. 44 through No. 52. 44 is a group of papers for the month of March, 1951. They run through November. Each one of these files has in it a cost sheet like Exhibit BR. The first one for March is a handwritten sheet. Each of the [2945] next ones are either typed or mimeographed. I cannot tell from the copies that we have. The figures are the same as to cans, cartons and labels on these exhibits, insofar as the typed figures go.

The Court: You say a file for each month?

Mr. Williams: There is a file for each month.

The Court: Beginning with what month?

Mr. Williams: The file I have with me begins March, 1951, and runs through November, 1951.

The Court: And other papers in the file, [2946] too?

Mr. Williams: Yes, there are quite a number of sheets in each file. The first one is about 29 or 30 pages, and they run about that number for each file.

The Court: We ought to make some kind of a record here. Do you concede what Mr. Williams has said and what Mr. Stark has said as being correct, Mr. Dixon?

Mr. Dixon: I am in no position to question them, your Honor, and if counsel says that is what happened, states that as his statement, that is sufficient for me.

However, I think, as I stated yesterday, the only record that we have on this matter at all is a copy of a summary of some 75 files that were apparently turned over to Mr. Williams and Mr. Stark, and/or Mr. Fisher, during the week of October 13, 1952, in which there appears the number 50, along with the other numbers, and a lot of other different symbols and numbers, and on the 50 number, which is apparently the one that Mr. Williams put on Exhibit BR, the only thing that we have is the statement, "File entitled Work Papers for Month of September, 1951." That is as far as the identification of this document goes.

I am not questioning the fact that this BR has at the top what is contained on the document, of course, and that it undoubtedly was among the material, the vast mass of material, apparently, that was turned over to the defendants during this week. However, my objection goes to the document [2947] on the ground that it is not the best evidence of what it purports to contain, that it is not identified as to who made it, it does not show on its face whether this is a work sheet in preparation for a computation of a final statement, or to just what the product refers. I mean this witness has endeavored to refer to this document in making his computation as indicating and relating to the cost of single-strength juice. It is not in dispute, your Honor, in the record, that there was no single-strength juice produced by the plaintiff during the year in question, in which this report was apparently prepared, particularly the month of September, 1951, or during the entire processing season of 1951.

Now, we are asked to admit this document as indicating the basis from which this witness, Mr. Regan, computed his figures, with reference to the cost of processing single-strength juice by this plaintiff in the year 1951.

As I indicated a moment ago, I know the rules of evidence are liberal with reference to the admission of documents, particularly where they are contained or taken from the files of the party against whom the document is attempted to be used. But here we have something that is obviously contained in a work file, a work paper file. It is wholly unidentified as to who made it. We have no opportunity whatever to cross-examine anyone, assuming that it would be desirable to do so, to determine the basis under which this document was made. [2948] as to whether it was just a guess. I don't mean a guess, but a computation that was prepared for comparison purposes, or for what purpose this was prepared.

So that it seems to me that there must be a greater foundation laid for the use of this document than merely to contend that because it was contained in a working paper file, along with literally thousands of other documents, the file being entitled "Work Papers for Month of September, 1951," that it is usable against the plaintiff in this action for the purpose for which it is endeavored to be used. And I again say that let's assume that it was properly identified, let's assume that this was part of the records of the company, the fact still remains, your Honor, that this record at this stage of the proceeding clearly shows that this company, the plaintiff here, against whom this document is intended to be used by the witness, did not produce any single-strength juice at all in 1951. [2949]

The Court: Well, that point I don't agree with you on, because although I think there was some small amount of juice produced, I don't think there was any produced in September.

Mr. Dixon: Well, that was for samples, yes, your Honor. I am excluding that. There was none sold.

The Court: You have injected into the case this suppositious 12,000 tons which you say you could have made and therefore an issue arises as to what would it have cost you to have made it.

However, the other part of it does give me some concern. This document was obtained in October, 1952.

Mr. Stark: That is correct.

The Court: We have had all this time whereby a deposition could have been taken or an interrogatory requested for admission. All those things could have been done. Any one of them would have put plaintiff on notice that this was a document you were going to use. The fact that you took hundreds and thousands of documents, that you microfilmed books and all, doesn't supply the requirement that there should be some notice to the parties as to what you are going to use, which of them you are going to use. And more important, you took no steps to identify it.

In my thinking, I draw a big distinction between such things as books and records, journals, checks, contracts, and as to all those things there has been no question. When they [2950] are produced, the plaintiffs say, "That's right, that is part of our books and records."

But when you get into the field of work papers, even though this has at the top the statement, "Cost analyses," you get into another field.

Now, take your work in working on a case. You certainly wouldn't want to feel some work papers you prepared, just leaving out the work product exemption, but some work paper you had prepared, a complaint or some tentative computation, would be binding on you unless there was some showing it was something you had relied on or used, or take a computation you made for income tax purposes. You might have a series of work papers.

Now, in criminal prosecutions for income tax violations, there are cases where work papers upon being identified and tied in with some final result can be used, but they still don't come in just because they are work papers. You may find a work paper where a man has been juggling around a certain figure and trying it in various places, and then the figure winds up somewhere else and it is proved it was in his handwriting, and the first thing you know the work paper then becomes admissible.

It seems to me that the difficulty here is: was this a cost analysis used by the company which they should be bound by, and it seems to me, also, that there may be other ways [2951] to identify it.

You apparently have had some very good auditors here. I notice here Account 430, 9/31/51, $71,000, less Account 430, 8/31/51, $61,800.

We would assume that these accountants have run those figures down to see where they are tied into the books of the company.

Mr. Stark: Your Honor, if I may make a couple of comments on this, so far as our not having notified the plaintiff or not having taken further depositions, or anything of that nature on this subject, Mr. Strachan stated yesterday this comes as a complete surprise to us, because we checked specifically, and it was ordered specifically in a separate paragraph that they produce cost analyses, and in the documents which were produced for us were these sheets which are labeled cost analyses, and although the file may be titled, whether by Mr. Williams or by the company, I am not sure, on the original certainly, the sheet Mr. Dixon has, is a list which Mr. Williams made for his convenience, but the original file may be titled work papers.

But the way the papers are kept does not indicate they are work papers in the sense of scratch papers.

They are an orderly series of summations on all of the different subject matters that the company's bookkeepers and accountants would keep in a month. They were classified together in one file, [2952] a file for each month, and they were furnished to us in answer to a request for their cost analyses.

To say now that these are not the cost analyses and we should furnish them more foundation as to what these are seems to me to come at the thing backward. We specifically asked for it. This is what was produced. We feel we are entitled to rely upon the face of the document and the fact that it was produced to us in reply to that request.

The Court: Now, if in the ordinary case where such a request was made and a pleading or a document was filed saying, "Here are the cost analyses." I don't think there would be any question that you are right.

Mr. Stark: No, that is not the——

The Court: But we both know what the situation was here where you had to look at the files and the files were turned over to you to look at them.

Mr. Stark: No, your Honor.

The Court: As far as producing for you specified papers, even your statement here shows that——

Mr. Stark: No, your Honor.

The Court: ——that these files were turned over to you and you indexed the complete files as they were. [2953]

Mr. Stark: This situation, your Honor, you must recall is not the situation which existed in the latter stages of discovery. At the time of this discovery

Mr. Walker was employed and being paid $500 a month to operate the plant, Mr. Smith was at the plant full time, Mr. Pendergast, the fruit buyer, was at the plant. The plant was in operation. It was a going business, be it all in the possession of a trustee. We were not given freedom to go through the files. These were specific items which were laid out and were produced for us.

And, in fact, I recall in the particular instance asking for something not covered by the order and being informed by Mr. Smith that those categories had been segregated and we were not to have anything other than those categories. Which was entirely proper. But I think it is indicative of the state of the plaintiff's business at that time.

It is our position that these are business records kept in the normal course of business. They are not work papers assembled and thrown away, but they were business records entered on a mimeographed form, filed in a file monthly, and whatever Mr. Dixon's objection seems to me, it seems at most to go to the weight of the evidence and not to its admissibility.

As far as not being able to identify who it was that prepared the document, that surprises me, because we had a [2954] rather definite understanding, so far as I was concerned, between Mr. Dixon and myself, before this trial began, that documents coming from the files of either company that had been produced on discovery would not require foundation of that nature, that is, technical foundation.

Certainly on the basis of that understanding we made no objection to the production of any of the documents that we furnished. I mean made no objection.

The Court: That is generally true, because so far we have had contracts and checks, letters, and things of that sort. You should, in fairness, concede that at least we are in a little different field than these other documents.

What about this matter of tying this in to the records? Have your accountants checked to see whether these figures correspond with figures in these records?

Mr. Strachan: Yes. Some of them do. I am not sure how completely we can do it.

What the accountants have done with respect to BR, for example, is to examine vouchers for the purchases of cans of certain sizes, and certain cartons, and certain labels. They haven't been able to get every size and every kind.

The Court: Have they specifically looked at account 430——

Mr. Stark: I am informed that the items you mentioned, the specific account references, have been checked and do tie [2955] into the records. But that doesn't mean every item on the page.

Mr. Strauhan: I would just as soon have Mr. Regan tell you to what extent he is able to tie it in, your Honor.

The Court: Mr. Regan, you have been sworn; just come forward and let me ask you some questions.

FRANCIS A. REGAN

the witness on the stand at the time of adjournment, having been heretofore duly sworn, was examined and testified further as follows:

The Court: You have been sworn.

On Exhibit BR, under the column on cans, appear the words Total Account 430; that is an account number of Winckler & Smith?

The Witness: Yes.

The Court: And the figure there after that is 9/30, '51, and then a figure of 71,545.89. Did you check and find that figure in the books of Winckler & Smith?

The Witness: Yes.

The Court: And the one below is Less Account 430, 8/31, '51, 61,800.33. Did you find that figure?

The Witness: Yes, sir.

The Court: Did you find, also, this item Total Charge This Month $8,053.20? [2956]

The Witness: No, sir.

The Court: The same would be true with the column under Cartons, did you find Account 431 and those entries?

The Witness: That is correct.

The Court: But did not find the total charge this month?

The Witness: That is right.

The Court: What would be your explanation that you found no corresponding figure to the total charge this month?

The Witness: Immediately above that total charge figure is a variance of an amount entitled some sort of variance. That figure I could not find in the books, and that is included in the total figure. The total figure, as I recall, includes the change in the account balance, plus or minus that variance figure.

The Court: Do you know what that variance figure is?

The Witness: No, sir.

The Court: You don't know what it means?

The Witness: No.

The Court: You couldn't figure it out?

The Witness: It didn't enter into my computations.

The Court: You couldn't fit it in?

The Witness: I made no specific attempt to. I couldn't find it in the books.

The Court: It is the difference between what is called Total Standard Cost, the 8,841.64, and the item called Charge [2957] This Month, is it not?

The Witness: I would have to look at that. I believe it is.

Mr. Strachan: Do you have the books here?

The Witness: I may have a copy of that specific one.

The Court: It can't be that, either.

The Witness: As I recall, that is not the difference, your Honor.

Then, in addition to checking those balances, I did examine purchase invoices, and did locate and tie in the unit figures appearing under Cans and

Cartons, not in all cases for all sizes, but in some cases, to the figure appearing on there, to the extent that I believed that at the time that check was necessary—was satisfactory in order for me to use that in my analysis.

The Court: That is all that you were able to identify as far as matters in books?

The Witness: Could I look at that again, sir?

The Court: Yes. I am looking particularly at some other account numbers shown below.

The Witness: On this particular one, your Honor, which is September, 1951, the figures down here are obliterated, but I believe in other months those totals may appear, and I feel reasonably sure that I would find the corresponding figures tied into the books. [2958]

The Court: You weren't able to take any of these figures and reconstruct them and find them in the books, like Less 432 Account, it looks like 9824.69?

The Witness: On this particular one I did not, but on others I have.

The Court: How many of these summary sheets are you going to use?

Mr. Strachan: We have March through November.

We had intended only to use this one.

The Court: In checking for the use of this one you made similar checks on others to tie in, for instance, items such as at the bottom 432 and 390-1, and so forth?

(Testimony of Francis A. Regan.)

The Witness: Yes, sir.

The Court: And although the figures here were mixed up a bit on others, you could make a check?

The Witness: On others I could. I didn't check all of them, your Honor, but to the extent that I felt I established a relationship between that and the general books of the company.

The Court: I think sufficient foundation, in view of all the facts, can be laid for this document. I think the thing that satisfies me is the tie-in with some figures in the books.

If you tie in at least one, it would indicate that there was some tie-in with the books, and that this, therefore, was some kind of a cost analysis that had some relationship to the [2959] books.

The matter of weight is a matter of cross-examination and all that. But that satisfies my concern, and upon some foundation being laid in front of the jury, unless something else develops, I will probably admit BR.

Mr. Strachan: I don't think, for my purposes, that I need do anything before the jury. If it is agreeable to your Honor, and not objectionable to Mr. Dixon, I would just as soon offer it in evidence at this point.

The Court: And then let Mr. Dixon cross-examine?

Mr. Strachan: That is right. I don't think it has any particular jury importance.

The Court: All right. Then BR will be admitted.

The objection is overruled, and it is subject to cross-examination by the plaintiff.

* * *

Mr. Dixon: Your Honor, I would like you to understand that my two exhibits that I offered yesterday are not yet in evidence. [2960]

The Court: Exhibits 79 and 80, ruling was reserved. Do you again offer them?

Mr. Dixon: Yes, I do, your Honor.

The Court: During the time Mr. Lynch was on the stand you asked that ruling be reserved pending redirect, and we finished with Lynch. He now again offers them, 79 and 80.

Mr. Dixon: Yes.

Mr. Strachan: I object to them as being irrelevant and immaterial, and they shouldn't be admitted because they weren't disclosed to us prior to the time they were identified here. [2961]

The Court: Well, if there is any merit to that objection, that comes under the heading of impeachment, and impeaching documents are always treated in a different category. The objection is overruled.

Exhibits 79 and 80 are received in evidence.

The Clerk: Plaintiff's Exhibits 79 and 80 in evidence.

(The exhibits referred to were marked Plaintiff's Exhibits 79 and 80 and received in evidence.)

The Court: Now, the next matter you wanted to take up?

Mr. Strachan: I would like to discuss Exhibit CB and tell you what we did, tried to do in that exhibit. In our discussions yesterday and also last Friday, your Honor indicated that we would be permitted to put in an exhibit for the purpose of rebutting Mr. Hodge and Exhibit 69. I have had the witness already testify as to what differences there were between his method of computation and Hodge's.

On Exhibit CB we set up three columns showing the items as taken from Exhibit 69, the adjustments by our accountants, as showing the amounts of adjustments, and in the third column we have combined or consolidated Exhibit 69 with the adjustments to show the exhibit as adjusted.

The Court: And you don't have in CB anything about oil?

Mr. Strachan: There is nothing in CB about oil.

The Court: Then I would say your CB complies with my requirements and it is subject to cross-examination. You [2962] covered these figures, some of them, in fact most of them have been covered, I guess all of them have been covered in the record.

For example, Winckler & Smith selling expense, 87,000, comes from 69. The 22,000 comes from 69. Your excess G and A, 37,000, comes from 69. Your $19,000 figure was testified to by Hodge, and the 37,000 figure by Hodge. He testified also to the $10,000 figure. I don't mean Hodge. I mean Lynch. Those that are under adjustment.

Mr. Strachan: We would like to have Mr. Regan explain that to your Honor and Mr. Dixon, because it is a new figure.

The Court: Where did the $10,144.46 come from?

Witness Regan: That is an item that——

Mr. Dixon: What item are we talking about? We just got these, your Honor.

The Court: Under the adjusted column, J. A. Lynch, down to before the sub-total figure. Gross Loss on Actual Operations per Exhibit 65 not included by Hodge, $10,000.

Witness Regan: That item for the gross loss on actual operations of the company for the year ended January 31, 1952, is identified as such on Exhibit 65. That item had not been included in Hodge's computation.

The Court: Well, it is in the record because it appears in 65?

Witness Regan: It is in the record on 65. [2963]

The Court: All right.

Witness Regan: However, the reason that is put in here is from the accounting viewpoint these adjustments are now handled as if 69 was the consolidated income for the year ended January 31, 1952, covering the actual operations and in addition the additional 12,000 tons.

Now, in developing that interpretation of 69, I recall specifically that the costs as appearing in Exhibit 65 were traced into 69 by your Honor when you looked at the 93,000 appearing on 65 and traced it into 69, and you looked at the 87,000 and traced it into 69.

Your attention was not called to the $10,000 that had not been taken in. This computation carries that over.

The Court: All right. Now, also, this is an analysis, as 69 was, as to what would be the final result, profit or loss, if 12,000 tons was added to what had already been done.

Witness Regan: Yes, sir.

The Court: In other words, it was not just what did happen with 12,000 tons alone, but what would have happened with 12,000 tons added to what Winckler & Smith had.

Witness Regan: That is down to the figure in the third column——

Mr. Dixon: Where is that? Oh, I see, the third column.

Witness Regan: That's right. The computation at the end represents the actual loss if the year taken into effect [2964] was one which stopped at Hodge's computation at $25,000 on over-all operations with the profit what would result only on the 12,000.

So the computation down through the $254,900.01 is the consolidated return or computation of income, and the last computation at the bottom then traces that back to the 12,000 only.

The Court: Well, you mean it is to the effect of 12,000 tons upon the gross operations? In other words, you have a comparable figure to Hodge's figure of $209,000 of what profit that would have resulted from the combined operations. I take it your figure is the comparable figure?

Witness Regan: Yes, sir.

The Court: Your conclusion is that there would have been a loss of 28,000?

Mr. Strachan: No, it would have increased the loss.

Witness Regan: There would have been a loss of 28,000 on the 12,000 tons, and on the over-all operations there would have been $212,829.03. That is the $184,000 loss plus the other.

The Court: All right. I see what you have in mind.

Mr. Strachan: As to that exhibit, your Honor, I would like to have the witness explain how it was prepared, with copies before the jury, and have him explain just as briefly as your Honor explained it as you ran down it. [2965]

The Court: I think that is proper. This exhibit is aimed at combating 69 and complies with what I have suggested. Do you propose also——

Mr. Strachan: I would like also on that to have the witness state, unless it is ruled improper, I would have him state that in this exhibit there is no account taken of the oil and peel.

The Court: Period.

Mr. Strachan: Sir?

The Court: Period. No account taken of oil and peel, period.

Mr. Strachan: Period.

The Court: That's all right. What do you want to do with CD and CC?

Mr. Strachan: All right. I will tell you about

CC. That takes the computation in BS but eliminates therefrom the portion of the computation which relates to oil and peel.

The Court: Well, now, what is this? Another exhibit in connection with 69?

Mr. Strachan: Well, that is what it is conceived as being, your Honor, because in our discussions yesterday your Honor said that Exhibit 69 had nothing to do with oil or peel, and that was the portion of it that you thought was improper as to——

The Court: I think that CC complies with what I have [2966] been talking about, but now the question is, how many of these exhibits, how many different computations are you going to make?

Mr. Strachan: Those are the only two that do not relate to the oil and the peel component of the TreeSweet contract.

After these, I will try to qualify and would offer in evidence BF as showing computations which he made for the purpose of determining what the fact would be if you took into account return on oil and peel under the TreeSweet contract.

Then I would offer BT as showing how that computation would be combined with the results of actual operations for the year ended January 31, 1952.

The Court: Then what next? CD?

Mr. Strachan: Then I would go to CD.

The Court: What is it supposed to be?

Mr. Strachan: Well, that is a computation showing sales, less cost of sales, including both the juice and the oil components, and giving credits that come out of the same figure as BS except for the item of additional G and A.

The Court: Does it add anything to what you have in BS and BT? It is on the same basis, taking into account oil?

Mr. Strachan: If I can have just a minute with co-counsel, perhaps we can eliminate one or the other, your Honor.

The Court: I don't know if it makes any difference if [2967] I am still of the same mind. I will probably sustain an objection to BS and BT and CD because they are all based on oil.

Mr. Strachan: Yes. Well, we think it is important to get before the jury the fact, which is a fact, that there was a $25 return under the TreeSweet contract.

The Court: You can bring that in, but I am pointing out that in logic it doesn't have anything to do with the getting of the 12,000 tons—well, doesn't have anything to do with Exhibit 69. It might have a bearing on whether or not Winckler & Smith would have gotten the 12,000 tons.

Now, Mr. Dixon made an objection the other night that I hadn't considered. Have you given any thought to that?

Mr. Strachan: I don't recall it.

The Court: Namely, his contention that from the standpoint of whether Winckler & Smith's oil processing was less efficient than TreeSweet, you can't rely on that for justification of a refusal to give Winckler & Smith the comparable contract unless you have proof in the record that Sunkist knew about that situation.

Mr. Strachan: There will be proof in the record as to that. But quite apart from that, your Honor, it seems to me that when we are making computations as to whether Winckler & Smith, had they operated under the terms of the TreeSweet contract, would have made a profit or loss, we should be [2968] allowed to show that if they were to have what they call comparable terms, that they wouldn't have had the fruit necessary to produce the juice for $171,000 as compared with the three hundred and some thousand dollars that TreeSweet had to pay.

If they are going to take the gain, they ought to take the cost of the gain.

The Court: I still think you have slipped a cog on that logic, because TreeSweet made the oil and turned the oil over to Sunkist. The return from the increased efficiency of TreeSweet benefited Sunkist.

Now, on a comparable contract, Winckler & Smith would take the fruit, and make the oil, and there would be less return to Sunkist. But that hasn't anything to do with what Winckler & Smith would have made. It may have a bearing, if it is admissible, on whether Sunkist would have given Winckler & Smith the contract.

Mr. Strachan: I think it also has a bearing on whether Winckler & Smith would have made a profit. If they had paid for the oranges the same that TreeSweet did, they would have paid 300,000.

The Court: Wait a minute. You talk about paying. They didn't pay that. They turned the oil over.

Mr. Strachan: All right.

The Court: It is what Sunkist received. [2969]

Mr. Strachan: Then the transaction would have been handled so that, to use the language of the Exhibit 67, there would have been obtained from the oil and peel returned by the processor——

The Court: There would have been obtained by Sunkist additional money.

Mr. Strachan: From the processor. Now, it seems to me if you are going to compare this, you have to compare the whole contract and not allow, as was done in Exhibit 69, the assumption that the only cost of fruit and the only return to Sunkist would be the 170,000 or $171,000, because that is entirely and radically different.

The Court: Now, Mr. Strachan, there are two different comparisons and you mix them up. This thing is complicated enough with this jury without further mixing it up.

To go back over it again, Exhibits 66 and 67 were summaries of what Sunkist got from TreeSweet and Silzle, what Sunkist got. Plaintiff then says Sunkist would have got from us $40 a ton. Exhibits 66 and 67 show what Sunkist got from Silzle and TreeSweet. Therefore, the oil became material because Sunkist got the oil.

Therefore, what you are talking about is a rebuttal to 66 and 67.

69 proceeds on the other basis, what would Winckler & Smith have made, you say, under a comparable

contract? A [2970] comparable contract is to turn the oil back to Sunkist. Therefore, what Sunkist got on that deal is not the comparison. You have got a proper matter of comparison with 66 and 67, but not with 69.

Mr. Strachan: Apparently I am not convincing your Honor.

The Court: No.

Mr. Strachan: So I will just summarize——

The Court: You have two alternatives.

Mr. Strachan: I will just summarize my position in this way, if I may.

69 is based upon the assumption adopted by the plaintiff. That assumption is that the only cost of fruit under the TreeSweet contract, had Winckler & Smith had it, would have been approximately 171,000 attributable to juice, and not attributable to any oil, nor does it contemplate that any oil would have been returned. [2971]

The Court: All right. Now, wait——

Mr. Strachan (Continuing): That is their theory.

Now, our theory is that if they were to have processed under the same terms as TreeSweet did, the total obtained from the processor would be not only the 171,000 for juice, but 130,000 for peel, and that, therefore, you should charge as a part of the cost of sales, on the hypothetical processing of the 12,000 tons, $300,000 instead of $171,000.

The Court: The fallacy was never clearer than in your statement right there. You started out by the cost to certain people, and then you switched over to the amount obtained from the processor. The fallacy is inherent right in your statement.

Secondly, you have already been told that it will be permissible to show what Winckler & Smith got from the oil, what they made from the oil that they get from the peel.

They were paid so much for processing it, there was so much oil involved; if that means so many dollars and cents to Winckler & Smith, you can show that. I am not saying that you can't show the oil at all. But you can't show, as part of 69, or in rebuttal to 69, what Sunkist would have got for the oil.

Mr. Strachan: I divorce Exhibit CD completely from rebuttal. It is our own computation. It is based upon the assumption and contradicts the allegation that if fruit had been [2972] available to Winckler-Smith at a comparable price, a profit would have been made. Because CD, in essence, is a computation showing whether there would have been a gain or loss to Winckler & Smith had Winckler & Smith obtained fruit on precisely the same terms as TreeSweet did, namely, $25.10 a ton.

The Court: CD says at the top Statement of Projected Results of Operation.

Then you come down to the bottom and you show Actual Loss and Additional Loss, which I suppose you mean to Winckler & Smith. Is that what you mean, to Winckler & Smith?

Mr. Strachan: Yes.

The Court: You can do one of two things with BS, BT and CD. You can lay your foundation outside the presence of the jury, which might be preferable. Or if you do it in the presence of the jury, in view of what I indicated I am going to rule, I will probably have to tell the jury why I am sustaining the objection to your exhibits.

Mr. Strachan: I think I would prefer to do it in the presence of the jury.

I don't think I will handle the thing in a manner that will be in any way objectionable.

The Court: I don't intend to make any big speech about it, but I don't want the jury to think that I intend to be arbitrary with you, even if you think I am. [2973]

Mr. Strachan: I just suggest that it is a matter on which there are differences of opinion.

The Court: On which we disagree.

Mr. Dixon: I hate to add anything to this already extended discussion on this matter, your Honor, which we have been over several times, but I wish to point out something that hasn't yet been mentioned. That in Mr. Hodge's exhibit and his testimony there was no reference whatever, and he did not take into consideration any profit which might have been made by Winckler & Smith in processing the oil, because that is a de minimus factor, anyhow.

The Court: All right. The point is this——

Mr. Dixon: It is not in the estimate.

The Court: The defendants aren't estopped from making what they think is a correct calculation.

Mr. Dixon: No.

The Court: The only thing we have run up against and we are not going to talk any more about it after this, is this: I don't want a comparison made which has a basic defect of logic in the comparison.

That is just not fair to a jury.

I concede that counsel are in good faith, understand this. If I didn't think they were in good faith on it, it would be a different story.

Mr. Strachan: I wouldn't be in the court [2974] room.

The Court: I concede you are in good faith, but in my opinion there is a defect of logic in that comparison; therefore, in my right to conduct the trial I feel that it should not go in as a comparison with 69.

We have been over all that.

But the defendants aren't estopped from showing that your computations weren't correct, as long as what they compute, in logic, has a bearing upon the computations you made, Mr. Plaintiff, or Mr. Dixon.

Mr. Strachan: May I ask just one further question?

Would it make any difference in your Honor's thinking or ruling if in laying the groundwork for CD I would have my witness testify that he had made a computation of the profit or loss that

Winckler & Smith would have had if they had obtained fruit and paid or returned to——

The Court: There is your trouble. You say "paid," and that is one thing; but when you say "returned to Sunkist," then you are off again.

Mr. Strachan: If they had obtained fruit which yielded to Sunkist from the processing contract $25.10 per ton?

The Court: That is the same problem. We are right back here where we were the other day when we had the tangle on 69 to start with. I injected myself into the thing because I felt that you didn't understand, or I didn't know at the time, were not trying to understand what the [2975] plaintiff had done, so we got off into something which created a lot of record here and we spent a lot of time on it.

We finally came to an agreement as to what the theory of 69 was.

But I had the same problem then of trying to keep the trial on a basis of, on a cross-examination of 69, of what it purported to be and not what somebody else thought it was.

* * *

The Court: The record will show the jury present in their proper places.

In your absence, Exhibit BR has been received in evidence. You haven't heard anything about it, but it is a sheet headed at the top Winckler & Smith Citrus Products Cost Analysis, Month of September, 1951.

Also, there has been received in evidence the two exhibits Mr. Dixon cross-examined on yesterday. The voucher [2976] and the bill from the Southern California Gas Company, and the check for $21.33, Exhibit 80; and a copy of the check and voucher attached, Exhibit 79, the payment of $340 to N. J. Winckler for parking, telephone, car expense, for the months of April and May.

Proceed.

FRANCIS A. REGAN

a witness by and on behalf of the defendants, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Regan, was Exhibit BR, entitled Cost Analysis Month of September, 1951, one of the documents that you referred to in making your adjustment of computation of costs for cans, cartons and labels?

A. It was, sir. I don't have a copy on the stand with me at the present time. I have one now.

Q. That is one of the documents that you referred to in your testimony as being the basis of your computation of cost of cans, cartons and labels for the year 1951?

A. It is part of the basis for that computation, yes. [2977]

Mr. Strachan: I have had marked and would like to have distributed to the jury copies of Exhibit CB.

(Testimony of Francis A. Regan.)

The Court: They may be distributed to the jury.

This is another one of these exhibits that is illustrative of testimony, such as Exhibit 69.

You recall that Exhibit 69 was some computations Mr. Hodge made about the mythical 12,000 tons. Now, Mr. Lynch testified yesterday as to certain matters of expense, according to his computation, and this is the defendants' exhibit for the same purpose as 69.

Again, the exhibit itself, when received in evidence, will not be evidence in itself, but will be illustrative of the testimony of the witness and of matters and figures appearing somewhere in the record.

All the figures, I think, have been identified with the possible exception of one figure.

Mr. Strachan: Yes.

The Court: All right.

Q. (By Mr. Strachan): Mr. Regan, was Exhibit CB prepared by you and under your direction and supervision? A. It was, sir.

Q. Will you explain briefly the manner in which it was prepared and what is meant by each of the three columns?

The Court: The first column is your summary of Exhibit 69, the second column are adjustments that you made, and the [2978] third column are the results that you would get?

The Witness: That is correct, sir.

Q. (By Mr. Strachan): Now, will you just recall your testimony as to what these adjusting items were and tell us briefly about the items under the column Adjustments by John A. Lynch & Company?

A. The adjustments in the adjustment column, the first addition, which is to the sales figure, in the amount of $2,870.30, results from having computed the sales price of the product related to the 12,000 tons in the sizes, in the can sizes and cases that the product was delivered.

The Court: Would have been delivered.

The Witness: Would have been delivered, yes.

The difference between the figure that I have computed and that appearing in Exhibit 69 makes up my adjustment.

Generally, the figures that I would use for sales would average approximately $62.74 a ton as set out in Exhibit 67.

The next adjustment appearing on CB relates to the adjustment of the cost of processing, where I found during the course of my examination that the costs on 69, which were on the 1949 levels, were lower than the costs that would have been incurred in the year 1951.

Q. (By Mr. Strachan): Your study of costs of 1951 resulted in an adjustment above the costs used in Exhibit 69 of $10.93 per ton, is that [2979 correct? A. That is correct.

Q. And gave you, instead of a processing cost of $35.57, as used in 69, a processing cost of $44.99 on the 1951 basis.

(Testimony of Francis A. Regan.)

A. A slight correction. It is an increase from $34.06 to $44.99.

Mr. Dixon: Are you talking about CB?

The Witness: CB. The line entitled Winckler & Smith Processing Cost.

The Court: All right.

Then your next line across there is your computation of, instead of Hodge's figure of $1.51 profit a ton, you wind up with $9.42 loss?

The Witness: That is correct.

The Court: Then the next is your totals?

The Witness: The next is the projection of the $9.42 a ton to a 12,000 ton capacity.

The Court: The matters of allowance, labels, advertising and discount, the adjustment there is based upon the fact of your larger figure of 752,000?

The Witness: In part that is true. The other cause for that would be what I believe would be the correct allocation of the yield of the 12,000 tons to particular can and case sizes. Some of the allowance was based on can size or case size. [2980]

The Court: Anyhow, those are your adjustments there.

Then the next line is your totals?

The Witness: That is correct.

The Court: Go ahead, Mr. Strachan.

Q. (By Mr. Strachan): Will you proceed with the next adjustment? I think you made no adjustments in the——

The Court: In the first three items.

(Testimony of Francis A. Regan.)

Q. (By Mr. Strachan): ——first three items. Then explain the next four adjustments you made.

A. The next adjustment I made concerned the actual general and administrative expense for 1952, which was not included in Mr. Hodge's computation.

The Court: That is what you testified about yesterday?

The Witness: As I testified to yesterday.

The Court: The $19,000 figure is the figure you arrived at yesterday?

The Witness: That is correct.

The Court: And the $37,000 figure you testified to yesterday?

The Witness: That is correct, sir. That is the figure that was necessary to bring the sales expense up to what I considered proper sales expense that would have been incurred on the additional volume.

The Court: And skipping the 10,000 figure for a minute, the 40,000 figure is the one you testified to yesterday? [2981]

The Witness: That is correct.

The Court: Increase in adminstrative expense according to your computations?

The Witness: That is correct.

The Court: I don't think you testified about the $10,000 figure.

The Witness: The $10,144.46 adjustment is the amount of the actual gross loss on operations experienced by Winckler & Smith in the year ending January 31, 1952. That loss was related to the 8,000 tons that the company actually processed. That loss was not included in Mr. Hodge's computation in computing the over-all loss for the company on the basis that the 8,000 tons that had been processed was processed, and in addition the 12,000 tons would be processed.

This loss was already incurred and should be in the computation, and for that reason I have so included it.

The Court: The next line, the first figure one forty-seven is from Hodge's Exhibit 69, the next is your adjustments, and the next is total?

The Witness: That is correct, sir.

The Court: The results that you get?

The Witness: The figures that your Honor just read are the total of the items to be deducted in the respective columns from the previous total of profits and allowances. These are the costs that are being deducted from what might be called the gross profit. [2982]

The Court: Now, explain your last figures on the page.

Mr. Strachan: I would like to have him explain what the $212,829.03 figure represents.

A. The line in which that figure appears contains in the first column the net result from over-all operations as computed by Mr. Hodge.

The second column carries the total of the amount that my adjustments would affect the total that Mr. Hodge had used, and the figure of $212,829.03 represents my computed loss that would result from the

(Testimony of Francis A. Regan.)

8,000 tons that had been actually processed, plus the additional 12,000 tons, under the terms of the Tree-Sweet contract as interpreted in Exhibit 69.

Q. (By Mr. Strachan): So that according to your computation the total loss for the year would have been greater with the added 12,000 tons than occurred with the 8,000 tons alone?

A. That is correct. My computation resulted in determining that the loss of $184,523.20 would have been increased by the amount of $28,305.83 to an over-all loss of $212,829.03.

Q. Now, none of the computations dealt with in this exhibit reflect any effect which the return of oil and peel to Sunkist might have had?

A. That is correct, sir.

Q. That is not accounted for at all in any of these [2983] figures? A. No, sir.

Mr. Strachan: I will offer Exhibit CB in evidence.

The Court: CB received in evidence.

* * *

The Court: Distribute CC.

On Exhibit CC, all the figures there appear somewhere in the record in the defense or plaintiff's testimony or exhibits, except the actual computations, right?

The Witness: That is correct, sir.

Q. (By Mr. Strachan): Was Exhibit CC prepared by you and under your direction and supervision, and is it based upon your examination and

(Testimony of Francis A. Regan.)

interpretation of the books and records of account of Winckler-Smith?

A. Yes, sir. That is Exhibit CC?

Q. Yes, sir. A. Yes, sir.

Q. I would like to have you describe briefly the manner in which you prepared it and the source of data, and explain to what extent it differs from the comparative computation which you made in Exhibit CB. [2984]

A. The method of obtaining the sales figures and the costs appearing in Exhibit CB——

The Court: CC?

The Witness: CB, were identical with the computations appearing in CC. The sales figures were obtained by analyzing the yield on the mythical 12,000 tons, projecting that yield in the proper case and can sizes, and applying the proper sales figure to each group.

Under the cost of sales the figures included therein were obtained from analyzing the results that would be obtained under the TreeSweet contract insofar as they apply to the mythical 12,000 tons, determining the allowances that would be allowed or paid, deducting those allowances or payments from the amount to be accounted for, and then extending the balance as the cost of the juice portion of that contract.

The processing costs were those costs computed the same as in Exhibit CB on the 1951 price levels.

The total cost of sales represents the cost of the juice portion of the product, and the cost of producing the juice.

(Testimony of Francis A. Regan.)

Deducting that figure from the sales figure, I arrive at a gross profit on the juice portion of the contract, and then I deducted from that the sales expense that I had computed in the same manner as on CB, and general and adminstrative expenses, and arrived at a net loss which applies only to the 12,000 tons. [2985]

At the bottom of the page that loss is added to the actual loss that had been experienced by the company, resulting in a total figure that would cover the actual loss, plus the additional loss that would result from processing the juice portion of the TreeSweet contract on a 12,000 ton basis.

Q. Now, will you explain briefly what the difference in method was as between CD and CC which resulted in your having somewhat different figures there?

A. The figures are identical until the computation is made at the bottom of the page on Exhibit CB.

Nowhere in CB has Mr. Hodge or myself included an item of about six thousand odd dollars of miscellaneous income for the year that the company actually received. That was not included in Mr. Hodge's computation and I did not inject into mine. The difference between the 28,000 and the 21,000 would be the amount.

Q. Now, in Exhibit CC, you have not taken into account any effect which there might have been from a return of oil and peel to the supplier of the fruit processed, is that correct?

(Testimony of Francis A. Regan.)

A. That is correct, sir.

Mr. Strachan: I will offer Exhibit CC in evidence.

The Court: CC received in evidence. [2986]

* * *

Q. (By Mr. Strachan): Mr. Regan, did you make a computation to determine the projected results of processing 12,000 tons of Valencia oranges under the TreeSweet contract terms in which you did make an allowance for the fact that oil and peel to the value of about $10 a ton was returned to Sunkist? A. I did.

The Court: That is Exhibit BS for identification, right?

The Witness: Yes, sir, that is one of them, I believe.

The Court: Well, let's talk about BS.

Q. (By Mr. Strachan): BS is the result of that computation, is that right?

A. That's right, sir.

Q. Now, will you tell us in what manner you proceeded to make that computation?

The Court: Just a minute.

Mr. Dixon: If the court please, I object.

The Court: Just a minute.

Mr. Dixon: All right.

The Court: Let me ask the witness. In that computation you took a figure which would represent the return to EOP for the oil and peel under the TreeSweet contract?

The Witness: Yes, sir.

The Court: And took another figure which would represent [2987] return from Winckler & Smith, correct?

The Witness: The amount returnable by them, yes, sir.

The Court: Under the TreeSweet contract the oil was returnable to Sunkist upon payment of a processing cost to TreeSweet?

The Witness: That is correct, sir.

The Court: The oil belonged to EOP?

The Witness: That's right, sir.

The Court: In BS you were also directing these computations as to oil in making comparison of what Winckler & Smith would have made with the 12,000 additional tons?

The Witness: That's right, sir.

The Court: The other computations in BS are similar to the exhibits that are already in evidence, CC and CB.

The Witness: The other computations are similar, yes.

The Court: You offer BS?

Mr. Strachan: I would have laid a somewhat more detailed foundation, but if there is no objection to the lack of foundation, I will offer it on the basis of your Honor's examination.

The Court: Objection?

Mr. Dixon: Objection on the grounds previously stated in the record.

The Court: The objection is sustained to BS.

The reason that this is being sustained, ladies and gentlemen, [2988] is simply this. On Exhibits 66 and 67, the plaintiff was making a comparison from plaintiff's standpoint of what EOP or Sunkist would have got from their oranges under, in one case the Silzle contract and in the other case the TreeSweet contract, and was comparing that with the $40 a ton figure which we talked about. So when they were making a comparison of what Sunkist or EOP would get in those two exhibits, there was computed not only what EOP or Sunkist would get from the juice, but what EOP would get from the oil, because the oil was returnable to EOP under those contracts. Therefore, the oil figure was included within those computations in comparing what Sunkist or EOP would have received from TreeSweet or Silzle on a per ton basis for product oranges, including both the juice and the oil which went back to EOP.

Here the comparison in BS is attempted to be made on the basis of what Winckler & Smith would have made from processing 12,000 tons under a comparable contract.

Mr. Strachan: Would have lost, I think is a better term, your Honor.

The Court: Defendant says would have lost and plaintiff says would have made. I should say 69, plaintiffs' exhibit, and BS, which is defendants' exhibit.

(Testimony of Francis A. Regan.)

The question is, what would Winckler & Smith have made?

Therefore, since Winckler & Smith was returning the oil [2989] to EOP under this mythical 12,000 tons, Winckler & Smith did not make anything out of the oil except what they might have been paid for processing and, therefore, what EOP might have made from the oil is not properly a part of a comparison of what Winckler & Smith might have made.

In other words, both Exhibit 69 and Exhibit BS, as well as Exhibits CB and CC, which we have just received in evidence, were calculations as to what Winckler & Smith would have made or lost from processing 12,000 additional tons. Therefore, what Sunkist or EOP might have got for the oil which was returned to them hasn't anything to do with what Winckler & Smith would have made or lost.

Accordingly, the objection is sustained to BS.

Q. (By Mr. Strachan): I will ask you to refer to the document marked BT and ask you whether that was prepared by you and under your direction and supervision? A. It was.

Mr. Dixon: What is that, BT?

Mr. Strachan: BT.

Q. Will you tell us in what manner you prepared BT, without going into figures?

A. BT is a consolidation of the results that I obtained through my calculations on BS.

The Court: You based your calculations in BT upon BS, right, in part? [2990]

The Witness: In part.

The Court: And you took a figure from BS which represented this oil returned to EOP, which we have been talking about?

The Witness: Yes, I did, sir.

The Court: And the other figures you took were figures from either Exhibit 65 or other parts of the record?

The Witness: They appear on 65. That is the first column. That is all as appears in 65 to the extent that the computation goes. That is down to the—well, the full exhibit 65, yes, sir.

The Court: Do you offer BT?

Mr. Strachan: Yes, sir, on the assumption that there is no objection for lack of foundation.

The Court: No objection for lack of foundation. By foundation, you mean in describing what it is and stating the figures, and so forth?

Mr. Strachan: That's right. I would have gone into some more detail.

Mr. Dixon: Same objection as before.

The Court: Same objection as discussed out of the presence of the jury.

Mr. Dixon: Same objection.

The Court: BT, the objection is sustained for the same reason that BS was sustained.

Q. (By Mr. Strachan): Mr. Regan, did you make a computation [2991] to determine whether Winckler & Smith would have had a loss from processing the 12,000 tons of Valencia oranges under the TreeSweet contract terms, assuming that

(Testimony of Francis A. Regan.)

Winckler & Smith would have paid in cash and returned in peel and oil approximately $25.10 a ton, which is the amount shown on Exhibit 67 to have been returned by TreeSweet? A. I did.

Q. Is Exhibit CD the computation which you made? A. It is.

Q. Will you describe that computation?

A. That computation starts off with sales figures identical with that appearing on the exhibits that I just testified to, computed in the same manner.

Under the cost of sales, I included two figures, one representing a cost for the juice portion of the contract, and one representing the cost of the oil and peel portion of the contract.

Q. At what rate did you use the return on the juice realization per ton?

A. That was figured at $14.24 per ton.

Q. And on the oil and peel realization, what figure did you use?

A. Approximately $10.81 a ton.

The Court: Well, let me ask again. This Exhibit CD is what you are talking about, for [2992] identification?

The Witness: Yes, sir.

The Court: It says Statement of Projected Results of Operations by Winckler & Smith on Processing 12,000 Tons of Valencia Oranges under the TreeSweet Contract Terms, right?

The Witness: Yes, sir.

The Court: Then your final figure on the sheet is

(Testimony of Francis A. Regan.)

the figure which you would say would be the actual additional loss to Winckler & Smith on the computations you have made?

The Witness: Yes, sir.

The Court: And in this exhibit, also, you have taken into account the matter of the return to EOP on the oil which would have to be delivered to them under the TreeSweet contract?

The Witness: Yes, sir, but in a manner, a different viewpoint to the ones to which we have previously testified.

The Court: You have the same figure of 744,000 that is found in Exhibit BS and found in Exhibit BT?

The Witness: The figures would be generally identical. It is the viewpoint that was placed on it by the question that was given to me.

The Court: But you were computing Winckler & Smith's loss on 12,000 tons?

The Witness: That is correct, sir.

The Court: Do you offer it? [2993]

Mr. Strachan: Well, I would like to have him describe the process, how these various elements entered into it, your Honor, as part of the foundation before I offer it, without figures, just tell what was done. I think he has told how he——

The Court: Well, I am content with my record on this. I will ask you another question. You took into account the juice realization, right?

The Witness: Yes, sir.

(Testimony of Francis A. Regan.)

The Court: Then you had figures which had as their basis the oil and peel return to EOP——

The Witness: By——

The Court: ——by Winckler & Smith.

The Witness: That is part of the computation, yes, sir.

The Court: In other words, under this contract Winckler & Smith would have had to give the oil and peel back to EOP, to whom it belonged?

The Witness: That is correct, sir.

The Court: There would have been some payment for the processing of it?

The Witness: That is correct, sir.

The Court: But the oil and peel would belong to EOP?

The Witness: That is correct, sir.

The Court: And your final figure in this computation is what Winckler & Smith would have made or lost with the [2994] additional 12,000 tons?

The Witness: That is correct, sir.

The Court: And in making that computation, you took into account what EOP or Sunkist would have got from the oil and peel returned?

The Witness: In part, sir.

The Court: All right. Same objection?

Mr. Dixon: Same objection.

The Court: As heretofore made out of the presence of the jury?

Mr. Dixon: Yes.

Mr. Strachan: I would like, your Honor, in order that the record may be clear, to show how

(Testimony of Francis A. Regan.)

the credits were utilized and how each item was arrived at, without going into actual figures.

The Court: The request is denied. Do you want to offer it?

Mr. Strachan: I will offer it.

The Court: Same objection heretofore made?

Mr. Dixon: Same objection, your Honor.

The Court: Same ruling. Objection sustained for the same reason the objection was sustained to BS and BT. [2995]

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr, Regan, I believe you testified you were the one who made the study of the industry and of the processing operations of the plaintiff in this case during the years 1949, 1950 and 1951, with particular reference to the determination of the costs of operation, is that correct?

A. That is partially correct, sir.

Q. Well, you made a study, did you, I think you testified you made a study of the industry with particular reference to its application during these years to Winckler & Smith and its operations?

A. Not quite, sir. I believe I testified that wherever the occasion in my judgment arose where I felt I needed to supplement the information I did possess, that I would go out and make inquiries. I did not investigate or make inquiries of the industry as such. [2997]

(Testimony of Francis A. Regan.)

Q. In other words, you didn't make any effort to familiarize yourself with whether, for example, there was a greater supply of Valencias in '49, a lesser supply at a higher cost in '50, and what the market condition was with reference to Valencias in '51—I take it you didn't go into that at all?

A. Only insofar as those items would appear in the plaintiff's records.

Q. Would appear where?

A. In the plaintiff's records.

Q. So that your study, then, was limited entirely to a study of the plaintiff's records that were examined by you during the course of your investigation, is that right?

A. Generally, with few exceptions.

Q. When did you start this study?

A. Personally, myself?

Q. Yes.

A. Some time within June or July.

Q. June or July of last year?

A. June or July of 1955.

Q. It has been going on rather continuously since that time? A. Periodically since then.

Q. I think one of the statements you made was that in your study of the operations of the plaintiff during the years [2998] '49, '50 and '51, you noticed that there was a decided drop in the amount of Valencias that were processed by the plaintiff during those years. Is that a fair statement of your testimony in that respect?

A. My statement, as I recall, the statement that

I made was an opinion based upon exhibits that had been offered.

Q. Now, can you answer my question, please?

A. I believe I did. I did make that statement.

Mr. Dixon: Will you repeat the question, Mr. Reporter?

The Court: He just now said he did make that statement.

Mr. Dixon: You did make that statement?

The Court: Answer the question first and then explain if you need to, Mr. Regan.

Q. (By Mr. Dixon): Your study showed that in 1949, that is the year ending July 31, 1950——

The Court: July or January?

Q. (By Mr. Dixon): The year ending January 31, 1950, that a substantial larger amount of Valencias was processed during that fiscal year by the plaintiff than in the fiscal year ending January 31, 1951; is that correct? A. That is correct.

Q. Did you examine the government figures on fruit available and the amount of juice, single-strength juice, processed in California during the years 1949 and 1950, that [2999] would be the years of the plaintiff, fiscal years of the plaintiff, ending January 31, '50, and January 31, 1951, to determine whether there was a drop, in fact, in 1951, in the amount of Valencias processed into single-strength juice in California? A. By the plaintiff, sir?

Q. I said in the industry.

A. You didn't say in the industry, as I recall.

(Testimony of Francis A. Regan.)

But I didn't make such a study and I had no information of that type.

Q. You don't want this jury to believe, then, from your statement, that you attribute this drop necessarily in Valencia production in '51 to a reduction in business, do you? A. No, sir.

Q. I just wanted to get that clear.

Mr. Regan, in 1951, did you make a study of the Sunkist selling prices of Valencia oranges in that year to determine whether there were any increases by Sunkist during that year of Valencias to independent processors?

A. In the calendar year of '51, sir?

Q. In the processing season in 1950. I am sorry if I used the term '51. A. No, sir, I did not.

Q. Well, it is a fact, is it not, that there were two increases after the opening price of Valencias by Sunkist, [3000] during the processing season of 1950, to independent processors, is it not?

A. Not having determined that, I wouldn't know whether that was a fact or not.

Q. In any event, you didn't inquire into that?

A. That is right, sir.

Q. I see. So that in your Exhibit BP, where you outline the purchases of fruit by the plaintiff, you are not suggesting, necessarily, that its production in Valencia juice in the year 1950 was proportionately less with reference to 1949 processing year than any other company in the industry?

A. No, sir.

The Court: If I understand that, your BP con-

(Testimony of Francis A. Regan.)

cerned the amount of fruit that the plaintiff processed?

The Witness: That is right, sir.

The Court: You did not make a study of what other processors processed?

The Witness: No, sir.

The Court: During the same year?

The Witness: No, sir. This exhibit relates only to the plaintiff.

Q. (By Mr. Dixon): Directing your attention to BQ, which purports to be an exhibit showing the purchases of raw fruit according to source of supply by the plaintiff, in the fiscal year of the plaintiff ending January 31, 1952, you [3001] have Morgan Ward 4354 tons. Do you recall that figure?

A. I do, sir.

Q. Is that the amount acquired by the plaintiff under the contract with Mr. Ward during that year whereby oranges were processed by the plaintiff into frozen concentrate juice?

A. 1700.90 tons are covered by that contract, sir.

Q. How many more tons were covered by that contract, if any, with reference to the school lunch program, whereby they were processed for Mr. Ward?

A. Well, as I understand it, that is not the same contract. There was a separate sale——

Q. I know it is a different contract, but have you computed, in determining your total, how that was allocated?

(Testimony of Francis A. Regan.)

A. Yes, sir. There was 1726 tons related to the school lunch program.

Q. So that exclusive of those two contracts what is the balance remaining of Valencias that were acquired from Morgan Ward during the fiscal year ending January 31, '52?

A. About 900 tons, in addition to the frozen contract, and in addition to the sale of fruit to the plaintiff in connection with the school lunch program.

Q. In your study and investigation of the operations of the plaintiff corporation, did you determine whether it processed and sold any single-strength Valencia juice in the [3002] fiscal year ending January 31, '52? A. I did, sir.

Q. And what did you find with reference to that type of operation by Winckler & Smith during the year ending January 31, 1952?

A. I found during the year ending January 31, 1952, the books show sales of single-strength juice in the month of August, I believe principally in August.

Q. I didn't ask you about sales yet. I asked you about whether you checked to determine whether they processed any, Mr. Regan.

A. Not being facetious, but if they sold it, they would have to produce it, sir.

Q. Were you sitting in this court room, and I guess you did hear of some purchases of a carload of single-strength juice?

(Testimony of Francis A. Regan.)

A. I don't recall specifically, but that could have been.

The Court: If you know. Did you investigate to see whether Winckler & Smith produced any single-strength Valencia juice?

Mr. Strachan: I am afraid Mr. Dixon has two things confused. He is talking about the purchases of single-strength juice. That was in September, as I recall it, and it was a purchase of canned [3003] juice.

The Court: I just want the witness to answer the question. If he doesn't know or didn't do it, all right.

Do you know whether Winckler & Smith produced any single-strength Valencia orange juice in 1951, the fiscal year ending January 31, 1952?

The Witness: It is my recollection that I did notice a small production.

I would like to verify the amount.

I paid no particualr attention at the time, but I recall some recollection of that. It would be a small portion.

Q. (By Mr. Dixon): In connection with your examination of the books, did you determine how much Valencia juice was sold by Winckler & Smith, apart from the Florida sales, in the year ending January 31, 1952? A. I did, sir.

Q And do you know whether that amount which you found as being sold was processed by the plaintiff, did you determine that?

A. Whether it was processed by the plaintiff?

(Testimony of Francis A. Regan.)

Q. Yes.

A. I paid no attention to that, sir. I didn't trace those sales through for that purpose.

Q. Then you can't answer my question in that respect? A. That is right.

Q. But you did make an exhaustive and extensive examination [3004] into the records of Winckler & Smith to determine how much it would cost them to process 12,000 tons, assuming it was made available to them, into single-strength juice, in the 1951 processing season, didn't you?

A. I did, sir.

Q. And in your examination of the cost records, if any, that you examined of Winckler & Smith during the processing season 1951, did you find anything that covered any costs on processing Valencia single-strength juice during that year?

A. I found costs that I interpreted would have existed whether they processed single-strength juice, or blends, or concentrates, yes, sir.

Q. You did take Defendants' BR into consideration in determining your cost, didn't you?

A. I did, sir.

Q. And do you know whether that exhibit which relates to cartons, cans and labels only would apply, necessarily, to Valencia juice?

A. I know they would, sir.

Q. What makes you say that you know it would?

A. Well, first, there are two bases for that statement. First, in allocating, using the cost figures set out on BR, there is no distinction made on this

(Testimony of Francis A. Regan.)

record, when it was prepared, as to what product went into the particular sizes, whether it was blended juice, grapefruit juice, [3005] concentrates, whatever it was.

Secondly, we found among the invoices, among the vouchers of 1952, billings from the American Can Company to Winckler & Smith Citrus Products Company, which in a few cases identified the purchase of cans as being orange juice cans, and I believe single-strength orange juice cans. [3006]

* * *

Cross-Examination
(Continued)

By Mr. Dixon:

Q. Mr. Regan, I think you testified this morning that you made a complete examination and comparison of the cost records of Winckler & Smith for the years 1949, 1950 and 1951, that is correct, is it not?

A. It is.

Q. You testified this morning that based upon Exhibit BR you computed the cost of cans, labels and cartons for processing an additional 12,000 tons of Valencia oranges by Winckler & Smith in 1951, is that correct? A. Yes, sir.

Q. Will you tell the jury what the costs were, for example, of cans in Exhibit BR?

A. I do not have a copy of BR, sir. Oh, yes, I do. I believe this is the court's copy. I have it here. The cost of cans in which size, sir?

(Testimony of Francis A. Regan.)

Q. Well, let's take the 12/46's, that's what we have been talking about in this case. [3011]

A. The cost per case appearing on BR is $.7089.

Q. What was the cost per case of 12/46 cans in 1949?

A. That would be per Mr. Hodge's computation, I presume?

Q. No. I am asking you from your examination of the books and cost records of this company for 1949 what the cost of a case of 12/46 cans would be or was in 1949.

A. I believe it would be—I know it would be less than that, Mr. Dixon, but I don't have that figure of what the cost was in 1949. I used the 1951 cost.

Q. I understood you to tell the jury this morning you made a comparison of all of the items which went into your Exhibit CB by comparing those costs with the same cost records from Winckler & Smith for the year 1949.

A. I made a comparison——

Q. Did you make an examination of the cost records for cartons for the plaintiff during the year 1949?

The Court: Cartons?

The Witness: Cartons or cans?

Q. (By Mr. Dixon): Cans.

A. Well, I can answer the specific question on the 12/46's——

Q. Just answer my question. A. Yes, sir.

Q. All right. What was the cost as indicated

(Testimony of Francis A. Regan.)
from the records of Winckler & Smith for a case of cans of 12/46's [3012] in 1949?

A. I have to make a short computation and I can tell you.

Q. Do you have your work sheets there before you?

A. I do, sir. I do in part. I have the figure I can compute from.

Q. Is the figure you are going to give this jury the figure contained in the books of this company?

A. Yes, sir.

Q. Or is it your own computation?

A. No. This is in the books of the company, sir. [3013]

Q. All right. What was it?

A. I believe it is 68 cents, sir, according to my computation here. And that is based upon——

Q. Just a moment. I am asking you where this 68 cent figure appears in the records of the plaintiff corporation. Will you tell the jury where that figure appears in the books and records of this corporation?

A. It appears on a voucher and attached invoice from the American Can Company to Winckler & Smith Citrus Processing Company, I believe the date is September, 1949, which covers a purchase of 46 ounce cans at the rate of $56.71 per thousand. Rapidly computing the unit cost and the cost per case of 12/46's, it would come approximately to 68 cents.

Q. Is that the only invoice that you examined

(Testimony of Francis A. Regan.)

from the books and records of this company in 1949 to determine the cost of cans in '49?

A. No, sir.

Q. What other invoices did you examine, and records? A. I have one in September——

Q. Just a moment before we leave that. Do you have in your work sheet the date of the invoice that you are referring to of 68 cents?

A. That would be in September, '49. The specific day of the month I don't have. [3014]

Q. Let's have it, please.

A. I don't have it.

Q. Didn't you make a record in your work sheets of the particular invoice that you examined on which you base this statement?

A. No, sir.

Q. You didn't? A. No, sir.

Q. You mean you have nothing in your work sheets to tell this jury from which you derived what specific invoice you examined for 1949 on which you base this 68 cents?

A. The only thing I can say——

Q. Can you answer that yes or no?

A. No, sir, I cannot answer that yes or no. The only thing that I can say is that I examined an invoice from the American Can Company to the plaintiff in September, '49.

Q. I heard that, Mr. Regan.

A. That is all I can say.

Q. I am asking you the date of the invoice, if you can give it to this jury, please.

(Testimony of Francis A. Regan.)

A. I can't give the date of the month. Just the month.

The Court: Do you have that invoice in your work papers anywhere?

The Witness: The invoice is over among the records of [3015] the plaintiff in the Sunkist Building, sir.

Q. (By Mr. Dixon): In other words, you examined this one invoice. What other invoices, with reference to cans, did you examine during the year '49?

A. I made a note of one here. In September of '49 for the 18-ounce cans.

Q. This is also in September. Did you make any examination of any other invoices for any other months in '49?

A. I believe I did, sir, yes, sir.

Q. What months?

A. I made no note on those particular invoices. The reason I did not make the note was that I was comparing invoices in the September, '49, to September, '51.

Q. Do you know whether additional discounts would be given for quantity purchases on cans, depending upon the amount purchased?

A. To my recollection in examining these vouchers there were no quantity discounts.

Q. But you didn't examine it for that purpose, did you?

A. Not for that specific purpose, no, sir.

(Testimony of Francis A. Regan.)

Q. All right. What was the price of cartons from invoices that you examined in '49, Mr. Regan?

The Court: Invoices in what year?

Mr. Dixon: '49, for cartons.

The Witness: I don't believe I have the '49 carton cost, [3016] sir.

Q. (By Mr. Dixon): You don't have that?

A. No, sir.

Q. So you just assumed that the figures that you took from '51 would be larger than they were in '49, in increasing the costs of cartons?

A. I wouldn't say that was my complete assumption, Mr. Dixon. I was just using '51 costs; and relating those costs to the costs Mr. Hodge used, I would say my assumption from that comparison would be that the costs were higher.

Q. You didn't, then, as a matter of fact, go back and compare these costs that you arrived at with the actual books and records of the company for these items in '49, did you? A. Yes, sir.

Q. All right. The comparison was the comparison you just testified to as having been made by comparing a few invoices?

A. Generally a few invoices, yes.

Q. The same with cartons?

A. The same with cartons.

Q. What about labels?

A. I have no note on the labels as to a comparison between '51 and '49.

Q. You don't have any notes on labels?

A. No, sir. [3017]

(Testimony of Francis A. Regan.)

Q. You know, as a fact, do you not, that there was an ample supply of labels in the supply store of this company in 1951, or did you know that?

A. I didn't hear that question.

The Court: Read it, Mr. Reporter.

(The question was read by the reporter.)

The Witness: I don't know it as a fact, sir.

Q. (By Mr. Dixon): Well, directing your attention to 65, Plaintiff's 65, it contains an item there on the balance sheet of supplies in the amount of $41,225.40. Do you know of what that item consists, Mr. Regan?

A. May I have a copy of the exhibit to which you are directing my attention, sir?

Q. I thought you did have it.

A. Now, if I could have your question again.

Mr. Dixon: Will you read the question?

(Question read.)

The Witness: I have a general knowledge of what that item would consist of, yes, sir.

Q. (By Mr. Dixon): Will you tell the jury what it consisted of?

A. Generally, that item would include cans, cartons and labels, principally.

Q. Do you know the breakdown of that item?

A. No, sir. Of the $41,000 figure, I do not have a breakdown of it at this moment.

Q. Did you run through the books of the company to see whether those purchases had been made

(Testimony of Francis A. Regan.)

in anticipation of processing operations during the 1951 processing season?

A. I could not identify such an anticipation from the records alone.

Q. In any event, you don't know when they were acquired, [3019] whether they were acquired for the season's operations of 1951?

A. I do not know, no.

Q. Now, will you tell this jury, directing your attention to Exhibit CB, how you [3020] arrived——

* * *

Q. Will you explain to the jury how you arrive at the $44.99 figure as being the amount that you concluded it would have cost the plaintiff per ton to have processed 12,000 additional tons of Valencia oranges in 1951?

A. Yes, sir. That cost per ton was determined in this manner. I first determined the cost by case size and can size in proportion to the tonnage that would be processed in those particular sizes. I determined that the cost per can size was as follows: for the 5½-ounce size——

Q. Let's take the 12/46.

A. The 12/46 size, the total cost per ton was $38.05.

Q. Thirty-eight dollars and how much?

A. Five cents.

Q. Will you tell the jury how that was broken down?

A. Yes, sir. Cost of cans, $16.43. Cost of cartons,

$2.60. Cost of labels, $1.18. Other ingredients, $2.44. Plant expense, $15.40. A total of $38.05

Q I assume that this other figure that you got here, $44.95 per ton, is the upward average of the processing cost computed on a comparable basis for what you thought would have been processed under this contract in other can sizes, is that correct?

A. That is substantially right to this extent, sir. I computed a similar cost on each can size determined by [3021] applying the tonnage involved to each size, the total cost for the particular can size, and extended the amount. That totaled a figure which was $41.92, as I recall.

Then to that figure, in order to make it comparable with Mr. Hodge's, I included a portion of my administrative expense to the same extent as Mr. Hodge did. That is $3.07 a ton, I believe.

Q. Well, now, you referred to an item of $2.44 per ton which was charged to other ingredients. Don't you know that in single-strength Valencia juice no other ingredients are added?

A. That may be true on occasions and maybe not true on other occasions, sir.

Q. Just what is the fact? Do you mean sometimes other ingredients are added to the juice and sometimes they are not?

A. That would appear to be true from the books and records of the plaintiff, sir.

Q. Have you perhaps confused the fact that in making the blended juice, and in making navel juice, other ingredients, such as sugar, are sometimes added, but that they are not added to single-strength Valencia juice?

A. That would be true, sir. However, I want to further explain that answer. [3022]

Q. That could be true?

A. That could be true.

The Court: Let him explain it.

Mr. Dixon: All right.

The Witness: The basis for including that was the same basis that Mr. Hodge included in his computation an item of other ingredients, which amounted to a figure that is about 30 cents a ton less than that. I do not have a breakdown of his individual cost figures here.

Q. (By Mr. Dixon): Well, in your computation it amounts to $2.44 out of your total of $38.05, doesn't it? A. That is right, sir.

Q. So if no ingredients were added to single-strength Valencia juice, that item could be taken out of your costs, is that correct?

A. That is right, if no ingredients, no other ingredients, were added, the cost would be that much less.

Q. And you have included that $2.44 item in computing your average tonnage cost for all sizes of single-strength Valencia juice produced under the 12,000 tons that we are talking about, isn't that true? A. That is true.

Q. So if it isn't properly there, it should be taken out of your computations for all the others.

(Testimony of Francis A. Regan.)

I think you mentioned an amount of $15.40 for additional [3023] plant expense. Will you tell the jury what that item consists of?

A. Yes, sir, that is the counterpart comparable to the eleven dollar some odd cents figure that Mr. Hodge used in his computation. That is the cost of running the plant generally, including direct labor, and the other expenses related to operating the plant.

Q. For example, do you mean you think additional supervision would be required and additional executive supervision?

A. I do, sir, for this reason: We have a problem here in computing costs relative to 12,000 tons of Valencia oranges, which would flow through the plaintiff's plant between the months of July and November. During that period of time the plaintiff actually had run a total of 5,000 tons through the plant in 1951. By including the 12,000 tons, in addition, it would mean that during those months a total of 17,000 tons of fruit would flow through this plant. And in addition to that the largest Valencia tonnage that this plaintiff has had, based upon my examination of the records, in any one year, was 13,000 tons. This plaintiff has actually, in 1951, run about 5,000 tons through their plant. Interposing 12,000 tons on top of that would mean a capacity of 17,000 tons of Valencias, which this plaintiff had not reached. [3024]

Now, doing that within a short period of time would necessitate other expenses you spoke about, which would call——

Q. That is in your opinion?

A. In my opinion that running 12,000 tons during a period of time, when 5,000 tons was actually run, would call for more employees, which in turn would call for more supervision.

Q. Yes, more employees, but that is already included in Mr. Hodge's cost per ton, is it not, the labor? A. At '49 cost, sir.

Q. Labor cost?

A. I am including it at '51 costs.

Q. All right. You have a right, of course, to do whatever you want to in your computation. But that was already included in Mr. Hodge's figure, was it not, the labor cost?

A. The labor was included at '49 costs, yes, sir.

Q. What was the difference, then, in dollars per ton, between his expense item which covered labor and supervision per ton, and your figure per ton?

A. I don't know what Mr. Hodge had in his figure for labor, and on my figure that is a total of all plant expenses. It is not broken down, and I do not have a breakdown as to direct labor alone. It is a total for all plant expenses. [3025]

Q. What did Mr. Hodge charge for plant expense in his computation, do you recall?

A. I believe it was $11.40. ~~That is from~~ my recollection.

Q. And yours is $15.40?

A. That is right.

(Testimony of Francis A. Regan.)

Q. Now, will you tell the jury how you arrived at the $15.40 per ton for plant expense for all types of cases of juice?

A. I took the amount of plant expense——

Q. Rather than take up the time on how you computed it, will you tell the jury how you arrive, I mean by item, at the $15.40 plant expense figure in your tonnage computation? A. I——

Q. Do you understand my question?

A. I do, sir.

Q. Will you break it down, please, in dollars and items? A. Break the $15 down?

Q. Break the $15.40 down so the jury will know what items you considered and how much you charged for each item in that $15.40.

A. That I haven't done, sir, and that would be quite a computation to do it. [3026]

Q. Do you mean in making up this figure of $15.40 you didn't break it down, you didn't add some items together to get $15.40?

A. I took the total plant expense, which included all those individual items, and computed it on the total, not on the individual items themselves.

Q. In other words, this $15.40 item per ton is the amount, if I understand your testimony, that is charged to plant expense across the board for all sizes of juice; that is correct, isn't it?

A. That is generally correct.

Q. You now say that you cannot tell this jury specifically the items which go into your computation of plant expense, and what you charge for each item in arriving at the $15.40 per ton figure?

A. I cannot tell the individual costs per ton for each item, sir. The computation wasn't made in that manner.

Q. In other words, you can't break down the $15.40 per ton to tell this jury, for example, how much of that is charged to labor, how much to other items that you regard as properly chargeable to plant expense.

A. That is right, sir. [3027]

Q. You can't do that?

A. No, sir, because I have not done it up to this point.

Q. Now, Mr. Regan, again referring to CB, according to your computation, you are of the opinion that an additional $10.93 should be added to Mr. Hodge's figure of $34.06, then, as the additional cost per ton which must be added to his figures?

A. Yes, sir.

Q. For processing? A. Yes, sir.

Q. So that there is a difference between you and Mr. Hodge of that amount in the figures that he used and the figures that you used?

A. Yes, sir.

Q. You can't tell this jury the basis of the question that I asked you how you break down this item of $15.40 per ton chargeable for all classes of juice, I mean all cases of particular sizes of juice that might be processed from the 12,000 tons?

(Testimony of Francis A. Regan.)

A. That's right, sir, and the reason again is that——

Q. All right.

The Court: Do you have some other reason other than the one you stated?

The Witness: The reason is expressed this way, sir. [3028] I treated the plant expense as a component part in itself without breaking it down any further. That is what I am trying to explain to Mr. Dixon.

The Court: Go ahead.

Q. (By Mr. Dixon): Now, directing your attention to 61, Mr. Regan, the selling expense for that year in 1949 against all of the tonnage for all types of fruit processing was $86,855.15, is that correct?

A. I do not have a copy of 61, but I believe that is correct, sir.

Q. To that amount you have added——

The Court: The Court has handed the witness a copy, let the record show. Go ahead.

Mr. Dixon: What's that?

The Court: I said to let the record show that the Court has handed the witness a copy of the exhibit.

Q. (By Mr. Dixon): Is that correct, Mr. Regan?

A. I don't think you finished the question, sir. I did not hear all of it.

Mr. Dixon: Read it.

(Record read.)

Q. ——additional selling costs of $37,729.62, have you not? A. No, sir.

Q. Well, directing your attention to CB, I notice that [3029] item you refer to, increase in selling expenses. Isn't that what we are to conclude, that that amount that I have just mentioned is to be added to the 1949 selling figure? A. No, sir.

Q. That was used by Mr. Hodge?

A. No, sir. That figure was not used by Mr. Hodge.

Q. And to the administration figure you have added for 1949 some additional amounts, haven't you? A. For the year 1949——

Q. For administration? A. No, sir.

Q. In your computation. I am talking now about arriving at the figures in CB.

A. No, sir. I will answer it this way, sir. I believe you may be slightly confused on what were the basic figures used by Mr. Hodge. They would be the selling and administrative expenses as set out in Exhibit 65, not 61. The selling expense I added was in addition to that set out in 65, not in addition to that set out in 61.

Q. I think perhaps we come to the same place. Maybe we don't. But I take it from your CB, Mr. Regan, that you added additional items in the amount of $107,451.46 to Mr. Hodge's computation. Is that what you are doing in CB?

A. Yes, sir.

(Testimony of Francis A. Regan.)

Q. So that actually Mr. Hodge shows from CB, from your [3030] CB, a profit of $25,231.45 on the this additional operation, I mean combined with the other operations, whereas you show a loss on the 12,000 tons of $28,305.83, is that correct?

A. That is correct, sir.

Q. So that there is a difference between your figure and Mr. Hodge's figure of how much?

A. $238,060.48.

Q. And that $238,060 figure or difference between your computation in CB and Mr. Hodge's computation in 69 is made up of the addition of the $131,160 item to the processing cost, is it not?

A. Yes, sir.

Q. Plus the $37,729.62 in increased selling expenses? A. Yes, sir.

Q. Plus an additional $40,000 for administration expenses? A. Yes, sir.

Q. Plus $19,577.38 that you think should have been added for additional administration expenses, exclusive of your item of $40,000, is that correct?

A. Yes, sir. That is the balance of the actual expense for 1951, the year ending January 31, 1952, which had not been included by Mr. Hodge.

Q. At least that is your opinion on the matter?

A. Based on the figures, to me it is a fact. [3031]

Q. So that according to your computation on CB, the more oranges that this plaintiff processed in 1951, if they had had an additional 12,000 to be processed into single-strength Valencia juice, the greater the loss would have been, is that your result, in a few words?

A. If the additional tonnage was processed under the TreeSweet contract.

Q. So that the more they processed in 1951, the greater the loss, is that correct?

A. That would be correct if the more was processed under the TreeSweet contract terms.

Q. Because even if we regard the 12,000 tons we have been talking about as a separate item, it is your view from your computation that the plaintiff would even have lost $21,351.79 on that particular operation?

A. I did not quite follow you on that, sir. Could I have it read?

The Court: Read it.

(Question read.)

The Witness: That's right, sir, as I have computed in Exhibit CC. Now——

Q. (By Mr. Dixon): Did you go so far as to determine how much you would have to pay for this or how you would spend this additional—was it $60,000, for administration expense? [3032]

A. The additional 40,000, you mean, sir?

Q. Yes, or whatever the figure was that you used.

A. According to my computation the money would be expended in the same manner that the company had expended $93,000 in connection with the processing of 8,000 tons.

(Testimony of Francis A. Regan.)

Q. In other words, you think the president of the plaintiff company, if they had taken on an additional 12,000 tons, would have had to have hired some more administrative officials to the amount of an additional forty or sixty thousand in 1951?

A. No, sir. In arriving at the $40,000, I have lowered the figure to $40,000, and it does not include additional salary or travel to Mr. Winckler.

Q. I am not talking about Mr. Winckler. I am talking about the additional amount of employees that you figure you would require here to handle the administration end of it, other than those that were there in 1951, to handle this additional 12,000 tons?

A. There would be a proportionate increase generally in all expenses, sir.

Q. In all expenses? A. Generally.

Q. In other words, the office force that did the billing would need some additional people there to do that, that is your administration cost? [3033]

A. The office force is part of the administrative expense, yes, sir.

Q. You don't think that the force that was there handling the amount in 1951 could also have handled the billings for this additional sales?

A. In part they probably could, sir. [3034]

Q. Well, then, how do you arrive at this additional $40,000? Is it for salary? A. No, sir.

Q. What is it for?

A. It is based upon a review of the $93,000 that was actually expended. And based upon the items that I have mentioned, the problems that would relate to processing an additional 12,000 tons during this relatively small part of the year, when the capacity at that time would then be greater than it had ever been before, there would be administrative problems that would be costly.

Now, as to dollars and cents how much would be spent in addition for stationery, postage, items like that, that $40,000 was not made up of component parts. It is in my opinion based upon the examination of the $93,000, that is what I believe would be a reasonable additional cost of administrative expense.

Q. But you can't tell this jury how you break that $40,000 down into necessary employees, can you?

A. No, sir. That wasn't arrived at by an addition of a number of figures. It was based on an over-all estimate, based upon the over-all $93,000.

Q. This is the first time in your experience that you ever had any occasion to contact or become acquainted with the operations of a citrus processing plant, Mr. Regan? [3035]

A. It is, sir. [3036]

* * *

OPAL SMITH

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan:

* * *

Q. What is your occupation?

A. Lab technician.

Q. Laboratory technician in citrus processing plants? [3037] A. Yes, sir.

Q. In what plant are you now employed?

A. Cold Gold Company.

Q. Where is that plant situated?

A. LaHabra.

Q. How long have you been employed as a laboratory technician by Cold Gold?

A. Three years.

Q. You are married now, Mrs. Smith?

A. Yes.

Q. How long have you been married?

A. Just about two years.

Q. What was your maiden name?

A. Chilcoat.

Q. Were you also known as Opal Comstock?

A. Yes.

Q. As Opal Comstock you were at one time employed by Winckler-Smith Citrus Products Company at Anaheim, is that correct?

A. Yes, sir.

(Testimony of Opal Smith.)

Q. And during what period of time were you employed as a laboratory technician for Winckler & Smith? A. '49, '50, '51 and '52.

Q. Under whose direct supervision did you work while employed by Winckler & Smith? [3038]

A. Frank Gilbert.

Q. What was his position in the plant at that time?

A. Plant superintendent and chemist.

Q. As I understand it, the operations of the Winckler-Smith Company were such that raw fruit was placed in machines called Citromats, which extracted the juice into tanks, is that correct?

A. Yes, sir.

Q. After that juice had been extracted in tanks, did you as laboratory technician have anything to do with the juice at that time, immediately after extraction? A. Yes.

Q. You did have something to do with it?

A. Yes, sir.

Q. What did you do with the juice as it was in the tank immediately after extraction?

A. I standardized it.

Q. Did you make any tests on it while it was in the tanks? A. I took a test on it, yes.

The Court: Keep your voice up.

A Juror: Louder, please.

Q. (By Mr. Strachan): A little louder.

A. Yes, I did.

Q. How did you make the tests on the juice in tanks? [3039]

(Testimony of Opal Smith.)

A. I took the Brix test and acid test.

Q. That was from a specimen or sample taken from a tankful of juice by the tank man, is that correct? A. Yes, sir.

Q. After the juice in a tank or a batch had been tested and canned, did you make any further tests on the juice in the can?

A. Yes, sir, after it was canned.

Q. So that on a single batch or tankful of juice you would make two tests, one as it was originally found in the tank, and another as it was found in the cans after it had been sealed in the cans, is that correct? A. Yes, sir.

Q. Were the results of these analyses or tests which you made regularly recorded on a written record provided for that purpose? A. Yes.

Q. Were the entries in those made by you as laboratory technician during the regular and ordinary course of business? A. Yes, sir.

Mr. Strachan: I would like to have Exhibit I-1 handed to the witness.

Q. (By Mr. Strachan): I ask you to examine the various sheets that are included in that volume called Daily Laboratory [3040] Statistics, and run through those and tell us, if you will, whether you recognize those as being a part of the records kept in the regular and ordinary course of business at the Winckler & Smith plant. A. Yes, sir.

Q. Do you recognize your signature and your handwriting on a number of those? Do you?

A. Yes.

(Testimony of Opal Smith.)

Q. Just to illustrate the method in which those records are kept, I will ask you to look at the first page of that volume, which is No. 461. On the first line there is an entry under Time; is that 11:00 p.m. or 11:00 a.m.? A. 11:00 a.m.

Q. Then under the heading which embraces the next two columns, Brix and Acid, there are two entries Under Brix there is 11.2. Will you tell us what, in the method of keeping these records, that stood for? A. That is, Brix?

Q. Yes. A. Sugar content.

Q. That is the so-called solids, per cent of solids, is that correct? A. Solids, yes.

Q. Under the next column following Raw Juice Extracted is Acid, and there is recorded 1.54 acid; will you tell us [3041] what that indicates?

A. Do you mean the difference in the two?

Q. No. Under Raw Juice Extracted——

The Court: What does the figure represent?

Q. (By Mr. Strachan): The figure 1.54 under Acid, does that indicate the per cent of acidity found in the raw juice as it came into the tanks?

A. Yes, sir.

Q. Now, following that is a heading called No. 2 Cans, with various entries there, and the first entry there drops down to the second line and follows immediately after the entries I have just read to you on the first line. Does that indicate, where it says Brix and Acid under the can section, does that indicate the results of your chemical analysis of the juice as you found it in the cans?

(Testimony of Opal Smith.)

A. Yes.

Q. And does the juice in the cans one line below, on the second line, indicate that that is the same batch of juice that was tested in the tanks and reported on line 1? A. Yes, sir.

Q. So that in the ordinary course of events you would have on one line the results of the test in the tank, and on the following line the results of the test on the same juice where it is canned; is that correct? A. Yes, sir. [3042]

Q. Now, I will ask you to—I will call your attention to the part of that page where it says sweetened orange juice. That indicates, does it not, the type product that was being run and packed at that time? A. Yes, sir.

Q. There were other symbols used in making this record which I would like to have you identify. What does the symbol OJ mean?

A. Unsweetened orange juice.

Q. As stated in these records, what does SOJ indicate? A. Sweetened orange juice.

Q. What does GF mean? A. Grapefruit.

Q. Sweetened or unsweetened?

A. Unsweetened.

Q. What does SGF stand for?

A. Sweetened grapefruit.

Q. What does BJ stand for?

A. Unsweetened blend juice.

Q. That is just blends of different citrus juice with no sweetening added? A. Yes.

Q. What does SBJ stand for?

A. Sweetened blend juice.

Q. What does SNO stand for? [3043]

A. Sweetened navel orange juice.

Q. Now, in some instances in the record there is no designation by the symbol or otherwise as to the product being run. Is it possible for a person experienced as a laboratory technician, as you are, to conclude from the entries that are made showing the results of the analysis what the product was that was being canned?

A. You mean the kind of juice that was being made?

Q. Yes. A. Yes.

Q. You can tell that from these records and from your experience, even though there is no express designation on the page, is that correct?

A. Yes.

Q. Are you able to tell the jury what was done with these daily laboratory statistics after the records were completed by you and the other technicians who might be on duty?

Mr. Dixon: Now, if the Court please, I don't know how long this is going on, but I would like to object to any further testimony along this line and ask to be heard in the absence of the jury if we are going to have an extended argument on this matter.

The Court: How much further foundation do you propose to lay? [3044]

Mr. Strachan: I think it is substantially completed, your Honor.

The Court: Finish your foundation and we will

(Testimony of Opal Smith.)

take the recess and hear counsel. Maybe it can be stipulated that the witness' testimony as to Exhibit I-1 for identification would be the same generally as her testimony as to I-2, I-3 and I-4.

Mr. Dixon: Oh, yes, your Honor, I assume so.

The Court: All right. What other foundation do you want to lay?

Q. (By Mr. Strachan): Referring again to page 4——

The Reporter: There was no answer to the last question.

The Court: Read the question.

(Question read.)

The Court: Objection overruled. You may answer.

The Witness: They were taken to Mr. Winckler's desk.

Q. (By Mr. Strachan): Now, I would like to ask you to refer again to the figures appearing on the first page of this exhibit, 461. I call your attention to the fact that the acid as recorded in the raw juice showed, according to the test there, as 1.54 per cent, whereas in the canned product it was recorded at 1.27 per cent acid. Can you explain how the change in acidity was accomplished?

A. Water was added.

Q. Now, again in the next line, referring to the second [3045] of the three batches run that day, the acidity of the raw juice at 154 appears in the cans as 124. Is that an indication again that water was added? A. Yes, sir.

Q. And likewise the acidity on 150 in the third batch appears in the canned form to be 123, which would indicate water was added again at that point, is that correct? A. Yes, sir.

Mr. Strachan: I think that's all the foundation, your Honor.

* * *

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury absent.

Do you offer in evidence Exhibits I-1, 2, 3 and 4?

Mr. Strachan: I want some more explanation. I want some particular pages identified and her interpretation of those particular pages, in addition to the exhibits.

The Court: Then you propose to offer the exhibits in evidence?

Mr. Strachan: Yes, sir. [3046]

The Court: What is your objection?

Mr. Dixon: If the Court please, I am objecting to any further testimony along this line on the ground that it would not tend to prove or disprove any of the issues in this case, that it is wholly irrelevant and immaterial to any of the issues of this case. I can only surmise, and that is why I am objecting at this point, as to what——

The Court: Let me stop you then.

Mr. Dixon: Yes, your Honor.

The Court: I intended to ask Mr. Strachan. What do you think this testimony and these exhibits prove? For what purpose do you offer this testimony?

Mr. Strachan: Well, it is for a variety of purposes, your Honor.

The Court: Let's have them.

Mr. Strachan: For one thing, it will corroborate some of the complaints that were made against the quality of the product and show that there was actually a foundation for the complaints made that the juice was watery.

I would use it, also, to show that Mr. Finley, when he was considering whom he might contact for the purpose of entering into processing agreements, didn't wish to contact Winckler & Smith because he had heard that their products were watered.

It will go to the question of damages in that it will [3047] show that there was an inferior product and not a Grade A product, such as Mr. Winckler testified.

It will serve as direct impeachment of Mr. Winckler as to whether or no his products were adulterated and whether he knew they were adulterated, and whether he knew that these records were being kept.

I might say this, your Honor, that the issue was clearly raised in the opening statement when Mr. Hurd told the jury that he would show that Mr. Winckler's business practices worked an imposition on the public, among others.

Mr. Dixon: Your Honor, I am glad to know what the purpose of this offer is after counsel has indicated what use he intends to make of this kind of testimony, because I think that will be of considerable help to us in determining whether this objection should be sustained or overruled.

It is already in the record here, your Honor, in cross-examination of Mr. Finley, and I think of any other official of Sunkist that had anything to do with any processing arrangement, so-called, that no examination was ever made or caused to be made by the plaintiff of its products.

The Court: By the defendant, you mean?

Mr. Dixon: I mean by the defendant of the plaintiff's product prior to this lawsuit or prior to any refusal to give any oranges or to make them available to the plaintiff, as requested in 1951. This is the best example that I know [3048] of of after the fact use of testimony that can be injected into a case through the back door rather than by direct testimony.

The Court: I have your point on that.

Mr. Dixon: Now, secondly, counsel has already stated, and it seems to me that the testimony I have just mentioned must be either repudiated, and I don't see how it can be repudiated, if the witness told the truth on cross-examination under the rule, that counsel said he had heard it was uttered. That is obviously hearsay testimony, if admissible, so that it can't possibly be admitted on that ground unless that is an afterthought, and that is going to be the testimony as of now, although it was not indicated to the plaintiff corporation in any way at the time any refusal was indicated to the plaintiff corporation that fruit was not available.

So that we have no foundation under the evidence in the case or any evidence that can be produced, at least in my view, based on the testimony already in this record, that assuming this is a factor, that it in any way could have entered into the refusal of any processing arrangement or the making available of oranges to this plaintiff in any way in 1951.

I would be the first to concede, your Honor, that had there been any statement made by the defendants or had any such excuse been related or reason given to the plaintiff at [3049] the time of the refusal, that this might be admissible evidence in support, not as proof of, but in support of the reason for refusing to do it, to make oranges available to the plaintiff. But that is not the situation we have here.

What has happened is we have positive evidence to the contrary in the record. We have the statement of counsel that he expects this witness from Sunkist, whoever it is, to come in and say they refused because they heard, they heard, h-e-a-r-d, not from their own knowledge or from any investigation that they made prior to a refusal that such was the case.

So I submit this evidence, if that is what it is used for, and assuming it is relevant in some way, assuming that there may be something wrong with this, and that is a question we are obviously going to have to go into, and it may take considerable time if this is to be injected into the case, and an explanation would have to be made because it would be highly prejudicial otherwise. If this line of testimony and evidence is permitted in the record, it would have to be explained, so that on that basis it doesn't go to any issue in the lawsuit, as I see it, framed by the evidence now in the record and before this Court in connection with the complaint and the answer and the pleadings in the case.

Now, furthermore, it seems to me that this type of evidence if of any weight at all, according to counsel's view [3050] of what he is offering it for, would require an endless amount of testimony on the part of customers and buyers of the plaintiff's product, and particularly single-strength Valencia juice, that they analyzed it, rejected it because it allegedly had water somewhere in the product. How that could be determined, I don't know, but let's assume that they could determine that and that because of that they refused to purchase the plaintiffs' product and, therefore, because they refused to purchase the plaintiffs' product, this plaintiff would have gone out of business because of this particular type of evidence.

Now, that is the argument and that is the alleged relevancy of this type of evidence, as I understand it. [3051]

Now, tested by that yardstick, and assuming that it is in evidence, the defendant would have to show that this was the cause of loss of sales. And that presupposes knowledge on the part of those who were purchasers, potential or actual, not by hearsay evidence, your Honor, but by direct evidence, which is the only kind that should ever be admitted on any kind of a situation such as is now being presented to this Court by this evidence.

Because, obviously, this is not a case, again, in which, we hope, we are going to be required to overcome unfavorable inferences that might be created in the mind of the jury against the plaintiff, in this case for violation of antitrust laws, by showing through extended evidence, and so forth, that this was or was not a proper and legitimate procedure.

In other words, that goes into the question—I assume the defendants here are offering this to show that perhaps there has been some violation of law of some kind by the plaintiff.

The Court: I think I have your points. I want to ask Mr. Strachan some questions and I will hear from you later.

Mr. Dixon: Yes.

The Court: You say, No. 1, with reference to complaints made. Do you have any evidence in the record of complaints made that water was in the juice? [3052]

Mr. Strachan: One of the complaint letters that we have referred to already was that the juice appeared to be extremely watery.

The Court: I remember letters that talked about the juice being bitter or acid; I don't remember about water. But let's not forget that those letters were not offered for the proof of the facts that are contained therein.

Now, let's take No. 2, Finley.

In the absence of a showing that Finley knew what were in these records, which I don't think you can show, I don't think they have any bearing on that.

This after-the-fact situation is a very astounding position for competent counsel to take.

I suppose Mr. Finley could say that he had heard certain things and be subject to cross-examination on what he heard.

Mr. Strachan: That is right.

The Court: If the defense wanted to base a refusal on what he heard. Then your defense would be based on hearsay and subject to the cross-examination of the plaintiff in that respect.

But even if Finley had so testified that he had heard such things, the fact that there was also found in the books, after he got into the case, something that might support your contention, doesn't make sense. Because how can you rely on something that you didn't know anything about? [3053]

Now, you say as to damages, that it was an inferior product.

Mr. Strachan: I will say, further, it is a spurious product. These are spurious products. They are not inferior; they are spurious, they are adulterated.

The Court: That goes into issues. I recall some testimony. I would have to see it now in the record, that as this juice went through some vat there was a precipitation that came off, which was again collected and added back.

Mr. Dixon: That is precisely all this relates to.

Mr. Strachan: It does not, and I will show it does not. I will show this is tap water.

The Court: Let's assume that you are going to show tap water, the point is that apparently precipitated water is added. It is water. Now you want to inject an issue that instead of the precipitated water, that there is tap water that goes in. We haven't a Food and Drug case.

You would have to follow with what Mr. Dixon says, and then follow that the loss of sales was due to this adulteration of the product, which you so far haven't undertaken, and which I doubt that you can sustain.

Mr. Strachan: If there is any doubt as to my sustaining it, I want to clear that up. I can make a very precise offer of what this evidence will prove.

The Court: Finally, you mention impeachment of Winckler. [3054] What was it that Winckler said that you are going to impeach?

Mr. Strachan: Before I get to that, it is pointed out to me that this bears on damages in this respect, too: In that what he is suing for is loss of profits, and I think this evidence will show the consistent practice of diluting orange juice and other products, which Mr. Winckler said were not diluted. What he is claiming is damages for not being permitted to sell water or watered products.

And getting back to the causation question, I think whether his product was good or bad has a bearing on why he went out of business. The question of causation. As the record stands now, Mr.

Dixon would be at liberty to argue that they had a fine product, it met the Grade A specifications of the Federal Government, and he had a fine product there which had gained public acceptance and he was entitled to continue selling it, and he would have continued to sell it.

Now, getting to the question of impeachment, beginning at page 1031 of the the transcript. This is Winckler.

"Q. Coming back to this first label, does 'Fancy' on the Anagold label mean that the contents of the can would grade fancy according to the standards of the United States Government?

"A. We believe it would, in spite of the fact that it [3055] was never examined by a government inspector.

"Q. You had your own inspection service, did you not?

"A. We had our regular plant inspection.

"Q. With laboratory analysis and such like that? A. Yes, this is correct.

"Q. Based on that you want the jury to understand that 'Fancy' on an Anagold package means that it would meet the specifications and requirements of the Government Grade A of fancy quality? A. Correct.

"Q. Here is another Anagold label. Instead of saying 'Fancy' it says 'Fancy California.' Would the use of 'California' in any way indicate a difference in quality between that product and the one that is marked 'Fancy'?

"A. No, it would not.

"Q. So you would say that the California Fancy——

"A. The word 'California' is just added simply to identify it that it is packed in California and not in Florida. It would have no bearing on the word 'Fancy.'

"Q. You want the jury to understand that the California Fancy Anagold would meet the specifications of Grade A Fancy as defined by the Department of Agriculture? A. Correct.

"Q. I believe under the government definitions of orange juice, a citrus product that is sold as orange juice [3056] contains no ingredient other than the juice extracted from fresh fruit, is that correct? A. That is correct.

"Q. Sweetened orange juice contains no ingredient other than the juice with dry sugar added, is that correct? A. That is correct.

"Q. Those same restrictions apply to grapefruit juice and to blends, is that right?

"A. That is correct."

Then I go to page 1041. This is an answer.

"A. No. The liquids—the oil evaporated, we had no oil recovery, because the oil went out with the vapors. There was no oil recovery. But we recovered, as you stated, the other liquids, which is, basically speaking, a part of the water contained in the natural fruit. That was collected in another small stainless steel tank which was a part of the equipment and which stainless steel tank received that condensed other liquids automatically without ever getting in contact with any outside air.

"Q. Well, was it the practice of the Winckler-

Smith plant then to restore to the extracted juice after de-oiling the same identical liquids that had been taken out of that juice in the de-oiling process?

"A. Well, what we call condensate, which I said was two to five gallons per hundred gallons, which was separated [3057] by the de-oiling equipment in the receiver, the little stainless steel tank, that automatically went back into the juice because there was nothing added and nothing taken away.

"Otherwise, we would have sold concentrated orange juice instead of single-strength orange juice.

"Q. To follow that up a minute, then it isn't permissible when you are making orange juice to be sold as orange juice to introduce tap water into the product, is that correct?

"A. That is correct, but that water that we are referring to was not tap water. That was the condensate which came from the orange, and I think you stated before that fancy orange juice means that it doesn't contain anything except what is in the orange.

"Q. After the juice has been extracted and is in the tanks there following this de-oiling process and restoration of the condensate, is it tested by chemical procedures to determine quality?

"A. Yes, it is.

"Q. What are those tests? I mean what do they test for? I don't want to know what the tests are.

"A. Well, I can describe it very briefly. They are tested for soluble content, for the Brix content, which is the sugar content, for the acid content, for the ratio between [3058] the acid and the Brix.

"Then the cans are tested for the vacuum. The cans, if they are properly sealed, have to show a certain vacuum.

"I think they are about the most important steps.

"Q. If on testing a batch of juice which has been fully processed and is ready for packing, it is found that the acid content is too high to comply with the specifications for orange, fancy, we will say, is there any way in which the acid can be reduced?

"A. Not to my knowledge, but I would like to point out that the acid content was checked, not after the juice was already extracted, but it was checked primarily, as I stated before, when we received the load of fruit, and if we received a load of fruit which was not up to the proper standards, we rejected such load.

"Q. All right. But if after you have processed fruit that you have accepted, and your analysis shows that it is too acid to meet government specifications, is there any way in which the acidity can be reduced before it is packed in the cans?

"A. The only way that I know that it can be done is that you blend a high acid tank with a low acid tank, and by blending the two tanks you bring down the acid content.

"Q. Are there some products where it is permissible to change the acidity if you brand the product something other [3059] than orange juice?

"A. I have no knowledge of any products or of any way to change the acidity. I have to state that I am not a chemist. I was managing the plant as general manager, and my burdens just couldn't include all the little details which were involved in production. But I have no knowledge that there is any way in any plant, or in any product, to change the acid content."

Here is further testimony beginning at page 1225 of the transcript:

"Q. One of the products that you mentioned having manufactured and offered for sale was a group called Citrus Cocktail, is that right?

"A. Correct.

"Q. What products did that embrace?

"A. The Citrus Cocktail is, basically speaking, a blended juice which was mentioned in this Court several times, a blend of orange juice and grapefruit juice. The only difference between the regular blended juice and the citrus cocktail is that there was a little bit of lemon juice added to it, which gave it a tangy flavor, and the Citrus Cocktail was really meant to be more or less part of the trademark.

"Q. Now, it was composed only of orange juice and grapefruit juice and lemon juice?

"A. There was a very little lemon juice added to it. [3060]

"Q. A little lemon juice?

"A. A little lemon juice to flavor it. That made the only difference between the customary blended juice which is manufactured by everybody and the Citrus Cocktail.

"Q. During what periods did you pack Citrus Cocktail?

"A. We packed Citrus Cocktail in 1946 and we packed in 1949 and we packed in 1950. Whenever we could get—we didn't pack in 1951 because we couldn't get Valencia oranges, I believe. It could be that we packed a very small quantity even in 1951.

"Q. Were the oranges used in the Cocktail Valencias? A. Yes, they were.

"Q. Did you ever use any navel oranges in packing the cocktail?

"A. Not that I would recall of. We definitely didn't use any navel oranges prior to 1949. It is possible that in 1949 maybe we used a very small quantity to blend it with the Valencia oranges, but I don't believe so.

"Q. There was no citric acid or anything of that sort added to change the acidity of the product, was there?

"A. No. Lemon juice was added to change the acidity.

"Q. Never any citric acid?

"A. Never any citric acid.

"Q. Now, that cocktail was packed in two sizes, wasn't it, No. 2 and No. 3 can?

"A. Correct. No. 2 and the 46-ounce." [3061]

Then on the same day; beginning at page, I guess it is 1198 of the transcript:

"Q. I show you this volume that has been marked Exhibit I, called Winckler & Smith Daily Laboratory Statistics, January 8, 1951, to December 17, 1951, and call your attention particularly to sheet No. 735, dated July 10, 1951, and ask you if you recognize that as being the form of Daily Laboratory Statistics used in the plant.

"A. Yes, I do recognize the form.

"Q. At the extreme—well, it starts out Plant Equipment, and then a code—what does that code mean, do you know?

"A. I wouldn't know.

"Q. And then the column in the left-hand side says 'Time,' and the next column is headed 'Raw Juices Extracted,' broken down into subheading, 'Brix' and 'Acid.' A. Yes.

"Q. Can you tell us what, in the ordinary course of business, was recorded under the column 'Time' and what was recorded opposite that time in the column 'Raw Juice Extracted'?

"A. Well, under the column 'Time,' as the word implies, it means when the sample was examined, the [3062] hour when the sample was examined.

"Q. Where is the sample obtained?

"A. On the raw juice?

"Q. Yes. A. From the raw fruit.

"Q. From the fruit or from the juice?

"A No. Well, I don't know how to answer that. You can't get juice unless you have fruit. The juice has to be extracted from the fruit.

"Q. But this is taken from the tank, isn't it, or whatever vat the juice is in after it has been extracted from the fruit?

"A. Well, I am not able to answer that question. That could have been samples taken from the fruit bin as the truck was unloaded, and then—just a second—the fruit extracted in the laboratory for sample purposes to identify the Brix content and to identify the solids, that could be one thing.

"Q. Brix and solids are one thing, are they not?

"A. No, they are not. Brix and solids are two different things.

"The Court: Well, tell us again, because I don't know.

"The Witness: Well, the way Mr. Finley explained [3063] it, and I try to get close to his explanation, soluble solids are all solids included in the orange. In other words, not only the sugar content, but also the acid content.

"Now, the amount of soluble solids is, basically speaking, the result of two factors, how many gallons of juice is in a ton of oranges and what the solid content is of one gallon of juice."

Then I will skip a little of the colloquy and get over to page 1200.

"Q. (By Mr. Strachan): Now, to get back to this, this is a record of some juice that was processed and canned as of July 7, 1951, is that correct?

"A. I haven't seen these damn things for so long I have to look at them a little better. In the first place, what I don't see—it doesn't state what it is.

"Q. Doesn't it say O.J. up here, for orange juice? A. I read that O.S.

"Q Did you have a product known as O.S.?

"A. No.

"Q. You had one O.J. for orange juice, didn't you? A. It could be grapefruit juice.

"Q. You mean O.J. could be grapefruit juice rather than orange juice?

"A. I don't know what the O.S. means. It can be the truck driver's initials. It can be anything.

"Q Take this next page, 736. That says G.F.

"A. That is definitely grapefruit juice.

"Q. You are sure that is not the driver's initials?

"A. I don't think so. It wasn't prepared by ou regular chemist. It was prepared by a girl name Comstock.

"Q. Who is she? Was she an employee?

"A. She was for some time, years ago. Now, let' see here. What is the question now? If we canne orange juice or not?

"Q. Can you tell from this whether that referred to orange juice?

"A. I wouldn't be able to make a definite statement one way. There is a tiny little letter mark o the top, and the next page—here is a G.F., and her is an O.J., and there is one mark that could b O.J. or O.S., and I cannot identify defintely on way or the other way.

"I still stick to my testimony that we didn't ca any orange juice except Silzle in any volume t speak of, and I think my testimony included tha I [3065] am not including in such statements a fe cases we may can for sample purposes.

"The Court: Well, does this sheet show th number of cases?

"The Witness: No, it doesn't, your Honor.

"The Court: This is laboratory testing?

"The Witness: This simply shows sample taken at a certain hour of raw juice.

"The Court: All right. Go ahead, Mr. Strachan

"Q. (By Mr. Strachan): That is page 735, is it? Yes. Well, whatever the product was, can you tell us in what size cans it was packed, according to this record?

"A. According to this record it was packed in 46-ounce cans. Now, I want to——

"The Court: Is that a No. 3 can?

"The Witness: Well, they call it sometimes incorrectly a No. 3 can.

"The Court: All right.

"The Witness: It is the same can as the 46-ounce."

The Court: Well, what has that got to do with it?

Mr. Strachan: Perhaps it isn't——

The Court: About half of what you read has no bearing on this problem at all. Do you have any more that has any bearing on it? [3066]

Mr. Strachan: This is page 1205, I think.

"Q. (By Mr. Strachan): In this laboratory record I notice that on the first line you have a date and an analysis of the juice extracted.

"A. Yes.

"Q. And then you skip a line, and then show over in the canning section the size of cans and other matters. A. Correct.

"Q. Does that mean that the lot that is analyzed on the first line is the lot that was disposed of or packed or canned as shown on the blank line following it? A. Definitely not.

"Q. It doesn't?

"A. It doesn't. You see, you take the juice and the plant is going, by the time you take a can you don't know, it may be from a different truck load, entirely different, you don't know from which bin it comes. There is absolutely no connection.

"Q. Then you are never able to identify from this record that these canned products——

"A. Was made from that juice?

"Q. Was made from that juice.

"A. Absolutely impossible." [3067]

The Court: Well, to take up the last thing first, will this witness testify that she can definitely ascertain that the cans that were tested came out of the very batch in which she put the test on the first line?

Mr. Strachan: She has already so testified and that was part of the regular procedure. That is the foundation I laid.

The Court: Generally, yes, but not specifically. She would pin that down?

Mr. Strachan: I understand she would.

The Court: Do you propose to show any conversation between her and Mr. Winckler?

Mr. Strachan: No, sir.

The Court: Where she told Mr. Winckler that tap water was put in the orange juice?

Mr. Strachan: No, sir.

The Court: You propose to show no conversation between her and Winckler at all?

Mr. Strachan: Not by this witness. I will connect it up, though with another witness.

The Court: With what?

Mr. Strachan: What?

The Court: What will you connect up?

Mr. Strachan: I will show that these records were regularly shown to Mr. Winckler, they bear his initials showing [3068] he has seen them. By one witness I will show they discussed this practice of adding water to these products.

I might mention what I have not already brought out, that some of the pages which I would have this witness interpret will show that citric acid was added to various products to increase acidity.

The Court: You may be seated.

I don't want to hear from you either, Mr. Dixon, right now.

This is a wondrous case. First you send counsel out here from Chicago and our ordinary pretrial procedures are interrupted so that in the course of trying to work out the pretrial we never find out an exhibit like this is going to be offered. I am as much at fault for that as anyone else, but that is one of the things that happened. Instead of having had all these exhibits identified down the line, it was not done.

Now, the obvious purpose of this evidence is to bootleg into the record after-knowledge which the defendants did not have. I don't think there is any doubt about that.

I heard Mr. Finley testify and I don't anticipate you are going to be able to prove that you had knowledge of the contents of these records. So the real purpose of it, although it is based upon alleged impeachment of Winckler, the real purpose of it is to get before the jury facts which were [3069] not within the knowledge of the defendants at the time refusal was made, if it was made, and so forth.

I don't know. It is an amazing case. Here is a case where we hear testimony yesterday that $39,000 was paid to accountants up to December 1st, and they have been out here since then and I anticipate there will be another $39,000 or $40,000 paid to them.

I heard testimony, when we had my little trouble with Mr. Williams, about how much money had been paid to counsel, and I would be interested in knowing, although we won't go into it now, but what totally the cost of this action will be to the shareholders of Sunkist. I think it will be an amazing figure. If Sunkist wants to spend its money in hiring Chicago accountants and Chicago lawyers to try lawsuits, why, I guess that is their business, but it is one of the amazing things about this case, when the defendants were represented by able counsel here in California, that things like this, and amounts of money like this were spent.

Part of it is this attempt to put into evidence these exhibits to show definitely after-acquired knowledge which defendants did not have at the time when there were requests for agreements. In that I see the fine hand of Mr. Williams. I am confident this is one of his thoughts. He has arranged this, to offer these exhibits.

If by any chance it should go into evidence on the basis [3070] of impeachment, and that is a serious question because you concede that this woman did not talk to Winckler, the closest she came to it is showing slips that were laid on his desk and they were initialed, but if it does go into evidence as impeachment, the jury will certainly be told, and told in no uncertain terms what it will not be considered for, and when I get through telling them what it is not being considered for, I am afraid that the exhibit will not be as effective as the defendants think it might be.

This matter of taking an exhibit that might be admissible for one small purpose and tossing it into a case where it can have the effect of being used for another purpose presents a problem. It presents a problem to the Court in its right to control the admissibility of evidence in a case.

As far as complaints made, your first ground, I see nothing to this. There is no evidence in the record, at least at this stage, except letters which were admitted not for the truth of what they contained, but were supposedly impeachment.

Secondly, most of the matter you read to me, Mr. Strachan, was brought out on cross-examination of Mr. Winckler, and although that is the proper way to lay the basis for impeachment, it doesn't always mean that the matters then become issues which are subject to impeachment.

You have mentioned that Finley made a decision, and what he had heard. That may be proper evidence. But the fact that [3071] in the records were certain evidence doesn't bolster his decision one iota. Something that was discovered afterwards in the absence of some showing that Finley or whoever the person is that you will call knew about those records and what was in them, doesn't mean anything. They are not admissible for that purpose.

Now, you say on the issue of damages. If we went into all the issues that you raised by your offer here and by the purported basis on which you say these documents are admissible in evidence, this case would be going for another month.

In that connection, unless I have some assurance about the end of this case, I will do what I threatened before and make you produce before me all the documents you are going to produce and the names of your witnesses and I will find out what you have got left, and send the jury home for two or three days until we straighten it out.

The remaining matter, the matter of impeachment, seems to me it is impeachment on issues that aren't major issues in this case.

I will think about it over recess.

Mr. Strachan: I want to mention, your Honor, that I would also regard it as bearing upon causation. We take the position that, and would argue to the jury, that one of the reasons for the second failure of Winckler, if not the first failure, also, was the spurious product he was selling under [3072] a false label. That is one of the bad business practices I think we can fairly argue to this jury was the cause of his having failed.

The Court: How can you argue that in the face of this record that the sales that were made in 1949 and 1950 were so large, and the fact that no sales in this particular product were made in 1951? If he had bad oranges, assuming plaintiffs' contention, if he had had oranges and then he couldn't have sold them, I could see the materiality of it, but he never got the oranges, and how can you argue if he had got them he couldn't have sold them?

Mr. Strachan: What he would have sold, apparently, was water juice, but I am going to take the position one of the bad business practices he was guilty of and which was responsible for the decline of his sales and his inability to sell in the later years, was the spurious product that he was offering to the public and had been selling to the public. It was not orange juice at all. It was orangeade. He was selling orangeade as orange juice.

I might also say I think as a technical matter this evidence will definitely lend itself to an argument that there had been no public injury involved in Mr. Winckler's elimination from whatever cause from the competitive field.

The Court: Have you any more you want to add, Mr. Dixon? [3073]

Mr. Dixon: Your Honor, my position is what it was when this question was originally injected into the case by counsel on cross-examination. I think the record will show I entered an objection at that time to this line of testimony on the grounds heretofore urged for the rejection of any further evidence along this line by this witness. Well, I don't know if there is anything I can add to it.

It is just a question of the defendant setting up a strawman on an immaterial issue and then we have to try to knock it down.

I would like to get along with this case, at least with what I feel as a lawyer is some evidence that deals with the issues.

That's all I can say, your Honor. I regard this evidence and this type of evidence and this type of examination as being resorted to for the sole and only purpose of injecting into this case something of an entirely collateral nature that has nothing whatever to do with any of the issues in this lawsuit. It is wholly immaterial whether this was a good product in the opinion of the defendants. We are not here trying the question of a violation of the Pure Food and Drug Act. That is what we would probably have to get into. That is all they could argue, that we were selling something under an illegal label, but the record belies the whole relevancy of this type of evidence, your [3074] Honor.

The facts here show an increase in sales, substantial increase in sales, not a decrease, and the question here is what would have happened if we had had access to Valencias in 1951. We didn't sell any Valencia juice in 1951 because we couldn't process any and sell it on a basis competitive with the defendants.

It is wholly irrelevant, it seems to me, to the basic issues, or any issue in this lawsuit, to inject this kind of evidence into the case. We would be here indefinitely in trying to justify it, and we would have to justify it. We would have to go into the explanation of it.

It certainly isn't relevant in my judgment on any impeachment basis.

The Court: You say it is relevant?

Mr. Dixon: It is not relevant on any impeachment basis. In other words, the testimony that counsel has read came out on cross-examination over my objection at a time when in the course of cross the discretion of the court was broad to permit examination into this type of thing, but it does not impeach his testimony, and if it does, it is on an immaterial issue in this case.

I just can't see it, whether this was watered or not watered. There is no evidence, and they can't produce any that the defendant had any knowledge, if that is the fact.

Secondly, they can't produce any evidence to show it [3075] had any effect on the sales of the plaintiff's product. That is the materiality, it seems to me, of what evidence the defendants can offer in this case, and if it doesn't tend to go to those issues, I can't see how it can do anything but confuse the jury, clutter up the record, and further extend the trial of this case to a time which in my judgment, and I say for the record I have tried many anti-trust cases, but I have never been in a case where I have seen so many straw men to be knocked down as they have been in this case by the defendants.

That is only my personal opinion, your Honor, and I perhaps shouldn't put it into the record, but I feel strongly about it because we are pretty near two months now in the trial of this case, and I was hoping I was seeing the end of it, but apparently if this is to be injected into as relevant to any issue, then I don't know when this case will [3076] terminate.

Mr. Strachan: One other matter that I would like to advert to, your Honor.

Your Honor has mentioned twice that the defendants have expended large sums of money in the defense of this case, and your Honor knows full well that through your own good offices proposals of settlement were from time to time solicited, and they were in every instance rejected, and the reason they were rejected was this: Mr. Armstrong, Mr. Wilcox, the growers who are members of the board of directors of the defendant companies here, stand charged by this Mr. Winckler with having been guilty of criminal conduct, which for one moment they do not concede and they never will concede, and I think they would have been men of very poor spirit and very poor judgment, and very poor quality of men, in every respect, if they would want to pinch a few pennies and not defend to the utmost their part in the conduct of an industry in which they represent co-operatives.

They are men of high regard in this community, and I don't think they can be blamed for having bent every resource to defeat what they regard as an utterly baseless claim, and a baseless charge against their integrity, honesty, and to defeat this claim that they are criminals and violators of federal law.

The Court: I understand they enjoy good reputations. I don't go along with you that a settlement of the case would [3077] mean any admissions of those facts.

That is neither here nor there.

I call attention—I probably didn't go far enough —I call attention to the amount of money spent, and the type of defense put on; as I have done heretofore in the past, that here is a bankrupt corporation pressing this action, and I concluded once before that the case was being tried by the methods of grinding down and delay because of certain things I saw. That is the real significance in this case, how many issues you can inject into it, how far you can spread it out, and still preserve some semblance of justice between a bankrupt corporation and a wealthy defendant.

Whether you settle this case or not is out the window and is not the problem. It is a problem of an offer that you made that injects issues in this case where this case would go on forever.

We will take a short recess and take the matter up at that time.

(Recess taken.)

The Court: The record will show the jury absent.

I am ready to rule on this matter.

The objection to any further questioning is sustained.

Do you offer the exhibits I-1, -2, -3, and -4, in evidence?

Mr. Strachan: I offer them in evidence. And I would [3078] also like to make an offer as to what the further testimony would show.

The Court: Let's take the offer, first, in evidence.

The objection is sustained.

The objection is sustained to further questioning on this matter and to these exhibits. First considering the purposes Mr. Strachan said that they were admissible for:

As to complaints made, the letters referred to are in evidence not for the truth of the facts contained therein.

As to Finley's decision, in the absence of a showing, in the way of foundation, that Finley knew about these documents and the matters referred to, they are not admissible as an afterfact to bolster Finley's decision, which according to counsel was based upon hearsay information that he obtained.

As to the question of damages, that they would go to the question of damages or causation, alleged inferior product, we are not trying a Food and Drug case.

As far as we know, maybe people liked orange juice with water in it as well or better than orange juice without water in it, assuming that you could prove that tap water was put in it.

As to your alleged impeachment matters, there is a serious question as to whether any of it is impeaching. And if there is impeachment, it is on collateral issues that don't [3079] go to the merits of this case.

Finally, even if it were admitted for impeachment, the jury would have to be instructed for what purposes it could not be used for, and it presents a serious question, evidence of this sort going into the record, in trying to protect against its misuse by instructions to the jury. The court has to weigh the probabilities of its value, its slight if any impeachment value, as contrasted with the other.

Finally, there has to be an end or some limitation to issues that can be tried in a lawsuit, and the introduction of these records and further testimony along this line would needlessly multiply the issues to be tried in this suit.

For those reasons, and for the reasons heretofore stated by the court, the objections made by Mr. Dixon will be sustained.

Mr. Strachan: Your Honor didn't expressly mention the matter of the pertinency to the question of public injury.

The Court: I don't see any pertinency to the question of public injury. Unless you are going to make a Food and Drug case out of this, and I am not going to do that, either. The record shows over a million dollars' worth of sales in the two preceding years, it shows substantially no sales of Valencia juice—those were gross sales that I was talking about, with sizable sales of Valencia juice—it shows substantially no sales of Valencia juice in the year when damage [3080] is claimed, and the contention of the plaintiff is that they couldn't buy your fruit at $40 a ton and make Valencia juice; that you nevertheless had contracted with your and their competitors so that your and their competitors could make Valencia juice. Therefore, this other matter of public injury, based upon any matters contained herein, is one step removed from the problem.

Now, do you want to make an offer of proof?

Mr. Strachan: Your Honor, I want to call attention to this: That the exhibit does not deal only with Valencia juice, or only with single-strength juice, it deals with all of the citrus products, and the exhibit will show that those citrus products, which should have contained nothing but the juice of the fruit, were diluted consistently by the addition of approximately 25 to 30 per cent of water, in cases where water was added.

I just want to make that clear, because of your Honor's statement that the issues were limited to Valencia juice.

We would show that all of these products were adulterated by the addition of water, and in some instances not only the addition of water, but the subsequent addition of citric acid, to restore acidity where the addition of water had reduced it.

Mr. Dixon: Your Honor, I want to ask counsel whether he represents to this court that this witness, if permitted to [3081] testify, would state that 25 per cent of the liquid content of the products covered in these exhibits contained tap water. Is that your representation as to what this witness would testify to, counsel, of her own knowledge?

Mr. Strachan, I was going to have the witness identify particular instances, and I was going to have the chief chemist of the EOP——

Mr. Dixon: I am talking about——

Mr. Strachan (Continuing): ——EOP make computations to show what the extent of adulteration was, and that testimony would be based upon these records and would show, together with the testimony of this witness, that the adulteration or stretching, as it is sometimes called, resulted in the addition of 25 to 30 per cent of tap water.

The Court: The question counsel asked you is, do you expect to show that by this witness, will she testify ~~that~~ 25 per cent water was added to any of these products?

Mr. Dixon: From these records that you are offering in evidence and her testimony?

Mr. Strachan: I wasn't going to have her make the computations, no. I was going to have her point out particular instances, which I will do in this offer.

Subsequent witnesses would make the computation.

As I understood it, the objection and the ruling were [3082] to this whole line of interrogation.

The Court: Let's go ahead with your offer.

If you are going to prove by a particular witness, tell us what you are going to prove.

Mr. Strachan: I am talking now about what the testimony of this witness would be.

The Court: All right.

Mr. Strachan: I would refer the witness to page 484 in Exhibit I-1 and show by her that the sheet dated July 18, 1949, bears her signature, and the records thereon are in her handwriting. That there was a reduction in the acid content or acidity of each batch from the time that the juice was tested, when extracted, until the time it was canned; that the reduction in acidity amounted to approximately, from an average of 165 in the raw juice to approximately 130 or thereabouts, 135, in the canned juice. That the Brix test was increased through the addition of sugar. That in the first batch the addition of water would amount to approximately 18 per cent; in the second batch approximately 21 per cent; in the third batch approximately 19 per cent.

The Court: She would make those computations, would she?

Mr. Strachan: I believe she could, yes, your Honor. That is what I expect her to do.

She would also testify that the water that was added was [3083] tap water added through turning on a valve connected to a tube that led to the various tanks. That she analyzed the acidity and solids content of the extracted raw juice, and advised the tank man how much water should be added and how much sugar should be added, in order to make the raw juice with the additives correspond to a prescribed formula given to her by her supervisor Gilbert. That the tanks were so calibrated that the water was added—the number of gallons to be added was measured by the tank man by marks on the tank, so that each one inch on the tank side represented seven gallons of water.

On page 466, we would show an increase through the decrease of acidity, that approximately 27 per cent was added to the batch recorded at 3:00 p.m.

At page 478, I would show that approximately 35 per cent of water was added to the orange juice there referred at 8:30 p.m.

With respect to page 517, sheet dated August 6, 1949, showing that the product run was unsweetened orange juice, I would show that there was water added, particularly in the first batch at 8:30 a.m., which resulted in approximately .38 per cent dilution.

That the raw juice and the juice as later tested in the cans shows, also, that the oil in the juice as canned when tested ranged from .05 per cent, .023, .032, .0325 per cent, .04 per cent, and to .06 per cent oil.

Pages 523 and 524 would show approximately 42 per cent water added, that is beginning at 7:30 p.m., which was unsweetened orange juice, single-strength orange juice.

Page 569, I offer to show and I believe the witness will testify that the batch tested at 10:00 p.m. represented over .60 dilution of the extracted juice.

On page 1353 and page 1354, I would offer those to show and the testimony of the witness to show that the records there related to processing of grapefruit, and that the records show that the grapefruit juice as extracted was [3085] substantially diluted by the addition of water before it was put in the cans and there tested.

In Exhibit I-2, I would expect to make similar showings with respect to the watering of grapefruit from pages 1356, 1360, 1361, 1364, 1392, and 1394, for various dates between January 4, 1950, and February 7, 1950.

The same exhibit, on page 1407, I would use the document and the testimony of the witness to show that there was added to the raw juice in the tanks citric acid to increase the acidity.

On page 1528, volume I-3, and by the testimony of the witness, I would show that on August 8, 1950, citric acid was added to orange juice, single-strength orange juice, so that the acidity which in the raw juice form averaged approximately .85 per cent of acidity, went to an acidity in the canned product averaging approximately 1.15 per cent acidity, and that that was product designed on the face of the exhibit as being unsweetened orange juice.

I-4, page 738, July 19, 1951, would show that five tankfuls of single-strength orange juice were extracted and canned, and that there was added water to bring the acidity of the raw juice from acidity ranging up to 1.53 per cent acidity down to an average of 1.18.

That on the following page, 739, under the date of July 20, 1951, were canned seven tanks of single-strength orange [3086] juice, six of them being canned in five and a half ounce cans, and that through the addition of water, the acidity was reduced from an average of approximately 1.45 per cent acidity down to an average of approximately 1.08 per cent, by an addition of approximately 33 per cent of water.

Those are illustrative of and include matters which I would show from these documents and from the testimony of the witness now on the stand.

The Court: In other words, those are only part and you would show more?

Mr. Strachan: I could show more. I want to say, your Honor, that were these documents admitted in evidence, I would have another witness, the chief chemist of Exchange orange Products, testify to his circumspection of these books and his conclusions therefrom, which would show on an over-all basis what these records indicate to be the regular and normal dilution of orange and other citrus products of approximately 25 to 30 per cent.

The Court: All right. To the offer of proof, may it be stipulated there are the objections heretofore made?

Mr. Dixon: Yes, your Honor.

The Court: The objection is sustained upon the grounds heretofore stated by the court.

Bring the jury down.

(The following proceedings were had in the hearing and [3087] presence of the jury.)

The Court: The record will show the jury present and in their proper places.

Ladies and gentlemen of the jury, the court now strikes from the record all testimony of the witness Opal Smith and all references to Exhibits I-1, I-2, and I-3 and I-4. You will forget that the witness ever appeared or testified.

I am going to shorten this trial and we are going to get done with it some day. [3088]

* * *

The Court: Let the record show the jury absent.

Mr. Strachan: If the court please, I have in the courtroom a person called as a prospective witness, Frank Gilbert, whose testimony in some respects would be similar to that of the witness Smith. I would like to outline in the nature of an offer of proof what I would expect him to testify to, and perhaps we can dispose of that.

He would testify that he is now chief chemist of Cold Gold Company in La Habra.

That he was chief chemist and part-time superintendent of the plant for Winckler & Smith between the years 1945 and 1953.

That he was the direct supervisor over the witness Smith, Opal Comstock Smith.

He would explain the testing processes and the maintenance of records as they were explained by the witness Smith, and would have been explained in the proof which I offered through her.

He would have testified that the raw juice was first tested, that there then was added water and sugar in the raw juice tanks, in order to make the contents conform to a predetermined acidity, solids, and content.

That the resultant product after the additives had been put in the tanks was then tested to see that it corresponded to the prescribed formula. [3089]

That then the material in the tank was canned, and that the cans were tested, and the results then recorded as indicated on the exhibits and as explained by the witness Smith.

He would testify that substantial quantities of water were regularly added to single-strength orange juice, as well as all other citrus products. That in addition to water, if necessary, citric acid in solid form, in crystalline form, would be added.

The same applied to sweetened juices of all kinds, and to grapefruit and blends of citrus fruits.

He would also testify that he was chief chemist at the time in 1947 when Exchange Orange Products had some hot concentrate processed at their plant, at the Winckler-Smith plant; that in part the product was not sterile, that it had black spots and had unstable cloud, and that the performance of that arrangement was not satisfactory to Mr. Finley.

The Court: The objection is on the grounds heretofore stated?

Mr. Dixon: The objection is on the grounds previously stated.

The Court: The objection to the offer of proof is sustained on the grounds heretofore stated by counsel, and by the court on the other matters.

Mr. Strachan: One other fact that the witness would testify: That the check mark or V mark appearing at the foot [3090] of many of these pages, and for identification I will refer to——

The Court: Pick out one as a sample.

Mr. Strachan: I am looking at 1489, which is June 26, 1950, there is a mark immediately to the left of the printed portion, "Prepared by," and that scrawl, and similar scrawls appearing on various of these sheets, are marks made by Mr. Winckler to indicate that he had seen the report. That in the regular and ordinary course of business these daily reports were daily placed on Mr. Winckler's desk for his inspection.

The Court: All right. The same objection?

Mr. Dixon: The same objection.

The Court: The same ruling. [3091]

* * *

The Court: The record will show we are here without the jury.

In the transcript yesterday, I was reading some of my remarks, and there is an error or two. On page 3069, line 18:

"Now, the obvious purpose of this evidence is to bootleg into the agreement after-knowledge which the defendants did not have."

I can't guarantee I said "record" but that is what I obviously meant. It should be "into the record."

On page 3070, line 19:

"Part of it is this attempt to put into evidence these exhibits to show definitely after-acquired knowledge which defendants did not have at the time when"——

And it appears "there were requests for admissions." I suppose what was said was "requests for agreements." I will just change "admissions" to "agreements."

On page 3071, line 24:

"You have mentioned that Finley made a decision, and he had heard." [3095]

It should be, I suppose, "on what he had heard." I will just change that.

All right, now what have you?

Mr. Strachan: There are several matters I want to mention, your Honor. One is that overnight I have been thinking over the ruling that you made on the general subject of whether we could show adulteration of product. I don't want to reargue any of the matters I mentioned yesterday, but I do want to say in addition that I regard the evidence of the fact of adulteration of product as being highly important to the issues as a matter of law in this regard. That you have the general rule that a person who is conducting himself or is engaged in a business that is illegal or contrary to public policy cannot sue to recover damages to that illegal business or the interference with his continued course of conduct against public policy.

The rule in antitrust is stated in the Commerce Clearing House Trade Regulations Service that no recovery can be had for violations of the antitrust laws if the business or property injured is inseparably connected with an enterprise the existence of which is abhorrent to public policy.

The evidence that was tendered through the witnesses and in the Exhibits I-1 through I-4 would show that substantially all of the product that was being sold by the Winckler-Smith organization was adulterated and was not produced in compliance with the Food and Drug Act and the regulations applicable. [3096]

There is a decision in the Southern District of New York, which I haven't been able to locate, which applies the same rule, in a suit on contract.

And in the case of Maltz vs. Sax, 134 F. 2d, page 2, the Court of Appeals for the Seventh Circuit held that a manufacturer of gambling devices could not recover treble damages for injuries to his business resulting from a conspiracy alleged to be in violation of the antitrust laws, because the remedies under the antitrust laws did not extend to businesses that were conducted in violation of law or contrary to public policy.

I think that principle is fully applicable in this case.

It seems to me that the case is analogous to, say, a person dealing in bootleg or untaxed liquor. If his supplier discriminates against him in price and he goes out of business, it seems to me that he certainly cannot recover damages sustained by him in the course of conduct of an illicit occupation.

It may be that, as your Honor suggested in this case, the bootlegger made a product that the buying public was very well satisfied with, but still it is an illegal product, and the product of the Winckler & Smith plant, as our evidence will show, was likewise an illegal product.

I want to mention that as an additional basis for our having tendered the evidence. [3097]

I think, also, that the general doctrine of unclean hands would preclude a recovery here.

So it seems to me on a legal basis the facts that we sought to adduce are highly relevant, if not strictly controlling as a matter of law in this case.

The Court: Does that complete the additional matter?

Mr. Strachan: Yes.

The Court: There are two very ready answers to what you have said. One of them is an answer that attention should have been called to yesterday. That is Rule 12 of the Federal Rules of Civil Procedure. 12(b):

"Every defense, in law or fact, to a claim for relief," and so forth, "shall be asserted in the responsive pleading thereto * * * except * * *: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party."

And (h) of the same rule is the waiver of defenses that are not presented.

I think clearly within that rule a defense of illegality or a defense of unclean hands would have to be pleaded.

Let me add, also, that I don't think it comes within [3098] the provision of failure to state a claim, because the claim is stated.

If it turns out that the claim is not properly in court because of illegality or unclean hands, it would have to be pleaded.

Now, secondly, while we were waiting for this case to go to trial I made a list of issues, I went over the pleadings, I heard a lot of argument, and I made a list of 17 issues, which I then discussed with counsel. And I thought, and I think we all agreed, that I had covered the substantial issues in the case. There may be a lot of minor evidentiary matters that might come up, but the major issues in the case were discussed in that memorandum. I went over the thing with counsel, and we had discussion on a number of them, and no question like this was ever raised.

True, Mr. Hurd, in his opening statement made some statement to that effect, but you don't demark your issues by an opening statement, particularly where there has been time spent on discussion.

So I think on both of those grounds the additional showing you make now adds nothing, and I am content to rest on the record as it now stands.

Mr. Strachan: Well, I suppose the question that your Honor has raised in regard to pleading might in part depend on whether this is an affirmative defense or whether it is [3099] a defense in law that when it appears from the evidence or in any other way the court should recognize it, in order that there will not be—and this is the first time the pleading matter has been called to my attention——

The Court: This wasn't an unexpected defense from what I heard yesterday. These records were obtained very early, and apparently it was the intention of the defendants to raise this defense early in the case. No place in the record have I heard anything about it until yesterday.

Mr. Strachan: I want to consider whether we shouldn't make a motion to file an amended pleading to clear up the procedural point.

The Court: You may consider the matter.

Mr. Strachan: Now, another matter along the same line, your Honor. I have a witness Higbee who is the chief chemist of EOP. I had intended along this line to make an extensive showing as to what his examination of the books disclosed. I would like to use Mr. Higbee, and what I propose to do, unless your Honor wants me to follow another course, in brief, is this:

I would put Higbee on the stand and have him testify as to his qualifications by education, his qualifications as a food chemist in the employ of the Department of Agriculture for a time, his subsequent employment as a chemist by EOP, his experience of some [illegible]0 years in that employment——

The Court: Are you now making an offer of proof?

Mr. Strachan: I am just outlining what I propose to do.

And then have him mention that he made analyses of the hot concentrate that was packed in 1947 by Winckler-Smith, a considerable part of which was not usable. What he found in that respect. And then I would go on and ask him if based on his training and his knowledge of chemistry as applied to citrus products there are formulae or methods by which if he were to be given the acidity and Brix ratio of the juice extracted and the acidity and the Brix ratio of the product as canned, he could compute to what extent there had been additions of water, citric acid, or sugar, as the case might be.

I would have him testify that he could make such computations, and he would identify his formula, and I would then ask him if he had made an examination of Exhibits I-1 to I-4, and if there were no objection I would ask him what his examination disclosed [3101]

The Court: Well, I want it done out of the presence of the jury as an offer of proof. From what you have outlined here, I would sustain an objection to it and, therefore, it has no place before the jury.

Mr. Strachan: That is what I wanted your Honor's advice on. [3102]

* * *

The Court: Any witness that fits in the category of this chemist who I told you to make an offer of proof on, [3113] I want offers of proof made outside the presence of the jury.

As to the matter of the comparability of the Winckler & Smith plant with TreeSweet, it may or may not be admissible. If it is admissible, it is on the question of damage and not upon the question of what Sunkist knew about the plant, unless you have some foundation there.

Mr. Strachan: It will also be rebuttal as to Winckler's testimony that his operation and product was comparable to TreeSweet.

Mr. Dixon: His operation was comparable?

Mr. Strachan: Yes.

The Court: I don't think there is any issue of comparability of operations.

Mr. Strachan: He said his products were similar.

We are also going to show that the yield of juice that was obtained by Winckler & Smith per ton was not comparable to that obtained by TreeSweet, which of course would bear on damages.

Mr. Dixon: Unless that testimony, counsel, is directed to some specific part of Hedge's statement or evidence, I would necessarily have to object to it, because I don't see how you could make that kind of comparison between TreeSweet's plant and the plaintiff's plant. It is not an issue in this case. The issue is what could the plaintiff have done had they had 12,000 tons—had they had oranges available to [3114] them, whether it is 12,000 or 15,000 tons, under terms comparable. That is the only question; not whether they would produce less or more.

The Court: It may be that what the yield of Winckler & Smith is would be admissible on the question of damage.

Mr. Dixon: You mean whether Winckler & Smith could have produced——

The Court: Supposing they couldn't have produced any orange juice?

Mr. Dixon: Sure, that would be relevant. If they had no plant.

The Court: It is a matter of degree. But we will cross those bridges.

All right. We will get started.

(Whereupon the proceedings were resumed within the presence of the jury as follows:)

The Court: The record will show the jury present in their proper places.

Mr. Strachan: Mr. Rodgers.

WILLIAM RODGERS

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: William Rodgers. [3115]

Direct Examination

By Mr. Strachan:

Q. Where do you live, Mr. Rodgers?

A. I live in Riverside.

Q. What is your present occupation?

A. I am a salesman with an industrial adhesives company.

Q. Have you at any time been employed in the citrus fruit processing industry? A. Yes.

Q. When was your first employment in that industry? A. In June of 1942.

Q. By whom were you then employed?

A. TreeSweet Products Company.

Q. How long did you continue in the employ of the TreeSweet Company?

A. About seven and a half years. I left in October of '49.

Q. October when? A. Of 1949.

Q. Will you tell us briefly what your various

(Testimony of William Rodgers.)

positions and duties were while you were an employee of TreeSweet?

A. Well, I worked in most of the positions in the plant. I was in the control lab a good deal of the time when I first went there; I was in charge of the by-products department for about two years; I managed our Phoenix cannery in the 1945 [3116] season, and packed grapefruit juice there; and in 1949 I went to Florida with a great many of the other men, and I was in charge of the actual supervision of the running of the cannery in Fort Pierce, Florida.

Q. You were an assistant superintendent for TreeSweet, were you not?

A. That is right.

Q. Did you have a complete familiarity with their processing methods and the products they produced? A. I had.

Q. Were you ever employed by the Winckler-Smith Citrus Products Company? A. I was.

Q. During what period were you employed?

A. From April, 1950, to some time in September of 1950.

Q. What were your duties while you were employed by Winckler-Smith?

A. Well, I guess you would call it plant superintendent. I had the responsibility of the physical operation of the plant, seeing that help was there for the various jobs, and I helped Mr. Gilbert schedule production and see that the various inventories were kept up on raw materials.

(Testimony of William Rodgers.)

Q. What would you say was the condition of the Winckler-Smith plant mechanically when you were employed there?

Mr. Dixon: I object to that question, your Honor, as [3117] being entirely too general and broad in nature, the condition of the plant.

The Court: It is a preliminary question and will be further gone into. Objection will be overruled.

This testimony is admissible for one purpose and not for another. Let me see if I can explain it to you.

Winckler & Smith claims damages, and you are entitled to find out generally about their plant. We are interested particularly in the year 1951 when Winckler & Smith claim they were injuriously affected by the TreeSweet and Silzle contracts.

In determining, therefore, what Winckler & Smith could have done, you are entitled to know whether this was a 100 per cent efficient plant or five per cent efficient plant, as it may have some bearing on your decision on that issue, if you reach that issue.

The evidence is not admissible as to whether Sunkist properly or improperly refused to give a similar contract to Winckler & Smith, unless there is evidence that Sunkist knew of the things that this witness is going to testify to.

Do you follow me on that?

In other words, on the issue of Sunkist's refusal to give a comparable contract, that refusal has to be charged, if you find such a refusal, on the basis of

(Testimony of William Rodgers.)

what the man who made the refusal knew at the time he made the refusal; not what he [3118] might have found out afterwards from this witness, or some other witness.

The objection is overruled.

The Witness: Will you restate your question?

Mr. Strachan: Will you read the question, please.

I will put another one.

Q. (By Mr. Strachan): What did you observe about the physical condition of the Winckler & Smith plant?

A. Generally speaking, it was in quite bad shape mechanically.

Q. How did it compare mechanically with the TreeSweet plant?

Mr. Dixon: If the Court please, I think that answer should be stricken as clearly the conclusion of the witness, that it was in bad shape mechanically.

That is a question for the jury to decide based upon the facts, if any, that this witness can give to them.

The Court: The objection is sustained and the answer is stricken out, and the jury is instructed to disregard it.

Q. (By Mr. Strachan): Now, will you mention specific respects in which the plant was not in good condition?

Mr. Dixon: If the Court please, I am going to, at this point, object to counsel leading this witness.

(Testimony of William Rodgers.)

The Court: Sustained.

Q. (By Mr. Strachan): Will you tell us what you observed [3119] about the plant with respect to its mechanical efficiency?

A. Well, at the time I went there the plant had been operating, and I found that the machinery, equipment, that was necessary to transport either juice or cans, or material of one nature and another, was in a condition of repair which made it necessary that the equipment be overhauled quite frequently to keep the plant running.

Q. How did that compare with the mechanical conditions of the TreeSweet plant?

Mr. Dixon: I object to that question, your Honor.

The Court: Objection sustained. We are not trying the issue as to what the TreeSweet plant did or did not do. [3120]

Q. What kind of equipment was being used for your extraction of citrus juices?

A. The Citromat extractor.

Q. In regard to the efficiency of the Citromat extractor as compared with other types of extractors—no. I will change that.

Can you tell us whether or not Citromat extractors were comparable in the production of single-strength Valencia juice with other types of extractors then used in the industry?

Mr. Dixon: If the Court please, I think I must object to that question, too. The evidence here is that this was a Citromat extractor. If this witness can testify there was anything wrong with it, that might be relevant.

The Court: I think the defendant would be entitled to show that this might not be the latest equipment. It is a question of fact for the jury whether or not a man who is operating a 1953 car is operating one that is as good as a 1954 or 1955. I suppose progress is made in equipment the same as it is made in automobiles. But I think you ought to go about it the other way. Inquire first what type extractors were used, a brief description of them, and then what was used by the others.

Mr. Strachan: All right.

Q. Will you tell us what other type extractors were [3121] used for the production of single-strength Valencia juice during the period when you were in the employ of Winckler-Smith Company?

A. Well, that was the only type that we had in operation.

The Court: Was there available——

The Witness: You mean the others in the field that they could have had?

Mr. Strachan: Yes.

The Court: You were there in 1950?

The Witness: Right.

The Court: At that time Winckler & Smith had what you call a Citromat?

The Witness: Yes.

The Court: What is a Citromat?

The Witness: Well, a Citromat is an extraction machine which cuts the fruit in half and its extrac-

(Testimony of William Rodgers.)

tion is due to pressure applied by rolls. As the halves of the fruit are run through the extractor, it has pressure exerted on it and that squeezes the juice out.

The Court: Was this a special machine made for the juice industry?

The Witness: Yes, it was.

The Court: And at that time, in 1950, were there later models of Citromats, or was there a different type machine [3122] that could also be used?

The Witness: There were two other major types of extractors available at that time. There was one manufactured by Food Machinery & Chemical Corporation, and the one manufactured by the Brown Citrus Machinery Company.

The Court: And their general purpose was to do the same thing that Citromat did?

The Witness: That's right.

The Court: Did they do it more efficiently?

The Witness: Very much more. I should qualify that in this way. The Citromat, being a crushing type of extractor, would crush out all of the oil and the peel juices and everything else into the juice. There was no means of segregating them. The other one——

Q. (By Mr. Strachan): I was going to ask you what the procedure with the other machines was.

A. Well, Food Machinery's citrus juice extractor was one in which the juice was always separate from the peel by means of an intermeshing finger extraction and pressure arrangement, which is a

(Testimony of William Rodgers.)

little difficult to describe. It probably had the highest quality juice of any of the extractors at that time.

The Brown, so-called Brown machine, was one which utilized the principle of the reamer, in which half of the fruit had a reamer working at high speed, and the juice was reamed [3123] out, but for the most part the peel and the juice were kept separate, which was not the case in the Citromat.

Q. Now, will you describe the difference between the juices by Citromat and those by the other processes?

Mr. Dixon: I object to that question, your Honor. I don't think that is material to any of the issues of this lawsuit as to what is produced by other machines.

The Court: How much time are you going to spend on this?

Mr. Strachan: Very little.

The Court: Overruled.

Tell us generally what the difference was.

The Witness: The Citromat juice would always be higher in oil than either the juice from the other two extractors, what was sometimes referred to as peel extractives, in other words, things you would get out of the peel by crushing it. You can get a good deal of water out of it that isn't properly considered juice.

Q. (By Mr. Strachan): Then which machines produced the higher quality single-strength juice?

Mr. Dixon: I certainly object to that, your Honor, higher quality.

(Testimony of William Rodgers.)

The Court: Sustained.

Q. (By Mr. Strachan): Now, with regard to the amount of single-strength juice of marketable quality that is extracted [3124] how did the Citromat machine process compare with the other two you have described?

A. Well, quality for quality——

The Court: He is talking about the amount of juice. You said quality.

The Witness: I thought he mentioned merchantable quality.

Will you restate the question, please?

Mr. Strachan: I will have the reporter read it.

(Question read.)

Mr. Dixon: I certainly object to the form of that question, your Honor.

The Court: Sustained.

Q. (By Mr. Strachan): Can you tell us how the amount of juice per ton, single-strength juice, extracted by the Citromat process compared with described?
the quantity extracted by the other method you have

A. Well, the Citromat would not extract as much juice from a given ton of fruit of a quality of juice which would be considered one which we would use in single-strength purposes.

Mr. Dixon: If the Court please, I object to the insertion by this witness of something which obviously is not an answer to the question. I don't like to be objecting, but——

(Testimony of William Rodgers.)

The Court: That part of the answer after "would not extract [3125] as much juice," after that the answer may go out.

The Citromat didn't produce as much juice as the later model machines?

The Witness: Yes, that's right.

Q. (By Mr. Strachan): Did you ever discuss with Mr. Winckler the advantages that might be gained by installing in the place of Citromats these other methods of extraction or machines for extraction of juice? A. I did.

Q. And on those occasions what did Mr. Winckler say to your suggestion?

Mr. Dixon: Now, if the Court please, I don't like to be objecting——

The Court: Make your objection.

Mr. Dixon: I object to the form of the question on the ground it is wholly irrelevant and immaterial to the issues to which this testimony is apparently directed.

The Court: Sustained. We are not concerned with whether Mr. Winckler for one reason or another did or did not put in the latest type equipment. We are only concerned with what equipment he had in there. There has to be some end to the issues injected in this case.

Q. (By Mr. Strachan): After you left the employ of Winckler & Smith, what was your occupation?

A. I worked with the Food Machinery & Chemical Corporation [3126]

(Testimony of William Rodgers.)

Q. And in what capacity were you with them?

A. Sales engineer.

Q. In that work did you have occasion to call on the citrus fruit processors in and about the Los Angeles area? A. I had.

Q. Did you have an opportunity to familiarize yourself with the manufacturing processes, the machinery that they employed in those manufacturing processes? A. I did.

Q. Did you have occasion to call on the Winckler & Smith plant after the time when you were employed by Winckler & Smith? A. I had.

Q. And you continued to call on them down to the time of the reorganization under Chapter X when the trustee was in possession, is that correct?

A. Yes.

Mr. Dixon: If the Court please, I object to this question.

The Court: I don't know what it is going to be.

Mr. Dixon: I don't, either.

The Court: Overruled. He said he did.

Q. (By Mr. Strachan): Are you able to tell us, based upon your experience in that field, whether it was general [3127] practice to use Citromat machines in the production of first quality single-strength juice in Southern California?

Mr. Dixon: I must object, your Honor, to the insertion of the words "first quality" by counsel.

The Court: Don't apologize. Make your objection.

Mr. Dixon: I object to the form of the question.

(Testimony of William Rodgers.)

The Court: What is the basis of your objection?

Mr. Dixon: That it calls for a conclusion of the witness. The insertion of the words "first quality" has not been defined. It might mean anything to the witness. Orange juice is all right.

The Court: I will sustain the objection. In my opinion the ground for the objection, however, is that we are not concerned with a comparison with other processors. If we did that, then we would have to have described in great detail what each plant had and how Winckler & Smith compared with that. Then we would be here another month.

Mr. Strachan: That's all.

Cross-Examination

By Mr. Dixon:

Q. Mr. Rodgers, you were contacted, were you, by someone from the defendants at some time prior to your appearance here in this case in this court room? A. I was. [3128]

Q. When were you contacted and by whom?

A. Oh, it was two years ago, I believe.

Q. Do you recall who contacted you?

A. Mr. Chalkley.

Q. I did not get the name.

A. Mr. Chalkley

Q. Can you tell the jury who Mr. Chalkley was?

A. I don't know. He is one of the gentlemen in this litigation, is all.

Q. Did you know him before he contacted you?

A. No.

(Testimony of William Rodgers.)

Q. What did he say when he contacted you at that time?

A. Well, we just discussed the generalities about the situation. He was just——

Q. I want you, if you can, to be specific as to what he said in substance when you first saw him as to why he was contacting you.

A. Well, he came out to see me and he just asked a few general questions about how long I had worked for Mr. Winckler, and I can't remember anything very specific about it because it is quite a long time ago. His visit was rather short.

Q. And that is the only time that you saw him?

A. Well, up until I saw him the other day.

Q. All right. Mr. Rodgers, you left TreeSweet in October, 1949, did you? [3129] A. Yes.

Q. Did you leave there voluntarily?

A. Yes.

Q. What were you doing between October, 1949, and the time that you were employed by the plaintiff in April, I believe you said, 1950?

A. I had a real estate business in Balboa.

Q. And you gave that up to go with the plaintiff, that is, Winckler & Smith?

A. I had sold the business, yes, shortly before I went with Mr. Winckler.

Q. You were with the plaintiff for a period of about five months in 1950, is that correct?

A. That's right.

Q. You left about the first of September, 1950, is that correct?

(Testimony of William Rodgers.)

A. Some time in September.

Q. That was during the processing season for Valencias?

A. Well, it was getting along toward the end of it, yes.

Q. You left voluntarily, I take it?

A. Mr. Winckler and I, when I went in there—his foreman had left or superintendent had left and I was there to cover the summer months. That was the understanding we had. [3130]

Q. In other words, you were only to be there temporarily in any event, is that correct?

A. Yes, that's right, during the major part of the production season.

Q. You mentioned the Citromat extractor as being used by Winckler & Smith. Sunkist uses the Citromat extractor in its processing plant, doesn't it?

A. That is correct, but not in the single-strength juice plant.

Q. But it has used it for extracting juice from the oranges? A. Yes.

Q. Now, when you went with Food Machinery, you represented it as a salesman. Can you tell the jury whether Food Machinery sells or leases its equipment to those who want it?

A. They lease their equipment, the extraction equipment, that is.

Q. So that that kind of equipment can't be purchased from Food Machinery? If you want it, it has

(Testimony of William Rodgers.)

to be leased? A. That's right.

Q. And there is a royalty arrangement under that kind of a lease, isn't there?

A. That's right.

Q. In addition to the rental?

A. That's right. [3131]

Q. Do you know anything about the Brown Machine Company, I think you mentioned?

A. Yes.

Q. Their arrangement is the same, is it not?

A. That is correct.

Mr. Dixon: I think that's all.

Redirect Examination

By Mr. Strachan:

Q. Did TreeSweet use Citromats?

Mr. Dixon: If the Court please, I object to that question. It is not direct examination——

The Court: I almost stopped you. If you had asked another question, I would have stopped you, but you asked one. I will let Mr. Strachan ask the same question as to TreeSweet. Overruled.

The Witness: TreeSweet did not use Citromats.

Q. (By Mr. Strachan): Citromats are extracting machinery that is taken on a lease basis, too, is it not? A. That's right. [3132]

Q. So neither Citromats—what is the other one?

A. Brown Machine.

Q. Both of them are taken on a lease basis, is that correct? A. Yes.

(Testimony of William Rodgers.)

The Court: Did Winckler & Smith own this Citromat, or was it a leased machine, if you know?

The Witness: At that time they were leased from the Bireley company.

Mr. Strachan: I would like to talk with you and Mr. Dixon and the reporter, your Honor, before this witness leaves the stand.

The Court: Come forward.

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Strachan: This witness would testify, if I asked him, and I offer to have him so testify, that during the time that he was employed by Winckler & Smith he observed that the single-strength juice that was produced was stretched by the addition of water and other additives to the extent of approximately 20 per cent. That when he recommended to Mr. Winckler that he obtain more efficient extracting machinery than the Citromats, Winckler said that he didn't see that he needed to do it, as long as he could make up for the deficiency by the addition of water. [3133]

The Court: Objection upon the basis as heretofore stated?

Mr. Dixon: Yes.

The Court: With reference to the testimony of Opal Smith and Frank Dobert?

Mr. Dixon: Yes.

The Court: Objection sustained.

(Whereupon the proceedings were resumed within the hearing of the jury as follows:)

The Court: Is that all, Mr. Strachan?

Mr. Strachan: That is all, your Honor.

The Court: Thank you, Mr. Rodgers. You are excused.

RICHARD BYLIN

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Richard Bylin.

Direct Examination

By Mr. Strachan:

Q. Mr. Bylin, I understand that you are having some difficulty with your voice, but try to raise it so that it can be heard.

Where do you live?

A. In Corona.

Q. By whom are you employed?

A. Exchange Lemon Products Company. [3134]

Q. In what capacity are you employed?

A. I am their internal auditor.

Q. In that capacity you supervise the auditing procedures that are conducted by a staff under you?

A. Yes.

Q. During the time that Exchange Lemon was a party to this litigation, that is before its dismissal, you were engaged, were you not, in certain activities compiling data for use in this litigation?

Mr. Dixon: Now, if the Court please, I move that the question of counsel be stricken from the record.

The Court: The objection is overruled, but let's not have any misunderstanding.

Exchange Lemon was at one time a party defendant. Now it is not a party defendant, but it is alleged to be an alleged co-conspirator in the case.

In all practical effects, except one, it is still in the case. The only thing is that no judgment can be rendered against Exchange Lemon. However, it is still in the case as far as availability to plaintiff to prove what it would have proved or might have proved had Exchange Lemon still been a party defendant.

(The question was read by the reporter.)

The Witness: Yes.

Q. (By Mr. Strachan): Did you in that connection make [3135] an analysis of the invoices for products, certain products sold by Winckler & Smith during the calendar year 1949 as compared with the calendar year 1950? A. Yes.

Q. What classes of products did you deal with in that analysis?

A. Valencia orange juice, sweetened and unsweetened.

Q. Now, will you tell us what you did in making the analysis, what data you compiled and what use you made of it?

A. We made a list of customers who purchased Valencia orange juice in 1949, and a list of the cus-

(Testimony of Richard Bylin.)

tomers who purchased those same products in 1950, and compared the two lists to determine those customers which appeared on both and those customers which did not appear on the lists of both years.

Q. Now, can you tell us how many total customers you counted in the year 1949 for Valencia orange juice?

Mr. Dixon: Are these customers of Exchange Lemon?

Mr. Strachan: No. These are customers of Winckler & Smith.

Mr. Dixon: I don't understand. How would this—well, all right.

The Court: Apparently vouchers of Winckler & Smith——

Mr. Strachan: Invoices.

The Court: ——invoices were made available to you, and you made some study of them? [3136]

The Witness: That is correct.

Would you restate the question to me, please?

Q. (By Mr. Strachan): Will you tell us how many customers for Valencia juice you found from the invoices for the year 1949?

A. There were a total of 708.

Q. Now, of those 708, how many did you find had in the following year also purchased Valencia products from Winckler & Smith? A. 93.

Q. So that the repeating customers represented what percentage of the total of the 1949 customers?

A. Approximately 13 per cent.

Mr. Strachan: That is all on direct.

(Testimony of Richard Bylin.)

Cross-Examination

By Mr. Dixon:

Q. Just one or two questions, Mr. Bylin.

I am not sure I understand your testimony from the questions that counsel put to you.

You talked about some invoices that you got in 1949 and '50?

A. Covering those years. I didn't actually receive them in those years.

Q. In other words, you took some records that were made available to you as a result of the discovery in this [3137] case, and analyzed them, and with the results that you just indicated; is that correct? A. That is correct.

Q. And you are the internal auditor for Exchange Lemon Products Company?

A. Yes, sir.

Mr. Dixon: That is all.

Mr. Strachan: No redirect.

The Court: You may step down. Thank you.

Mr. Strachan: Mr. Smith, please.

ARVEL SMITH

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Arvel Smith.

Direct Examination

By Mr. Strachan:

Q. Where do you live, Mr. Smith?

A. In Ontario.

Q. By whom are you employed?

A. The Exchange Orange Products Company.

Q. How long have you been employed by that company? A. Something over 18 years.

Q. In what capacity are you employed?

A. As the comptroller and assistant secretary.

Q. Have you prepared certain schedules showing statistical data concerning the citrus fruit products in the United States, California and Arizona territory, and the Sunkist portion, with respect to various commodities? A. Yes, I have.

Q. There has been marked for identification as Exhibit CE——

The Court: How many of these have been marked?

The Clerk: I have marked a total, your Honor, of CE through CK, for identification, a series of charts. [3139]

* * *

The Court: Can't we save a lot of time on these with a general statement of the calculations?

(Testimony of Arvel Smith.)

Mr. Strachan: I think we can, your Honor.

Mr. Dixon: I certainly have never seen these exhibits before, counsel, but go ahead. It is statistical information.

Q. (By Mr. Strachan): Referring to all of these exhibits, CE, CF, CG, CH, CI, CJ, those are statistical data, are they not, prepared by you or persons working under your direction and supervision? A. They are. [3140]

* * *

The Court: Can't we do this? Can't we stipulate that as to the figures taken from the Government reports there is no objection; as to figures taken from Sunkist records which were reported to the Government there is no objection? [3141]

Mr. Dixon: That is correct.

The Court: That as to figures that the witness took from Sunkist's records, which were not reported to the Government, that you would stipulate that the witness, if he testified, would testify that these were the figures?

Mr. Dixon: Yes.

The Court: I am not asking you to stipulate that the figures are correct, but I am asking you to merely stipulate that the witness would so testify.

Mr. Dixon: Yes, that is all right, your Honor. That will save considerable time. [3142]

The Court: Is that satisfactory?

Mr. Strachan: Entirely satisfactory, your Honor.

(Testimony of Arvel Smith.)

The Court: So in this manner you have drawn up these various statistical figures and charts, CE to CK, inclusive, the last of which was a chart and the rest were statistical figures. They involve various subject matters. But that is the way you drew them up?

The Witness: That is correct.

The Court: You would testify, you are under oath, that the figures you got from EOP or Sunkist that were not reported were correct figures?

The Witness: That's right.

The Court: And the various charts involve different matters. CE is headed, "Single-Strength Blended Orange and Grapefruit Juice." It does not include pure orange.

The Witness: No.

The Court: That is just blended——

The Witness. Blended orange and grapefruit juice.

The Court: CF is headed, "Sunkist Percentage of Total California-Arizona Tonnage of Valencia Products Oranges." That is what that is related to?

The Witness: My exhibits aren't marked, your Honor, so I am having to check these.

The Court: Well, you look at mine. CF is "Sunkist Percentage of Total California-Arizona Tonnage of Valencia [3143] Products Oranges"?

The Witness: Yes.

The Court: CG is "Valencia Single-Strength Juice and Frozen Concentrate Production of Exchange Orange"?

(Testimony of Arvel Smith.)

The Witness: That's right.

The Court: This is limited entirely to what Exchange Orange produced and whether it went into single-strength Valencia or concentrate?

The Witness: That is correct, together with the Sunkist tonnage of the Valencia oranges.

The Court: CH is "Single-Strength Orange Juice Production." By that do you mean all production in the United States?

The Witness: That is correct.

The Court: And then the percentage produced by Exchange Orange?

The Witness: That is correct.

The Court: This would include both navel and Valencias?

The Witness: Yes, that's right. Some charts do not. That one does.

The Court: CI says, "Frozen Concentrate Orange Juice Production." That is limited to concentrate, but it involves the United States, California-Arizona, and the amount that EOP produced.

The Witness: Right. [3144]

The Court: And CJ is "California-Arizona Orange Juice Utilization for Single-Strength and 42° Brix Frozen Concentrate," right?

The Witness: That is correct.

The Court: This would be all oranges produced in California-Arizona, navel or Valencia, and what they went into, either single-strength or Brix, 42° Brix?

The Witness: That is correct. There is one difference there, your Honor, and that is on the frozen concentrate the gallons of raw juice used in frozen concentrate was multiplied by a factor of 4. The figure taken from the USDA report was multiplied by 4 to convert from frozen concentrate to the equivalent single-strength.

The Court: Also, when you say 42 Brix, did you have to make some computation to reduce a 60° Brix or a 39° Brix, in order to get a figure for 42?

The Witness: No. The government report is based on 42 Brix.

The Court: In other words, the company in making a report to the government converts whatever Brix they make to 42?

The Witness: If that is the type product the government is asking about. The government asks special reports for other Brix as well as 42.

The Court: Do you think this includes all Brix? [3145]

The Witness: No. This is just 42 Brix.

The Court: Just 42 Brix?

The Witness: The so-called household package of 42 Brix frozen concentrate.

The Court: Is that the little can you buy?

The Witness: That's right.

The Court: That is 42 Brix?

The Witness: 42 Brix.

The Court: So this is slanted at the amount of that product from California-Arizona?

The Witness: That is correct.

The Court: And CK is a chart in red and green,

(Testimony of Arvel Smith.)

and the red shows the amount of concentrate made in various years from California-Arizona, and the green shows the amount of single strength.

The Witness: That is correct.

Q. (By Mr. Strachan): Mr. Smith, in looking over the set I had marked, I think I omitted one that has to do with grapefruit. Do you have a copy of that here?

The Witness: There is one called single-strength grapefruit juice production.

Q. (By Mr. Strachan): Apparently those I brought over did not include that. Could I have your copy?

A. I have made some marks on it. I have another copy back there. [3146]

Q. Where can I get that?

A. Well, here it is. I have one.

Mr. Dixon: Counsel, I have an extra one that you gave me this morning. You can use that.

The Court: That would be CL.

(The exhibit referred to was marked Defendant's Exhibit CL for identification.)

The Court: What you said about these other exhibits, as far as where you got the figures, applies also to CL?

The Witness: That is correct.

The Court: And the stipulation as to those figures you took from EOP or Sunkist records, you would testify the figures are correct?

The Witness: That's right.

The Court: And counsel will stipulate, not that the figures are correct, but that you would so testify, right?

Mr. Dixon: Yes, your Honor, except that—well, I want to object to the introduction of any of these until I have asked some questions concerning some of them, because of the nature of the reports.

The Court: I am just trying to get a foundation laid, and so forth.

Mr. Dixon: Yes.

Mr. Strachan: I will offer the exhibits CE through CL, inclusive. [3147]

Mr. Dixon: Was this one on grapefruit marked?

Mr. Strachan: That is CL for identification.

The Court: I will reserve ruling.

Mr. Strachan: That's all on the direct.

The Court: You may cross-examine.

Cross-Examination

By Mr. Dixon:

Q. Now, with reference to all of the exhibits, CE through CL, Mr. Smith, you are aware, of course, of the fact that Exchange Orange has certain contracts with processors, independent processors, pursuant to which oranges are turned over to the processor for processing into citrus juice products, are you?

A. Yes, I am.

Q. Now, in reporting any figures that may be contained in any of these exhibits with reference to single-strength orange juice produced by Exchange Orange during any of the periods covered by this

(Testimony of Arvel Smith.)

exhibit, have you included and reported any amounts processed under any arrangements that you may have had during these periods with independent processors? Do you understand my question?

A. Yes, I understand your question.

Q. Can you answer that to the jury?

A. The production by Silzle and TreeSweet on the orange [3148] juice is not included. Production of the canned orange juice produced for the Exchange Orange Products Company by Exchange Lemon Products Company is included.

Q. I am sorry. I can't hear you, Mr. Smith.

A. The canned orange juice produced by Silzle and by TreeSweet——

Q. You are speaking now of the year 1951?

A. Of the year 1951.

Q. Yes.

A. ——are not included in this report.

Q. Which report are you talking about? Which exhibit, please?

A. It may be several of them, Mr. Dixon.

Mr. Strachan: Your exhibits are not marked?

The Witness: No.

Mr. Strachan: Why don't you use these, then?

Q. (By Mr. Dixon): Can you go over the exhibits from CE to CL and tell the jury——

The Court: Wait, before you do that. You didn't hear part of his answer. Let's get that straight. He said in certain of these exhibits production by Silzle and TreeSweet of the orange juice was not in-

(Testimony of Arvel Smith.)

cluded, but that production by Exchange Lemon for EOP was included.

Isn't that what you said?

The Witness: That is correct. [3149]

The Court: You don't have anything here about lemons, do you?

The Witness: No.

The Court: So, therefore, you haven't got anything about EOP production of lemons for ELP, if it existed?

The Witness: No. There is nothing in here about lemons.

The Court: Now, the question, Mr. Dixon?

Mr. Dixon: Do you want the question read again, Mr. Smith? A. Yes, please.

> (The record referred to was read by the reporter, as follows: "Q. Now, in reporting any figures that may be contained in any of these exhibits with reference to single-strength orange juice produced by Exchange Orange during any of the periods covered by this exhibit, have you included and reported any amounts processed under any arrangements that you may have had during these periods with independent processors? Do you understand my question?")

The Court: That isn't the question. You asked him to point out the exhibits.

Q. (By Mr. Dixon): Referring to Exhibits CE through CL, Mr. Smith, will you tell the jury in which of those exhibits, if any, Exchange Orange

(Testimony of Arvel Smith.)

reported production of single strength [3150] to the government for the years referred to in said exhibits as to whether or not the figures so reported included the amounts processed by independent processors of oranges made available to them by Exchange Orange for processing into single-strength juice during the years in question? That is kind of a—do you understand my question?

The Court: I think you have two or three questions in one. First, let me ask this.

When Exchange Orange Products reported its production by by-products oranges, first, generally, did it report to the government agencies production for it under contracts which EOP may have had with Silzle, TreeSweet, Bireley's, and various of your processing contractors?

Mr. Strachan: May I raise a question about that, your Honor? It seems to me there are perhaps two things involved. You are talking about the products fruit which was available, and then talking about what was produced from the fruit I think that mixes two things up.

The Court: Maybe I did the same thing Mr. Dixon did. He had too many things. I will see if I can narrow it further.

In your reports to government agencies as to your processing activities, did you or did you not include the products processed by these companies with which EOP had contracts? [3151]

The Witness: In some instances they were re-

(Testimony of Arvel Smith.)

ported to the government and in other instances they were not.

The Court: Now, let's take this. In drawing these exhibits and in getting your figures which you used either from government reports or from EOP and Sunkist records, did you include the processing and the results of it as carried on by independent processors under contract with EOP?

The Witness: Some were reported to the government and some were not, your Honor. The basic difference was if the products were to be sold under the Sunkist or Exchange label, it was reported to the government. If it were going to be sold, eventually sold under the processor's own label or own distribution system, Exchange Orange did not report it to the government.

The Court: Now, we understand on the basis of which you make your report. Now, drawing up these exhibits E to L, those that might be involved in this, did you use the government figure based on whether you reported or not?

The Witness: We used the figure that we reported to the government.

The Court: Therefore, it would follow that you have not included in these exhibits the processing done by Silzle and TreeSweet where they took the product and sold it under their own name?

The Witness: That is correct. I believe in 1950 Silzle [3152] processed a little bit of blend and a little bit of grapefruit juice, and that was reported by us to the government because it came back to us.

(Testimony of Arvel Smith.)

The Court: Because they came back and were sold under your label?

The Witness: That's right.

The Court: But the contracts in the canning year of 1951, as I understand the record, all those products that were processed by Silzle and TreeSweet were retained by them under their option and sold under their own labels?

The Witness: That's right.

The Court: So you didn't report that?

The Witness: That is correct, we did not.

The Court: Which specific exhibits would be affected by that if, for instance, that was to be included?

You are interested, Mr. Dixon, just in TreeSweet and Silzle?

Mr. Dixon: Yes.

The Court: That wouldn't affect CE, would it?

The Witness: No, it would not, because that is a blend of orange and grapefruit juice.

The Court: What about CF?

The Witness: CF would have been affected.

The Court: CG?

The Witness: CG would have been [3153] affected.

The Court: CH?

The Witness: CH would have been affected.

The Court: CI, frozen concentrate.

The Witness: That would not have been affected.

The Court: Not by Silzle and TreeSweet?

The Witness: That is correct.

The Court: CJ?

(Testimony of Arvel Smith.)

The Witness: That would not have been affected, because that is completely from USDA reports.

The Court: USDA? What's that?

The Witness: United States Department of Agriculture marketing reports.

The Court: Well, would the United States Department of Agriculture have picked up the Silzle and TreeSweet production?

The Witness: I am presuming that TreeSweet and Silzle reported. In some years I am sure they did.

The Court: This being a total of everything in California-Arizona, you would assume that TreeSweet and Silzle were included in CJ?

The Witness: That is correct.

The Court: What about CK?

The Witness: CK, your Honor, is merely a pictorial presentation of the CJ. [3154]

The Court: And CL involves grapefruit and would not be involved?

The Witness: That would not be involved.

Q. (By Mr. Dixon): You are familiar, of course, Mr. Smith, with the fact that Exchange Orange had contracts with TreeSweet during the years '48, '49 and '50, are you not?

A. That is correct.

Q. Your answer would be the same with reference to reporting figures on single-strength juice to the Government for those years as you have stated for '51? A. Yes. [3155]

* * *

(Testimony of Arvel Smith.)

Now, Mr. Witness, on CF, -G and -H did you make a similar computation and in the column where you have "Sunkist tonnage," could you put "Sunkist tonnage," or whatever other column would be involved, plus TreeSweet and Silzle, and make a further computation?

The Witness: It could be done. It has not been done.

The Court: That is a question of fact for this jury to decide.

The Witness: Your Honor, on CF, under Sunkist tonnage, that includes the tons that went to TreeSweet and Silzle, because that is all of the Sunkist tonnage.

The only column that would be affected is the Sunkist tonnage into single-strength and frozen concentrate.

The Court: This column here (indicating)?

The Witness: That is correct.

The Court: What about your percentage?

The Witness: Your percentage, then, would automatically be affected.

The Court: You seem to be a fellow that likes figures and knows how to handle them, and you could do this job a lot easier than some of us could.

Mr. Dixon: If the court please, I would like to inquire concerning CF and CG further.

The Court: All right.

Mr. Dixon: Upon going back over them I have a couple [3156] of questions.

The Court: Go ahead.

(Testimony of Arvel Smith.)

Q. (By Mr. Dixon): Referring to CF, Mr. Smith, and the column headed Sunkist Tonnage into Single-Strength and Frozen Concentrate for Sale by Exchange Orange, you have certain figures there which I assume are tonnage figures. Does that column represent the total tons sold by Exchange Orange or Sunkist during the years in question, or what does that figure represent—that column represent?

A. That column represents the tonnage of fruit that Sunkist, through Exchange Orange, put into single-strength and frozen concentrate in those production seasons.

Q. In other words, that is the actual amount of tonnage of Valencia oranges that was processed by Exchange Orange, itself, into juice?

A. By itself and other processors that would have been processing, and which the juice would have been sold under the Sunkist and Exchange label.

Q. In other words, the tonnage figures in CF, in the column I have just mentioned, include the tons, for instance, that are processed by Exchange Lemon? A. That's right.

Q. For Exchange Orange?

A. That is correct.

Q. But it would not include, for example, the year '49, [3157] the tonnage that was processed by TreeSweet? A. That is correct.

Q. On its contract with Exchange Orange for that year? A. That is correct.

(Testimony of Arvel Smith.)

Q. And for the succeeding years?

A. That is right.

Q. Directing your attention to CG——

The Court: Which is Valencia single-strength juice and frozen concentrate production.

Q. (By Mr. Dixon): Yes, of Exchange Orange, you have the heading Tonnage into Single-Strength Juice for Sale by Exchange Orange, during the various years. Does that column and the figures thereunder, in tons, represent the tons of Valencia oranges processed by Exchange Orange during the years in question?

A. By Exchange Orange, and the processors as I outlined before. That is, those in which the juice was processed and came back and sold under our own company labels.

Q. Well, take the figure 1945-46, in which there is 30,379 tons under that heading, does that 30,379 tons represent the amount of tons of Valencia oranges processed in that year by itself, or Exchange Lemon, or any other processor that might have processed for Exchange Orange and turned the product for sale under the Exchange label?

A. If it were processed by a processor and the goods [3158] came back to us to be sold under our label, that is the complete tonnage of juice that went into single-strength juice.

Q. Yes. But there, again, the figures in the column I just mentioned do not include, for example, any tonnage that might have been processed under the TreeSweet contract? A. That is correct.

(Testimony of Arvel Smith.)

Q. Or Silzle in 1951?

A. Silzle in 1951, and TreeSweet in various other years.

Mr. Dixon: Thank you. That clears it up to my satisfaction.

Redirect Examination

By Mr. Strachan:

Q. See if I can clear it up to my satisfaction.

As I understand it, the column——

The Court: Which one?

Q. (By Mr. Strachan): On Exhibit CF, that is entitled Sunkist Tonnage into Single-Strength and Frozen Concentrate for Sale by Exchange Orange, does not include the tonnage that was processed, say, by TreeSweet or Silzle, and sold by TreeSweet and Silzle through their own organization under their own brand, or under the private brands of their own customers? A. It does not include those tons.

Q. Because those were sales not made by Sunkist? [3159]

A. That is correct. And that is the way I developed the form.

Q. And that is true in -G and -H, wherever the column is headed with reference to sales by Exchange or sales by Sunkist, or sales by Exchange Orange; is that correct? A. That is correct.

Mr. Strachan: That clears it up to my satisfaction. Thank you.

The Court: I was going to ask the witness if he wanted to make a computation where he could put a

(Testimony of Arvel Smith.)
double total in on those, and maybe attach the other computation as CG-1, or something, to it.

Mr. Strachan: I think, your Honor, we would be getting into a different subject there. These were to deal with the extent that Sunkist or its components were competitors in the selling market.

The Court: This looks just to the selling market?

Mr. Strachan: That is what was dealt with here.

The Court: All right.

Are they offered in evidence?

Mr. Strachan: Yes, sir.

Mr. Dixon: No objection.

The Court: CE, CF, CG, CH, CI, CJ, CK, and CL, that is, CE through CL, inclusive, are received in evidence. [3160]

* * *

PAUL A. COVINGTON

called as a witness by the defendants, being first sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan:

* * *

Q. What is your business?

A. In the investment brokerage business, investment banking.

Q. What firm are you associated with?

A. Wagenseller & Durst, Incorporated.

Q. How long have you been associated with that organization? A. Approximately five years.

(Testimony of Paul A. Covington.)

Q. What position do you have with the organization? A. I am secretary-treasurer.

Q. Do you recall ever having conducted any negotiations with Mr. Nicholas Winckler, or Mr. Walker, or Mr. Rubin, or anyone else, with respect to the prospective purchase of the [3162] Winckler-Smith Citrus Products Company, or the stock of that company? A. I do not.

* * *

Q. (By Mr. Strachan): Have you investigated within your organization to find out whether or not any other person in that organization conducted such negotiations? A. I have investigated.

Q. What did your investigation disclose?

A. I can find no evidence of any such negotiations.

Mr. Strachan: That is all. [3163]

Cross-Examination

By Mr. Dixon:

Q. Mr. Covington, you were with this firm, of course, back in 1951 and 1952? A. Yes, I was.

Q. Do you recall whether you had any telephone conversations with anyone at Winckler-Smith or the trustee during those years concerning the sale of the plant? A. Not that I recall.

Q. Mightn't you have had them? You have a lot of telephone conversations, I presume, with a lot of people concerning properties and investments, do you? A. Sure, we do.

Q. You might have had some over the phone dur-

(Testimony of Paul A. Covington.)

ing that year concerning this matter that you don't now recall, isn't that so? A. It is possible.

Mr. Dixon: That's all.

The Court: I notice the questions asked and your answers concerned negotiations. Does the record show that Winckler-Smith said he entered into negotiations?

Mr. Strachan: Well, discussions, I think.

The Court: Do you know whether you had any inquiries, or did you inquire from the firm whether you had any inquiries? [3164]

The Witness: I did inquire from everyone in the firm who would normally conduct that.

The Court: As to inquiries?

The Witness: As to inquiries.

The Court: As well as the question of negotiations?

The Witness: Yes, I did. [3165]

* * *

January 26, 1956—2:00 P.M.

* * *

PAUL A. COVINGTON

the witness on the stand at the time of recess, having been heretofore duly sworn, was examined and testified further as follows:

Cross-Examination

By Mr. Dixon:

Q. Mr. Covington, did you have a Sherwood Field as manager of the Buying Department of your firm in 1952? A. Yes.

(Testimony of Paul A. Covington.)

Q. Is he still with your firm? A. Yes.

Q. Did you contact him among other members of your staff to inquire as to whether he had ever had any conversation with Mr. Winckler about Winckler & Smith?

A. Mr. Field has been out of town. I believe he is due back today or tomorrow. He was not in the office today. [3166]

Q. Would you recognize his signature?

A. I think I would.

The Court: Has this been shown to counsel?

Mr. Dixon: I will show it to him, your Honor.

The Court: Mark it for identification plaintiff's next in order.

The Clerk: Plaintiff's Exhibit 81 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 81 and received in evidence.)

Mr. Strachan: May I see it?

(Mr. Dixon handing document to Mr. Strachan.)

Q. (By Mr. Dixon): I will hand you Plaintiff's Exhibit 81 and ask you if you recognize Mr. Sherwood Field's signature thereon.

A. That is correct.

Q. That is his signature?

A. It is on our letterhead.

The Court: Speak up.

The Witness: That is correct, and it is on our letterhead.

(Testimony of Paul A. Covington.)

Q. (By Mr. Dixon): Did you have an opportunity to contact Mr. Field with reference to the inquiry that you made of other members of the staff?

A. No, I have not.

Mr. Dixon: Plaintiff's Exhibit 81 offered in evidence, [3167] your Honor.

The Court: Let me see it.

(Mr. Dixon handing document to the court.)

The Court: Exhibit 81 received in [3168] evidence.

* * *

O. E. HANSON

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: O. E. Hanson. [3169]

Direct Examination

By Mr. Strachan:

Q. Where do you live, Mr Hanson?

A. Anaheim, California.

Q. You are now in retirement, I understand?

A. That's right.

Q. Prior to your retirement by whom were you employed? A. Bank of America.

Q. How long were you employed by the Bank of America? A. 35 years.

Q. You were the branch manager of the Anaheim Branch, is that correct, at some time?

(Testimony of O. E. Hanson.)

A. Yes, sir.

Q. For how long were you manager of that branch?

A. From 1937 until October 31st last year. About 17 years.

Q. During that time did you have any occasion to consider the credit sought from time to time by the Winckler & Smith Citrus Products Company?

A. I did.

Q. Prior to the Chapter XI reorganization did the Bank of America extend any credit to the Winckler-Smith company?

A. Will you state that again, please?

Q. Before the Chapter XI bankruptcy in 1948 and '49——

Mr. Dixon: If the court please, I think the jury ought [3170] to be instructed, or counsel should refrain from using the word "bankruptcy" in his questions. It was not a bankruptcy of this corporation.

The Court: We have been over this before. Reframe your question, Mr. Strachan.

Q. (By Mr. Strachan): Did the Bank of America or the Bank of America branch of which you were manager extend credit to the Winckler-Smith Citrus Products Company before the organization proceedings in 1948, '49? A. No.

Q. After those reorganization proceedings were completed did Mr. Winckler call on you with a view to securing credit accommodations for the company?

A. He did.

(Testimony of O. E. Hanson.)

Q. What discussion did you have with him at that time?

The Court: I am going to inquire of counsel the purpose of this line of proof. Approach the bench.

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Strachan: This is rebuttal of Mr. Winckler's testimony——

The Court: Rebutting what?

Mr. Strachan: He testified that he approached the Bank of America for credit, and that they had a million dollar line of credit at the Bank of America.

Mr. Dixon: No. [3171]

The Court: Can you show me the transcript?

Mr. Strachan: Yes. (Exhibiting volume to the court.)

I have just referred to record page 1017, beginning at line 8.

He also testified that he went to the Bank of America to refinance the RFC loan. He testified to conversation with Mr. Hanson.

The Court: What happened with your first witness illustrates the problem you have got.

The impeachment of efforts to refinance the RFC loan, I think that is definitely impeachment of immaterial matters.

You have already called one witness, which I suppose hasn't done you any good on that problem.

Mr. Strachan: His testimony is that they all

(Testimony of O. E. Hanson.)

gave him one answer, that because of the inability to get fruit, and for that reason only, they couldn't refinance.

That is how he has tried to tie this thing in to the fruit supply problem.

The Court: This other witness, the way it turned out he knew nothing about it, and then at the end of it it turned out there had been some kind of a letter written.

All right. [3172]

(The following proceedings were had in the hearing and presence of the jury:)

Q. (By Mr. Strachan): Will you tell us what discussion you had with Mr. Winckler when he called on you following the return of the plant to Winckler & Smith operations after the first reorganization proceedings?

A. He approached us for a certain amount of credit to finance shipments of single-strength orange juice, I remember.

Q. A little louder, please. We can't quite hear you.

A. To finance shipments of single-strength orange juice on the basis of documentary drafts with bills of lading attached.

Q. That is, as shipments were made and the shipping documents were received, then you would advance money against the shipments, is that correct? A. That's right.

(Testimony of O. E. Hanson.)

Q. And you held the billing for those shipments as security for the bank?

A. Yes, sir. We had title to the commodity.

Q. Did Mr. Winckler try to secure from you any further line of credit; if so, what did you tell him?

A. I have no such recollection, sir.

Q. Do you recall whether the bank extended some credit to the corporation on guarantee by Mr. Rubin? A. Yes, we did. [3173]

Q. Will you tell us what that transaction was?

A. Well, it was quite a while ago, and if my memory serves me right, we agreed to loan or extend credit on these documentary drafts to the extent of Mr. Rubin's guarantee.

Q. So that the credit you extended was secured by the shipping documents and the invoices, and also by the guarantee? A. Yes, sir.

Q. Can you recall what was the maximum amount of credit extended on that secured basis?

A. Less than $50,000.

Q. That was the maximum loan at any one time?

A. Well, the guarantee was $50,000 and we never exceeded that.

Q. Did you at any time extend or the bank extend to Winckler & Smith Company any credit on other than a secured basis?

A. I think at one time we extended him a certain amount on Mr. Rubin's guarantee.

Q. But never on the individual credit of the corporation, is that correct? A. That's right, sir.

Q. Do you recall that at one time Mr. Winckler

(Testimony of O. E. Hanson.)

called on you when the RFC mortgage was in default with a view of attempting to refinance it?

A. I have a faint recollection.

Q. Will you tell us as best you can remember it what [3174] occurred at the time he sought to have the Reconstruction Finance loan refinanced by the Bank of America?

A. Well, we had a verbal application, let us say, at which time he approached us for a real estate loan to make up the RFC loan.

Q. Do you recall whether the loan was in default at that time?

A. It was my understanding it was in default, yes, sir.

Q. And can you tell us what disposition you made of that verbal application?

A. Well, it was rejected, probably for two reasons: One, that it was a one purpose building and, secondly, that it was already in default.

Q. Do you remember what if any showing was made in support of the verbal application for that refinancing?

A. Well, I have a recollection that Mr. Winckler brought in an appraisal from some independent appraising company which showed the value of the property.

Q. Do you recall what the value as shown by that appraisal was?

A. No, sir, but it was several hundred thousand dollars.

Q. After that appraisal was shown to you, did

(Testimony of O. E. Hanson.)

you decline to loan the $50,000 for refinancing the RFC loan?

A. Yes, sir. No formal application was [3175] filed.

Q. At any time during your business relations with Mr. Winckler, did you ever tell him that the reason that you were not extending credit or would not refinance the mortgage loan was because he was unable to get citrus fruit for processing?

A. No, sir.

Mr. Strachan: That's all.

The Court: This has been offered for impeachment purposes?

Mr. Strachan: Yes, sir.

The Court: All right.

Cross-Examination

By Mr. Dixon:

Q. Mr. Hanson, the Bank of America, that is the Anaheim branch, did the financing of the Winckler & Smith Company to the extent that it did any, is that so? A. Would you repeat that, sir?

Q. Perhaps my question isn't very well worded, Mr. Hanson. It is a fact, is it not, that during the years 1949 and 1950, the Winckler & Smith Company was loaned substantial amounts of money by the Bank of America at Anaheim?

A. Yes, sir.

Q. Do you recall approximately how much the total amount was during those two years?

A. You mean the aggregate? [3176]

(Testimony of O. E. Hanson.)

Q. Yes, in the aggregate.

A. I couldn't answer that, sir.

Q. Was it in excess of a half million dollars?

A. I wouldn't care to answer it, because it would be merely a guess.

Q. Will you tell the jury what that was? As I understand your answer to counsel's question, the money that was loaned to Winckler & Smith during 1949 and 1950, was loaned on inventories or bills of lading representing sales of inventory and stock, is that correct? A. That's right.

Q. Is that an unusual type of loan for a bank to make? A. No, sir.

Q. It is customary, I take it?

A. That's right.

Q. Is that what is called sometimes the factoring of accounts? Is that a fair description, or is that different?

A. It is not exactly the same, I don't believe, in banking terms. But we held the commodity. We had title to the commodity and it was ours until the drafts were paid.

The Court: That is because when goods are shipped on a bill of lading, the holder of the bill of lading controls the delivery with the title of the goods?

The Witness: That's right.

The Court: Will you tell the jury that? They may not be [3177] familiar with a bill of lading.

The Witness: In other words, when a bill of lading with a draft attached is brought to the bank, the

(Testimony of O. E. Hanson.)

bank then gets title to the commodity, and, of course, when the bill of lading is paid off, why, the money comes back to the bank. That is how the bank gets their money back, gets their loan paid off. [3178]

Q. When you made these loans, Mr. Hanson, did you have any idea or did you make any inquiry as to the volume of business that was done by Winckler & Smith, and concerning which business you were being secured for any moneys that you loaned to Winckler & Smith in the years 1949 and '50?

A. The volume?

Q. Yes.

A. We had no way of knowing what the volume would be, but at no time would the outstanding indebtedness be greater than the guarantee which we held.

Q. I am talking now about the financing charges or the financing of loans by securities securing the loan on the inventory or products sold by the company.

I find it rather awkward to describe it, but you know the type of loan that I am referring to?

A. Yes, I understand that part of it, but I am not quite clear about some of the rest of your question.

Q. In other words, before you would make a loan, say, a line of credit up to a certain amount, you would have to have security for the loan by way of the inventory of the company; is that the way it is worked out in layman's language?

A. Yes, that is correct.

(Testimony of O. E. Hanson.)

Let me explain. These bills of lading are brought in to the bank, and possibly one or two or three every day, [3179] and then the money starts coming back, so you have a revolving sort of a thing, see?

Q. And as the bills of lading come in and are applied on the loan, then the loan goes on as long as the security or the inventory is adequate in the judgment of the bank, is that correct?

A. As long as we had satisfactory experience.

Q. And has the Bank of America had loans of that character and made them with Winckler & Smith during the years '49 and '50?

A. Yes, sir.

Q. It is a fact, is it not, that during the year '49, for example, the business of the company was in excess of one million dollars?

A. I couldn't answer that, sir.

Q. Do you recall writing to Mr. McFarland in Kansas City, in 1950, who had addressed an inquiry to you and the bank concerning Winckler & Smith?

A. I have no recollection.

The Court: Mark it for identification and show it to counsel. Exhibit 82.

The Clerk: Exhibit 82 for identification.

(The exhibit referred to was marked Plaintiffs' Exhibit 82 for identification.)

Q. (By Mr. Dixon): Mr. Hanson, I will hand you what has [3180] been marked Plaintiffs' Exhibit 82 and ask you if that is your signature at the bottom of the letter? A. It is, sir.

Q. Did you write that letter to Mr. McFarland?

2

A. I did.

Q. And was a copy sent to Winckler & Smith, if you know?

A. I don't know whether a copy was sent to Winckler & Smith. I doubt that, because it is of a confidential nature.

Q. The facts stated therein are true, are they, or were at the time you stated them?

A. They were to my best knowledge.

Mr. Dixon: Plaintiffs' Exhibit 82 offered in evidence. 7

The Court: Let me see it.

Mr. Strachan: I don't think it has any relevancy or materiality. 8

The Court: Let me see it.

(Document handed to the court.)

The Court: It is another one of these things that would be admissible for a limited purpose only.

Mr. Dixon: That is all we are offering it for, your Honor.

The Court: Objection overruled. Received in evidence, but it is not to be received as any evidence of the facts contained therein, but only to be used in connection with [3181] the testimony of this witness. It is to be used by the jury in judging the testimony of this witness.

(The exhibit referred to, marked Plaintiffs' Exhibit 82, was received in evidence.)

Q. (By Mr. Dixon): Mr. Hanson, do you know time when the conversation took place? what the volume of sales was of Winckler & Smith in 1951 when they inquired of the bank concerning a loan that counsel has asked you about; do you recall? A. '51?

Q. Yes.

The Court: Referring to the testimony about the application on the RFC loan.

The Witness: No, I do not know, sir. I can't remember.

Q. (By Mr. Dixon): During that year the bank did loan some money to Winckler & Smith under this security arrangement that you mentioned, is that correct? A. I think we did, sir.

Q. Is it the customary practice of the bank when it is making a loan to a closed corporation of a substantial amount, to require the signature of the officers, or the principal stockholders, of that corporation on the note?

Mr. Strachan: Your Honor, I don't think it is properly called a closed corporation. The evidence shows they were trying to sell and did sell some stock to the public.

Mr. Dixon: The evidence shows the stock sale was withdrawn, [3182] counsel, as you know, in the early part of June of 19——

The Court: Reframe your question and leave out "closed corporation."

Q. (By Mr. Dixon): What is the policy of the bank, or what was it, Mr. Hanson, in 1951, with reference to requesting or requiring the signatures of officers, directors, or stockholders on loans as additional security?

A. Well, that is the understanding that I had with Mr. Winckler at the time we agreed to loan him money; that we would have this personal guarantee, otherwise we would not be interested.

Q. And Mr. Winckler signed the note, as well as the others, did he not?

A. I think he signed a continuing guarantee, which is equivalent of guaranteeing the note, along with Mr. Rubin.

Q. I think you said one of the reasons you turned down the loan was because this was a one-purpose plant in the sense that it was usable for just the processing of citrus juices, in other words, the type of plant or security that was involved in any such loan was one which would have a restricted market value in the event of sale; is that one of the reasons?

A. I think we are talking about two different things. I am talking about the operating line of credit, and I think you are talking about the application for real estate loan. [3183]

Q. Yes. I am sorry I hadn't indicated or made it clear to you that I was talking about the application that counsel inquired of you concerning the loan or a loan in 1951 to refinance the RFC loan. That is the one that I am talking about. Was that one of the reasons that you mentioned?

A. Well, there were two reasons as I gave you. One was that it was a one-purpose building, which banks generally are not very much interested in making loans on. And the other was that the loan was already in default.

I think those were the two primary reasons.

Mr. Dixon: I think that is all. Thank you very much. [3184]

Redirect Examination

By Mr. Strachan:

Q. Mr. Hanson, whether or not the bank would extend credit to the corporation without security or without a guarantee by some other person would depend upon the financial standing of the borrower, would it not? A. Yes, sir.

Q. And if the borrower had sufficient assets in comparison to his liabilities, the bank would extend credit to such a borrower for a proper purpose without any security or without the guarantee of any third person, would it not?

A. Yes, sir. It is quite a common practice to do so.

Q. That is the ordinary practice, is it not?

A. Yes, sir.

Q. From your examination of the financial condition of Winckler-Smith Company, did you conclude that the bank could not providently loan money to Winckler-Smith Corporation except on a secured guaranteed figure?

A. That was our opinion, sir. [3185]

* * *

NED LEWIS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan:

* * *

Q. What is your business?

A. I am the manager of a local import and export business by the name of Wilbur Ellis Company.

Q. In what business is Wilbur Ellis Company engaged?

A. They are engaged in many types of business. We handle animal feeds, we handle plant foods, and we handle frozen sea foods.

Q. Do you know Mr. Nicholas Winckler?

A. Yes, sir.

Q. Mr. Winckler testifying in this case said that among other persons that he contacted in efforts to refinance a loan on his plant or in an effort to sell the plant, he contacted various persons, including Wilbur Ellis Company. [3187]

Do you recall whether Mr. Winckler contacted you in that connection? A. He did.

Q. Will you tell us what was said by him and—was it you he contacted? A. Yes.

Q. Did you discuss the matter with him?

A. Yes.

Q. About when and where was the conversation?

(Testimony of Ned Lewis.)

A. To the best of my recollection, it was some time in 1951. Our company had been purchasing one of the by-products from his plant and in the various courses of business that we had with him he suggested that he come in and talk to me about a refinancing, or whether we might be interested in some type of business relations with him further than the purchase of by-product citrus peel.

Q. About what time in 1951 was that, if you can recall?

A. My memory is hazy on that. I am not sure just when it was. About four or five years ago.

He came into my office one day and we went over the situation quite thoroughly, and I told him at that time, I believe, that it was rather an interesting set-up, that it was the type of business with which I was not familiar and I would be very pleased to take it up with my associates and let him know whether there was any community of interest. [3188]

I did so, and it was the conclusion of our group that it was the type of business about which we knew little and foreign to what we generally did, and largely because of that and largely because we had plenty of interests in our business, anyway, that we would advise Mr. Winckler we were not interested in going further with the matter.

Q. And did you so advise him? A. I did.

Q. And did you advise him of the reasons for your decision?

A. To the best of my knowledge, I did. I believe I wrote him a note in the matter.

(Testimony of Ned Lewis.)

Q. Was the reason you decided against investing in the business or refinancing the business the fact that, if it were a fact, Mr. Winckler, had no source of raw fruit supply?

A. I don't remember that that had anything to do with it. I don't think I knew enough about it to go into that.

Mr. Strachan: That's all.

Mr. Dixon: May I have this marked for identification next in order?

The Court: Plaintiff's Exhibit 83.

(The exhibit referred to was marked Plaintiff's Exhibit No. 83 for identification.) [3189]

Cross-Examination

By Mr. Dixon:

Q. Mr. Lewis, do you recall when it was that you had this conversation with Mr. Winckler that you have mentioned concerning acquiring an interest in Winckler & Smith?

A. No, I do not remember the dates.

Q. Were you at that time handling any products for Sunkist? A. No.

Q. I will hand you what has been marked for identification as Plaintiff's Exhibit 83 and ask you if that is your signature. A. It is.

Q. And the date of the letter is November 6, 1951, addressed to Winckler & Smith Company of Anaheim, California, is that correct?

A. That is correct.

Q. Does that refresh your recollection as to the

(Testimony of Ned Lewis.)

A. It does. I would say it was shortly before November 6th.

Q. Was the substance of your conversation with him at that time concerning the matter substantially as set forth in your letter of November 6, Plaintiff's Exhibit 83?

A. I believe that I told him that I would take it under [3190] advisement with my associates, and I don't think I gave him any answer at the time, and I believe the letter is the answer to his suggestion that we go in with him.

Q. Did you tell him at that time that after your discussion of the matter you were very much impressed with his grasp of the business?

A. I think so. He made a very good impression on me as far as knowing his business was concerned.

Mr. Dixon: That's all. Plaintiff's Exhibit 83 offered in evidence.

Mr. Strachan: It is not material. It is not in any way inconsistent with what the witness has testified. [3191]

The Court: Objection overruled.

I don't think it is much more pertinent than the witness' testimony on direct, but I will receive it in evidence.

Mr. Dixon: I don't care to read it to the jury.

The Clerk: Plaintiffs' Exhibit 83 received in evidence.

* * *

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Strachan: I want to say, your Honor, that I feel it may well have a prejudicial effect on the jury to have your Honor comment on the pertinency or lack of pertinency.

The Court: Did you lay any foundation when you were examining Winckler, other than your general questioning that in this particular case this man had told him that that was the reason he wouldn't——

Mr. Strachan: He said everybody they contacted gave him one reason, and only one reason, for not refinancing the business, and that was lack of [3192] fruit.

I just wanted to record here my objection.

The Court: I will tell the jury to disregard what I said.

Mr. Dixon: Your Honor, this testimony that counsel is directing these witnesses to apparently relates back to the inquiry that he made as to what efforts Winckler had made to sell the business and refinance it, and the record will show that Mr. Winckler testified that he made at least 100 contacts. Now, the defendant brings in before the court, so far, three of those contacts for the purpose, presumably, of impeaching Winckler's testimony, that he never contacted them.

That is my understanding of what he is trying to do with the witnesses.

The Court: One witness, yes; but these other witnesses Mr. Strachan contends are impeachment of Winckler's statement that everybody had declined to refinance because Winckler had no source of supply.

Mr. Dixon: That was a general statement. I agree it is not applicable to all witnesses.

The Court: My point is that it was a general statement, and I think if you wanted to impeach, if you want to be technical, you would have to pin it down to each one, rather than impeach as you are doing.

That is the reason for my remark. I personally think it is very questionable whether it is impeachment, but I will [3193] tell the jury to disregard what I said.

* * *

(Whereupon, the proceedings were resumed in open court within the hearing of the jury as follows:)

The Court: Ladies and gentlemen of the jury, as I have told you time and time again, you are the sole judges of the facts in this case, and discussions between the judge and counsel are not evidence and have no bearing upon your view of the facts. Specifically, in this instance I direct you to disregard what I said about the letter.

They are in the record and you may consider them. They are offered for impeachment purposes, and you may consider them for that purpose in the [3194] case.

NELS WARNER

called as a witness by the defendants, being first sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan:

Q. Mr. Warner, where do you live?

A. 824 North Helena, Anaheim.

Q. What is your business?

A. Citrus. Citrus processor.

Q. By whom are you employed?

A. By Golden Citrus Juices in Fullerton.

Q. Raise your voice a little. This is a rather large room with a high ceiling, and you will have to speak a little louder.

Where is that plant located?

A. 130 West Santa Fe, Fullerton.

Q. How long have you been employed by Golden Citrus in that plant? A. Since March, 1950.

Q. That was the time the plant first opened?

A. That's right.

Q. And you have held your present position with the company in that plant ever since you took the job, is that [3195] correct? A. Yes.

Q. Will you tell us the nature of the processing operations that are conducted at that plant?

Mr. Dixon: If the court please, I object. I don't see how it can be possibly relevant to any of the issues in this case, as to what went on in the plant of the Golden Citrus Company in Fullerton.

The Court: Objection sustained.

Do you want to approach the bench?

Mr. Strachan: I don't think so.

The Court: All right.

Q. (By Mr. Strachan): Prior to your employment by Golden Citrus, where were you employed?

A. Winckler & Smith, in Anaheim.

Q. How long were you employed in that plant?

A. From 1946 through '50, March.

Q. [illegible]ing the time that the business was closed down, while it was in Chapter XI reorganization, by whom were you employed?

A. Well, I was employed by Silzle Corporation.

Q. And that plant is where?

A. That is in Anaheim. I believe it is 206 or 208 South Atchison Street.

Q. During the year 1951 did Golden Citrus process any [3196] single-strength juice?

Mr. Dixon: Again, your Honor, I must object.

Mr. Strachan: I will connect this up, your Honor.

The Court: I want you to approach the bench. This time I direct you to. Previously I invited you.

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Strachan: On this subject the witness will testify that their sources of fruit are the Independent Growers. That they had a surplus of fruit.

The Court: Who did?

Mr. Strachan: Golden Citrus. They were able to

(Testimony of Nels Warner.)

buy fruit, and they had a surplus of fruit that they actually were selling or offering for sale.

The Court: What is this Golden—a cannery?

Mr. Strachan: A cannery.

What I wanted to prove by that first question, which I think I should be permitted to prove, is that they are equipped and went into business to process frozen concentrate. That is primarily their business.

The Court: They process frozen concentrate?

Mr. Strachan: Yes.

The Court: Not single-strength?

Mr. Strachan: Single-strength only as a by-product when their concentrate equipment is in full use. [3197]

Mr. Dixon: What is this man in Golden Citrus?

Mr. Strachan: Superintendent of the plant.

Mr. Dixon: He doesn't run the plant, buy the fruit, and all that?

Mr. Strachan: He runs the plant.

The Court: And Golden bought fruit from who?

Mr. Strachan: From the Independent Fruit Growers, the same source that Winckler had. And they processed single-strength juice in that year.

Mr. Dixon: 1950?

Mr. Strachan: 1951.

Mr. Dixon: From fruit they bought?

Mr. Strachan: Yes.

Mr. Dixon: How does he know? I want the records, counsel. I am not going to be satisfied with that.

Mr. Strachan: I think he knows where they got

(Testimony of Nels Warner.)

the fruit, and I think he knows what products they made.

The Court: What were they paying for fruit, do you propose to show that?

Mr. Strachan: I don't know.

The Court: Do you propose to show how much single strength they made?

You said it was only made as a by-product.

Mr. Strachan: It was only made when their concentrating equipment was overloaded, that's [3198] right.

Mr. Dixon: I would like to know how much they have made.

Mr. Strachan: We can ask him. He probably can tell you.

Mr. Dixon: I don't see any relevancy to this thing, unless the testimony that he expects to offer is that this company, Golden Citrus, actually bought fruit at, say, $40, for 120 pounds solids, and processed it into single-strength juice and sold it at a profit during that year.

That is the question. Nothing else.

Otherwise we have to go into the question whether there was a loss or profit.

The Court: Do you propose to show that?

Mr. Strachan: Show what?

The Court: That they bought $40 fruit?

Mr. Strachan: They bought from the Independents at prices that were usually parallel to and the same as Sunkist.

(Testimony of Nels Warner.)

The Court: And processed into single-strength orange juice at a profit?

Mr. Strachan: I don't know whether they made a profit. But they did it.

Mr. Dixon: It wouldn't be relevant at all in this case.

The Court: If you show that they processed single-strength juice and lost, you are offering evidence on the plaintiff's side of the case. If they did it at a profit, it might have some materiality. [3199]

Mr. Strachan: I don't think you can say, when you have a large plant producing many products, whether product A makes a profit and product B doesn't.

I take it that these people are in business for a profit, and if they make single-strength juice it is because they don't have as great losses as they otherwise would have, and prudent businessmen were able to buy fruit and process it into single-strength that year.

The Court: If they were essentially making frozen concentrate, they might well make a little single-strength juice at a loss in order to keep the plant running. What would that tend to prove?

Mr. Strachan: It tends to prove that one of Winckler's competitors was buying fruit and making single-strength juice, when he was not.

I say it gives rise to a strong inference that there was some reason, other than his claim that he couldn't obtain fruit at the right price.

Mr. Dixon: If this witness can testify of his

(Testimony of Nels Warner.)

own knowledge that this company bought fruit, 120 pound solids, at $40 a ton, plus delivery charges, and processed that particular fruit into single-strength juice, and sold it at a profit, I ~~will~~ agree that his testimony would be competent.

Mr. Strachan: I don't know whether he can testify as to the profit, or not. But at least it shows a competitor [3200] was buying fruit at those prices and was processing it during that season.

Presumably they were doing it for business reasons.

The Court: Where would that leave us?

Then we would be up in the air. If the witness only went so far as to say it was bought and was processed into juice, then we are up in the air on another issue—was there a profit or loss?

Then we again proceed with another issue that has to be run down.

Unless——

Mr. Strachan: I don't raise the issue of profit or loss. I just say there is evidentiary significance to the fact that a competitor in this field was buying fruit and making single-strength juice.

The Court: You don't specify how much juice.

Mr. Strachan: I will find out. I didn't ask him.

Mr. Dixon: Didn't you talk with this witness before you put him on the stand? Don't you know what he is going to testify to, counsel?

Mr. Strachan: Do you want to have me sworn?

Mr. Dixon: No.

(Testimony of Nels Warner.)

Mr. Strachan: This is a very vigorous cross-examination, Mr. Dixon.

Mr. Dixon: I contend if all you expect to get out of [3201] this witness is what you have indicated, that it is an utter waste of time of this court, and the whole examination would be fruitless. And if you don't know now, I think this is kind of late to start discovery proceedings, in the courtroom, from this witness.

Mr. Strachan: Thank you for the lesson in practice and procedure, Mr. Dixon.

Mr. Dixon: Just a passing comment.

The Court: Well, both of you cool off.

If you haven't talked to him, you should have an opportunity to for the purpose of making your offer of proof so I can rule on this matter.

Personally I don't think it is material to the issues.

If you want to talk to him further, I will take a recess and let you do it, or I will let you make your offer of proof now, or I will consider this as your offer of proof.

Mr. Strachan: I think you can consider this as my offer of proof on this line of examination.

The Court: So I understand your offer, you don't know how much tonnage of oranges were bought or how much single-strength juice was made, or whether the single-strength juice was made at a profit or loss, or at what price the product oranges were purchased?

Mr. Strachan: He testified that they were pur-

(Testimony of Nels Warner.)

chased at the Independents' price, which was substantially the same as [3202] the Sunkist posted price, and that it was purchased on a basis that was adjusted according to solid content.

Mr. Dixon: I would like to have that testimony from this witness.

Can you represent this witness will testify to that?

Mr. Strachan: Yes, Dr. Dixon, I can. And I will tell you that under oath, if you want me to.

Mr. Dixon: Then I have no further objection. Proceed if you can do that.

Mr. Strachan: That is what he has told me.

The Court: Are you prepared to show the amount of tonnage and the amount of juice produced?

Mr. Strachan: I will ask him.

The Court: You don't know?

Mr. Strachan: I don't know what his answer is going to be. He told me that it was produced.

Mr. Dixon: Then how can he make an offer of proof, your Honor, of the kind that he has presented to this court?

Mr. Strachan: If it is a question of quantity, I can ask him and tell you what the quantities will be: but I know he will testify that he bought the fruit and he made the juice.

The Court: On your present offer, the objection is sustained. If you want a recess for the purpose of talking to the witness, I will hear [3203] you.

* * *

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: Let the record show the jury absent.

Mr. Strachan: Your Honor, during the short recess I talked to the witness. The testimony would be that——

The Court: This is supplementing your offer of proof?

Mr. Strachan: There was some question raised as to what the amounts would be and I can supplement the offer. His testimony would be that during the canning season of 1951, due to the fact that they had oranges in excess of capacity of their frozen concentrating facilities, they packed between 80 and 100 thousand cases of single-strength orange juice, and that they still had surplus oranges, and they sold those oranges, about 1,000 tons, at prices that ranged from $30 to $34 a ton.

I am told that the record shows that some of that tonnage was bought by Winckler, 16 or 17 tons.

The Court: Then you don't propose to put any proof on as to whether they packed this orange juice single-strenth at a profit?

Mr. Strachan: No, I don't think that can be isolated and I don't think it is essential.

The Court: What is the position of the plaintiff?

Mr. Strachan: This I might add. This is information that was furnished to the plaintiff pursuant to a subpoena [3205] served on Golden Citrus.

(Testimony of Nels Warner.)

Mr. Dixon: Golden Citrus, counsel? Now, let's get this straight.

Mr. Strachan: That is my understanding.

Mr. Dixon: I think this is the one company I did not get the subpoena served on. There was no subpoena served on this company, so I don't have the facts of what they would have returned to a comparable subpoena, but——

The Court: Plaintiff's subpoena, or a defendants' subpoena?

Mr. Strachan: Plaintiff's subpoena duces tecum, and we have copies of what was returned to Mr. Dixon, or we were told that that was given to Mr. Dixon in response to the subpoena.

Mr. Dixon: I have Mutual Citrus Products.

The Court: Do you have a copy of that subpoena you are talking about?

Mr. Strachan: We have just sent for it.

Mr. Dixon: Just a moment, your Honor. I may be in error. Golden Citrus Juices. I will take it back. I did serve one on them.

The Court: All right. Is there any objection by the plaintiff to this offer of proof?

Mr. Dixon: Yes, because on information given to me by Mr. R. E. Freeland of Fullerton, who called me with reference to it, all of the products produced by this company since [3206] 1951 were frozen concentrate. There were 240,000 gallons in 1951 out of operations, since 1951, no single-strength juice. The source of their fruit was American

Fruit Growers Association. This shows it sold them 988 tons in 1951. That is the information that was given to me by Mr. Freeland. There was no information that they processed any single-strength juice in 1951, according to the information that I have here in my notes.

Mr. Strachan: What I am offering in opposition to what Mr. Dixon has stated is sworn testimony.

The Court: Well, what is the plaintiff's objection to the offer of proof?

Mr. Dixon: Plaintiff's objection, your Honor, to the offer of proof is that the offer does not contain information or facts which would make it relevant to the issues or any of the issues of this lawsuit or which would tend to prove or disprove any such issues.

If I understand the purpose of this offer, counsel is putting this witness before the court for the purpose of showing that Golden Citrus Juices, Inc., purchased some fruit, that is, some Valencia oranges, from Ward in 1951. That is not in dispute, because I am informed by the company that they sold 988 tons to—bought 988 tons from Ward in 1951. However, they could not give me at my request the prices paid or the soluble content of the oranges any more [3207] than one of the other witnesses that testified here could, so that there was no basis for any comparison, the testimony being that the oranges were bought on a tonnage basis wholly without any reference to the soluble content

(Testimony of Nels Warner.)

of the oranges and, therefore, the prices paid would not be comparative.

Further, that the offer does not show that whatever was purchased—I mean, first, that the offer does not show the purchase price on a comparative basis to the evidence before this court as to the prices at which oranges were made available for processing purposes by Sunkist, and also by the testimony of Morgan Ward when he sold them.

Second, that the offer of proof does not show or contain any statement that this witness would testify that any of the oranges so purchased at whatever price were processed into single-strength juice by this company.

The Court: Well, that is what he said.

Mr. Dixon: And sold at a profit.

The Court: The matter can be handled on cross. You can bring out the character of the business, and the witness either knows or does not know whether it was sold at a profit. Objection overruled. Let's make it short and get rid of this witness.

Mr. Strachan: I shall, and may I go back and take up——

The Court: Personally, you put on your case, but I think if the witness has to make those admissions on cross, you have [3208] really got nothing, but technically you may have some slight——

Mr. Strachan: One of the charges is there is a monopoly and use of monopoly power, and we are showing——

The Court: But your testimony is going to admit

(Testimony of Nels Warner.)

by its very terms that this was an unusual situation that developed where they had more oranges than they could use for concentrate, and in an emergency situation they first canned some juice and then offered to sell the fruit, so you have got at best an exceptional situation. I am going to permit it.

Bring the jury down.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: The record will show the jury present and in their proper places.

Come back, Mr. Warner.

Q. (By Mr. Strachan): Mr. Warner, for the processing of what citrus product is the plant primarily designed? I am talking about the Golden Citrus plant?

A. Well, it is frozen concentrate, lemons and oranges, mostly oranges.

Q. What is the source of the fruits that are processed by Golden Citrus?

A. Repeat that, please?

(Question read.) [3209]

Q. (By Mr. Strachan): With reference to the year 1951.

A. Well, single-strength juice.

Q. No, the sources of the raw fruit.

A. What comes through our own packing houses.

(Testimony of Nels Warner.)

American Fruit Growers, and which we buy from the independents.

The Court: Are you connected with American Fruit Growers?

The Witness: Yes, Golden Citrus is.

Q. (By Mr. Strachan): In the year 1951, did Golden Citrus pack any single-strength Valencia juice?

A. Yes. I believe between 60 and 80 thousand cases.

Q. In view of the fact that the plant was primarily designed to produce frozen concentrate, will you explain to the jury how it happened that you produced some 60 or 80 or a hundred thousand cases, whatever you said, of single-strength juice?

A. It is an overflow of fruit that we couldn't handle in the plant on the frozen.

Q. That is your concentrated freezing capacity?

A. That's right.

Q. Wouldn't absorb all the fruit you had available from your sources? A. That's right.

Q. In packing single-strength juice, what extractors do you use? [3210]

A. The Brown citrus extractors.

Q. Do you use any Citromats at all in that plant? A. No.

Q. Now, in addition to having processed single-strength juice, did you still have some surplus oranges available? A. Yes, we did have.

Q. In 1951?

(Testimony of Nels Warner.)

A. Yes. I believe we sold about 1,000 [3211] tons.

Q. Do you know approximately the prices at which those surplus oranges were sold?

A. Not right offhand, but probably between thirty and thirty-five dollars a ton. It varies in price. Sometimes it is 30, other times it would be as high as 35. But it would average I believe around 33, $34 a ton.

Q. In the ordinary course of business and in normal years, is the fruit that is available to you, through your usual sources, in excess of the capacity of the plant to process it into frozen concentrate?

A. Do you mean——

Q. Do you ordinarily have fruit to sell?

A. Definitely, every year.

Mr. Dixon: Counsel, just a moment.

Are you the employee or the officer of this company that is in charge of the selling of the fruit?

The Witness: No, I am not.

Mr. Dixon: Then I ask, counsel, that the one who is in charge be produced on that testimony.

Q. (By Mr. Strachan): Do you have personal knowledge of the fruit being sold from your plant that is surplus?

A. Definitely. I am the plant superintendent.

Q. Based upon your experience and familiarity with the processing in the industry, will you tell the jury how the productive capacity of Citromats compares with the productive [3212] capacity of

(Testimony of Nels Warner.)

Brown's citrus extractors, in the production of single-strength juice?

Mr. Dixon: I will object to the question, your Honor.

The Court: Sustained. There is no dispute on the question. We have had testimony on it, and it would be entirely cumulative.

The Witness: Well, the difference between a Brown——

The Court: Just a minute. I sustained the objection to it.

The Witness: Excuse me, sir.

Q. (By Mr. Strachan): In your experience in the industry, have you ever known of any plant, except the Winckler-Smith plant, that processed Valencia oranges for single-strength packing, through the use of Citromats? A. No.

Mr. Dixon: I object, your Honor. It is the same question.

The Court: Sustained. The answer may go out, and the jury is instructed to disregard it.

Q. (By Mr. Strachan): Are you able to tell this court and jury for what purposes, and what purposes only, Citromats are used in citrus processing plants, generally, except the plant of Winckler & Smith?

Mr. Dixon: Same objection, your Honor; and objection to any further line of questioning along this line.

The Court: Sustained. [3213]

Mr. Strachan: Before the witness steps down I

(Testimony of Nels Warner.)
would like to discuss the matter, but I will go on with another subject now.

Q. (By Mr. Strachan): Will you tell us what you observed about the mechanical condition of the Winckler-Smith plant during the time that you were employed there between 1946 and 1950?

Mr. Dixon: Objection, your Honor.

The Court: What is your objection? What ground?

Mr. Dixon: On the ground that it is wholly irrelevant and immaterial, and the question is entirely too general in its nature. We will be here indefinitely.

The Court: Sustained.

Limit your question to the year 1951.

Mr. Strachan: The witness wasn't employed there during 1951.

The Court: Then he won't be able to testify.

We are not going to try out the condition of the Winckler & Smith plant in '46, '47 and '50. That is not the problem.

If we did that we would again multiply the issues. You would put proof on, and then the plaintiff wants to come back and put contradictory proof on.

Mr. Strachan: I don't think the plaintiff wants to put contradictory proof on, because I don't think any is available, your Honor. [3214]

The Court: The jury will disregard the remarks of the court and counsel. It is not evidence in the case.

(Testimony of Nels Warner.)

You know what the issues are. Let's proceed.

Q. (By Mr. Strachan): At the time when you were employed at the Winckler-Smith plant, will you tell us what procedures were followed for grading and culling raw fruit as it was taken into the extracting machines?

Mr. Dixon: I object, your Honor.

The Court: Sustained.

The witness was there until March, 1950. We are concerned with matters in '51 in that respect.

Mr. Strachan: Except for making a statement out of the presence of the jury of the proof I would tender, that is all the examination I have of this witness.

The Court: Make it now. Come forward with the reporter.

Mr. Strachan: The other witness I have is on the same question. I thought we could finish up with this witness, and then go ahead with the other.

The Court: All right, we will do that.

Cross-examine, Mr. Dixon.

Cross-Examination

By Mr. Dixon:

7 Q. Mr. Warner, what is your position or was your position at Golden Citrus in 1950?

A. Still the plant superintendent. [3215]

Q. Will you speak up, please, so that I can hear you and the jury can hear you?

A. I said plant superintendent.

(Testimony of Nels Warner.)

Q. Were you in charge of the buying of the fruit processed in the plant? A. No.

Q. Who was?

A. We had one fruit buyer at that time, in fact, I think there was about two or three of them. Mr. Ace Clark. Mr. Phil Twambly, assistant manager.

Q. But you had nothing to do with the buying or the pricing of it, that is, the price at which it was purchased by Golden Citrus? A. No.

Q. Golden Citrus, since 1951, has been processing frozen concentrates, has it not?

A. Correct.

Q. Entirely?

A. Not entirely. In '51 we produced some single-strength juice.

Q. And that is the amount that you testified to as put in from the surplus that you had after running the frozen concentrate? A. Yes.

Q. Did you have anything to do with the selling of [3216] the fruit by Golden Citrus? A. No.

Q. What is Golden Citrus? Is it kind of a half co-op?

A. Golden Citrus Incorporated at that time was owned by the American Fruit Growers and Mr. Tom Eddington. He is an independent grower and a packer. Since 1953 Minute Maid Corporation has bought in with him, so they own 66 per cent now, Tom owns one-sixth, and the American Fruit Growers own one-sixth.

Q. Are you a stockholder in Golden Citrus?

A. No, I am not.

(Testimony of Nels Warner.)

Q. You had nothing to do with the selling, then, of any fruit that they might have had available for sale in 1951, did you? A. No, I didn't.

Q. You had nothing to do with the determination of the price at which it would be sold, did you?

A. No.

Q. Have you examined and know of your own knowledge what the records of the company were with reference to the selling price of any fruit?

A. I do keep close contact with them——

Q. Just answer my question, Mr. Warner, and we will get along fine.

Mr. Strachan: He is answering it. [3217]

The Court: Read the question.

(The question referred to was read by the reporter as follows: "Q. Have you examined and know of your own knowledge what the records of the company were with reference to the selling price of any fruit?")

The Witness: Yes.

Q. (By Mr. Dixon): In 1951? A. Yes.

Q. Who made those records available to you?

A. The office.

Q. When? A. Before I came up here.

Q. Who made them available to you, Mr. Warner? A. Mr. Ace Clark, assistant manager.

Q. Who is Mr. Freeland?

A. He is the office manager and comptroller.

Q. Is he the one in charge of the records?

(Testimony of Nels Warner.)

A. He is in charge of the records.

Q. Did you ask him for the records?

A. He was not there.

Q. What examination did you make of the selling records of oranges in 1951 by Golden Citrus?

A. We have a girl there that is assistant to Mr. Freeland on all fruits handled, and all I had to do was ask [3218] her.

Q. Do your selling price records show the soluble content of the fruit sold? A. No.

Q. They don't?

A. Not that I know of. Not to my knowledge.

Q. It just shows the selling price per ton?

A. Right.

Q. But it does not show the soluble content of the tonnage sold?

A. That I wouldn't know.

Q. At least the records that you examined didn't show that, did they? A. That's right.

Q. Did I understand you to say, Mr. Warner, that you just talked to some girl in the office about these records?

A. No; I talked to Mr. Ace Clark, the assistant manager, and he had the girl look them up.

Q. And she brought them out and presented them to you? A. Right.

Q. When was this done, yesterday or today?

A. Today.

Q. Can you tell some of the people at this time that bought oranges from Golden Citrus in 1951?

(Testimony of Nels Warner.)

A. I couldn't tell you. [3219]

Q. You couldn't tell us? A. No.

Q. So this tonnage that you testified was sold in 1951, this surplusage—it was a surplus, was it not?

A. Yes.

Q. Of about how many tons?

A. I would say in the neighborhood of a thousand tons.

Q. Don't you know? You examined the records.

A. Not exactly, no. I don't watch them that close.

Q. From the records that were made available to you, you didn't add them up or determine how many tons were sold? A. No.

Q. And you don't know to whom they were sold?

A. No.

Q. Or for what purposes they were sold?

A. Well, let's put it, no.

Q. I didn't get your answer.

A. No.

Q. You had nothing to do with the selling of the single-strength juice that you testified was processed out of the surplus fruit in 1951, did you?

A. No.

Q. You are not the selling officer or official of this company, or weren't in 1951?

A. No. [3220]

Q. And you had nothing to do with the selling price of it? A. No.

Q. And you do not know what the selling price of the juice was, do you?

Testimony of Nels Warner.)

A. I know of the juice oranges, yes.

Q. I am talking about the single-strength Vaencia juice that you testified was processed from he surplus fruit that you mentioned in 1951.

The Court: He is talking about the canned juice.

The Witness: The canned juice, no, I do not now.

Mr. Dixon: That is all.

Redirect Examination

By Mr. Strachan:

Q. You said you didn't know whether the surplus fruit that was sold at approximately $34 a ton was sold with reference to solids; is that correct?

A. That's right.

Q. In the production of single-strength juice, as contrasted with concentrates, the Brix content is not important, is that correct? A. Right.

Mr. Strachan: That is all.

Subject to the offer I will make out of the presence of the jury, I think that concludes it, your Honor.

The Court: You may step down. [3221]

Do you have another witness to call?

Mr. Strachan: I think we can handle the other witness and the offer of proof at the same time. The subject matters will be about the same.

* * *

The Court: The record will show the jury absent.

Mr. Strachan: Your Honor, the matters which I thought were within the purview of your indicating rulings which I could have offered evidence on by this witness are the following:

The Court: This is your offer of proof?

Mr. Strachan: This is an offer of proof, yes, sir.

To show that the Brown citrus extractor produces better quantities and better qualities of single-strength juice; that perhaps 15 or 20 per cent more is obtained through the use of those extractors than through Citromats.

That the quality of the juice produced by the Citromat is inferior in that the oil content is high and that [3222] it cannot be entirely corrected by de-oiling equipment such as Winckler-Smith used.

The Citromat is ordinarily used in the industry for grapefruit or for the production of bases and hot concentrates, and that the Winckler-Smith plant is the only one known to this witness to have used Citromats in an attempt to produce single-strength juice.

As to the Winckler-Smith operation, the witness would testify that the Citromats were overworked to the——

The Court: What year was this?

Mr. Strachan: This was down through 1950, I think it was. March of 1950.

For the period down through and including March, 1950, the Citromats were being overcrowded with the result that a poor product was obtained, product in which there was too much peel and oil.

We would show also throughout the entire period of his employment down through March, 1950, the use of graders and cullers was inadequate, that there was never more than one grader on duty, and sometimes none at all.

That after complaints had been received over the quality of the product, the dirt and the spots in the product had been made the subject of complaint, a conference was held between various interested people, including Mr. Winckler and the witness, and the witness said that he thought that the [3223] difficulty was due to rotten fruit and culls going into the plant for processing, and recommended that additional graders be used because the one grader was not sufficient to handle all of the raw fruit that was going into the Citromats, and that his suggestion was not followed.

He would also testify that as a result of failure to eliminate the contaminated and rotting fruit from the processing, contamination of product resulted, causing high bacteria count and poor quality of juice.

The witness would also testify that the sanitation in the plant was bad, there was water around on the floors, the residues from peel and juice were not properly disposed of, with the result that flies caused further contamination.

He would also testify that the plant was not mechanically in good condition, that he was unable to put it in good condition and Mr. Winckler said they had no funds for that purpose.

I have, also, the witness Templeton under subpoena and present. He is now employed as production foreman at Golden Citrus plant and has been since July of 1950.

That he was an employee in the Winckler-Smith plant from August, 1949, to July of 1950.

His testimony would be the same as and would largely corroborate the testimony of Warner.

This evidence, your Honor, would be offered for [3224] various purposes. One would be to show the fact that there was bad product and that the bad product might well have been, as we will argue was, the major cause of the lack of sales and the financial collapse.

In addition to that, the testimony concerning the lack of adequate grading and culling would be in direct rebuttal of Mr. Winckler's testimony on that subject.

The Court: Warner would be quite an expert if he could testify about bacteria count.

Mr. Strachan: I think he is.

The Court: And contamination.

Mr. Strachan: I think he knows his business.

The Court: What is the objection?

Mr. Dixon: The objection, your Honor, is on the grounds previously stated, and, furthermore, that if this evidence is competent and relevant to any issues in the case, we would be required to, naturally, rebut it by testimony showing that the inspections of the plants that are processing fruit by the State of California, and so forth, were made and this plant complied with all of those inspection requirements, and so forth.

The Court: In other words, it would inject——

Mr. Dixon: A wholly collateral issue.

The Court: ——issues into the case that are ollateral and would take a long period to [3225] ry.

Mr. Dixon: Yes, your Honor. That is the basis f the objection.

The Court: Objection sustained on the grounds tated by counsel and upon the record heretofore ade in the absence of the jury on similar matters, nd upon other grounds that would be valid to sus- ain an objection.

Mr. Strachan: Would this be a good time, your onor, for me to state my offer with respect to the itness Higbee?

The Court: Yes, sir.

Mr. Strachan: I would like to get that out of he way.

Mr. Dixon: What witness is this, counsel?

The Court: An offer as to the witness Higbee.

Mr. Strachan: I have indicated to your Honor n chambers this morning I had present as a pros- ective witness Mr. Higbee and I would, except for our Honor's suggestion in chambers, have had him worn. I understand that in lieu of this I can make his offer as if he were actually on the stand, had een sworn, and I would make this offer as to what would prove by him to the same effect as if he had ctually been produced, sworn, and were on the tand.

The Court: Right.

Mr. Strachan: Ralph H. Higbee would testify in substance that he is the chief chemist of Exchange Orange Products Company.

That he is a graduate chemist. After [3226] graduating and taking his degree in chemistry, he became a food chemist in the employ of the Department of Agriculture, assigned to the matter of supervising the observance and enforcement of Pure Food and Drug regulations.

After leaving the federal employment about 1921, I believe it was, he became a chemist in the employ of Exchange Orange Products Company, and has remained in that employment ever since until he became chief chemist in about 1945, I believe it was.

Mr. Higbee would testify that as chief chemist he had occasion to analyze the hot concentrate which Winckler & Smith undertook to manufacture for Exchange Orange Products in the year 1947; that a large part of the product was found to be defective in various respects; parts of it were inadequately pasteurized and were in an unsterile condition, and some of the product was so unsterile that the decomposition progressed to the point where it had to be destroyed.

Other of the product contained dirt and other foreign matter which rendered it unfit for consumption or use.

He would testify that the hot concentrate produced by Winckler & Smith for Exchange Orange Products was not a satisfactory product.

In addition, he would testify that he as a professional chemist could examine the acidity and Brix ratio [3227] of extracted juice and the acidity and Brix ratio of products derived from that juice, raw juice, and by analysis and computation could determine to what extent the juice had been adulterated through the use of water, sugar, or citric acid, and could compute the extent of such adulterations.

He would testify that a rule of thumb for calculating the amount of dilution is to take the starting acidity, per cent of acidity, divide that by the final per cent of acidity, and multiply that by 100, and subtract 3 from that product, to determine the per cent of dilution.

As an example, the starting acidity of 1.50, divided by a final acidity of 100, times 100, minus 3, would give a result of 147, which result would indicate that the dilution consisted of adding 47 gallons of water to 100 gallons of original juice, or a 47 per cent addition.

He would further testify that this sheaf, which I will now ask to have marked as a defendants' exhibit for identification——

The Court: The next number, Mr. Clerk?

The Clerk: Defendants' Exhibit CM.

Mr. Dixon: Have you a copy for us, counsel?

Mr. Strachan: I will have to get it for you.

The Court: Get it later. This will be marked CM for identification. [3228]

(The exhibit referred to was marked Defendants' Exhibit CM for identification.)

Mr. Strachan: ——is the scientific formula by which an exact computation could be made as to the matters.

Mr. Higbee would also testify that he had reviewed in detail all of the items appearing in the Winckler & Smith daily laboratory statistics, which are identified in this record as Exhibits I-1 to I-4, inclusive.

That from an inspection of these records, he determined that substantially all of the products of Winckler & Smith had been subject to adulteration through the use of water or sugar or acid, citric acid, or all three.

He would testify that from these records it appeared that the consistent practice was to buy fruit with high acidity, dilute the extracted juice with water to a predetermined level, then add sugar to attain a desirable sweetness.

That in other instances the procedure was to extract the juice, add water to get the desired volume, then to add citric acid and sugar in order to get a resultant product which would have the acidity and solids content which was predetermined by the formula. [3229]

When I say that his testimony would be that substantially all of the product had been so adulterated, I mean that the witness would testify that substantially 100 per cent of the production had been adulterated by the addition of ingredients, such as water, citric acid, or sugar.

The witness Higbee, further, would substantiate and corroborate the testimony of the witness Opal Comstock Smith, which was received without objection, and which your Honor, on your own motion, struck. And would, in addition, substantiate the further testimony, which I offered by the same witness. And would substantiate in full the testimony on these subjects which I offered to introduce by the witness Gilbert.

Higbee would identify this document, entitled Amounts of Sugar and Water Added by Winckler & Smith to Stretch Their Canned Sweet Orange Juice, calculations based on 100 pounds of raw juice, as being a computation made by him and under his direction and supervision.

He would testify that the computations were correctly made from the contents of the Exhibits I-1 to I-4, inclusive.

The Clerk: I have marked the document Defendants' CN.

The Court: CN for identification.

(The exhibit referred to was marked Defendants' Exhibit CN for identification.)

Mr. Strachan: The further testimony would be that his [3230] examination of the exhibits in the "I" series indicated that similar adulteration occurred in the other products manufactured.

He would also testify that because of these adulterations the marking of the juice products as Grade A, the marking of these products without indicating the adulteration, would violate the Food and Drug laws and regulations thereunder.

The Court: Do you offer that?

Mr. Strachan: Yes, I offer that evidence, and I offer the two exhibits that I have just had marked in connection with this offer.

The Court: May we incorporate the record heretofore made as the objection, insofar as pertinent?

Mr. Dixon: Yes, the objections made in the testimony of the witness Smith, Gilbert, Rodgers—I am not sure whether Rodgers was included therein —and the use of Exhibits "I" before referred to.

The Court: And incorporate, as well, these discussions out of the presence of the jury?

Mr. Dixon: Yes, your Honor. This, again, in my judgment illustrates that if this testimony were permitted to come into this case we would be chasing rabbits literally from now until Christmas.

The Court: Bacteria from now to Christmas.

The objection to the offer of proof is sustained. There [3231] are so many reasons why it is objectionable. I won't repeat them all.

Previously I mentioned Rule 12, that if you are going to defend on the basis of this product and unclean hands as was suggested, or illegal products, I am confident it would have to be plead under Rule 12.

In the statement of the issues the question was never raised.

We have an example here of two long intricate exhibits, CM and CN, exhibited, I take it, for the first time to counsel.

Mr. Dixon: I have never seen it even now, Judge.

The Court: But for the first time presented which have never been exhibited to counsel, and no attention ever called that this was going to be an issue in the case.

There are so many reasons that I finally say this: A district judge has a right to be sustained, if he is right in his decision, even if wrong in his reasons, and I therefore humbly suggest, if this matter is reviewed, that if there are other reasons besides the multiplication of issues, besides the injection of exhibits never before exhibited to counsel, besides the matter of a defense of unclean hands, and violation of the law by the product, which wasn't even pleaded, that I may have the benefit, in sustaining my ruling, of those reasons that I may not have thought of, which would validly sustain my ruling on this offer of proof. [3232]

So the objection is sustained. [3233]

* * *

The Court: Before we adjourn, there is one thing I [3234] want to call to your attention, and you may make your suggestions.

One of the jurors said to the bailiff, "Which one is the Government lawyer?"

You know, you get discouraged. We have been trying a case for 26 days, and now a juror says, "Which one is the Government lawyer?"

And I think the bailiff replied, "There isn't any Government lawyer here."

It seems to me that I ought to, before we go any further, tell this jury that this is not a public anti-trust case.

They may be confused because they know, or maybe somebody knows that Mr. Dixon used to represent the Government.

Mr. Dixon: Not to my knowledge.

The Court: I don't mean that they would know you personally, but you have had your name in the paper a few times representing the United States Government in the Antitrust Department.

Mr. Dixon: It has been at least three years now.

The Court: At any rate, I think they ought to be told again.

We tried to tell them to start with various things; that this is a private suit for damages, the situation with the plaintiff, that it is a corporation under Chapter X and there is a trustee. If necessary I will tell them the [3235] trustee, it is true, is in one sense a court officer, but this is not a Government suit; that the purpose of the action, an antitrust action, is a private action based upon alleged violation of the antitrust laws, which remedy, if one exists, after the proof is in, is given to the plaintiff to help enforce the laws, but it is a private suit.

Probably, again explain, as I mentioned, something about Walker's status. Because that may have led to the confusion. They know of the reorganization proceeding. There was some reference to him as a court officer.

I am debating, also, whether they shouldn't be told very frankly—this, now may cut both ways—told very frankly as to what happens in the event of a recovery; namely, that if there was a recovery, creditors of this corporation would come in first.

Expenses of—this one I want you to think about —expenses involved, and so forth, if there was a recovery in that amount, returned to the corporation. I don't know. You see my point?

We have been trying a case for 26 days, and then a juror says to the bailiff, "Which is the Government lawyer?"

Mr. Strachan: They probably think it is Mr. Figg.

The Court: He is a pretty good lawyer, but I don't think so.

Mr. Strachan: Your Honor, on that last matter, as to who the beneficiary would be, I think it would definitely be objectionable. [3236]

The Court: I realize we have got to stop somewhere, but I would like to make it clear. The evenness of it I thought was probably this. I only hazard this. If this jury thought Mr. Winckler was the plaintiff, I doubt if the plaintiff's luck would be as good as if they did not think he was. That is neither here nor there.

At least you think this over and give me some advice on what to tell this jury. Somewhere after 26 days they ought to know what kind of an action was filed. Do you agree?

Mr. Fisher: I wonder if a jury would after being told?

The Court: Well, this has been a hard case. It is a confusing case. We have come within the last few days to a problem of some multiplication of issues which certainly has had an effect upon this jury.

Whether it would have as much an effect as to know what this action is about or not, I don't know.

But this isn't like a case of a fellow that ran his car in front of a train and got hurt, with issues whether there was negligence, was contributory negligence, and what is the nature and extent of the injuries. We have got a complicated case.

All right, think it over. Maybe you can see me a few minutes before court in the morning. 10:00 o'clock tomorrow morning. [3237]

* * *

January 27, 1956, 10:00 A.M.

* * *

Did you have any discussion as to what I should tell the jury about this case?

Mr. Strachan: No, we haven't, your Honor.

The Court: About the government lawyer?

Don't you think I ought to say something this morning?

Supposing I merely point out that Mr. Dixon is not a government lawyer, and point out how the action was filed and how the trustee intervened?

Mr. Strachan: And that there are no government lawyers participating in the case.

The Court: Yes.

Mr. Strachan: Somebody in our group surmised —and it may be a fairly accurate surmise—that they got the impression that somebody in the back of the room was a government lawyer.

Mr. Dixon: I think it would be sufficient, your

Honor, [3242] to say that you don't know the basis for the question, but you thought it was clear that this is a private lawsuit in the sense that the government is not represented in the case, nor a party in any way to it; that Mr. Walker is the representative of the plaintiff corporation appointed by the court by reason of the proceedings under Chapter X, but that doesn't make him a government lawyer. If that is what they had in mind.

Mr. Strachan: I have no objection to what your Honor outlined.

The Court: Can't you leave it to my good judgment?

Mr. Strachan: I can.

Mr. Dixon: Yes.

The Court: I think the jury ought to be told. I think they ought to know this isn't a government antitrust suit.

Mr. Strachan: What your Honor suggested is quite satisfactory.

Mr. Dixon: Whatever you say is all right with me, your Honor.

The Court: I will try to be careful.

Bring the jury down. [3243]

(The following proceedings were had in the hearing and presence of the jury:)

The Court: The record will show the jury present in their proper places.

Ladies and gentlemen of the jury, one of you inquired or made a statement to the bailiff about who was the Government lawyer. I want you to listen rather carefully.

This is not a suit by the Government. This is a private antitrust suit. It happens Mr. Dixon, who is attorney for the plaintiffs, some years back represented the Government, but he has not been with the Government for some time. If any misunderstanding arose out of that fact, let's clear that up.

So it is a private action, civil action for damages, based upon the antitrust laws, and the antitrust laws are so worded that there is a right given to a private person to bring an action for damages under the antitrust laws. Congress put that provision in to secure enforcement of the antitrust laws.

This suit started out by an action by Winckler & Smith corporation. That is the way the suit started. Then, as you heard, after the suit was filed—I can't give you the exact date, but at some later date the petition under Chapter X was filed by that corporation. The corporation then became subject to what we speak of generally as the bankruptcy laws, [3244] the Chapter X procedure.

At that time, when the petition was filed, Mr. Ronald Walker was appointed by the court, and by the court I don't mean myself, because I don't know whether—I want to be fair about this.

Mr. Fisher: I think it was filed in your court.

The Court: I think that's right. That's right. When we speak ordinarily of the court, we mean all the judges, but in this particular case, I believe it was filed in my court and I appointed Mr. Walker as the trustee for this corporation. Mr. Walker is not

Government officer. He is a court appointed officer a reorganization proceeding.

Then Mr. Walker, as the trustee, intervened in is suit, which is a procedure that is possible when suit is pending by the Winckler & Smith corpora-on. Mr. Walker intervened as trustee, pressing hatever right he had as the one appointed in the organization proceeding to continue with the suit. Subsequently, Mr. Dixon came in—let me go back e step further. Mr. Irwin was generally Mr. alker's attorney as trustee. Subsequently Mr. ixon came into the action representing the plain-ffs, and by the plaintiffs we speak of the trustee tervening, acting for the corporation, and what-er residuary rights, if any, the corporation itself d in the matter. We have not done any separation that.

So there is no Government lawyer. It is not a overnment [3245] antitrust suit. It is a private titrust suit relying upon the antitrust laws.

Is that satisfactory?

Mr. Strachan: Yes, your Honor.

Mr. Dixon: Satisfactory.

* * *

GERALD J. O'HANLON

called as a witness by the defendants, being first sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan:

Q. Where do you live, Mr. O'Hanlon?

A. In La Mesa, California.

Q. In what business are you engaged?

A. Food brokerage.

Q. How long have you been engaged in the food and beverage business?

A. Since I graduated from Marquette University in 1922.

Q. You were employed twice in a sales capacity by [3246] the Winckler-Smith Company, is that correct? A. I was.

Q. The first time was in 1949 to 1950?

A. Yes.

Q. Subsequently you were employed as sales manager in the summer of 1951, is that correct?

A. Right.

Q. How long did you continue in that employment?

A. I believe it was June—you mean 1951?

Q. Yes. A. About four months.

Q. Beginning in June and ending when? Perhaps in October? A. About October.

Q. Under what circumstances were you re-employed by Winckler & Smith, in 1951?

(Testimony of George J. O'Hanlon.)

A. I was with Kellogg Advertising Agency, and it was at the suggestion of Mr. Kellogg and Mr. Winckler, also, that we get together. I did with Mr. Winckler and I rejoined the organization.

Q. At the time you had had that discussion with Mr. Winckler, did he tell you what his plans for the company were?

A. I have to trust to my memory there. If I remember correctly, at the time he was planning to come into the frozen orange juice concentrate, and it was his plan to develop into [3247] that field because the field had been expanding and enlarging. I think that is about the sum and substance of it.

Q. Now, when you went to work in 1951, what was the first work that was assigned to you?

A. One of the first problems he had that I worked at was to dispose of surplus inventories on products that were in storage in various sections of the company.

Q. What products in particular were those?

A. They were canned lemonade, if I remember correctly, and orangeade, and some hot pack concentrate.

Q. Those were inventories which had been carried in the warehouses from a prior season or seasons, is that correct?

A. They must have been, yes.

Q. Did you dispose of those warehouse inventories?

A. I think we disposed of practically all of them.

Q. And how did you accomplish that?

(Testimony of George J. O'Hanlon.)

A. Well, we had—it was a case of unloading them, so to speak. We had to reduce our price in order to dispose of them.

Q. Can you recall generally at what price you disposed of those carried-over inventories?

A. Oh, possibly 60, 65 per cent of the original selling price. [3248]

Q. During the summer of 1951 if I understand it, the Winckler-Smith Company was not producing single-strength Valencia orange juice, at least in any considerable quantities, is that correct?

A. I don't think so.

Q. Do you know why it was, did you discuss with Mr. Winckler why it was that single-strength juice was not being produced?

A. I believe there was a shortage of fruit at the time.

Q. At that time what was the principal source of raw fruit furnished to Winckler-Smith Company—oranges?

A. I think he had a connection with a buyer who endeavored to buy fruit in various places, and I think he also had a connection with a company there in Anaheim.

Q. Do you know whether he ordinarily bought fruit from Morgan Ward?

A. Morgan Ward rings a bell as one of the sources of supply. He had been a source of supply, if I remember correctly, previous to that time.

Q. Do you remember that during that summer Morgan Ward had made an arrangement with Case-

(Testimony of George J. O'Hanlon.)

Swayne & Company for the production of single-strength Valencia juice?

A. That I do not know.

Mr. Dixon: I object to that, your Honor. [3249]

The Court: The witness says he doesn't know.

The Witness: That I do not know.

Q. (By Mr. Strachan): Do you know whether Case-Swayne was obtaining oranges from Morgan Ward at the time when Winckler-Smith was not getting oranges?

A. All I know about that is that I heard that was the case, but I definitely do not know.

Q. Where did you hear it?

Mr. Dixon: Just a minute. I move that any——

The Court: The answer may go out. It is hearsay.

Q. (By Mr. Strachan): Where did you hear this? At the plant?

Mr. Dixon: Same objection, your Honor, it is obviously hearsay testimony.

The Court: Sustained.

Q. (By Mr. Strachan): Can you tell us from whom you heard it at the plant?

Mr. Dixon: Objection, your Honor.

The Court: What materiality has that?

Mr. Strachan: I think it is quite material to show that Mr. Winckler was trying during this period to get Morgan Ward——

The Court: You are asking the man for hearsay. If you want to ask him specifically if he heard this from Mr. Winckler and then follow up, you may. But supposing he heard [3250] it from the janitor

(Testimony of George J. O'Hanlon.)

or some school boy that came by, what difference would it make?

Q. (By Mr. Strachan): Did you ever discuss this with Mr. Winckler, or did Mr. Winckler discuss it with you, that you can recall?

A. I know that at times because of the fact that fruit seemed to be difficult to get, Mr. Winckler mentioned that he was trying to get fruit from various sources, including Morgan Ward.

Q. Do you recall that in September of 1951, there was a commitment made by Winckler-Smith Company, through one of its brokers, to sell approximately a carload of single-strength orange juice to Ralph's Stores?

A. Through our Los Angeles broker, yes.

Q. Do you recall that Winckler-Smith did not have on hand juice to deliver?

A. Yes, sir, we could not fill the order.

The Court: Keep your voice up so that the men over here and the attorneys can hear you.

Q. (By Mr. Strachan): Did Mr. Winckler take that situation up with you and ask you to do something about it? A. Yes.

Q. What did he ask you to do?

A. He asked me to get in touch with the Exchange to see if I could get juice from them. [3251]

Q. In that conversation did he tell you that he had attempted to obtain juice, but juice was short and he hadn't been able to? A. Yes.

Q. What did you do after he asked you to get in touch with the Fruit Growers Exchange?

(Testimony of George J. O'Hanlon.)

A. I got in touch with a man I knew over there at the Exchange.

Q. Do you recall who that was?

A. I think I got in touch with Don—both Don and Howard—I can't remember their last name.

Q. Thompson? A. Thompson, yes.

Q. When you got in touch with them, what did you do?

A. I told them what our predicament was, we wanted to fill that order because the customer had been a very loyal customer, and in order to continue our relations with him we wanted to fill the order.

Q. What did Mr. Thompson say?

A. At first he said he didn't know whether it was possible to get any, but he would look into it and see if he could. Those aren't his words. And I called him back I think it was either the next day or the same day and asked him if he had succeeded in getting juice, and he said he was working on it. On the next day he called me back and said— [3252] wanted to check with me to see if we needed the quantity that we were requesting, and if what we were requesting was to fill a complete order. And he then said that he would be able to get it for us.

Q. And he got it and gave it to you. Did he tell you that juice was in short supply at that time, single-strength juice?

A. As I remember, he said, when I first spoke to him, that he wasn't sure whether he could get it, because it seemed to be in short supply, but he would do his best as a favor.

(Testimony of George J. O'Hanlon.)

Q. So as a result of doing a favor you obtained the juice, is that correct?

A. Yes, sir, we obtained it.

Q. And it was packaged under one of the Winckler-Smith private brands and delivered to Ralph's?

A. It was the Anagold brand.

Q. And it was delivered to Ralph's under the Anagold brand? A. By us, yes.

Mr. Strachan: That is all. Thank you.

Cross-Examination

By Mr. Dixon:

Q. Mr. O'Hanlon, when you were discussing taking over the sales managership for Winckler & Smith in 1951, did you [3253] know, or can you tell the jury whether you knew whether there were any plans on the part of Winckler & Smith to secure additional operating capital through the sale of stock?

A. Yes. If I remember correctly, Mr. Winckler told me that they were.

Q. And he informed you that plans were under way to secure additional capital, and so forth, by that means and method, is that correct?

A. I think it was the sale of stock.

Q. And that it was part of the plan of Winckler & Smith to expand its operations in the frozen juice end of the business, so to speak? A. Yes.

Q. Counsel asked you something about unloading some stocks, when you came with Winckler & Smith in, I believe it was June, early part of June, was it, of '51?

(Testimony of George J. O'Hanlon.)

A. I think it was about that time. [3254]

Q. The latter part of May?

A. No, it was not May. I think it was in June.

Q. These were stocks that were held over, still available from the previous season's pack, is that true, and had not been disposed of?

A. That is my understanding, yes. But it was not orange juice.

Q. It was these other products? A. Yes.

Q. Like lemonade? A. Right.

Q. And, of course, it isn't good sales policy to permit any product of that kind to remain on the shelves, is it? A. No.

Q. Or an inventory for any extended period of time? A. It is expensive.

Q. So that was the reason for disposing of the stocks then remaining, is that correct?

A. Yes, sir.

Q. At the discount price that you mentioned?

A. Yes, sir.

Q. Do you recall offhand how much there was of that?

A. No, I could not. I could not even guess at the total.

Q. I think you said in answer to a question of [3255] counsel that you believed there was a shortage of fruit, that is Valencia oranges, in 1951, and that that was the reason why Winckler & Smith didn't process any orange juice that year, is that correct?

Mr. Strachan: I believe my question, as the record will show, was limited to available for single-strength juice.

Q. (By Mr. Dixon): Do you understand my question? A. Yes, I do.

Q. What is your recollection of what you testified to?

A. That is my recollection, that there was a shortage of fruit for single-strength canning purposes, or at least he was having difficulty in getting fruit for single strength.

Q. That is my point. There was difficulty in getting fruit. Do you recall whether there was a question of price, too, at which fruit could be secured? In other words, the fruit that you are referring to, are you not, Mr. O'Hanlon, was the Valencia oranges that would be acquired and processed into single-strength orange juice by Winckler & Smith?

A. Yes.

Q. That is the kind of fruit we are talking about, isn't it?

The Court: You have got to keep your voice up.

The Witness: Yes. I am sorry.

Q. (By Mr. Dixon): Speak so the juror over at the far end can hear your answer, Mr. [3256] O'Hanlon. A. I will.

Q. Do you recall whether you ever had any discussion with Mr. Winckler about that phase of the problem of securing adequate amounts of Valencia oranges for processing purposes into single-strength juice by Winckler & Smith in 1951?

(Testimony of George J. O'Hanlon.)

A. No doubt we did, but I do not recall the discussions.

Q. I realize it has been nearly five years since that discussion occurred. But at any event you do recall there was some problem about getting Valencia oranges for processing purposes by Winckler & Smith? A. He wasn't getting them.

Q. Do you recall whether there was a larger amount of Valencia oranges generally available for processing purposes in single-strength juice——

A. No.

Q. ——in 1951? A. No, I do not.

Q. You don't recall and are not familiar with those facts? A. No.

Q. So when you said that you believed there was a shortage of fruit, that is Valencia oranges, in 1951, and that that——

Mr. Strachan: That is not a correct statement of the testimony thus far. [3257]

Mr. Dixon: Just let me finish my question, counsel, please.

The Court: Finish your question, but if you attempt to quote the witness, I right now don't remember what it was he said, but quote him as accurately as you can.

Mr. Dixon: My notes indicate that this witness stated he believed there was a shortage of fruit and that was the reason for not producing single-strength juice. That is my recollection. If I am in error, I will gladly stand corrected.

(Testimony of George J. O'Hanlon.)

Q. Will you tell the jury again, Mr. O'Hanlon, just what your testimony was in that respect?

A. My understanding of the situation at the time was that primarily Mr. Winckler's intentions were to go into the frozen concentrate. He seemed to be having difficulty in getting fruit for some reason or other. I am just trusting to memory, and my words are not his expressions at all.

Q. I understand.

A. His source of supply that he had been receiving fruit from previously was not supplying him with fruit.

Q. Did you have any discussion with Mr. Winckler in 1951 concerning processing Valencia oranges into single-strength juice?

A. We may have, but I don't remember definitely.

Q. In other words, you don't recall what conversations, [3258] if any, you had with him about that? A. No.

Q. Are you familiar with the capacity of producing frozen juice by Winckler & Smith?

A. The capacity he had for producing frozen juice?

Q. Yes, and comparing it with reference to the capacity to produce single strength juice during the processing season.

A. We started out in a small way because, I think, due to the fact that his capacity for producing frozen juice would have to be expanded as his business developed.

(Testimony of George J. O'Hanlon.)

Q. In any event, insofar as you now recall, there was no discussion between you and Mr. Winckler about not producing any single-strength juice at the plant in 1951, was there, and putting all the facilities, whatever they were, into producing frozen concentrate? A. Not entirely, no.

Q. Now, you testified with reference to your conversation with someone at Exchange Orange with reference to getting a carload of single-strength juice in 1951. That occurred about in September of that year, did it?

A. I think that was the month.

Q. So that at least as far as you now recall, Winckler & Smith did not have any single-strength juice available to fill that order, that it had processed at its own plant? A. Yes. [3259]

Q. That was the reason, one of the reasons you gave why you contacted Exchange Orange to get it?

A. Yes.

Q. Did you contact them after that for any more juice? A. No.

Q. Do you recall what the market was with reference to the demand for single-strength juice in 1951 insofar as Winckler & Smith was concerned? A. No.

Q. Do you recall whether you had inquiries from customers of Winckler & Smith concerning the securing of single-strength juice for sale to his customers in 1951?

A. I do not recall definitely. I do recall that we were sounding out the possibilities of obtaining business on single-strength juice. But I don't recall any inquiries from customers directly. [3260]

* * *

PAUL S. ARMSTRONG

called as a witness by and on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan: [3262]

* * *

Q. What is your position in the Sunkist system?

A. I am general manager of Sunkist Growers, Inc.

Q. Are you also personally a grower of citrus products? A. Yes, I am, in a very small way.

Q. What is your professional training, Mr. Armstrong?

A. I graduated in horticulture at Michigan State College in 1915, and I have been associated in horticultural operations ever since.

Q. What was your first connection with the citrus industry or citrus products industry?

A. Shortly after leaving school I was employed as a dealer serviceman, one of the original dealer servicemen of the then California Fruit Growers Exchange, whose function it was to call on the retail trade throughout the country and stimulate better

Testimony of Paul S. Armstrong.)

isplays, more reasonable pricing, and in other ways promote the sale of product.

Q. In what parts of the United States did you rve in that capacity?

A. I started in Boston, covered several places in ew England, and then later was in the Middle 'est, stationed in Cleveland and Chicago. [3263]

Q. When did you first come to the Los Angeles ea, what might be called the home office?

A. In the spring of 1917.

Q. In what capacity were you first employed re?

A. I was made manager or in charge of the aler service group of employees, and later became sistant advertising manager.

Q. Will you describe for the jury what the Sunst system is and how it has acquired the various nctions that it performs for the growers who are members?

Mr. Dixon: If the court please, I don't want to ject, except I think the use of the word "system" re requires some definition, if it is going to be ed in this examination, because unless I know what is I must necessarily object to the use of the term.

Mr. Strachan: I will withdraw the question for e moment.

Q. (By Mr. Strachan): Are you familiar with e phrase "Sunkist system"?

A. Yes, sir, I have heard it used.

Q. Will you tell the jury what is denoted by e phrase "Sunkist system"?

(Testimony of Paul S. Armstrong.)

A. Well, it is an expression sometimes used by persons who are studying the industry to denote the group of functions that are performed on behalf of the grower in various corporations, [3264] some selling fresh fruit, some of them products, and some of them supplies. They are all referred to together as the Sunkist system.

Q. Will you describe to the jury what the Sunkist system is and what functions it has assumed?

Mr. Dixon: If the court please, I think I must object to that.

I have no objection to this witness testifying to what the Sunkist Company, the corporation defendant herein, does, what it is composed of, or anything else; but I think the use of the term, generally, "system" is misleading. At least I don't know what it means.

The Court: Let's not quibble about words. I understand from what the witness has said that the word "system" means two things, generally. It means, first, the organization that exists from the grower up through the exchanges, through the packing houses, the orange and lemon exchanges, and finally up to the Sunkist Corporation itself.

The Witness: Correct, your Honor.

The Court: Secondly, it means the functions that are carried on by various of the units of this organization?

The Witness: That is correct.

Mr. Dixon: May I ask one or two questions at this time?

(Testimony of Paul S. Armstrong.)

Mr. Strachan: I have no objection. [3265]

Mr. Dixon: Just in the interest of saving time?

The Court: If that is what is meant by "sysem," it is a term that we can use. Maybe it will save ime to have one term to package up all that maerial.

Now what do you want to ask, Mr. Dixon? On oir dire?

Mr. Dixon: Yes.

By the use of the term "system," are you referring to anything different from any other marketing o-operative organized under the Capper-Volstead Act and operating under that act?

The Witness: Well, it refers to the particular ystem that has evolved for the service of this paricular organization. It might be identical, it might e different in some respects than other systems set p for the same purpose by other commodities.

Mr. Dixon: Is it the same type of marketing rganization that we have in other marketing co-perative organizations organized under the federal ct?

The Witness: Generally speaking, such as you ave in the dairy business and other markets.

Mr. Dixon: All right. Just one other question. By the use of the term "system," do you mean that n addition to the functions which those organizaons perform, that Sunkist performs something in ddition that is not performed by these other mareting organizations? [3266]

The Witness: I would have to know to which marketing organization you are referring. They are not identical.

Mr. Dixon: All of them.

The Witness: I couldn't make a general answer to that question.

The Court: We are not going to go into other co-operative organizations.

I take it, Mr. Armstrong, that there are walnut growers, raisin growers?

The Witness: Yes, in California and elsewhere in the country.

The Court: And in other states where there are other commodities that we are not familiar with here, they have similar organizations, and when I say "similar," in general terms?

The Witness: Correct.

The Court: They start out on the basis of these co-operative marketing organizations?

The Witness: Yes.

The Court: All right.

We will use the term "system," then, as applying to the structure of this set-up from the grower on up through the districts, the packing houses, the exchanges, EOP, ELP, Sunkist, and also as referring to the functions that are respectively carried on and performed by the various parties. [3267]

The Witness: That is right.

Q. (By Mr. Strachan): Will you describe for the jury the growth of the functions of the Sunkist method of doing business and how the functions are

(Testimony of Paul S. Armstrong.)

performed by the various component parts of the Sunkist organization?

A. I answered a number of questions put by Mr. Dixon when I was appearing as a witness, and I wish to not be repetitious, but I think it might be helpful if I ran briefly through the evolution of this industry and the part that the Exchange, as we call it, has played in it over the years, and I will avoid and only allude to things that I covered in more detail in your questioning.

Oranges were introduced into California at the time the Mission fathers came here from Mexico and brought with them the economic plants that they had known of in Spain. That was along about the time of our Revolutionary War in 1776, and from there to 1800.

The first orange grove that was recorded of any consequence in this state was planted at the Mission San Gabriel in 1804. At that time, of course, there was no transportation elsewhere, and the fruit thus grown was for strictly local consumption.

And the industry did not assume commercial importance until the coming of the railroads in 1877, when we had our first transcontinental railroad connection in Southern California. [3268] It was stimulated by the having of such transportation, and having proven that oranges could be grown here to good advantage. There was an immediate expansion in the acreage, in the expectation of serving the whole nation instead of the locality. And they overdid it, so it wasn't long before the supply outstripped the then demand and something had to be done.

The first organizations formed were local packing houses, because no one grower was large enough, himself, to undertake these complicated things, either in preparing for market or in marketing itself, so they grouped together. And I think oftentimes they were aided in that by the fact that they had previously had to group together for other purposes, such as irrigation, so they were conditioned for that sort of thing.

There were a number of scattered associations, there was one out here in Pomona, in the '80s, another one in Riverside, and they sprung up here and there, serving the growers in the community in which they were located, owned by the growers themselves, directed by the growers themselves, and operating in the growers' interests.

Attempts were made as early as the middle '80s to group these scattered associations into an integrated marketing agency or group of some kind, but because each of these associations was very individualistic and was very sure that the [3269] fruit they produced was better than the fruit that anybody else produced—which they still think—why, they didn't get together very easily, and it wasn't until the crisis of the early '90s, in fact, the panic of 1893, that this grouping finally took on cohesive form and we saw the organization of the Southern California Fruit Exchange, which was nothing but a grouping of a number of these local associations

(Testimony of Paul S. Armstrong.)

that already existed for the purpose of carrying out marketing functions, because the associations were principally for the purpose of harvesting the fruit, and putting it in shape to be marketed. [3270]

Q. By the association, you mean the packing houses?

A. The packing houses, I should refer to in every case, although they are called associations in our language.

For purposes of contact and administration, these scattered associations were grouped into regions, which were called in the early organization districts, and they became members, each in their own locality, of a so-called district exchange. There was one in Orange County, there was one in Riverside County, there was one or two in Los Angeles County, one in San Bernardino County—there were seven all together, which were sort of the charter members of the California Fruit Growers Exchange.

The district exchange was the responsible agency to determine the sale of the fruit that had been prepared for shipment by the member associations of that district, and these districts operating together, the seven of them, set up a central organization, first known as the Southern California Fruit Exchange, whose function it was to provide the sales representation in markets either by salaried officers or through brokers, and to handle a number of other functions which I will go into in a moment. But they also served as the liaison between the local

(Testimony of Paul S. Armstrong.)

associations and also the source of our government, so to speak.

The growers who belonged to a local packing house governed that packing house by a board of directors elected [3271] from among their number, and they served without compensation, and still do, and they selected a manager who is a salaried man, and with him select the staff.

Then in turn the district exchange is governed by a board of directors representing one or two from each of the member packing houses in that district, and they serve also without compensation. They select a manager and the limited staff that the district requires.

Then the central organization, which we called Exchange now called Sunkist Growers, is governed by a board of directors consisting of one designated representative from each of the districts. At that time there were seven districts. In 1951, which is the date we are considering here, there were 25 districts. The directors of the central organization also serve without compensation. They represent their constituents just like a legislative representative would in establishing the policies of the organization. They employ the manager and in consultation with him the rest of the staff.

Q. Are those directors themselves citrus fruit growers?

A. Yes. They are citrus fruit growers and are elected by the district which sends them to the central organization and are subject to change each

(Testimony of Paul S. Armstrong.)

week, if they wish to, at the pleasure of the district which sent them.

Now, the creation of that organization in the '90s solved temporarily these distressing problems of low returns. [3272] I remember the old gentleman that I first met when I came out here who was then president of Sunkist, or California Fruit Growers Exchange, Mr. Storey of Alhambra, who said that he received in 1892 only 10 cents a box for his oranges. They had high hopes of what the organization could accomplish by federating together, and they did accomplish a great deal.

We went through another series of years when the returns were quite satisfactory, and that resulted in another upsurge of planting, because under the American way of life, we can choose our occupation and where we want to pursue it, and anything that looks promising, people already in it expand their own operations, and then other people are attracted into it. So it was not long after the formation of the Southern California Fruit Exchange in 1893, that we were confronted with another crisis.

Meanwhile, they had established offices in various parts of the United States and Canada. We now have 50 such offices, salaried offices. We have brokers besides in some places. They have succeeded in broadening the basic distribution of citrus fruit, but even with that the expanded plantings out here and the plantings in Florida, which were then be-

(Testimony of Paul S. Armstrong.)

coming more prominent, caused there to be an excess of supply over demand.

It was under those circumstances that the board of directors decided, with some misgivings, to resort to advertising, [3273] which was thought to be quite an adventure when applied to a natural fruit. I covered that subject before, so I will not go into that.

The Court: You mean that is when you acquired the Sunkist name and embarked on the Sunkist advertising?

The Witness: Yes, that's right. That was in 1907, your Honor, and we started advertising in the spring of 1908.

While the start was very small in terms of dollars, the results were very dramatic in the opinion of the directors at that time, so they continued to advertise and increase the appropriations, and the result of all that was that we got quite an increase in production again, not only here, but in Florida.

The Court: I was in error. You were advertising the Sunkist name from 1907?

The Witness: That is correct.

The Court: And then later on you acquired the sole right to the Sunkist name from some other group that also had a claim on it?

The Witness: The California Packing Corporation, I think, also used the name Sunkist for dried fruits and canned fruits, and had a registration in the Patent Office for that class of goods, just as we had for citrus fruit.

(Testimony of Paul S. Armstrong.)

The Court: What year was it you acquired that?

The Witness: 1950. [3274]

The Court: All right.

The Witness: As I say, I will not go into the advertising subject in detail, but suffice it to say as a result of all these efforts and the discovery of vitamins and the importance of orange juice in child feeding, and a lot of other things too numerous to mention, the growth of this business has really been spectacular. Of course, along with that has gone a growth, as there had to be, of production, so that in the citrus industry nationally we have had a doubling of production every 10 years for the last 40 years. That has presented quite a challenge for any marketing operation, and that is why we needed some of these things that I have been describing to implement those efforts.

Now, in addition to sales, which is the principal function of the exchange, we have related departments. For instance, traffic is one. Traffic came into the picture very early. A person unacquainted with such things doesn't know how to route railroad cars so that you can protect a through rate so that you have to have a professional do that. The same thing is true of collection of claims. It is hard for anyone not experienced in those things to do an adequate job.

So that closely related to sales was the traffic direction of all shipments which were made on behalf of the packing houses, but which were watched over

(Testimony of Paul S. Armstrong.)

by the central organization in the progress and distribution. [3275]

It is also highly important to have a fan-like distribution on all the railroad systems of the country all the time, so that if the weather is adverse one place, or conditions are very favorable some other place, you have what we call overnight diversions, cars available close by that can be diverted to such places. That goes on all the time, and still does.

Of course, we had from the beginning, I believe, although it precedes my personal experience, accounting facilities and the other operations that are required to run any business.

The next department that I recall having been established after advertising was the field department. That department was set up primarily to be advisory to the associations in their handling operations and pass along the good ideas from one to the others. They also had the primary responsibility of seeing that the standards established by the board of directors to govern the quality of fruit growing under the Sunkist trade-mark would be observed. They were sort of a referee in that respect, because that trade-mark which soon became very much esteemed by the public and therefore valuable to the one privileged to use it, was not owned by any one association, but was owned by all of them as a group, and it became the duty of the directors to establish standards under which such trade-mark might be used. The field department was the department in our organization that was charged [3276] with that responsibility.

Starting from very small beginnings, we now have quite a substantial field department that not only carries out the original functions, but also is engaged in very extensive testing and experimentation on better ways of preparing fruit for market, better packaging, better protection against decay, because citrus fruit is a perishable product, and is very sensitive to adverse conditions in transit or during distribution.

The skin of a sound orange will not decay, but if t is scratched, it will decay for sure, and therefore ll of the fruit has to be picked and handled by loved hands.

That covers the principal departments that we ave within the organization, except for research, hich was set up in some later years, and that was harged with responsibility of learning the chemstry of citrus fruits, both for by-product purposes nd also for the purpose of refining of handling ractices in the fresh fruit industry.

Now, as time went along, after the fresh fruit tuation had been pretty well systematized, if I ould use that word, although it is never finished——

Q. What you have described up to now relates rimarily to the handling and marketing of fresh ruit as fruit, is that correct?

A. Yes. In those days for the most part no atntion [3277] was given to the so-called culls that ere discarded and were an inevitable part of the

(Testimony of Paul S. Armstrong.)

business, but no utilization was made of them. But it was not very long before the growers, the directors wondered whether some salvage couldn't be secured out of the fruit that inherently was not of a quality that was suitable for the fresh fruit market.

So they started with lemons in 1915, because the citric acid made in Italy was a well known article of commerce, and everybody knew how to make it. You could read about it in chemistry books. That was likewise true, although it was a little more difficult, to make essential oil of lemon, which was used in flavoring extracts, and a lot of other uses well known before Exchange was organized.

There were some who were pretty dubious about adventuring into things other than fresh fruit. In a democratic organization like the Exchange or Sunkist, those points of view are very freely expressed and very strongly held by the directors. So all of them would not go into this by-products venture, just some of them. So the packing houses shipping lemons that had confidence in the salvage that might be secured from the unshippable fruit through that means, formed the Exchange Lemon Products Company which was owned by those packing houses who decided to support it. The other packing houses did not support it and had no part in it.

The same thing happened with oranges the next year in [3278] 1916, when there was set up a small group, less than all of our packing houses shipping oranges, who decided to undertake the development on a salvage basis of recoveries from oranges that

(Testimony of Paul S. Armstrong.)

were not suitable for shipment to the fresh fruit market because of size or grade or surplus, even.

They had a harder time of it in some respects than the lemon group, because there were no established articles of commerce that anyone knew how to make that required oranges. I remember they started out with trying to make vinegar out of oranges, like you make it out of apples and make it out of pears. That was not an economical thing, we soon found.

The next adventure was marmalade, which was even worse.

Q. What do you mean that marmalade was even worse?

A. We had no trouble selling the marmalade, but when we got all through, we were selling about one or two cents of oranges in a 25 cent glass of marmalade, and the rest was labor, glass, transportation and sales expense. So we would have had to swamp the country with marmalade to make a dent in the tonnage of oranges available for that purpose.

So that caused a temporary set-back to the Orange Products Company, and they almost ceased operations. But the original group that had grubstaked them and some others decided they were going to make another try, and they reorganized, I think it was in 1921, and have been going ever since.

Over the years, with the help of our research department, [3279] they have both, both Lemon and Orange, learned how to make things that no one knew how to make at the time they started. The chemistry has been learned, the producing technique, the storage technique, and markets have been developed. That is a story in itself which I won't attempt to go into here. Not only in the food products field, but in pharmaceuticals and, of course, with vitamin C, which was unknown at the time I started with Sunkist, became one of the main reasons for justifying the consumption of citrus fruit, and it is now available in various forms other than fresh fruit.

That, I think, Mr. Strachan, briefly covers the evolution of the organization. [3280]

* * *

Q. (By Mr. Strachan): Mr. Armstrong, I think you said at the outset the products processing corporations were set up and owned by less than all of the members of the Sunkist organizations?

A. That is correct. And it came about for the reason that I mentioned, that they weren't all sold on the soundness of the enterprise.

But another situation developed in the depression years of the '30s.

Mr. Dixon: If the court please, I have no wish to interrupt this approach to the problem, but it seems to me by this time we should be able to proceed with the usual method of question and answer.

The Court: Do you have some further history to sketch in this matter?

Mr. Strachan: That is right. [3281]

The Court: Will it be brief?

Mr. Strachan: Yes.

(Testimony of Paul S. Armstrong.)

The Witness: Very brief.

The Court: All right. Overruled.

The Witness: At the beginning the fruit that ent to the by-products destiny was what we called he culled, off sizes or blemished fruit, or something of that sort. In the '30s we got into terrific surplus problems, as did many agricultural producers, and then it was necessary to send to by-products outlets, for conversion into something on a salvage basis, fruit that was perfectly suitable for the fresh market, both by appearance, size, and every other consideration.

When that happened, it was necessary to make these products outlets available for all of the packing houses, respectively, of oranges and lemons, and then later grapefruit, and that was when they became an integral part, you might say, of the Exchange organization in one way or another.

Q. (By Mr. Strachan): In about 1932 or '33 there were governmental restrictions placed on the uantities of fruit that might be marketed in fresh orm, is that true?

A. Yes, in the early years of the depression, in 932 and 1933, Congress considered various types f legislation to alleviate the distress of farmers enerally, and they passed in 1933 the Agricultural djustment Act, and at the same time [3282] the ational Industrial Recovery Act, for the benefit f industry.

We were one of the first industries to take ad-

(Testimony of Paul S. Armstrong.)

vantage of the provisions of the Agricultural Adjustment Act, and we have operated ever since 1934 under a marketing agreement set up under that statute and supervised and operated in some respects by the government itself, the purpose of which is to regulate supply and demand to the benefit of both the consumer and the producer, so that the markets will not be alternately glutted and starved, and we will have a more orderly distribution.

Q. The products companies which are owned by the Sunkist organization have processing facilities which they own and directly operate, is that correct? A. That is correct.

Q. In addition to that, it has been the policy, has it not, of the Sunkist organization to utilize on occasion the facilities of independent processors?

A. Yes, indeed it has. In fact, at the time our own facilities were established there was a considerable body of opinion that thought it would be better to rely entirely on outside processors. But the trouble with that was if conditions were unfavorable they were not interested in processing, and we couldn't dispose of the fruit that must go to that outlet. [3283]

Mr. Dixon: If the court please, I know there has been a broad discretion here in telling the background and history of this organization. I have no objection to it. But it seems to me now that this witness begins to express opinions which directly relate to independent processors and their con-

(Testimony of Paul S. Armstrong.)

nection with this industry, and at this point I must object and ask that any questions that relate to that phase of the industry and the relationship of Sunkist to it be conducted on the basis of questions and answers.

The Court: All right. I think that is what counsel has started to do at this time.

Mr. Strachan: Yes, I was.

The Court: Proceed.

Q. (By Mr. Strachan): Will you tell us the program that has been adopted by the Sunkist organization to make use or avail themselves of the use of outside processing facilities of independent processors?

A. It was and is the general policy of the organization to utilize to the fullest extent possible the facilities of outside processing groups to the extent that we had fruit available for that purpose.

The reason for that is that we wanted to take dvantage of their own skills and manufacture, and in the development of new products and in the roadening of markets.

We built a plant of our own for both lemons and for [3284] oranges, and we at times even shared our carity, in years when the fruit supply was indequate for all, with some of these outside processors, particularly those who had come to rely upon s as a regular thing for raw material or fruit upply, because we didn't want——

Mr. Dixon: If the court please, I object to that, "those who had come to rely upon this company."

(Testimony of Paul S. Armstrong.)

Now, obviously that is a conclusion and is hearsay and goes wholly outside of any permissible answer to the question, as I see it, and I object to it on the ground stated.

Mr. Strachan: I don't think it is hearsay. I think it is a straightforward statement of the policy established by the organization through its board of directors.

Mr. Dixon: My objection, your Honor, in case it isn't clear, is to that part of the answer of this witness where he said that processors had come to rely on Sunkist.

They are obviously not a part of the Sunkist organization, they are not within the co-operative group at all, and if we are to have any statements or questions of that kind, I want to fully inquire into them by direct evidence.

Q. (By Mr. Strachan): When you say——

The Court: Wait just a moment. I am just thinking about this.

Mr. Strachan: Pardon me.

The Court: I am going to strike that part of the answer [3285] at this time, grant the motion to strike, and instruct the jury to disregard it.

We will discuss it in the absence of the jury at some later time.

Q. (By Mr. Strachan): Will you explain the economic considerations which lead to the policy of making use of the independent processors' facilities?

(Testimony of Paul S. Armstrong.)

Mr. Dixon: If the court please, I certainly object to that question, economic considerations.

I have no objection to any testimony as to what this company did and the facts that he can testify to of his own knowledge. But we are not concerned here with economic policies of this defendant as they may apply.

The Court: Objection sustained at this time. What did the defendants do?

Mr. Strachan: All right.

Q. What did the defendants do?

The Court: Limit your answer, also to what they did and not the background of why they did it.

Q. (By Mr. Strachan): What did Sunkist do with regard to engaging the services and facilities of independent processors?

A. We had as a general policy the encouragement of independent processors, and supplied raw material or fruit for their processing requirements. Especially those who were [3286] our regular customers.

Q. In general, there were two different kinds of contracts made by Sunkist with the so-called independents, were there not? One of those was a hiring contract under which the contractor took the fruit and processed it for the account and risk, and returned the product to Sunkist; is that correct?

Mr. Dixon: If the court please, I think that this witness, having been in this business as long as he has, is fully competent to tell this jury what arrangements they made and with what companies

(Testimony of Paul S. Armstrong.)

they made them, if he knows those arrangements and the details of his own knowledge.

Otherwise, I object to any further general characterizations and leading questions of this witness at this stage of the examination.

The Court: Objection sustained. The question is leading.

Reask the question.

Q. (By Mr. Strachan): Will you tell us what kind of arrangements what types of arrangements were made between Sunkist and independent processors?

The Court: What period are you talking to? We have been talking from 1700 on. Let's bring it down to within some reasonable period of time.

Mr. Strachan: All right. [3287]

Q. (By Mr. Strachan): When did Sunkist first make use of the facilities of independent processors?

The Court: Approximately? We don't care about the exact date.

The Witness: We sold fruit to independent processors as soon as they existed, which I would guess was about sometime in the 20's.

Q. (By Mr. Strachan): And you have continued to sell fruit at your regular prices to processors ever since, is that right?

A. Yes. Our preference was to sell to them.

Q. Under conditions when the independent processors couldn't or wouldn't buy, did Sunkist make any other arrangements?

(Testimony of Paul S. Armstrong.)

Mr. Dixon: Now, if the court please, I object to the form of that question. It obviously assumes something that counsel knows is not proper.

The Court: Objection sustained, but not on that ground. I will let counsel bring this thing down to currently. How about the years beginning, say, 1949?

Mr. Strachan: All right.

The Court: To get a starting place. In the year 1949, what types of processing agreements did you enter into? Just give us the types, if they fit into categories.

Mr. Strachan: Would that be, your Honor, the period [3288] say from 1949 through 1951?

The Court: That is what I had in mind.

Mr. Strachan: That is what I had in mind, too.

Mr. Dixon: If the court please, I hate to object here constantly at this stage of the examination, but I must object to the use by counsel of the term processing in connection with any agreement, because that assumes a lot and is open to different constructions and may be in fact a question for the jury to determine. I have no objection to contracts or testimony as to what the actual arrangement was, if this witness knows, but to characterize the arrangement as a processing agreement in his question seems to me entirely to assume a question to be perhaps decided by this jury. I object to the question on that basis.

Mr. Strachan: The question is that of the court.

The Court: It was the court's question, and it is like the numerous stories of the lawyer who said, "Your Honor, if you are asking that question on behalf of my opponent, I object to it. If you are asking it on my behalf, I withdraw it."

I think the objection is well taken, because one of the issues in this case is whether or not the Silzle and TreeSweet contracts were actually processing contracts or whether they were contracts for the sale of juice to Silzle and TreeSweet, or oranges made into juice. Let's call them contracts [3289] with independents. Is that an agreeable term?

Mr. Strachan: It is all right with me.

The Court: Contracts, and by that term we will mean contracts concerning product oranges. That is what we are talking about, isn't it? Is that right? Product lemons, and so forth?

Mr. Strachan: Yes.

The Witness: Earlier testimony has shown, and I have so testified myself, that Sunkist as such did not make processing contracts with anybody. Our concern was with selling fruit as fruit, and Sunkist growers did sell fruit to other processors. Arrangements other than that were made either by Exchange Lemon or by Exchange Orange.

The Court: What types of contracts were there beginning, say in 1949 on up through 1951 with independents? Did they fall into one or more categories generally?

The Witness: I would say generally there were two categories. One was a participating type of contract where the fruit was furnished by the Exchange Orange, for example, and the manufacturing cost was furnished by the processor, and then they shared in the ultimate results of sale on some basis that was worked out in this understanding.

The other type was simply hiring the facilities of the outside processor to expand your own capacity which was insufficient. You just hired them to do it on what we called [3290] a custom pack basis. Those arrangements were all made by these companies and not by me, so I speak only in generalities.

The Court: Now, that second category, was there a breakdown of that into two types, one where EOP hired the independent to process and paid the independent for it, and the canned juice went back to EOP, and another kind in which the independent was given an option to buy the canned juice? Was there a breakdown in those two categories, or was that all one kind?

The Witness: I wouldn't feel competent to answer that because that deals with the particulars of the contract, and I am not sufficiently familiar with it.

The Court: They were not made with your consent?

The Witness: They were not made with my knowledge or consent. Made with my knowledge of the fact that they were made, but not the terms.

The Court: Go ahead.

Q. (By Mr. Strachan): Mr. Armstrong, in setting up these arrangements with processors or with independents for furnishing fruit and having it

(Testimony of Paul S. Armstrong.)

processed other than through the sale, the direct sale of the fruit to the independent, was there ever any intent or object on the part of Sunkist to grant or withhold such an arrangement for the purpose of eliminating any independent from the field of competition?

Mr. Dixon: Now, if the court please, counsel obviously [3291] knows that that question is improper. It calls for a conclusion of this witness and directly invades the province of this jury. I object to it on those grounds.

The Court: Of course, the witness has said that the contracts were not made with Sunkist. However, there is an integrated relationship here, and an official of Sunkist should certainly be permitted to state whether or not he had a certain intent or did not have a certain intent, or his organization did or did not. Objection overruled.

The Witness: Could I ask the reporter to read the question?

The Court: The question can be answered yes or no, I think.

Read the question, Mr. Reporter.

(Question read.)

The Court: Well, on being reread, I think you have to limit it to this witness' participation and intent as far as any of his activities.

The Witness: There was no such intent, I can say that.

The Court: Other than that, I don't think the

(Testimony of Paul S. Armstrong.)

question is proper when you say intent on the part of Sunkist. I think it has to be tied in with the individual person.

Q. (By Mr. Strachan): Do you personally know——

Mr. Dixon: Just a moment. I move that the answer of the witness that he put in there be stricken from the record, [3292] your Honor.

The Court: I think we are being super-technical.

Mr. Dixon: I am. I have to be at this stage, your Honor. I regret it. This witness, your Honor, as further testified he did not participate in the naking of any of these arrangements, yet he has nswered as to the intent of those arrangements.

The Court: That is something you can argue bout.

Mr. Dixon: I think the answer should be tricken and the jury instructed to disregard it.

The Court: Maybe I am being super-technical on his question.

Mr. Dixon: If I understood your Honor's rulng——

The Court: I am going to change my ruling. his is a one-question proposition and then you are oing on to something else, aren't you?

Mr. Strachan: That's right.

The Court: You have a problem of a corporate efendant. There is no individual defendant in this se. There is a corporate defendant charged with ts alleging injury. Under the law, it is a double-rreled proposition.

(Testimony of Paul S. Armstrong.)

Mr. Dixon: That's right.

The Court: Either the act was intended to do a certain thing, or it had the necessary effect of doing a certain thing. Therefore, the defendant should be allowed to put on proof [3293] from the corporate defendant as to one or both of those aspects. The question going through my mind is how do you prove the intent of a corporate defendant?

On the plaintiff's side, you prove it through the acts of the individuals. I think, therefore, in rebuttal the individual official should be entitled to say neither he nor any act of the corporation that he was in any way connected with had any intent. That is what I was thinking about.

Mr. Strachan: That is precisely it.

The Court: His connection with it. Let me see if I can ask the question. I know he has disclaimed he has had anything to do with these contracts, but that is again a question of fact for the jury.

The objection is sustained. The answer will go out.

Let me see if I can ask the question. Well, you ask it again, Mr. Strachan.

Q. (By Mr. Strachan): Do you know of any instance in which any member of the Sunkist organization or any of its components made or refrained from making an arrangement for the use of independent processing facilities for the purpose of or with the object of eliminating any independent processor from the competitive field?

Testimony of Paul S. Armstrong.)

Mr. Dixon: Just a moment. I renew my same bjection.

The Court: You may have the same objection. verruled.

The Witness: No. There was no such intent on y part [3294] or on the part of anyone connected ith the organization, to my knowledge.

Q. (By Mr. Strachan): Mr. Armstrong, will ou describe the conditions under which the Florida trus fruit industry is conducted and describe the ffect of the Florida citrus fruit industry upon e marketing of California citrus fruit and citrus ruit products?

A. Citrus fruit has been grown in Florida about s long as it has in California, and the industry as been of large proportions for a long number of ears. The fruit is of a different type and it is less xpensive to produce citrus fruit, oranges I am peaking of now, or grapefruit in Florida than it in California.

The reasons why that is so are because of much wer taxes, lower wage rates for labor, lack of ecessity for irrigation, because they operate under tural rainfall, but be that as it may, they can roduce oranges per hundredweight in Florida for bstantially half of what we can in California.

Therefore, they were very quick to seize upon the oducts outlets for oranges in the form of single- rength orange juice and single-strength grapefruit ice, and later when the techniques were estab- hed of frozen concentrated orange juice. They

(Testimony of Paul S. Armstrong.)

have made the going very difficult for us as far as recovering the cost of the product. [3295]

I earlier testified that at no time have we been able to secure a price for products oranges which returned to the grower an average cost of producing such oranges.

One of the principal reasons why that is so is because of Florida competition. They establish the national price level and we must live under that price level.

Mr. Dixon: If the court please, I hate to object, but it seems to me that this answer is just replete with conclusions and is not in answer to the question. I will not object further if your Honor feels that this line and this answer is proper.

The Court: Well, the witness is qualified as an expert in this field. Those matters which are matters of ipinion, I think the jury will be able to pick out, and those matters which are as to matters of fact, of course, you have the general rules that apply to anything of that sort. But limit your discussion of the Florida situation to general points, and then let your counsel ask the specific question as we go on. Have you finished now about the Florida situation?

The Witness: Yes. [3296]

Q. (By Mr. Strachan): After the development and successful commercial application of the technique of packing concentrated frozen orange juice, how did that affect the competitive situation as between California and Florida?

(Testimony of Paul S. Armstrong.)

Mr. Dixon: Same objection, your Honor.

The Court: Overruled.

The Witness: Florida became very large producers of both single-strength orange juice and of frozen orange juice concentrate. And at the time we are talking about, 1951, while I do not have the exact figures in mind, I would think that the volume produced in Florida at that time, although the business was then young, was about 30 million gallons per year.

The Court: Of what?

The Witness: Frozen orange juice concentrate. I don't remember the figures as to single-strength juice, which was an earlier product.

California, to my recollection, has never reached in excess of 4 million gallons of frozen juice concentrate in a year.

And we could only sell our product, I might add, at prices that were competitive with products of similar character produced from Florida fruit.

Q. Will you tell us how many growers there are who are members of the Sunkist [3297] organization? A. In 1951?

Q. Yes, in 1951. A. Approximately 12,000.

Q. Can you tell us the average acreage of the groves of these 12,000?

The Court: What is the purpose of this? What bearing does this have on the issues of the case?

Mr. Strachan: We have here a group of small operators, and I want to bring out by this witness how it is that through this Sunkist organization they are able to co-operatively solve the many problems.

The Court: That is a good answer, Mr. Strachan.

I am going to permit the answer, but I am going to instruct the jury now what I instruct them at the time I give them their final instructions.

You are not to be governed by sympathy or prejudice or public opinion in your decision in this case. All persons, including corporations, stand equal before the law, and in your decision in this case you have a lot of things to decide, but one of your considerations will not be that ultimately Sunkist and EOP may be owned by 12,000 owners who have any particular size of acreage.

Let's get that straight right now. I am going to permit this, because I want you to have a picture of this whole thing. My general conclusion has no bearing on the issues of [3298] this case at all, any more than if you were trying a personal injury case in deciding for plaintiff or defendant, you say, well, which is the most well to do, which one is better established, is one a corporation, one an individual, shall we give the plaintiff a big recovery because the defendant is a corporation, or shall we give the plaintiff no recovery because the defendant is some poor little guy who comes in here, or shall we give a verdict for the defendant because of something about the plaintiff?

That is not the way you decide, justly, cases. You

(Testimony of Paul S. Armstrong.)

jurors are judges of facts, just like I am a judge of the law.

I want you to know entirely the picture of the defendants, but one consideration before you will not be the effect of what you do on anybody concerned.

The objection is overruled.

The question now was the relative size of the groves of these 12,000 members, average size.

The Witness: Approximately 16 acres per individual.

Q. (By Mr. Strachan): Are the services that are provided through the Sunkist system available on an equal basis to all of the member growers?

Mr. Dixon: Your Honor——

The Court: You may have the same objection. Overruled. [3299]

The Witness: Yes.

Q. (By Mr. Strachan): Does Sunkist or do any of its components, by that I mean Exchange Orange Products and Exchange Lemon Products, pay any dividends on the stock issued by them?

A. Sunkist itself has no stock, has no capital stock. It is a non-profit co-operative organization.

The affiliates, such as Exchange Orange, have capital stock, all of which is owned by Sunkist now, since it was acquired from the packing houses shipping oranges, as I explained before.

The Exchange Lemon Products Company, at the time of this action under discussion, was a corporation, the stock being owned by the associations o packing houses shipping ~~lemons.~~

Q. No dividends are paid on the capital stoc of either Exchange Orange or Exchange Lemo Products, is that correct? A. No, no dividends

Q. Does the Sunkist system deal in the product of any who are not members of the association?

A. No, it does not.

Q. The exchange system, as it was then know or the Sunkist system now, is referred to, is it no in a pamphlet issued by the United States Department of Agriculture?

A. The co-operative program has been fostere by government [3300] for a long period of year and the application of those principles has bee studied in respect to this commodity, that is, orchard crops, and in respect to field crops, and dir crops, and so on. So in the course of their promotio —and it is really a promotion on the part of government of co-operative development—they have issued bulletins to inform others similarly situate how they, also, might organize and operate.

One such bulletin is the result of an extensiv study made by the Farm Credit Administration, so called then, a part of the Department of Agriculture, called the California Fruit Growers Exchang System, which explains in a rather voluminou bulletin the structure, the operations, the contracts and all other pertinent information, including many statistics.

(Testimony of Paul S. Armstrong.)

They recommended that form of operation. It was considered sort of a model.

Q. What use has been made of that pamphlet that you have just described?

A. It is widely distributed by the Department of Agriculture on request. We maintain a quantity in our office which we send out to general inquiries not only in this country but throughout the world.

Q. Is it used as a source material——

The Court: What has that got to do with the issues in the [3301] case? I have been giving you a lot of latitude, but what conceivable issue would the fact that this book might be used as source material pertain to?

Mr. Strachan: I want to show it is a standard handbook used and accepted for use in institutions of higher learning, and that is the basis for offering it in eviednce.

The Court: What does it prove? Namely, it has been used in institutions of higher learning. What else does it prove?

Mr. Strachan: I say it is a foundation for receiving the pamphlet, the government publication, in evidence.

I have had it marked as Exhibit CO, and on the basis of the evidence given, and the evidence offered now, I offer the exhibit in evidence.

Mr. Dixon: I of course object, your Honor.

The Court: Sustained.

Mr. Strachan: That is all.

The Court: That is Exhibit CO. That is the document you are referring to, is it not, Mr. Ar strong?

The Witness: Yes, it is, sir.

The Court: Objection sustained. [3302]

* * *

Friday, January 27, 1956—2:00 P.M.

* * *

Mr. Strachan: If it please the court, I have o short witness I would like to put on out of order.

The Court: You may.

Mr. Strachan: Mr. Myron Kunin.

MYRON KUNIN

called as a witness by the defendants, being fir sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Myron Kunin, K-u-n-i-n.

Direct Examination

By Mr. Strachan:

Q. Where do you live?

A. 10550 Dolcedo Way, Los Angeles 24.

Q. In what business are you engaged?

A. I am a private investor.

Q. How long have you occupied yourself i private investing? A. Since 1946.

Q. Do you recall having some time in 1951 or 195 talked with Mr. Nicholas Winckler about the po sibility of your making an investment in the Winckler-Smith Citrus Products Company? [3304]

A. I do, sir.

Q. Did you have a meeting with Mr. Winckler?

A. Yes, I did.

Q. Where was the meeting?

A. In my office.

Q. Who was present at the meeting?

A. I don't recall who, in addition to Mr. Winckler, but I do think that there were one or two others with Mr. Winckler at the time.

Q. Will you tell as nearly as you can what was said by Mr. Winckler and what was said by you in the course of this meeting?

A. Mr. Winckler presented his balance sheets and several sheets of paper showing his experience over a number of years, and after a review of the papers, I told him——

Mr. Dixon: If the court please, I think the answer is not responsive to the question as to what was said by Mr. Winckler and this witness.

The Court: Overruled. Go ahead.

The Witness: After reviewing the papers, I had concluded that——

The Court: Just tell us what you said.

The Witness: All right, Judge. I said that I was not interested.

Q. (By Mr. Strachan): Did you at any time at that [3305] meeting say that you were not interested in investing simply because the Winckler-Smith

Company did not have the raw fruit available to them? A. No, sir.

Mr. Strachan: That's all. Thank you. There may be some questions from the other side.

Mr. Dixon: No questions. [3306]

* * *

Mr. Strachan: I tender Mr. Armstrong for cross-examination.

Mr. Dixon: No cross-examination, your [3307] Honor.

* * *

The Court: The record will show the jury absent.

The Clerk: I have marked a series of 66 exhibits for identification, your Honor, beginning with Defendants' Exhibits CP through CZ, inclusive; DA through DZ; inclusive; and EA through EZ, inclusive; and FA through FC, inclusive.

> (The exhibits referred to were marked Defendants' Exhibits CP through CZ; DA through DZ; EA through EZ; and FA through FC for identification.)

The Court: These are all papers from the files of the plaintiff corporation?

Mr. Strachan: Those that have been marked from CP to EI are of that class.

Mr. Dixon: I must say for the record that we disclaim any responsibility whatever for CP as being from the files of the plaintiff, which is the first exhibit.

Mr. Strachan: I am wrong on that.

The Court: Let me look at them.

Mr. Strachan: That is a letter from the files of the defendant.

Mr. Dixon: I think the rest of the exhibits, marked commencing CQ——

The Court: Let's take them as they go. The first is CP. It will be stipulated, first, as to the foundation, that [3313] this is a letter written by Arthur Johnson Company to California Fruit Growers Exchange?

Mr. Dixon: Your Honor, I know nothing about it, except what appears on the face of the document. It appears to be one received by Exchange, so I will stipulate to that effect.

Mr. Strachan: I will make that representation.

The Court: You could produce a witness who would so identify it?

Mr. Strachan: I could.

The Court: What do you offer it to prove?

Mr. Strachan: I offer it to show that at the date of that letter the defendants had notice of the objections that were being raised to the quality of operation and manner of operation of the Winckler & Smith Company.

The Court: State briefly your grounds of objection.

Mr. Dixon: Objection on the ground that it is not the best evidence, and it cannot be admitted for the truth of the statements contained therein, your Honor, which I understand is the purpose for which it is offered. Objected to on that ground.

The Court: Objection sustained. It is also dated September 24, 1945.

Now, let's see if we can take a group. CQ to how far are supposed to be from the records of the plaintiff company?

Mr. Dixon: Through EI, your Honor. Commencing with [3314] CQ and ending with EI.

The Court: As to these, is foundation waived as far as coming from the records of the plaintiff company?

Mr. Dixon: It is, your Honor.

The Court: These are offered for various purposes, are they?

Mr. Strachan: Yes, they are, your Honor. The first one is offered——

The Court: CQ?

Mr. Strachan: Yes, CQ is offered to show that the year 1949 was an abnormal one as far as the competitive situation of California Valencias with Florida products was concerned.

The Court: Mr. Dixon?

Mr. Dixon: Objected to, your Honor, on the ground it is not the best evidence; that the exhibit is signed by the president of the plaintiff corporation who was in court and available for cross-examination concerning anything contained in said letter. [3315]

The Court: Objection sustained. Also on the further ground that the wording itself is a future prophecy. It is not any statement of fact by the witness. "We are optimistic, and so forth, that this year might prove an exception." It is not even a recitation of a fact. It is a recitation of some prophecy. Objection sustained.

Now, CR, what do you offer CR for?

Mr. Strachan: CR is offered likewise as evidence that the year 1949 was not a normal one for the market for Valencia orange products in competition with Florida.

The Court: Same objection?

Mr. Dixon: Yes, your Honor. I might say in the interest of saving time that as to any document that purports to be signed by the president of the plaintiff corporation, who was available here in court for cross-examination during the course of the trial by the defendant, that we object to the admission of any of these documents that may fall in that category on that ground, that it is not the best evidence.

The Court: Of course, if there is impeaching matter in it, that is different.

Mr. Dixon: Yes.

The Court: But you add that statement to the objection heretofore made, right? You add that objection to what was heretofore said?

Mr. Dixon: Yes, your Honor, on the same ground. [3316]

The Court: Well, this again is prophecy. The third paragraph, "California industry will not be able to supply the total demand." That is obviously what might be called sales talk. I see no relevancy. Objection sustained to CR.

CS is offered to prove what?

Mr. Strachan: CS is offered to show that the 1949 season was not a normal one with respect to the competitive position of California on orange products. Also, that the financial condition of the company was unstable at that time. It had not been able to work out satisfactorily credit arrangements. Fruit was purchased, contracted for purchase from the Independent Fruit Growers at prices below the market price that was posted by the Fruit Growers Exchange.

Mr. Dixon: Is it offered, counsel, for the truth of the statements contained therein, and are you willing to so stipulate, that the facts alleged therein are true and it is being offered for that purpose?

The Court: Is it offered for the truth of the facts contained therein?

Mr. Strachan: No. It is offered on the theory of admissions, your Honor, admissions against interest.

Mr. Dixon: Well, then, it must be the truth of the statements contained therein. In other words, your Honor, what I am saying is this, that if this document goes in, the plaintiff does not want to be deprived of the right to itself [3317] refer to this document and not have the defendant claim that they have only admitted certain facts in the document as being true after I make reference to it.

The Court: I don't agree with your position. If it goes into evidence, it can be used by either side. When it is being offered as admissions, plaintiff could use it and defendant could use it, but that doesn't mean the defendant has to stipulate that what is in there is true, particularly where he is offering it as alleged admissions on your part.

However, if it goes into evidence, you are cer-ainly entitled to use it. That's the way I see it.

Now, I don't know what the admissions are. What articular admissions are you relying on? [3318]

Mr. Strachan: I didn't hear you, your Honor.

The Court: What particular admissions?

Mr. Strachan: For example, in the third para-raph, "* * * the importance of sweetened juices, amely orange juice and blended juice, has increased nsiderably over the past," due to the conditions in lorida, and the favorable conditions in California. nd the paragraph beginning at the bottom of the st page is an admission of the financial instability f the company and its limited financial resources. nd the last paragraph, the "additional informa-on" covers an admission that they were obtaining uit at prices lower than the Exchange Orange sted prices.

The Court: It is dated in June of '49. It seems me too remote on the question of any admission to the financial condition.

Mr. Strachan: We take the position that from e moment they sold their plant under this ex-emely unfavorable lease-back arrangement, they d no financial stability, and that that finally ght up with them two years later. The situation t increasingly worse.

I don't think the financial condition was created ernight, as the other exhibits show, and this is an mission immediately after the first reorganiza-n proceeding that the financial picture was bad.

The Court: If I admit it, I will then not let you offer [3319] further evidence to contradict it.

Mr. Strachan: To contradict it?

The Court: I am not going to create these situations——

Mr. Strachan: None of the matters that I have been referring to here are what we want to contradict; they are admissions that we want to establish, facts we want to establish.

The Court: I don't know. Mr. Dixon seems interested in it.

Are you objecting to it?

Mr. Dixon: I don't know as I do, your Honor, provided, as I said, that we can have equal access to the use of this document and refer to it. At least not have the defendants come in at that time and say that they only offered part of it and plaintiff cannot make use of some of the other statements that are contained in this document.

That will be true as to all of these offers, your Honor, so that is why I am taking the time, at this time, to have it clearly understood that if I do not object to the introduction of some of these documents, that we may be able to use them, too.

The Court: If they go into the record, I don't know how either side can be prevented from using them in their argument. You may read it one way and put your interpretation on it, and the defendant may read it another way and put [3320] their interpretation on it. But if it goes into evidence it is in the record.

Do you object to CS?

Mr. Dixon: No objection.

The Court: CS received in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit CS.)

The Court: What is CT offered for?

Mr. Strachan: On the abnormality of the 1949 eason contained in the second paragraph.

Mr. Dixon: Objection to this, your Honor, on he grounds previously urged to Exhibit CR.

The Court: It doesn't say that. If this goes into vidence, it could be argued that this Winckler juice as so good that they are getting orders every day rom every part of the country, people that never raded with them before. It doesn't say anything bout any abnormal condition.

You could argue that. Plaintiff could argue somehing else.

Are you offering it?

Mr. Strachan: I am offering it.

Mr. Dixon: Objection on the grounds previously tated, your Honor.

The Court: Objection sustained.

CU. [3321]

Mr. Strachan: CU is a so-called Anagram, also ffered to show that the 1949 market was abnorally favorable for California, referring particuarly to the first paragraph.

It also shows the extremely high price prevailing or the orange juice, at $3.95 for 12/46-ounce cases.

The Court: Is there objection to CU?

Mr. Dixon: Objection, your Honor, on the ground that this type of thing, which is a sales statement in 1949, and is being offered for the truth of the statements contained therein, is not the best evidence, and the contents thereof do not tend to prove or disprove any of the issues in this lawsuit.

The Court: Overruled. CU received in evidence.

The Clerk: Defendants' Exhibit CU.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit CU.)

The Court: CV, an Anagram?

Mr. Strachan: The portion under the heading "California Trend:

"Orange juice market is up. We are entirely sold out on our pack of California Valencia orange juice. The demand for blend is strong and sales on grapefruit juice exceed the supply."

Offered for that passage and also showing the price of orange juice quoted in the box up in the upper left-hand corner.

The Court: Is there objection?

Mr. Dixon: Yes, your Honor, on the grounds previously stated.

The Court: Overruled. CV received in evidence.

The Clerk: Defendants' Exhibit CV.

(The exhibit referred to was marked Defendants' Exhibit CV and received in evidence.)

The Court: CW, what is that offered for?

Mr. Strachan: That is a letter that is offered to show broker complaint against the product. I am offering it, but with your Honor's ruling with regard to the other letters relating to navel juice, for that reason it should be excluded.

The Court: Sustained. The objection to CW sustained on the same ground as others of that kind.

CX. This is a reply, apparently, to CW. Right? [3323]

Mr. Strachan: This is put in to show the effect of Florida conditions on the market and to show, also, the effect of the development of the——

The Court: Are you looking at the same thing I am? CX is a letter from Winckler & Smith.

Mr. Strachan: I had those clipped together, your Honor. I thought the reply was part of CW. I am sorry.

The Court: I am wondering now if our numbering system is all off?

Mr. Strachan: No, the numbering is all right.

The Court: You don't offer CX?

Mr. Strachan: Yes, I offer CX, which is a reply to CW.

Mr. Dixon: Objected to.

The Court: Sustained. I can't make any rhyme or reason out of it, I'll be very frank with you. Mr. Dixon, I wouldn't object to CX. It shows Mr. Winckler is being very honest. But I can't follow you men. I have been trying to. Objection to CX sustained.

CY?

Mr. Strachan: CY is offered to show the effect of the Florida conditions on the California market, and also the effect of the development of frozen concentrate on the processors of single-strength juice, making canners' operations less profitable or unprofitable. [3324]

The Court: Read me what part you have in mind.

Mr. Strachan: Up at the top. "Production of single-strength juice remains extremely small due to high fruit prices paid by the low temperature concentrators, which puts the squeeze on the canners and makes production unprofitable."

The Court: Is there objection to CY?

Mr. Dixon: Yes, your Honor. This is dated February 18, 1950. Counsel is offering it for the truth of the statements contained therein. It is not the best evidence.

The Court: Objection overruled. CY received in evidence.

The Clerk: Defendants' Exhibit CY.

(The exhibit referred to was marked Defendants' Exhibit CY and received in evidence.)

The Court: CZ? That is a navel juice problem, isn't it?

Mr. Strachan: Yes, it is.

The Court: Same ruling. Objection sustained.

Mr. Dixon: Well, your Honor, maybe I won't object to this.

The Court: Pardon me. I didn't hear an objection. I was trying to save time.

Mr. Dixon: I have no objection to it.

The Court: CZ received in evidence.

The Clerk: Defendants' Exhibit CZ.

(The exhibit referred to was marked Defendants' Exhibit CZ and received in evidence.) [3325]

The Court: DA?

Mr. Strachan: Is CZ received, then?

The Court: CZ is received.

DA, what is it offered for?

Mr. Dixon: What is it being offered for, counsel?

Mr. Strachan: I haven't read it for some time. This is a complaint that the navel juice was not up to the standard for navel juice.

Mr. Dixon: Objection on the ground previously made with reference to this type exhibit.

The Court: All right, DA objection sustained.

DB?

Mr. Strachan: That is offered as an admission that the development of frozen concentrate techniques had been injurious to the packers of single-strength juice.

Mr. Dixon: If it is being offered for that purpose, we certainly object to it on the ground that it is not the best evidence.

The Court: It is not being offered for impeachment?

Mr. Strachan: For the purpose of contradicting the testimony that the single-strength juice was a profitable item. Particularly, I am offering it for this:

"Due to big production and acceptance in frozen concentrate, prices and production were thrown out of balance in Florida to such an extent that none of [3326] the packers of single-strength juice were able to operate with a profit or any assurance of delivery of merchandise."

Mr. Dixon: Objected to on the further ground that the letter to which this is a reply is not made a part of this exhibit, so it is completely unintelligible without the letter of the 7th referred to in the exhibit, to which DB purports to be a reply.

The Court: Objection sustained.

Mr. Strachan: Did your Honor rule?

The Court: Objection sustained. DC?

Mr. Strachan: I am offering DC as an admission contained in the following portion of the Anagram:

> "Unfortunately the crop is short this year and this year a great portion of the fruit available to processors is going to be used by the frozen concentrators who can afford to pay more for fruit than canners. For this reason fruit supply will be short."

Mr. Dixon: You are offering it for that purpose, counsel?

Mr. Strachan: I am offering that admission.

Mr. Dixon: Admission of what? What is it an admission of as far as the issues of this case are concerned?

The Court: First, is there any issue about the crop being shorter in 1950 than in 1951? [3327]

Mr. Strachan: It is not the short crop that I am talking about particularly. One of the issues here is why Mr. Winckler went out of business, and it is our contention one of the reasons was that he did not or would not or could not use his single-strength plant and produce profitably in competition with the frozen concentrators.

The Court: This is the year 1950?

Mr. Strachan: That's right, and in 1950 that trend had started, and it was not until late summer or the fall of 1951 that he started in production of frozen concentrate. This is an admission that the frozen concentrate competition for process fruit was putting the squeeze on the single-strength manufacturers.

The Court: Objection?

Mr. Dixon: Objection, your Honor, yes. Some of these things cut both ways, but I don't like to encumber the record.

The Court: If this was in 1951, there wouldn't be any question about it, but you offer it allegedly for an admission, and I don't think there is any dispute about this insofar as the year 1950 is concerned. [3328]

Mr. Strachan: Well, it is establishing the fact by their own statement that the frozen concentrates were taking up the fruit at prices too high for the single-strength operators to pay, and that commenced long before he finally went broke. Over a year before that.

The Court: Overruled. DC received in evidence.

The Clerk: Defendants' Exhibit DC in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit DC.)

The Court: DD. What part of this?

Mr. Strachan: This is to show the availability of markets for California juice because of the shortage of supply in Florida; and also is offered for the prices quoted on the Winckler-Smith products, $3.65 for 12/46-ounce cans of orange juice.

The Court: The same objection?

Mr. Dixon: Yes, your Honor.

The Court: Objection overruled. I consider it pertinent only insofar as the prices are concerned.

The Clerk: Defendants' Exhibit DD admitted in evidence, your Honor?

The Court: DD in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit DD.)

The Court: DE. [3329]

Mr. Strachan: DE is offered to show that there was no good will attached to the Anagold label, or at least in some markets the Anagold label was a liability rather than an asset.

The Court: Do you offer the letter to prove the truth of the facts contained therein?

Mr. Strachan: I am offering it as showing that a broker reported facts therein stated to Mr. Winckler in December of 1950.

The Court: Objection?

Mr. Dixon: Objection, your Honor, yes, particularly on the ground that it refers to navel orange juice.

The Court: To what?

Mr. Dixon: Particularly on the ground that it refers to navel orange juice.

The Court: refers to navel orange juice, and it is not the best evidence of the truth of the facts contained therein. The objection is sustained.

DF.

Mr. Dixon: What is the date of this?

The Court: I suppose the part you are interested in is the little slip attached thereto?

Mr. Strachan: That's right.

Mr. Dixon: Your Honor, if this is to be made clear as to part, I think we ought to have an exhibit that is clear as to [3330] all of the Anagram, because this is just like emphasizing something, and I frankly can't read the rest of the exhibit, and I don't know——

Mr. Strachan: I wish it were a clearer print, myself.

Mr. Dixon: I object to it on that ground.

Mr. Strachan: That it is a poor print?

Mr. Dixon: Yes, and that you can't read most of it.

You picked out a part out here which will be clearly readable, and I don't know whether the rest of the exhibit would make it more readable, or refer to this, or not, because I frankly can't read it.

We are certainly entitled to know what is in the exhibit that you are offering.

Mr. Strachan: If the objection is to the rider that has been attached——

Mr. Dixon: No, it isn't to the rider. The objection is to the exhibit itself, that it is unreadable for the most part, and you have apparently been able to read the part that you want, but the rest of it is not readable.

Mr. Strachan: I can read it all. I will have the rider taken off, if it is thought that gives undue emphasis.

The Court: That objection I would sustain.

You can submit another.

Is there any other objection to it?

Mr. Strachan: I would like to have Mr. Dixon produce [3331] the original.

Mr. Dixon: You are not going to ask me at this time to find this exhibit, counsel?

The Court: Didn't you make the Anagram from an original?

Mr. Strachan: We made this facsimile copy from the Anagram and returned the Anagram to the plaintiff. So we can't get a better copy unless we have the original Anagram.

Mr. Dixon: Counsel, at this stage of the trial, to now ask the plaintiff to go through boxed records, whatever it is, to find the original, or whatever it is, is imposing a burden that I don't think we should have to assume.

I think you have the clear obligation to furnish to this Court and to the jury, if it is admissible, and to counsel, readable copies of the documents that you want to use.

Mr. Strachan: As long as they are your documents, I can't do that, unless you make them available.

Mr. Dixon: Then you could have the originals, and given us time and notice to try to find them.

The Court: Your request is denied that the plaintiff look for this Anagram, but you may be able to work out——

Mr. Strachan: I will ask that the rider attached there be removed, and I offer it for the purpose I stated.

Mr. Dixon: My objection is not to the rider.

The Court: I can't make out parts of it, either.

Mr. Strachan: The part for which it is offered certainly nobody [3332] has trouble reading. I don't think there is anything there that with some care cannot be read. I certainly never heard, before, that it was a ground of objection to admissibility that a fine or perfect facsimile copy be used.

The Court: It wouldn't be a ground of objection to an original, but it would be to the use of a purported copy.

However, this statement that you have here, again I can't understand all the fuss. It cuts as much one way as it does the other.

Mr. Strachan: It shows, in our theory, that the difficulty in obtaining fruit in the year 1951 was due to a scarcity of fruit for processors. It says right there that there is a scarcity of fruit for processors in California never experienced before.

The Court: And plaintiff's argument is that notwithstanding the situation the processors were in, Silzle and TreeSweet didn't have that problem.

I have trouble following you.

Mr. Dixon: Frankly, your Honor, I do not have any real objection to many of these documents that the defendant is offering, because I think some of the material contained therein, if usable by either party, can be used for both sides; but my objection to the document is that, first, it doesn't comply with the rules of the Court as to photostats, which I think provide that they must be black on white, and [3333] the real objection is that this is a document that, if it was ever resorted to or used, we ought to be able to read the whole thing.

The Court: The objection is sustained, unless you want to get a better copy.

Mr. Strachan: I am informed that Mr. Smith was asked to get these documents out so that we could get better ones, and I don't think there is any reason why Mr. Dixon shouldn't make them available to us.

Mr. Walker: When was Mr. Smith asked?

Mr. Strachan: About two weeks ago.

Mr. Williams: Two or three weeks ago.

Mr. Strachan: And he has the documents all selected.

The Court: Check with him.

Mr. Strachan: We have checked with him.

The Court: Where is Smith?

Mr. Dixon: Do you mean where is he today?

The Court: Yes.

Mr. Dixon: I don't know.

The Court: Has he an office?

Mr. Walker: Probably at home. He is trying to get a vacation in.

Mr. Strachan: I understand the same request was made of Mr. Dixon two weeks ago.

Mr. Dixon: I don't think there was any request of me, [3334] counsel.

The Court: It may be possible to work that out. The objection is sustained.

Mr. Strachan: Is the objection sustained because of the quality of the print, or because of the contents, your Honor?

The Court: Sustained because I can't read a lot of that matter there, and I don't think a jury could, either.

DG, what is this offered for?

Mr. Strachan: That is to show the effect of the Florida market on California prices in 1951; and also to show the prices at which Winckler & Smith were quoting California juice.

The Court: Is there objection to it?

Mr. Dixon: Here, again, your Honor, the objection is that part of this copy that I have, frankly, I can't read it. It seems to me that the documents that are offered at least should comply with the rules of this Court.

The Court: This is better than the other one. However, the date——

Mr. Dixon: What is the date?

Mr. Strachan: The date is May 26th.

The Court: What year?

Mr. Strachan: 1951.

The Court: I am looking at my copy. Maybe yours is better. See that the original copy has the date on it. The [3335] objection will be overruled and it will be received in evidence.

The Clerk: Defendants' Exhibit DG.

The Court: On the condition that the date can be made legible, and you may write it in.

Is there any doubt as to the date?

Mr. Strachan: If you look over in the heading that is above the prices, it says "Prices effective as of June 2, 1951."

The Court: Yes, that gives us the year. And the date is March or May?

Mr. Strachan: It is May. May 26th. Prices effective June 2nd.

The Court: I will write in the date. DG received in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit DG.)

The Court: DH.

Mr. Strachan: DH is a letter received by Mr. Winckler from Merchants Acceptance Corporation, it is a creditor, asking for an explanation, or calling attention to the poor comparative showing made up to that time that year compared with the year before, and asking for an explanation.

May 2nd is a reply, which among other things contains the statement that "last year we had a very unusual situation due to the inadequate Florida stocks which permitted us to [3336] run a large volume during the winter months. This has never happened before and it is not anticipated in the future."

It shows the bad financial condition of the company in 1951 as compared to 1950, and also shows that the prior year had not been a normal one, because of the lack of normal competition from Florida.

The Court: What is the objection?

Mr. Dixon: I don't know as I have any, your Honor.

I have no objection to this exhibit.

The Court: Received in evidence, DH.

The Clerk: Defendants' Exhibit DH.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit DH.) [3337]

The Court: DI?

Mr. Strachan: DI is offered as a report made in the regular course of business by a broker reporting two facts. One is the buyer is dissatisfied with the product. Second, that the competitors were quoting lower prices, and that the lower price quoted as of June, 1951, was $2.90.

Mr. Dixon: Well, your Honor, objection. This is offered for the truth of the statements contained therein?

Mr. Strachan: I offer it to show what was reported.

Mr. Dixon: Then we certainly object to it on that ground.

The Court: Objection sustained, either on the ground of what was reported or on the ground of the truth of the facts contained therein.

Mr. Strachan: I did not understand the ruling. I didn't hear you.

The Court: You mentioned price. In that sense, you are certainly offering it for the truth of the facts contained therein, and the objection will be sustained on that ground.

As far as any notice to Winckler, he said nothing in there that would make it admissible. Objection sustained on both grounds.

DJ?

Mr. Strachan: That is the reply. It is offered on the same theory DI was, and also offered to show what the price [3338] quoted as of June 12 was by Winckler & Smith.

Mr. Dixon: If DI is objectionable, certainly DJ shouldn't go in.

Mr. Strachan: I am offering them separately.

The Court: I suppose $2.95 refers to 12/46's. What is the $1.32½? What does that apply to?

Mr. Strachan: That is 24/2's, I believe, your Honor.

The Court: Is there any objection?

Mr. Dixon: The plaintiff's object in the first place to BJ without BI being in evidence to connect up the two letters, which show what the matter is that is being discussed, where the juice is not supposed to be up to par. The prices are not sufficiently identified to indicate what the product is that is being priced. Objected to on that ground.

The Court: I will overrule the objection to DJ. If you want DI to go along with it——

Mr. Dixon: Yes, your Honor. If you are going to overrule my objection to DJ, then I withdraw my objection to DI.

The Court: Fasten the two of them together, Mr. Clerk, so they won't get lost, and they will both be received in evidence.

The Clerk: Defendants' Exhibits DI and DJ in evidence.

(The exhibits referred to were marked Defendants' Exhibits DI and DJ and received in evidence.)

The Court: DK? [3339]

Mr. Strachan: DK is offered primarily for the last paragraph which reads:

"California has a big Valencia crop. We know the only way to move it is to be competitive with Florida."

Mr. Dixon: What is this one, counsel?

The Court: DK?

Mr. Dixon: I have before me DK.

Mr. Strachan: The last paragraph.

Mr. Dixon: It certainly is wholly irrelevant, your Honor.

The Court: I don't know what it proves.

Mr. Dixon: I don't know either.

The Court: What does it prove? A big Valencia crop?

Mr. Dixon: That is already admitted.

Mr. Strachan: It shows a big Valencia crop, but it also shows the California canners are going to have to meet the competition of Florida, that is what, and Winckler's intention to meet it. A part of the evidence has been that the Florida canners broke the market on single-strength juice by dumping a large quantity of juice at low prices, and that is why it became unprofitable for Winckler & Smith.

The Court: Objection sustained. It is cumulative and any bearing on the issue is too remote.

DL, what do you think you have in here?

Mr. Strachan: That is offered only for the prices, your [3340] Honor. It shows another quotation by that time by Winckler & Smith, June 30th, on the orange juice.

Mr. Dixon: I don't think I have any objection to that, your Honor.

The Court: DL received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DL and received in evidence.)

The Court: DM?

Mr. Strachan: DM is offered to show that Winckler & Smith in July was quoting prices on carload lots of unsweetened California Valencia juice at certain prices.

Mr. Dixon: I don't think I have any objection to this one here, your Honor.

The Court: DM received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DM and received in evidence.)

The Court: DN?

Mr. Dixon: What is this?

Mr. Strachan: That is offered to show the price quoted on July 11, 1951, on Valencia juice, and also for the admission contained in the section headed New Price, which reads:

"Please note that we have revised our prices on our entire citrus line. This revision was made possible by more favorable fruit supplies."

Mr. Dixon: I don't think I have any objection to that [3341] one, your Honor.

The Court: DN received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DN and received in evidence.)

The Court: DO?

Mr. Strachan: That is offered to show complaints made with respect to the quality of the product.

Mr. Dixon: Objected to on the ground that it is not the best evidence of the facts for which it is offered.

The Court: Well, if it goes in, it has to go in with a limitation. You have got these in already. Do you want another one?

Mr. Strachan: Yes, sir.

The Court: DO received in evidence. Objection overruled.

(The exhibit referred to was marked Defendants' Exhibit DO and received in evidence.)

The Court: Mr. Clerk, remind me to tell the jury about DO.

Mr. Dixon: That is only for so-called impeachment purposes, your Honor?

The Court: Impeachment purposes.

DP?

Mr. Strachan: Well, I put that in because it was a reply to DO. I will not offer it unless Mr. Dixon asks us to.

Mr. Dixon: Just a moment. No, I don't think, since the [3342] DO has been offered for that purpose, that it is necessary to put in DP.

Mr. Strachan: I won't offer it.

The Court: DP is withdrawn.

DQ, what part of this Anagram?

Mr. Strachan: I am putting that in to show an offer to quote prices on orange juice on request, also for the statement that, "Aparently the way Florida is footballing, the price of citrus juice supports what we said on June 23rd."

The Court: Where is that?

Mr. Strachan: DQ.

The Court: Where is it about Florida?

Mr. Strachan: The third paragraph.

The Court: The third paragraph?

Mr. Strachan: And also the last paragraph.

Mr. Dixon: I have no objection to it, your Honor.

The Court: DQ received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DQ and received in evidence.)

The Court: DR?

Mr. Dixon: I have no objection to this one, your Honor.

The Court: DR received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DR in evidence.)

The Court: DS? [3343]

Mr. Dixon: I have no objection to this one likewise.

The Court: DS received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DS and received in evidence.)

The Court: DT?

Mr. Strachan: I put that in to show the distressed basis for disposing of carry-over inventory mentioned by Mr. O'Hanlon on the first page.

On the second page, I put it in for the admission contained in the following:

"California citrus juice season has been delayed this year due to excessive Florida inventory which has forced prices to an unreasonably low level for citrus juices."

Mr. Dixon: This letter, your Honor, represents some of the things that I wanted to at least bring out through this witness on cross-examination when he was here this morning, and this was one of the letters.

The Court: Then you have no objection?

Mr. Dixon: Well, I don't like to have to put witnesses on the stand to explain some of these things which can be easily explained, and that is the only reason I am considering whether to object to it on the ground that the witness who wrote this letter was before the Court this morning for examination on this question. I am going to object to it on that [3344] ground, your Honor, because I did not have a right to cross-examine. This witness who wrote the letter was here and therefore the best evidence concerning anything contained therein was readily available to the defendant. They now seek to bring in through the back door something concerning which direct evidence was available to them this morning when this witness was offered by them as part of their case and I did not have an opportunity by cross-examination this morning to even go into the situation that is referred to in this letter, and for which they are now seeking apparently to offer the letter as proof of the facts contained therein.

The Court: Well, of course, it would ordinarily be admissible as an admission if there are any admissions, but it seems to me it should have been considered at that time. The witness was here available for examination.

Objection sustained to DT.

DU, what is this offered for?

Mr. Strachan: Well, this is offered because it contains an explanation of the inability to get fruit which is entirely inconsistent with the position taken by the plaintiffs, and that was true of the letter I last offered, particularly in the third paragraph, where it says,

"The condition as existing up to the present time has been brought about by the fact that too high a percentage of fruit has been going into concentrate [3345] and we have not been able to obtain fruit at a price that would enable us to be competitive on the production of single-strength juice."

They were caught between the single-strength and the concentrators.

Mr. Dixon: But TreeSweet wasn't. We have no objection to it.

The Court: DU received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DU and received in evidence.)

The Court: DV? [3346]

Mr. Strachan: That is put in because of the admissions that the company had heavy local bookings which made it unable to quote on unsweetened orange juice as of the date, which is August 24, '51.

Mr. Dixon: There again, your Honor, I don't know as I have any objection to it. The trouble is, it is quite obvious to me what this telegram refers to.

The Court: It isn't to me. It looks as if O'Hanlon was doing a little sales puffing, that is what it looks like. Is that the way you read it?

Mr. Strachan: No.

The Court: What do you think it means, heavy local bookings?

Mr. Dixon: What is it being offered for, counsel?

Mr. Strachan: Offered to show that there were reasons other than refusal of a processing contract that were responsible for inability to sell the juice.

Mr. Dixon: If it is being offered for that purpose, I object to it, your Honor. The witness was here this morning.

The Court: Sustained.

Mr. Strachan: I don't know whether the fact that the witness was here, or not, has anything to do with whether they can change their story four years later.

The Court: Counsel, I wonder how serious you are on [3347] some of these offers. What do you contend this means?

Mr. Strachan: Well, I contend, your Honor—

The Court: How would you explain this to a jury?

Mr. Strachan: I contend that all of these things add up to this: That the idea that this business failure of Winckler's was due to a refusal of fruit from Sunkist is definitely an afterthought and a rationalization, and the correspondence shows that various other explanations were given by the plaintiff corporation at the time the transaction occurred.

The Court: I will receive it in evidence. I will change my ruling. If you can make anything out of it, all right.

If you are going to read all this stuff to the jury, they really will be worn out.

Mr. Dixon: I would like to be heard on this so I understand what it is being offered on. Because to me, reading this in context, it is sales talk, and it doesn't say what the bookings are for.

If counsel is apparently going to try to argue that plaintiff had heavy bookings on unsweetened juice, or any other product, at that time, and that was the reason he wasn't able to offer any price on it, it is obviously not supported by any evidence already in the record, which I think was available to the defendants, and, therefore, should be based upon that foundation. In other words, this [3348] document is ambiguous on its face, as far as interpreting it is concerned.

The Court: I hate to be wishy-washy, but I am going to plop back on the other side. Here is a man who was sales manager, he wasn't even an officer of this corporation, and I take it that you are going to argue that this is an admission of some kind that actually they couldn't sell unsweetened juice because of—whatever heavy bookings are, and therefore it wasn't because they didn't have it to sell.

On the whole face of the record the thing is absurd.

Then you have the problem of what is meant by "bookings," and the question of one side or the other explaining this exhibit could well take up a half hour before you got through with it.

Certainly the administration of justice doesn't require the alleged admission by a sales manager, who came in a short time before, as proof of a case. If you haven't anything better than that——

Mr. Strachan: It seems to me that what Mr. Dixon has said that has persuaded your Honor has to do with the weight, rather than materiality and relevancy.

The Court: It isn't what he said.

As I sat here and I ruled one way, and then the other, then I read the thing over and see how ambiguous it is, and I hear you arguing this way, and then the other fellow replying [3349] to what it means, I can envisage a further delay of the trial over one little telegram by a sales manager.

Mr. Strachan: I can assure you that it won't lengthen, the trial 30 seconds, your Honor, if you admit it.

The Court: Objection sustained.

DW.

Mr. Strachan: That is offered to show the disposition of the inventory at distressed prices.

Mr. Dixon: Objected to, your Honor, on the ground that this document was signed or allegedly signed by the witness who was before the Court this morning.

I think if there was anything of that kind that counsel wished to use, he should have used it at that time when he had the oral testimony here and we had the right of cross-examination.

The Court: Isn't this all cumulative? Didn't the witness testify to that?

Mr. Dixon: It is cumulative, in any event, in my judgment, but they are offering it, and I am objecting to it on the grounds stated.

The Court: Objection sustained to DW.

DX.

Mr. Strachan: That is offered because it constitutes an admission that the supply of oranges for single-strength juice in September of 1951 was very low, and also for the [3350] prices quoted as of that date for the sale of that juice.

Mr. Dixon: I object to it, your Honor, on the ground that the witness, Mr. O'Hanlon, who apparently signed this document, was available here in Court this morning for direct examination of anything contained herein that counsel might wish to have used it for. Therefore, it is not the best evidence, and the plaintiff objects to it on the ground that if anything contained therein is to be used in any manner, it should have been brought out on direct examination by the defendants this morning so that the plaintiff would have the right of cross-examination.

Mr. Strachan: I don't think that we have the exclusive alternative of showing by testimony, rather than by letter. I think either one might be proper.

The Court: Don't you have prices shown in the record already?

Mr. Strachan: For certain periods. I don't think there is anything for this particular period.

The Court: You have an Anagram coming up here, EA.

Objection sustained.

DY.

Mr. Strachan: Your Honor, I dislike seeming to argue after ruling——

The Court: That is all right.

Mr. Strachan (Continuing): ——but I do want to say that [3351] I think the evidence is uncontradicted that on the date of this letter the supply of oranges for single-strength juice was extremely limited. There was practically none available.

The Court: You say the evidence is uncontradicted on that?

Mr. Strachan: I rather think that is the fact.

The Court: Then it is only cumulative.

Mr. Strachan: I know, but here we have an admission from the other side.

Mr. Dixon: He is not an officer of the plaintiff corporation.

Mr. Strachan: Do you mean that the assistant sales manager of the plaintiff corporation was not a man whose word could be relied on? That seems to be the position taken.

Mr. Dixon: Don't be absurd, counsel. I said he was not an officer of this corporation.

The Court: It is getting late and we are tired, and I have sustained the objection.

DY.

Mr. Dixon: What purpose is this offered for?

Mr. Strachan: This is a report——

The Court: It is offered for the truth of the facts contained there, I suppose.

Mr. Strachan: ——as to the market prices that the [3352] Parrot Company reported had been quoted by Silzle and Case-Swayne in the San Francisco market.

The Court: Objection?

Mr. Dixon: Yes, your Honor.

The Court: Sustained.

DZ.

Mr. Dixon: I don't think I have any objection to this, your Honor.

Mr. Strachan: I will withdraw the offer of DZ.

The Court: You can't get it in, Mr. Dixon, if he doesn't offer it.

DZ withdrawn.

Mr. Dixon: I said I had no objection before he said he wished to withdraw it.

The Court: I am not going to calculate the time element. I am trying to keep down the number of exhibits. If I can find any ground to sustain the objection of either one of you I am going to do it.

Mr. Dixon: As far as I am concerned, they can all stay out.

The Court: EA.

Mr. Strachan: I am offering that to show the prices quoted, as well as for the text of the Anagram.

The Court: EA received in evidence.

I didn't hear your objection, but I will assume it is [3353] the same.

Received in evidence.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit EA.)

The Court: EB.

Mr. Strachan: I am offering that to show the fact that the plaintiff company was commencing to quote on frozen orange concentrate and did quote rices as of that date, to show the prices quoted.

The Court: What is the materiality of that? To how that they were going into the concentrate business?

Mr. Strachan: "We are just starting out in the rozen concentrate field."

They started that in September of '51.

Mr. Dixon: That isn't the best evidence, counsel, of that fact.

Mr. Strachan: Well, it is plenty good evidence, I think.

I don't think there is any best evidence rule applicable against this.

Mr. Dixon: Even though the person that signs the document was in Court this morning and you could have asked him the question?

I object to it on the ground stated, your Honor.

The Court: Didn't he testify to this this morning? [3354]

Mr. Strachan: No, sir.

Mr. Dixon: He testified to some things, that they went into the frozen juice business, yes.

Mr. Strachan: He said when he was employed, Winckler told him that he was going to go into the business.

The Court: Overruled. EB received in evidence.

The Clerk: EB in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit EB.)

The Court: EC.

Mr. Strachan: I am offering this for the Market News statement that the shortage of Valencias is increasing because of the fact that available fruit is going into the more profitable frozen concentrate than into the unprofitable single-strength juice, and as a consequence they have had to withdraw prices on the canned orange juice."

Mr. Dixon: I don't know how much of this stuff is going to go into the record in this case. It is capable of two interpretations.

The Court: Objection overruled. EC in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit EC.)

The Court: ED.

How many more do we have here?

Mr. Dixon: We are just starting, your [3355] Honor.

Mr. Strachan: I am offering that for the admisions contained therein as to the occasion for the hortage of fruit in the fall of 1951.

Mr. Dixon: Your Honor, I certainly object to t, again, on the ground that the person who alegedly signed this document was here in Court this orning, and certainly now is no time to try to put n as proof of the fact contained in this letter anyhing which was available to the defendants by diect examination when this witness was here this orning. And I have no right of cross-examination o go into this question at this time.

The Court: I am not going to go any further night. I am getting tired and so are you.

Mr. Dixon: We are not bound by these sales anagers' statements.

The Court: This is an odd situation. I am tryg to reason it out. Here is a man who was assistt sales manager, not an officer or director. He monstrated on the witness stand this morning at he knew something about sales, but I don't ink he demonstrated any great knowledge of mats other than that. You had him on the stand,

and now you offer these as admissions against the company. Of course, the strict rules of admissions against interest, if it is an admission on some issue, might make them admissible. I would like to have you both look it over and think about it. [3356]

I might go back and change some of my decisions on these letters. [3357]

* * *

January 31, 1956, 9:00 A.M.

* * *

The Court: Let the record show the jury absent.

The Clerk: Counsel handed me a motion by the defendants for leave to amend their answers, and the plaintiff has handed me a motion for leave to amend the complaint. [3365]

* * *

The Court: We will consider the motion of the defendants. With the showing made by the motion as being defendants' argument to start with, let me hear from you briefly, Mr. Dixon, as to why this motion should not be granted.

Mr. Dixon: May it please the Court, this is a motion to amend the answers to the amended complaint which comes at a time when we are practically through the trial of this case and in which the defendants are endeavoring to set up a so-called affirmative defense to the action of the plaintiff. We submit that this defense, if it be a defense, was waived [3366] by the defendants not affirmatively stating it as required by the rules at the time the answer was filed to the amended complaint.

That this is a complete afterthought on the part of the defendants when they found that under the state of the pleadings, which determines the issues in this case, they were unable to inject into the case this wholly collateral issue of the question as to whether or not the products of the plaintiff complied with the requirements of the Food and Drug Act of the Federal Government. [3367]

Again, I would say that such an issue, if it were properly raised at the proper time, would be one which would not have any relevancy or bearing on the issues in this case.

Counsel suggested in their first effort to inject this into the case by amending the pleadings a short time ago, that they felt it was a question of law, and apparently now they have changed their position again with respect to that.

But on either basis, if as a question of law, it should have been determined prior to the start of the trial in this case, because if the contention that they then made was correct, that it would be dispositive of the issue and of this case, then we have been spending about six or eight weeks of time before the Court which has been utterly wasted.

As to the question of fact, we submit that that is not an issue in this case. It could not be raised even if properly alleged in the answer of the defendant. Because the question of whether this product or the products, which the plaintiff processed and sold in commerce, complied with the Federal

Food and Drug Act is not a material or relevant issue in this case. And if it were one we would be forced to defend that action, and obviously we would be trying an issue here which has no place in an antitrust lawsuit.

I think, therefore, your Honor, that the motion submitted by the defendants should be denied.

Mr. Strachan: May it please the Court, your Honor has [3368] read the motion and the proposed amendment to the answer. The motion proceeds, as does the proposed answer, not on the theory which Mr. Dixon has mentioned, that of an affirmative defense, but rather proceeds upon the theory that one of the issues of law, one of the controlling issues of law in this case depends upon the fact as to whether or not there was adulteration of the plaintiff's product.

If that adulteration be established as a matter of fact, it is our position that as a matter of law plaintiff has no right to recover.

The motion also proceeds on the theory, which is set out therein, that the pleadings, the evidence, all of the pretrial discovery proceedings, indicated to the plaintiff, and was understood by the plaintiff and its counsel, that there was an issue as to whether the product was adulterated or not.

Otherwise, why call for the laboratory records, why was the call for the laboratory records resisted? Obviously because it all bore upon the purity, the integrity of the Winckler-Smith product.

Their allegations in the complaint, which are in substance that Winckler-Smith was and had a reputation for being a packer of quality, high quality citrus products—those allegations are denied.

Mr. Winckler testified that his products were of high quality. In his opinion they exceeded the minimum standard [3369] established by the Federal Government.

On cross-examination Mr. Winckler was asked about the quality of his product and he stated, further, that it was a first class product, probably higher quality than many of the others. It certainly exceeded the standards of the department.

He was asked whether it was permissible in packing citrus fruit juice to add tap water. He said no. [3370]

He was asked further whether he knew of any way by which acidity of the juice could be reduced to bring it within the minimum standards prescribed by the government. He said he knew of no way.

Had Mr. Winckler been honest, he would have answered those questions directly to the opposite and would have admitted that his product was a spurious product, that he knew how to reduce the acidity and he did reduce the acidity by adding water and other adulterants. That would have ended the lawsuit at that point.

But he was not forthright. He didn't testify to the fact, and the laboratory records which we produced here and the testimony of Miss Comstock and the others that have been offered on that subject would have presented inrrebuttable proof that the product was watered, as it in fact was.

As a matter of fact, it was so well known to everybody in the plant that there was a standing joke among the plant workers to the effect that if you gave Mr. Winckler an orange and a rowboat and a pair of oars and put him in Lake Mead, he would turn the lake into orange juice.

I say he was a notorious violator of the law. He has no standing in this Court, and we should be allowed to prove our side of the issues which were made by the pleadings, we contend, which were tendered by the proof, which were known from the date of the pretrial discovery, and we have [3371] presented this amendment only to point up and to avoid a mere technical objection to our evidence on a very substantial issue, evidence which, if we are precluded from putting it in, will have an extremely prejudicial effect on the defense of this case.

I might add that in any event the doctrine of unclean hands is a legal theory and need not be pleaded and is fully applicable here.

Mr. Dixon: If the Court please, before we close on this point, I think your Honor is aware of the decision in the Keifer, Steward v. Seagram, 340 U.S. 211, which completely disposes of the legal argument just made by counsel with reference to so-called unclean hands by a plaintiff in an antitrust suit.

The Court: Yes. I am familiar with the case. In fact, it was a different kind of unclean hands, but it was the same kind of doctrine.

The motion of the defendants is denied for the following reasons, among others:

First, as to discovery, what goes on in discovery is not determinative of the issues of the case. Discovery proceeds upon the theory that information may be obtained which may lead to other evidence, and I know of no rule that what happens in discovery demarks the issues of a case.

Secondly, we took part of a day here in particular [3372] going over issues, demarking the issues in this case. This issue was never raised or never tendered and never discussed by the defendants. Therefore, the Court concludes that the defendants did not have the issue in mind at that time or, if they did have the issue in mind at that time, they deliberately kept it from the Court.

Three, the application comes too late. At this stage of the proceedings, it would open a vista of affirmative evidence and rebuttal evidence that would take as long as this case has already taken to try. It is an example again, in my opinion, of the defendants trying to inject into this case every possible collateral issue, instead of talking about the essential elements of this case.

Here is the absurdity of the matter. The plaintiff's contention is that they couldn't buy oranges and make orange juice and sell it in 1951. The defendants have defended upon the ground that in other years they diluted their orange juice, that they—I don't know how far back the defendants would go, I could look at these records, but from what I have heard, there has been an offer here of matters in 1947, 1948, 1949 and 1950, all of which boils down to this: That the defendants say, "Well, if the plaintiffs did make orange juice in 1951, they would have diluted it in 1951."

That certainly is extremely speculative. The law presumes that conduct is legal, and if you are going to engage [3373] in any presumptions of what would have been done, it is not the presumption that the plaintiff would have done in 1951 what he might have done in some prior year. You have a presumption that a thing once shown to exist continues, but that presumption refers to some physical fact that is shown and not to some course of conduct. If there is any conflict between the presumptions, certainly the presumption that a person would conduct himself lawfully controls over the other.

So we have, therefore, this speculative proposition that if the plaintiff had gotten oranges and if he had made orange juice, he would have put water in it.

The records in this case put into evidence and viewed in the light most fair to the defendants show that in 1949 and 1950, there was an operating profit made. By operating profit, I mean the profit based upon activities of the company before there were included into the statements other matters which defendants claim should have been considered as a loss. [3374]

For instance, in 1949 the operating statement, as such, shows a profit. The main controversy between plaintiff and defendant is whether $170,000 should have been thrown into the loss column. That $170,000, plaintiff argues, was properly attributable to

eorganization; defendants argue that it should have
one in to the profit and loss statement for the year
9.

I think that is the major controversy between the
arties on that year.

Now, that $170,000, in any event, from a practical
andpoint, whether or not it belonged in the final
perating statement of profit and loss, did not affect
ie fact that the plaintiff made citrus products, in-
uding orange juice, and sold them at a profit.

The year 1950 is a similar situation. Plaintiffs
laim they show an operating profit; defendants, by
djustment, say they do not. Their adjustments con-
ern the matter of judgment as to whether an item
hould be carried over in one year or two. There is
o attack made upon the veracity of the books,
emselves, showing sales and so forth.

So you then have a situation where involved in
is case is what happened in '51, not what hap-
ened in these other years, except insofar as they
ight show what would be background material that
d to the economic or financial position of the com-
any in '51. [3375]

Now, the defendants would attempt to show what
ppened in prior years as a basis of an inference
what plaintiffs would do in the year in question.

There is no dispute that they didn't make orange
ice, except for the possibility of samples; I see no
roof by the defendants that they made orange juice
at year.

I think, therefore, it injects speculative matters
d matters not strictly within the issues of the

case. It would tend to confuse the issues. It has not been pleaded. It was not called to the attention of the court as an issue in the case.

What went on in discovery has no bearing on what might ultimately be the issues in the case.

Mr. Strachan: May I have just a word, your Honor?

The Court: Yes.

Mr. Strachan: As to the suggestion that evidence as to what would have been done in 1951 is speculative, I have this to say: that the laboratory records show in the year 1951, when Valencia oranges were being processed into single-strength juice for Silzle company, and being processed into frozen concentrate for Morgan Ward—no. When the Winckler & Smith company in 1951 was processing single-strength juice under contract with Silzle, that juice was watered. And I think the evidence would show, and we would offer further evidence to show, that because of the nature of the Citromat [3376] machine, which was being used, there was no way of producing a profitable yield in single-strength juice from the Citromat process, and that of necessity water would have to be added both to get a satisfactory juice yield and to get a palatable product.

As to the discussion of issues preceding trial, I wasn't present, but I was given to understand that the fact was that there was a request during those discussions or a suggestion that it be stipulated that the Winckler-Smith product was comparable to other manufacturers of citrus product, and that the suggestion was refused. That certainly was brought to the court's attention and we felt indicated that the matter was in issue.

Furthermore, our purpose is not only to show that in the ordinary course of business the production would have been adulterated in 1951, but also to show that in the prior years 1949 and 1950 there was adulteration of product; that that adulteration was responsible for the damages, and it was that, and other conduct on the part of the plaintiff's business, that was responsible for the failure and responsible for the damage, rather than any alleged unlawful conduct on the part of the defendants.

The Court: My ruling stands.

As far as other products, we are not concerned, certainly, with the quality of other products in this case, and any contention you make that the showing you have made has [3377] foundation in this record and would support that losses occurred in '49 and '50 because of the product, I think falls completely on the record. Plaintiffs claim that they made a profit in those years, and your showing concerns itself largely with the adjustment of various items. There has been no showing that would tie in with any now claimed showing of inferiority in these other products.

As to your contention that you would show that the juice was watered when made for Silzle, again, it seems to me, the same principle applies: you are speculating as to what would have been the situation thereafter, and you run up against the presumption that things are done legally, and how you can ask a jury to make an inference of what a man would have done seems to me entirely speculative.

It was not raised as an issue. And the intimation, if it exists, that you say occurred, certainly didn't advise the court or counsel of the tendering of the issue.

Mr. Strachan: One other matter on which it bears, your Honor, and I don't want to leave the subject without having expressly mentioned it, and that is the fact that the practice of the Winckler & Smith company was to make an adulterated product is a circumstance and would explain why the defendants did not give Winckler-Smith the sort of a contract that they gave TreeSweet, even if it needed their services, and would explain to the jury why that was refused and not allow the [3378] jury to speculate on other causes from the plaintiffs' evidence that Winkler, on his own story, was making products that were comparable to TreeSweet and Sunkist. [3379]

The Court: This is your last suggestion now?

Mr. Strachan: I think so.

The Court: Well, you heard from all the witnesses so far and no official of Sunkist or EOP has so testified. There is a complete lack of foundation that this was knowledge in the official family of Sunkist or EOP at the time the alleged refusal was made.

I think Mr. Finley is going to testify further, but I don't anticipate nor do you offer that he is going to testify to his knowledge of this adulteration. Certainly without that discovery, there would not be any justification of the refusal to make the fruit available. [3380]

* * *

The Court: EC went into evidence and ED is the next one in order.

Mr. Strachan: That's right, your Honor. I offer that on two bases. One is that it shows that in October of 1951, they were offering to sell orange juice, and the other is that it constitutes an admission that the fruit supply is short and the shortage was caused by the government school lunch program.

Mr. Dixon: We object, your Honor, if you are ready to have an objection now.

The Court: Yes.

Mr. Dixon: This again is a letter from Mr. O'Hanlon, assistant sales manager of the plaintiff, and not binding on the plaintiff, but it is obviously a sales letter endeavoring to excuse the inability to a customer, a broker of the plaintiff, [3382] to make single-strength juice available to him. It wouldn't be expected that they would admit the factual situation. The letter itself is not in accord with the evidence already before the court, that in 1951 there was a greater supply of oranges available, Valencia oranges, than in any previous year I mean that is already in the record, and while this may be regarded as some kind of an admission, it seems to me it is just further cluttering up the record and would require us to make that explanation, perhaps

Mr. Strachan: Well, the record doesn't show what Mr. Dixon says as to the availability of oranges. It shows there was a very large crop of oranges, but it also shows that the demand for oranges in frozen concentrate form was extraordinary, and that combined with the school lunch program had made the abundant supply—accounted for most of the abundant supply and left little, if any, for single-strength juice.

The Court: Technically, it is my opinion it is admissible. If you want to put the jury asleep reading all these letters, you may do so. ED in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit ED.)

The Court: Now, we have EE.

Mr. Dixon: I have no objection to that. If we are going to have these in, that certainly should go in. [3383]

The Court: I take it you are offering it, are you?

Mr. Strachan: Yes, sir.

The Court: EE in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit EE.)

Mr. Strachan: EF is offered to show an admission that the Winckler-Smith Company got a late start in the frozen concentrate business.

Mr. Dixon: I have no objection.

The Court: EF in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit EF.)

The Court: Is EG offered?

Mr. Strachan: Yes, sir.

Mr. Dixon: I have no objection, your Honor. If this type of thing is to go in, we might put them all in.

The Court: Do you offer EG?

Mr. Strachan: Yes, sir.

The Court: EG received in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit EG.)

The Court: Is EH offered?

Mr. Strachan: Yes, sir, principally for the contents of the second paragraph.

Mr. Dixon: What is it being offered for, counsel? The [3384] truth of the statement contained therein?

Mr. Strachan: It is an admission by Mr. Winckler as the president of the company that the single-strength juice business in California was poor because of low prices in Florida which made it impossible for California packers to compete.

The Court: "In markets far away from the home."

Mr. Dixon: Yes.

The Court: Objection to it?

Mr. Dixon: Yes, there is, your Honor.

The Court: On the same grounds heretofore stated?

Mr. Dixon: Correct.

The Court: Overruled. In evidence, EH.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit EH.)

The Court: Is EI offered?

Mr. Strachan: EI is offered, yes, your Honor.

The Court: For what purpose?

Mr. Strachan: Primarily the second paragraph in the portion addressed to "our brokers."

Mr. Dixon: Well, your Honor, if this is the type of thing that is to go in, I presume it should go in.

The Court: EI received in evidence. If that is an objection, it is overruled.

(The exhibit referred to was received in evidence and marked as Defendants' [3385] Exhibit EI.)

The Court: Is EJ offered?

Mr. Strachan: Yes, sir. That is a different series, isn't it?

Mr. Dixon: This starts a new series, your Honor. I want to register a general objection to all of these exhibits which apparently run from EJ through to——

The Court: EW.

Mr. Dixon: Yes. On the ground that the person who purports to be making these reports, namely, the one referred to in most of them, is the manager, who is clearly available to give this testimony, if it has any relevancy to any issue in this case, by word of mouth rather than by this type of documentary form of evidence, so that the witness would be available for cross-examination. This is another effort to get some things in through the back door and to the jury which they couldn't get, possibly, by putting the witness who made these statements to the executive committees of the Exchange Orange and of Sunkist, and so forth, before the jury.

In other words, the objection is on the ground it is not the best evidence, cannot be offered for the truth of the statements contained therein, that to receive it in evidence would be to deprive the plaintiff of an opportunity to cross-examine any of the statements here that may be relevant to any of the issues of this lawsuit. [3386]

It is objected to on the further ground that many of the statements contained herein are irrelevant and immaterial to any of the issues of the lawsuit here, and would not tend to prove or disprove any such issues, even if admissible. But our primary objection is on the ground previously stated.

The Court: Are these all purported statements? I see one here that is a resolution. Do you distinguish between actions and a recitation of somebody's statement at the meeting?

Mr. Strachan: No. These are offered on the theory that they record the business transactions as they occurred in the ordinary course of business, reflected in the regularly kept minutes.

The Court: Business entries?

Mr. Strachan: I said these are a record of the business regularly conducted at these meetings and regularly recorded in the minutes.

The Court: I would agree that action taken by a corporation as shown by the minutes would seem to me would be proper, but it would seem to me that where somebody got up and made a speech and made some statements, that that is not action taken by the company.

Suppose you had something better than minutes. Here you have some secretary's recording of what she thinks somebody said. Supposing you had had a stenographic report of what [3387] Mr. Armstrong said at a meeting, to point this problem up, and you offered the stenographic report of what Mr. Armstrong said at the meeting, do you think that would be admissible?

Mr. Strachan: If it was a record that was regularly kept, if it was the practice to keep stenographic records of the reports made by the officers to the executive committee or the directors, I think what was reported is certainly admissible.

The Court: I don't agree.

I think if any of these concern action taken, policies established, something that was the business activities of the company, as distinguished from somebody's report or speech or remarks, that is one thing.

Now, we have the basis of the offer and we have the basis of the objection; is that right?

Mr. Dixon: Yes, your Honor.

I could elaborate further on my objection. I don't think it is necessary to do so. Because to me, at least, it is so obvious that this type of thing is self-serving, it is not corporate action.

The Court: I don't know. Self-serving. We talked about that before. That leaves me kind of cold.

This happened before this suit.

It seems to me it hinges on the question whether this was action taken by the organization or whether it is just [3388] talk.

Mr. Dixon: That is my primary objection to it, your Honor, that if it is being offered for the truth of the statements contained therein, then I don't see how under any rule of evidence it is possibly competent.

The Court: You are offering it for the truth of the statements contained therein?

Mr. Strachan: No.

The Court: Then what other purpose would it have?

Mr. Strachan: I am offering it for the purpose of showing what was brought before the board and the executive committee at various times, which was responsible for their policy determinations; what was reported to them.

Mr. Dixon: How does it relate to the plaintiff in this case, counsel, will you kindly inform me? I am perhaps pretty stupid.

The Court: Now, wait.

If you have a specific action of a board that is in question, then some specific offer of what preceded that action may be proper. But this, so far, is offered generally to supposedly explain corporate action, and that is too general an offer.

Mr. Strachan: If you want me to point out particularly what portions I have in mind, your Honor, it will save you some reading. [3389]

Mr. Dixon: These are offered, I take it, in toto, counsel?

Mr. Strachan: Yes, I am offering these excerpts.

Mr. Dixon: Then they stand on that basis.

The Court: Let me look at them.

Mr. Dixon: It isn't a resolution that you are offering.

The Court: Each one of these has some resolution in it? No, not all of them.

As to EJ, the objection will be overruled. It will be received in evidence. However, the jury will be instructed that the document was not received in evidence for the truth of the facts recited by the person purportedly speaking to the committee. It will be received in evidence showing the corporate action, and that the jury might consider the matters purportedly stated by the person, not as any truth of the facts contained therein, but only of assistance to know what was reported to the committee when it took its action.

I would not permit you to argue to the jury the truth of the facts contained in the recitations.

Do we understand each other on it?

Mr. Strachan: I believe so, your Honor.

The Clerk: Defendants' Exhibit EJ received in evidence.

(The exhibit referred to was marked Defendants' Exhibit EJ and received in evidence.)

The Court: Now, EK.

EK received in evidence with the same limitations. [3390]

(The exhibit referred to was marked Defendants' Exhibit EK and received in evidence.)

The Court: Objection sustained to EL. It is entirely a recitation.

EM. EM received in evidence subject to the same limitations as EJ and EK.

(The exhibit referred to was marked Defendants' Exhibit EM and received in evidence.)

Mr. Strachan: EN, I don't think I will offer, your Honor. I will withdraw that.

The Court: EN withdrawn.

Mr. Strachan: I will also withdraw EO.

The Court: EO withdrawn.

I take it you are offering all these unless you tell me they are withdrawn?

Mr. Strachan: That is right.

The Court: EP received in evidence subject to the same limitations as EJ, EK and EM. It is action by the board. The recommendations and things stated may be considered by the jury in determining what the board had before it when it took action, but not for the truth of anything therein contained.

The Clerk: Defendants' EP received in evidence.

(The exhibit referred to was marked Defendants' Exhibit EP and received in [3391] evidence.)

The Court: EQ. Objection sustained.

ER. Objection sustained.

ES. Objection sustained.

Mr. Dixon: I don't know as I have any objection to that, your Honor.

The Court: I have been assuming that you were objecting.

Mr. Dixon: Yes. Well, I made the general objection.

The Court: You don't object to ES? Well, maybe they don't offer it. This it not a game now. Either we offer it and, if it is offered, there is or is not an objection.

Mr. Strachan: Yes, I offer it.

Mr. Dixon: No objection.

Mr. Strachan: I do think if it is received without objection, comparable minutes which have been excluded which bear on the same subject——

The Court: That is a matter of consistency of counsel and not the consistency of the court in its rulings. You have a right to object or not object to tendered evidence.

ES received in evidence.

The Clerk: Defendants' Exhibit ES received in evidence.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit ES.)

The Court: Since there is no objection, the order I made sustaining the objection which I thought was made will be set aside. [3392]

Mr. Strachan: What did you say, your Honor?

The Court: The order I made previously sustaining an objection, what I thought was an objection, will be set aside.

Is ET offered?

Mr. Dixon: Objection.

The Court: Sustained.

EU?

Mr. Strachan: May it please the court, in the second paragraph, fourth line, near the right-hand side end of that line, there is a figure 17,000, which is a typographical error, and should be corrected to read 11,700.

Mr. Dixon: I object to this.

Mr. Strachan: May I amend it on its face?

The Court: Yes, you may amend it on its face. It is offered and there is objection. Let me read it. The middle of the paragraph, "There is some question whether Sunkist specifications can be met in all outside plants, the manager said, and this is being checked closely through continuous inspection."

It is offered and there is objection?

Mr. Dixon: Yes.

The Court: Objection sustained.

EV?

Mr. Dixon: Objection, your Honor.

The Court: Objection sustained. [3393]

EW?

Mr. Dixon: Objection.

The Court: Objection sustained.

EX?

Mr. Strachan: Those are taken from the books and records of the Sunkist organization.

Mr. Dixon: To what period do these apply, counsel? You have just got 1951. I assume that is the whole year.

Mr. Strachan: Yes, it is the year 1951.

Mr. Dixon: I don't know as it is particularly relevant. Some of these exhibits you put in by month and others you put in by years.

Mr. Strachan: This is by the year.

The Court: Foundation waived?

Mr. Dixon: Your Honor, this doesn't show what it was spent for. It is my understanding from the records of the company and the previous actions of Sunkist that there was an appropriation made of around a million dollars for advertising purposes. Now, what is regarded as advertising again is a pretty broad subject. There are such things as shelf allowances, radio, television, and so forth. Now, does this represent all types of items? That is my question, your Honor. Or have they selected certain things and said, "This we regard as being spent for advertising; this we regard as being spent for sales promotion; and this we regard [3394] as being allowance made to the buyer, such as a shelf allowance."

It is my understanding that the million dollars covered all of those items Here we find it comes up to $664,000. It isn't too material.

The Court: Well, let's find out.

Mr. Strachan: As I understand it, these are the actual expenditures for advertising, and this doesn't include promotional cost. This is just Sunkist advertising of all kinds.

The Court: What do you mean by advertising?

Mr. Dixon: Yes, that is the question.

The Court: Let's see if we can define advertising so there is no problem. What is included in the term advertising?

Mr. Dixon: We might disagree with counsel as to whether it was advertising or not. Will you specify, counsel, what items you are covering in these expenditures?

Mr. Williams: Counsel, you recall you asked for information on Sunkist advertising and it was supplied with a big sheet. It will show the 664,000. It gave a detailed breakdown.

That, as I understand it, is the advertising by Sunkist and does not include such items as, say, co-operative advertising through the dealer, where the dealer advertises in a newspaper and had an allowance for it. This is advertising [3395] by Sunkist.

The Court: Do you mean in periodicals and newspapers?

Mr. Williams: Yes.

The Court: Billboards?

Mr. Williams: Yes. It is the all-over advertising.

Mr. Dixon: I have no objection to the exhibit, your Honor, if advertising is defined in the exhibit so that the jury will know what this money was spent for, and what is not included herein that might also be said to go into sales promotion work, such as these shelf allowances and other items. If counsel will specify in detail what items they have included in these total amounts, I have no objection to the exhibit.

The Court: Can't you in two or three words say what it is, if by advertising you mean billboards, magazines, newspapers, periodicals?

Mr. Williams: I don't have the detail sheet, your Honor. Do you have the detail sheet, counsel?

Mr. Dixon: No, I don't. I have got enough trouble trying to keep these papers straight.

The Court: You must have a copy somewhere.

Mr. Williams: We have a copy somewhere. I don't have it in the court room.

The Court: Let's pass this one and you can check it. In other words, if there is a specification as to what it is, there will be no objection. [3396]

Mr. Dixon: What is meant by Advertising, your Honor? That is my only objection to it in its present form.

* * *

The Court: What is the next one?

Mr. Strachan: FD is a graph showing the weekly fruit receipts of Exchange Orange Products Company in tonnage.

The Court: Is that all fruit?

Mr. Strachan: This is just Valencia oranges.

The Court: Oranges for sale as oranges and product [3397] oranges, also?

Mr. Strachan: No. These are the tonnages delivered to Orange Products Company, which is—

The Court: All oranges, then, all Valencia oranges?

Mr. Strachan: To Orange Products, which are the products oranges and not the fresh fruit oranges, and not those that are sold as fruit oranges by Mr. Kelly.

The Court: Can it be stipulated that these are charts prepared from the records of EOP?

Mr. Strachan: Yes.

The Court: Any objection?

Mr. Dixon: We haven't had any chance to check them, your Honor, but we are not going to question them, your Honor.

The Court: FD received in evidence.

(The exhibit referred to was marked Defendants' Exhibit FD and received in evidence.)

Mr. Strachan: Now, we come to FE, which is that group I earlier withdrew, and they are now set up to show the orange utilization by the Orange Products Company by years from 1947 through 1951.

That, again, is based upon the books and records of Orange Products Company.

Mr. Dixon: It includes the years from '47 to '51, doesn't it, counsel?

Mr. Strachan: Yes. [3398]

Isn't that what I said?

Mr. Dixon: I thought you said just the year '51.

The Court: What do you mean by the words grower participation?

Mr. Strachan: That will be explained by Finley, whose testimony will relate to this subject. And that term is used in Sunkist to designate the sort of arrangements that TreeSweet and Silzle had in '51, for example, and others had in other——

The Court: Isn't there grower participation in everything that EOP does?

Mr. Strachan: This is different in this respect, your Honor: When you have what they call these grower participation contracts, you are entering into a contract in which both the packer and the grower are going to have to await future market devlopments to find out what is going to be realized for the product, so the growers and the processor, alike, are participating in the proceeds of the product and participate in the rise or the fall of the market.

Mr. Finley will explain the origin of those and what it is that the term designates.

Mr. Dixon: If the court please, I think this exhibit might not be objected to by the plaintiff if they would change the designation to "gravy train" instead of "Grower Participation."

The Court: Now, let's be serious. [3399]

Mr. Dixon: But, certainly, I don't think that any identification of that kind should be on an exhibit.

Mr. Strachan: The phrase is one that Mr. Armstrong used, and which is commonly used to designate this type of joint venture.

Mr. Dixon: I don't see how it could be said to be——

The Court: What is meant by "deferred payment"?

Mr. Strachan: Deferred payment is the arrangement under which, say, Mission Dry buys oranges, perhaps, to put into bottlers' bases, or something of that sort. They may buy them in July, process them into these bases, but then instead of paying for the oranges they put them in the warehouse——

The Court: And don't pay until they sell?

Mr. Strachan: That is right. It is a secured credit transaction in that they pay when they withdraw from warehouse and sell. But they pay on the basis of the price at the time the oranges are acquired by them.

The Court: Title was reserved in the oranges and in the product until such time as they are sold?

Mr. Strachan: Not under those arrangements, your Honor.

The Court: Security was on the basis of the warehousing?

Mr. Strachan: That is right.

The Court: I think in view of the fact that this case hinges around the Silzle and TreeSweet contracts, that the term Grower Participation either should be eliminated or [3400] should be thoroughly explained to the jury what is meant, and the jury instructed in some way in connection with it.

Mr. Strachan: We certainly have no desire to mislead on that, and I think that both Mr. Armstrong's testimony, which has already been given, and Mr. Finley's testimony, which will be given, will define precisely what is intended by the designation "grower participation"; why that phrase was properly applied to this sort of an arrangement.

Mr. Dixon: If the court please, we get here into something which seems to me can be very misleading, because these two contracts are, of course—that is, the TreeSweet and Silzle contracts in '51—are in a sense one of the bases of the plaintiffs' claim here. Now, they are admittedly of a different type than all the others.

The Court: I think the term should be struck off of it. TreeSweet and Silzle will speak for themselves, and the witnesses can describe what happens, refresh the jury's recollection.

You have no other objection to the exhibit?

Mr. Dixon: No, your Honor.

These figures don't all check out with ours, but I am not objecting to that.

Mr. Strachan: What are we going to call that?

Mr. Dixon: Just leave it blank is my suggestion.

The Court: You can leave it blank. The contracts speak [3401] for themselves, TreeSweet and Silzle. Or you can put some other material on it.

Mr. Strachan: It seems to me if we put a descriptive heading on all of these others, we show for EOP's account, we show what is deferred payment, we have shown what we have always regarded as a third category, which is Grower Participation.

The Court: It would be very logical to leave it blank, because that is one of the controversies in the case. Plaintiff puts one characterization on it and you put another. The jurors are entitled to take either one. Why should you submit an exhibit which puts your characterization on it?

Mr. Strachan: It happens that is what it is known as in the business.

Mr. Dixon: It couldn't possibly be, your Honor, because that exhibit from start to finish shows that the only company that ever had this so-called kind of a grower participation contract up until 1951 was TreeSweet. Now, how could it be known in the business? If the plaintiff had known about this contract, we would have been more specific in our demand that we have this so-called grower participation contract.

Mr. Strachan: You mean your demand of Morgan Ward?

Mr. Dixon: Of TreeSweet—of Sunkist and Exchange Orange.

The Court: Let's go ahead. The ruling will be the objection is sustained unless you eliminate the words "grower participation," in which event it will be received in evidence.

Mr. Strachan: I would like, if that modification of the exhibit is required, to eliminate the "for EOP account, for deferred payment," and just have a list there.

The Court: I don't follow you. [3403]

Mr. Strachan: It seems to me that we are going to give a wholly erroneous impression if we show that we had two designated classes of arrangements there, one for EOP account, the other for deferred payment, and then we had two special arrangements that are unclassified at the end, so I would rather take it all off.

The Court: When you call the witness, you would take the ones for EOP account and you would point out that these people were processing for EOP. Then when you took the deferred payment account, you would point out that these were the Hyland-Stanford, Mission Dry contracts, in which the money was paid to Sunkist when sold, but Sunkist was secured by the warehouse receipts.

There has been enough talk about Silzle and TreeSweet already.

Mr. Strachan: But they are grower participation type, and they include a type that was offered to other processors who are customers. They were offered to Case-Swayne.

The Court: Then you can strike out the line across all, if you want to. I think you make it more complicated, but that is up to you. If you want to take the entire line there——

Mr. Strachan: I would like to have us consider in that connection, your Honor, FF, which is a graphic representation of the facts that are shown on FE. It shows year by [3404] year the various sorts of arrangements that were made and the volume that was processed under those arrangements. There the charts were keyed to the same headings that are used on FE.

The Court: The ruling will be the same. The grower participation is your characterization and is an issue in the case. I don't think it is proper. If you want to use the term TreeSweet and Silzle, or if you can think of some other term that can in a few words describe it where you have a contract to process it, give an option to purchase with discounts, and reserve title to it, all right, but I don't think you are entitled to characterize it in the exhibit when that is one of the issues in the case. In fact, that is the big issue in the case.

Consider it further and talk about it later.

Mr. Strachan: That is what I would like to do.

Mr. Dixon: While we are on this, I have this further suggestion. It seems to me that the colors that they have used here, while the blue and the green may stand out, I mean they are very similar and it would be much more easy if they want to characterize it to put one or the other, Exchange or this so-called grower participation group, in red, so they could be distinct.

The Court: I am not going to require that. The colors are distinct enough if a person isn't color blind, and it [3405] can be pointed out what the matter is. I take it that your representation, Mr. Strachan, is that these charts are built from the figures shown in FE.

Mr. Strachan: That is correct, your Honor.

The Court: Will you accept Mr. Strachan's representation on that, Mr. Dixon?

Mr. Dixon: If counsel so represents, I will accept it.

The Court: Other than what we have been discussing about the words "grower participation," you would have no objection?

Mr. Dixon: No, your Honor, I wouldn't.

The Court: Talk it over and let me know [3406] later.

* * *

Mr. Strachan: Your Honor, there was some discussion at our session on last Friday of Exhibit DF, which was a poor reproduction of an Anagram. I have here another print which may be more legible than the exhibit which was identified.

The Court: Much more legible. I can read it without my glasses.

Mr. Dixon: What is the exhibit we are talking about?

The Court: DF, the Anagram which was not readable. The white copy may be put in in place of DF and it may be received in evidence.

Mr. Dixon: May I have a copy of it, your Honor?

The Clerk: DF received in evidence. [3407]

* * *

The Court: The jury is absent.

The Motion to Amend to Conform to Proof. I will consider the motion as plaintiffs' showing. I will hear from the defendants.

Mr. Fisher: May the court please, first I want to call to the court's attention that this is labeled "Motion to Amend the Amended Complaint to Conform to the Evidence," and therefore should be predicated upon that ground.

The first one that he seeks is the addition of the words:

"Single-strength Valencia orange juice was the principal source of income and profit of the plaintiff and constituted approximately 80 per cent of the total citrus juice products processed and sold by the plaintiff during the years 1949 and 1950."

I believe there is no evidence that breaks down the principal source of income and profit. I think there was evidence to the effect that approximately 80 per cent of the total citrus juice products was processed and sold by the plaintiff during those two years, but as to whether that was the principal source of income and profit during those two years, I believe there is no evidence to break that down.

The Court: When you say "amendment to conform to proof," no one concedes that plaintiff has proved or has not proved the allegations by the fact that the amendment is allowed. It is whether the plaintiff would be permitted to argue these [3409] matters if the amendment was permitted.

In other words, it is looking at the case most favorably from plaintiffs' standpoint. Or if it was to conform to proof from the defendants' standpoint, it would be looking at the case most favorably from the defendants' standpoint.

I think there is sufficient evidence for the plaintiff to make some argument on that. Whether it is a sound argument is another question.

On the amount of sales of the various products, you would have to do some computing where the profit came from, but it could be argued that because of the large amount of Valencia sales, that that was one of the sources of profit. [3410]

Mr. Fisher: Now, with reference to the total sales during the two years exceeding $3,000,000, I believe that is correct. Is it not, Mr. Williams, Winckler & Smith total sales in the two years exceeded $3,000,000?

Then the next statement:

"The single-strength Valencia orange juice processed by the plaintiff during said years was sold in interstate commerce in competition with single-strength Valencia juice processed and sold by the defendants, EOP and Sunkist, and co-conspirators TreeSweet and Silzle."

The sales, we have pointed out, were made by Sunkist uniformly and not by EOP. Hence, the word EOP should come out.

Mr. Dixon: If the court please, on that the language is processed and sold by the defendants EOP and Sunkist. Certainly EOP processed it. It is true Sunkist sold it. But I don't know how else you can in simple language break it down, unless you want to say processed by EOP for sale by Sunkist and sold by Sunkist. That is the thought in mind. It is hard to distinguish.

The Court: All right. Let's go ahead.

Mr. Fisher: Throughout in this paragraph they have combined all citrus juice products stating that the total sales of the plaintiff of all citrus juice products exceeded [3411] $3,000,000, and in that they have combined not only single strength, and we have been reminded a number of times that this lawsuit relates to single-strength orange juice, and not to citrus products as a whole.

The Court: It would be permissible to make an argument or a comparison as to what part of the business was single-strength juice, would it not? That has been talked about. If they sold one can of single-strength juice, that would be a far different situation from if they had sold 400,000 or 500,000 dollars' worth of single-strength juice in comparison to their total sales.

What is your next point? Do you object to paragraph 2?

Mr. Fisher: Yes, we do, your Honor. That states that:

"In 1951 Sunkist and EOP controlled and accounted for approximately two-thirds of all of the product Valencia oranges available in California for processing into single-strength orange juice and other citrus juice products. The product Valencia oranges which are not processed by defendant EOP into citrus juice products or by independent processors for the account of EOP are usually sold by Sunkist to independent processors."

Now, the evidence is counter to that, in that there is first a sale by the citrus distributing plant, and the [3412] products not sold are those which are processed by EOP.

The Court: The Citrus Distributing Plant is a part of Sunkist.

Mr. Fisher: It is a part of Sunkist.

The Court: And Sunkist fixes the price that it will sell product oranges for?

Mr. Fisher: Correct, it does.

The Court: Well, I don't see your point.

Mr. Fisher: The point is that it is the products which are not sold which are then processed by EOP, and this is stated in the reverse, "which are not processed by EOP are sold."

Then the next sentence says:

"In 1951 Sunkist determined the selling price for its product oranges after consulting independent processors who were potentital purchasers thereof, including TreeSweet and Silzle."

The reference there, I am sure, should be "consulting the customers of Sunkist," rather than characterizing them as independent processors.

The Court: That may be the trouble with my disagreement with you, Mr. Fisher, is these are still allegations in a complaint. These aren't findings. These are allegations of a complaint which plaintiff thinks it can argue and thinks it has proved. [3413]

Now, you might argue that these men were customers and that the Sunkist officials consulted their customers. The plaintiff likewise could argue as alleged that the officials consulted independent processors who were potential purchasers.

These aren't findings. This is still the allegation of a complaint broadened out based upon what the plaintiff contends it has proved. Unless the plaintiff is far amiss on some contention, it seems to me that they ought to be granted. I don't know in a way what good it will do except that it is proper to amend a complaint to conform to what you think the proof is. They are not findings. [3414]

I am not putting any stamp of approval on these allegations, any more than I would the allegations of the complaint as it was before the amendment.

Mr. Fisher: The same phrase occurs.

Well, I believe there was no testimony concerning the consulting of Silzle

The Court: I think there was testimony.

Mr. Fisher: My recollection is that there was no testimony. I think Mr. Kelly said, among other things, that he did consult TreeSweet, but I recall no testimony to the effect that he consulted Silzle.

Mr. Dixon: I will be glad to give your Honor the reference to it.

The Court: Do you have a reference to it?

Mr. Dixon: I think I can get it in just a moment. Page 323: "On single strength, I would ask the then customers, and as I remember them, they were Case & Swayne and Silzle and Mr. Finley."

And then the next question:

"Did you ever ask anyone at TreeSweet?

"And TreeSweet. I am sorry I overlooked that."

Mr. Fisher: I stand corrected.

The last sentence we particularly object to. The statement there is:

"The Sunkist selling price for Valencia [3415] oranges in 1951 also established the selling price for such Valencia oranges as were offered to independent processors by other suppliers."

That statement, I think, is just contrary to the evidence.

The Court: Mr. Fisher, a jury in deciding this case has a right to believe such witnesses as they want to. There were witnesses who appeared here that made that very statement, that the Sunkist price, in substance, established the price to processors.

There is also evidence that on other occasions fruit was sold at less than $40, and in some of those cases there was no reference to solid content.

Now, this doesn't seem to me to be out of line with what plaintiff could argue. The jury is entitled to believe one witness and disregard the rest. The jury could say as to those sales of less than $40, either there wasn't a solid content ratio, or maybe they were inferior oranges, we believe the witness who said the Sunkist selling price established the price for oranges.

I think Morgan Ward himself——

Mr. Fisher: No, he didn't say that it established the price. He said that his price followed generally. He did not say that it established the price.

The Court: Wouldn't that be a permissible inference for the jury, if he said that his price followed the Sunkist price, [3416] wouldn't it be a permissible inference, therefore, that the Sunkist price established his price?

Mr. Fisher: No, I think not. Because actually his prices were lower for the most part than the Sunkist prices.

The Court: Does that complete your showing on II?

Mr. Fisher: Yes.

The Court: Do you object to III?

Mr. Fisher: We will not object to III.

The Court: Do you object to IV?

Mr. Fisher: Yes. The objection there, and I would like to read that subparagraph:

"Plaintiff's existence as a juice canner depends and at all times herein mentioned was dependent upon the acquisition by it of large quantities of by-product fruit for processing into canned natural or frozen concentrate juice."

They propose to add after the word "juice" "at a price or on terms comparable to those at which Sunkist made Valencia oranges available to other independent processors for processing into citrus products, particularly single-strength Valencia juice."

As a matter of fact, that was in issue from the beginning, and the inclusion of the frozen concentrate, while originally in the complaint, in the matter of proof the lawsuit has been restricted to natural strength orange juice. [3417]

The Court: You are objecting that he is not taking something out of his complaint, you are objecting that he is leaving in the complaint the words "frozen concentrate juice"?

Mr. Fisher: If the amendment is to conform to the proof, I think it should be out.

The Court: I have your point.

What about V, do you object to V?

Mr. Fisher: I am not through with IV.

The Court: All right.

Mr. Fisher: In this, that there is no evidence in the case that he was dependent for his supplies on Sunkist.

In fact, the evidence is counter to that. He had been getting his supplies from Morgan Ward and not from Sunkist.

And when you tie this in with, "upon the acquisition by it of large quantities of by-product fruit at prices or terms comparable to those at which Sunkist made the Valencia oranges available to other processors," it is tantamount to an allegation that he was dependent upon us for the acquisition of by-product fruit, which the evidence shows the contrary. He had, in effect, turned his back upon Sunkist as a supplier and was getting his supplies in the years before 1951 from Morgan Ward. [3418]

Now, passing to V, we have not been able to check out the figures that are in this. The 5,400,000 gallons is, I believe, approximately correct. I think Exhibit 11 shows instead of the figure being approximately 3,400,000, that the evidence shows that it was 3,045,000 gallons.

Mr. Williams: Just about 44,000.

Mr. Dixon: Well, I might say at this time for the record, your Honor, that the computation is based upon figures that I thought represented what they apparently did in the record. I have, however, since Mr. Williams directed the change here in the stipulation, and so forth, to my attention, checked these figures, and the actual figure is 4,511,202 gallons, of which approximately 3,044,394 gallons were processed. I am perfectly agreeable to having those figures checked.

The Court: Let's have the figures again.

Mr. Dixon: 4,511,202 gallons, and then the next figure is 3,044,394 gallons.

The Court: All right. May the motion to amend be amended in that manner?

Mr. Fisher: Yes, though we object to the balance of it.

The Court: You still object, but the amendment may be made. The clerk will make the change in the record. Go ahead.

Mr. Fisher: Turning now to the last sentence, it says: [3419]

"Because of the monopoly control by Sunkist and EOP over the quantity and price at which Valencia product oranges were made available to independent processors of single-strength juice other than Tree-Sweet and Silzle, and the aforesaid contracts, plaintiff was unable to and did not process any single-strength Valencia juice in 1951."

There isn't any evidence in the record showing that Sunkist and EOP had a monopoly control. In fact, the evidence is to the contrary, that fruit was purchased by Swayne from other sources, fruit was purchased by TreeSweet from other sources. It can't be said that this would be to conform to the proof. Quite the contrary.

The Court: I think the plaintiff is entitled to argue that point, that there is sufficient showing from which a jury could find that there was a monopoly control, not over every orange, but over such a substantial part of the oranges that, coupled with the price set by Sunkist of $40, and coupled with the TreeSweet contracts, this argument would follow.

Mr. Fisher: I think at the most there was only 66⅔ per cent of the product oranges, of Valencia oranges, which was available to Sunkist or EOP, and it can't be said that that constitutes a monopoly control. I don't think the evidence [3420] will bear it out.

The Court: Well, what do you think would have to be shown? Is there any magic in figures? Isn't it a question of fact from all the evidence in the record?

Mr. Fisher: There are, of course, certain cases where as much as 90 per cent is said to amount to a monopoly control, but certainly not when there is only 66 per cent or two-thirds.

The Court: Of course, the law is, monopolize, attempt to monopolize, or attempt to exercise monopoly control.

I think we better adjourn and take up again at 1:30. It's 12:10 now.

Mr. Fisher: Could that be 2:00 o'clock, your

Honor. We have made other plans for the noon hour.

The Court: Well, we wasted a couple of hours. We will work tonight on instructions then.

Mr. Fisher: That is agreeable.

The Court: 2:00 o'clock. But we are going to keep on going on some of this instruction work. 2:00 o'clock.

(Thereupon, a recess was taken to 2:00 [3421] p.m.)

Tuesday, January 31, 1956—2:00 P.M.

(The following proceedings were had in the absence of the jury:)

Mr. Fisher: If the court please, I think before lunch we were down through paragraph V of Mr. Dixon's proposed amendments.

Now, we object to paragraph VI in which he proposed to add:

"Defendant EOP agreed with TreeSweet to make Valencia product oranges available to TreeSweet, a competitor of Sunkist and plaintiff in the interstate market for single-strength Valencia orange juice, under an arrangement or contract pursuant to which TreeSweet would not be required to purchase product Valencia oranges from Sunkist or any other source, for processing into single-strength Valencia orange juice."

There is nothing in the contract with reference to any requirement to purchase oranges. TreeSweet was privileged to buy elsewhere, and so far as the quantity was concerned the quantity to be supplied to TreeSweet was in the discretion of the supplier. We see no reason, nor is there anything in the evidence that we can see which would justify the amendment of the complaint in the manner specified.

The contract, as a matter of fact, was submitted long [3422] prior to this trial. It had notice of the terms of the contract, and it was attached to our interrogatories way back in 1952.

There is no occasion that we see for the amendment.

As I say, under the terms of the contract, TreeSweet was privileged to buy oranges from any other source, and did.

I think they purchased something like a thousand tons or more from sources other than Sunkist. And the quantity to be furnished TreeSweet under the contract was in the discretion of the supplier. There were no requirements under the contract.

As to paragraph VII, we have no objection to the suggested change there.

As to paragraph VIII, where the proposed amendment is to insert:

"at the Sunkist published selling price for Sunkist single-strength Valencia orange juice, less certain discounts and allowances not available to other purchasers, including the plaintiff here."

The evidence is clear that discounts and allowances were allowed under the Silzle contract, and there is also evidence to the contract that Mr. Swayne was approached for a contract similar to the TreeSweet contract, and he elected not to take it.

Hence the evidence does not support the statement that it was not available to other purchasers. [3423]

The Court: It would be a question as to whether it would be all others or certain others.

Mr. Fisher: As it reads it would apparently be all others.

As to paragraph IX, the proposed additional matter is:

"and at the Sunkist published selling price for single-strength Valencia orange juice."

That relates to the statement:

"Substantially all the single-strength natural orange juice processed by TreeSweet and sold by it during the 1951 orange juice canning season was processed under said contract and was sold in competition to that processed and sold by plaintiff to the canned juice market."

Then they seek to add:

"and at the Sunkist published selling price for single-strength Valencia orange juice."

The evidence in this trial is to the effect that TreeSweet sold at varying prices from the Sunkist price, and not at the Sunkist published selling price for single-strength Valencia orange juice. [3424]

Turning now to paragraph X, where they seek to strike a portion of paragraph F appearing on page 13 of the amended complaint, so that that paragraph would read:

"As a direct and a proximate result of each of the above acts of the defendants and the monopoly control of defendants Sunkist and EOP in 1951" and so forth.

Now, there again we contend that there is no evidence in the record of a monopoly control of Sunkist or of the defendants Sunkist and EOP in 1951, as to the amount and price of product Valencia oranges available for processing. I mentioned that point before in connection with other paragraphs.

Reading on:

"* * * for processing into single-strength Valencia orange juice by independent processors, all price competition between Sunkist, TreeSweet, and Silzle in the single-strength Valencia orange juice processed by them and sold in interstate commerce was eliminated; Sunkist determined, dominated and controlled the price at which such juice was offered for sale in interstate commerce by TreeSweet and Silzle * * *"

The evidence is that there was no requirement that TreeSweet and Silzle sell at the price for which they purchased. They were free to sell at such amounts as they desired, [3425] and there is further the evidence in the record that the price at which juice was offered for sale in interstate commerce was dominated and controlled by Florida. There is substantial evidence in the record to that effect.

Furthermore, the point of price fixing was never pleaded in either the first complaint or in the amended complaint, and were it to be introduced at this stage of the trial, certainly we should have a chance to combat it and there should be a continuance of the trial for that purpose.

Furthermore, the point of the statute of limitations which we have heretofore raised would be applicable to such a change in theory.

Reading on:

"* * * plaintiff was unable to process, can, and sell any single-strength Valencia juice in interstate commerce in competition with that sold by Sunkist, Tree-Sweet and Silzle; plaintiff in an effort to keep its customers for single-strength Valencia juice purchased from Sunkist for sale and delivery to one of its said customers approximately 1,400 cases of single-strength Valencia orange juice at a price substantially in excess of that at which TreeSweet was then purchasing single-strength juice from Sunkist under the contractual agreement [3426] hereinbefore referred to in specification III(d) herein;"

To begin with, that purchase relates to a purchase by Ralph's. That was a purchase by a single customer for the purpose of meeting the requirements of a single customer. The purchase was in intrastate commerce. It was not in interstate commerce at all. Furthermore, it was an accommodation sale only and was on the same terms as would ordinarily be sold for an isolated sale to another canner. There was no difference in the amount of discounts which would have been given in connection with that sale than would have been given TreeSweet or any other canner had they purchased orange juice. It was on the same basis.

Then to continue:

"Plaintiff lost the profits on its anticipated single-strength Valencia juice business in 1951 and was forced to file proceedings under Chapter 10 of the Bankruptcy Act on March 19, 1952."

In other words, they are injecting here the so-called Ralph's sale, not in the Robinson-Patman Act cause, but injecting it in the first cause of action, and certainly the matter of the Ralph's sale has been known for a long period of time. It is nothing where an amendment is required due to the evidence produced at the trial.

We think that paragraph X is particularly [3427] vicious for all of these reasons which we have pointed out.

Now, as to paragraph XI, we have no objection.

Paragraph XII we object to. Again this, if granted, would amount to a change in the theory of the plaintiff's lawsuit. There is no evidence that "and co-conspirators ELP, TreeSweet and Silzle have conspired to and in fact have monopolized." There is no evidence of that. It was not pleaded in the amended complaint. It certainly comes now too late for them to seek to change the theory of their lawsuit. The theory of that lawsuit was based on the theory that we had a lawful monopoly and here they are switching from that viewpoint. [3428]

As to XIII, we have no objection to XIII, nor to XIV.

As to XV, we certainly do object. In that paragraph there is an attempt to bring in the Hyland-Stanford and General Foods contracts and allege them as part of their claim for damages.

Your Honor, those contracts were introduced, and as I recall it they were offered—we did not object to them, but they were offered on the understanding that they were simply being offered as background. Now, then, if they are to attempt to predicate, as they do here, the damages on that, then certainly it seems to me that the trial should be continued, because we should have an opportunity to combat that.

Furthermore, the Hyland-Stanford contract goes years back, and there would be the matter of the statute of limitations' point which we raised in connection with the Silzle contract.

But above all else, through this proposed amendment they are attempting to base their cause of action for damages on the two contracts which, when they were introduced in evidence, it was on the understanding that it was merely background.

The Court: Would you still object to XV if the plaintiff could not count upon those contracts as causes of action for damages, but merely argue their part in the picture as a whole? [3429]

Mr. Fisher: We anticipate that they would argue on the picture as a whole, we anticipated that. I think that was in connection with the background, but certainly they should not bring them into the complaint here as a part of their claim for damages.

The Court: Mr. Dixon, I want to hear from you on certain things here.

In paragraph X, are you pleading now——

Mr. Fisher: Your Honor, Mr. Fowle has a thought that perhaps should be expressed, if your Honor does not object.

The Court: All right.

Mr. Fowle: I simply thought, your Honor, in answer to your last question, that even to permit plaintiff to argue this matter to the jury would be prejudicial.

This is an allegation with respect to transactions, which was not contained in the amended complaint. Really, in my view, it has nothing to do with the theory of the amended complaint. I don't believe there is, really, any evidence in the record, anyhow, that there was an exclusion of other marketing cooperative organizations, such as Independent Fruit Growers Association.

Mr. Ward didn't testify that there was any exclusion. He said he tried to do business with them, but wasn't able to.

All sorts of inferences could be drawn from that that are [3430] exactly as good as the inference that he was being excluded.

In any case, it seems to me that it would be prejudicial to argue this matter to the jury or to allow it to be argued.

The Court: You are talking now about XV?

Mr. Fowle: Yes, I am.

The Court: All right.

As to X, Mr. Dixon, are you for the first time raising the question in this complaint of price fixing?

Mr. Dixon: Not as a factor for which the plaintiff claims any damage, your Honor.

The Court: Wait a minute. By that you mean you are not listing it now as one of the specific things——

Mr. Dixon: No.

The Court: ——which like the six things already in the complaint you contend are the cause of your damage?

Mr. Dixon: Definitely not, your Honor.

The Court: Secondly, has it been referred to directly or indirectly in the amended complaint as it stands to date?

Mr. Dixon: Yes, I think it has basically, because the first cause of action to which this amendment relates charges that the defendants entered into contracts, among other things, which had the effect of restraining trade in interstate trade and commerce.

I might digress for a moment.

We have heard much in this case previous to the opening [3431] of the trial, and even during the trial on the motions to dismiss, as to the necessity for allegations in any private damage suit showing public injury. I think the complaint already stated sufficient allegations to show public injury to the extent that it may be required under the cases, but this allegation, your Honor, is another indication or another allegation, which I think is properly in the case, because as your Honor will note in the instructions which we have filed with the court, which we would request be added here, that this type of thing, if true—in other words, it is a question of fact—would be corroborative and supporting evidence of the existence here of the combination which the plaintiff charges violates the antitrust laws in the first cause of action, and which resulted in restraints of trade.

Now, that is all this allegation does, your Honor.

The plaintiff does not contend that it was damaged as a result of any arrangement of this kind, any more than it claims that it was damaged as a result of the Hyland-Stanford and General Foods contracts, but those contracts, as well as the effect of the contracts complained of in this case between TreeSweet and Exchange Orange and between Silzle and Exchange Orange had this effect.

That is all this allegation means.

Now, that is important, your Honor, in the case to the extent that it may be evidence of the existence of the combination [3432] charged to exist here by the plaintiff in this complaint. But it is not the basis of any claim of damage, obviously.

In other words, I did not know, frankly, until all the evidence was in in this case, and I had the benefit of Mr. McMillan's testimony, and of the testimony of the representative from Silzle—I had endeavored to get that information before, but was not successful in doing so until we elicited it here from the testimony of those two witnesses, that that is actually what happened in these contracts, your Honor. And I think the record is clear to that effect and that is why we are now asking that this allegation be added to the allegations made in the complaint, as evidence of the existence here of a combination which the plaintiff charges violates the antitrust laws.

I think in the instruction that we have submitted to your Honor you can see on this point when we get to it that there is no claim made that this type of thing, if a jury so finds, was necessarily—I mean that it in and of itself damaged the plaintiff, that is not the claim.

The Court: I intend to see that the jury is instructed that plaintiff has the burden of first showing a violation of the antitrust laws;

Second, showing that its damage resulted from one or more of the six matters pleaded in the first and second cause; [3433]

And, thirdly, the exemption of the Bireley contract, and other similar contracts, from the complaint for damage.

Mr. Dixon: This is not an attempt to extend the issues of the lawsuit, your Honor. Rather, it is an active allegation which will limit the issues of the lawsuit insofar as the second cause of action is concerned, involving Section 2 of the Sherman Act.

Your Honor will note by reading the amended complaint, and the second cause of action, that not only the original complaint, but the amended complaint, as well, alleged two things with reference to violation of Section 2. Namely, that the defendants had combined and conspired to monopolize, and, second, that they had attempted to monopolize. [3434]

Now, either one of those allegations constitutes, separately stated, if proved, a violation of Section 2 of the Sherman Act.

Now, what has been done by this amendment is to take out of this case entirely any reference to the attempt part of Section 2 and to limit the issue under Section 2 or under the second cause of action entirely to the claim that there was a combination here to monopolize the citrus juice products processed in California and sold in interstate commerce by the things alleged in the first cause of action, I mean those facts and then any additional facts that are added here, such as Paragraph XV.

Now, Paragraph XV which we have suggested and requested be added here brings into focus the Hyland Stanford contracts and the General Foods contracts solely for the purpose of indicating the existence here on the part of the defendants of the conspiracy or combination to monopolize the citrus juice market. How? These contracts evidence that, your Honor. The plaintiff does not claim he suffered any damage from them. He couldn't. But certainly if they are in this case at all, they are admitted for the purpose of showing the existence of that alleged combination in violation of Section 2.

Now, these allegations in 15 clearly are supported by evidence already in the record, the testimony here of Mr. [3435] Ward and others, how he was restricted in the sale of his product, I mean of the oranges he had for sale to Hyland Stanford, I believe it was, after 1950, when this kind of contract that is already in evidence was entered into, which prevented them from purchasing oranges from Ward or from any other source except under very restricated conditions which, of course, never came into effect.

So that I just wanted to point out in passing that the purpose of all of these amendments, your Honor, to the complaint is to sharpen up and put in focus the issues in this case, and that I think is done more clearly now that we know what the evidence in this case actually is, than I could certainly have hoped to have done at the time I filed the amended complaint.

There is no surprise here. There is no additional claim made by any of these amendments that the plaintiff suffered any damage by reason of anything that is asked to be added to the complaint here, but the allegations which we do ask be added to the complaint do in my opinion support the general allegations of the existence here of the combination to violate both Section 1 and Section 2 of the Sherman Act.

I might add further that in connection with this whole matter, the plaintiff will probably dismiss the third cause of action involving the Robinson-Patman Act before this case goes to the jury with the further purpose of focusing [3436] the issues in this case on what I regard as the basic complaint against the defendants as now alleged in the amended complaint, and as would be further, perhaps, clarified by the addition of the amendments that we request be added to the complaint at this time.

The Court: All right. The objections to the motion to amend are overruled. The motion to amend is allowed with the understanding that plaintiff will not be entitled to rely for damage upon any matters contained in these amendments, that the plaintiff is now limited to six items as alleged, and that these items are matters which go to enlarging the form or explaining the complaint or eliminating some of the issues such as have been discussed by counsel.

With that understanding and ruling in mind, any question of statute of limitations is obviated in the matter.

Mr. Fisher: If the court please, we feel very strongly about this, particularly changing and bringing in the Hyland-Stanford and General Foods contracts.

The Court: This doesn't change a thing. When they were admitted, the jury were told that the plaintiff was not counting upon them, could not count upon them for damage, and they were introduced generally for other purposes in the case, and that is exactly what the situation is here. I would apprehend that the plaintiff could argue this matter even without this amendment. [3437]

Mr. Fisher: But, your Honor, this does inject into this case the matter of price fixing, which was not in, and we feel we should be accorded an opportunity to meet that, and the defendants will therefore move for a continuance of the trial, say for two weeks from next Tuesday, in which to meet it.

The Court: The complaint alleged on page 10 of the amended complaint, that the defendants, and so forth, combined, conspired with each other, and entered into contracts which had the purpose and effect of unreasonably restraining interstate trade and commerce and so forth.

Price fixing is nothing new to you gentlemen. I called your attention to it a long time ago. I can't cite you the record, where, as I read the amendments, I think it was to the Silzle contract, they were open and shut price-fixing provisions, permission to sell certain juice in Arizona or somewhere else if it would be sold at a certain fixed price.

It can also be argued, although that amendment definitely in my opinion was price fixing, the amendment to the contract, it could also be argued that since TreeSweet and Silzle bought the juice from Sunkist based upon a formula that involved Sunkist prices, that inferentially there was price fixing of the juice to TreeSweet and Silzle. Certainly TreeSweet and Silzle wouldn't buy juice at a certain price from Sunkist under those contracts and then sell it for [3438] a less price. That would be elemental. They wouldn't exercise their option to buy unless they were intending to sell at something that had some relationship to the price they bought it at.

How good that argument is, I am not going to pass on, or whether it would persuade me, but I think it is an argument available to plaintiffs.

I called attention of you gentlemen a long time ago to the price-fixing provision in the Silzle contract.

Mr. Fisher: Your Honor, I well remember that incident and what you said at the time when you referred to the February 1, 1952, amendment to the Silzle contract. You said, "Perhaps I am injecting into this case something that shouldn't be there," if I recall your Honor's words.

The evidence has explained that, and that it was not the intention of the agreement that they fix the prices at which Silzle should sell.

The Court: That is your contention and you may argue that.

Mr. Fisher: I think all of the evidence points towards that, your Honor.

The Court: Here was a general allegation in the amended complaint. It is an allegation, as I recall, that was carried over from the first complaint. Certainly the defendants, with as able counsel as you have, must have had some inquiry [3439] or concern about how these contracts had the purpose and effect of unreasonably restraining interstate trade and commerce. I suppose you could have found out specifically what the plaintiffs meant by that.

My ruling will stand.

The Clerk: Is the amendment to be filed in writing or not?

Mr. Fisher: Your Honor, might we have a few minutes' recess to confer among ourselves?

The Court: For what purpose?

Mr. Fisher: To determine whether there is anything further we would want to present in this connection.

The Court: All right.

(Recess.) [3440]

Mr. Fisher: May the court please, without desiring to reargue the matter of the amendment, I would like to make this statement: That the defendants have been taken by surprise by the injection in the amended complaint of the charge of price fixing;

and, also, by paragraph XV of the proposed amendment, which is the one that brings in the Hyland-Stanford and General Foods matters, and which says there were other arrangements which gave EOP first call on the processing facilities of the company to the exclusion of other marketing cooperative associations, such as Independent Fruit Growers Association.

Now, we called no witnesses from Hyland-Stanford nor General Foods. We have not conferred with them, and in order to adequately combat that it would be necessary for us to confer with them and to produce evidence to combat it, and we, therefore, move for a continuance of the trial, and I will shorten it for a continuance until one week from today, in order to produce evidence with which to combat these two new features of the complaint.

Further, we would like to have until Friday morning in which to file our answers to the proposed amendments.

The Court: As to the price fixing features, I don't think you are taken by surprise. The contracts were contracts which your clients entered into, you knew what the contracts were, you knew from the date of the first complaint [3441] that there was a general reference to contracts generally: you knew what contracts were entered into. There was a reference in the first complaint filed to the Tree-Sweet contract. Subsequently, by amendment, there was a specific reference to the Silzle contract.

The court, itself, called attention at one time to the price fixing features, which seemed to the court was clearly price fixing.

The amended complaint alleged that the contracts—and the original complaint also—have had the purpose and effect of unreasonably restraining interstate trade and commerce.

I would assume that competent counsel both here in Los Angeles, a firm in Corona, and a firm in Chicago, would attempt to analyze what was meant by that language, and proceedings could have been taken to find out definitely what particular effort or purpose the plaintiff was talking about. It is general language and proper language in the complaint.

I think the defendants have known all along that the plaintiffs were resting practically their entire case on the TreeSweet and Silzle contracts, and such inferences as they could argue to a jury that a jury might draw from those contracts.

Certainly, the price fixing element is an inference which a jury would be entitled to draw.

As to paragraph XV of the proposed amendment, you also [3442] must have contemplated when the contracts went into evidence, at the time the court told the jury the plaintiff was not relying on them for damages, but they were introduced for general purposes, that the plaintiff's would, therefore, make use of them generally in connection with the case.

And as to this particular thing that you talk about, maybe I read it differently than you do, but it says, "which gave defendant EOP first call on the processing facilities of said companies"——

I think that is right in the contracts, as I recall.

Mr. Dixon: That is correct.

The Court: Then the allegation says,

"to the exclusion of other marketing co-operative organizations, such as Independent Fruit Growers."

What plaintiff is probably going to argue—there is nothing said in the contract that excluded a particular independent or particular independents, but if the contract said it gave EOP first call on the facilities of Hyland-Stanford and General Foods, certainly the plaintiff would be entitled to argue that if EOP had first call on their facilities, therefore everybody else, including A, B, D, Independent Fruit Growers, any other co-operative, had second or third call, whatever it might be on the facilities.

As I see the record, there is no contention here that the contract makes that reference to it. [3443]

Plaintiff, in fact, is being fair with you and in substance telling you what it is going to argue to the jury, that is all it amounts to.

And if the plaintiff had argued this, without this amendment, and you had objected, I would not have stopped the plaintiff, because the contracts, as I recall, say that EOP has first call on the processing facilities. So supposing we got to the jury and the plaintiff had started to argue that and said under this contract EOP has got these companies tied up, if Independent Fruit Growers went to them to do work for them they would have to stand in line behind EOP, and if you had objected and said that is not a proper argument, I would have overruled you.

So all this amounts to is that the plaintiff is telling you in black and white what it is going to argue to the jury, and I think it is a proper argument.

How persuasive it will be, I don't know. You have got arguments that you can make. They may be more persuasive than the plaintiff's.

Now, as to time to answer, the procedure in this thing, I have two suggestions. I think a further Amended Complaint should be filed incorporating these provisions in it, so we will have something tangible here to work on. That should be filed promptly.

The defendants should have a right, if they desire, to [3444] file answers to this complaint as [3445] amended.

* * *

Mr. Dixon: Then for the record, your Honor, at this time we will make that decision and will dismiss the third cause of action set forth in the amended complaint.

The Court: All right. The motion is granted. The amended complaint, then, will contain the first two causes of action with only the changes as indicated by this amendment [3447] to conform to the proof. Now, you can draw your answer accordingly.

Mr. Fisher: And will be served and filed when?

The Court: The plaintiff said they will have it in here Thursday morning, and I want the answer here Friday morning. You could have your answer ready to file before their complaint is in. There are no changes in number.

Mr. Fisher: We will do our best, your Honor.

The Court: You know exactly what the amendments will be. It means work on the part of both of you.

The motion for continuance is denied.

* * *

(The following proceedings were had in chambers:)

The Court: First, the Federal Rules require the court to inform you as to what instructions the court is going to give. As a matter of practice, we follow the procedure in this district whereby at the conference we go over the instructions, try to reach agreements, if we can, and if not, the court tells you what instructions, at least in substance, he is going to give and what he is going to deny.

The rules provide that after the instructions are given, you are to be given an opportunity out of the presence [3448] of the jury to make your objections to the instructions.

In a big case, sometimes in a small one, that is difficult for the reason that instructions, of course, as read have no numbers, so we have adopted the practice here in Southern California and elsewhere in California of making our record at the conference and having a stipulation that at the time you are called to the bench after the jury is instructed, that you may then incorporate by reference the objections you have made here in chambers with the same force and effect as if you then repeated them, and you may make additional objections which might occur to you on the spur of the moment.

Sometimes you go over something in black and white, and then when you hear it read—I know I have stopped in the middle of reading something and knew that something was wrong, after we had torn it apart at conference.

There has been a case or two that wasn't too clear about it. That procedure I took up in the Las Vegas Plumbers case, 210 F. (2d) 732 at 744. I outlined the procedure and the Circuit agreed it was acceptable and also cited the other cases in which there might have been some question, so that the result was a summarization up to that time of what we have had, and I don't know of any case since then. It means authority in the Circuit for this procedure.

I don't see any question about it. If anybody has any objection, they can voice it, but you incorporate by [3449] reference the objections you make here in chambers with the same force and effect as if you made them again out there after the instructions were given, plus supplementing them, and it seems to me a much more orderly procedure.

* * *

Now, first, this is a very crude outline, but I want to give each of you a copy of it, some kind of outline of what we ought to cover in the instructions. There may be others you think should be added.

No. 3 can go out, can be stricken, which refers to the Robinson-Patman Act and the Clayton Act.

No. 4. You notice I say Judge James' general instructions. For you strangers here, Judge James was a very fine judge we had on this bench, and he had a set of instructions on conspiracy that have been printed up and they are really the backbone of what we still have around here on [3450] conspiracy. I haven't pulled them out yet. The only trouble is they are lengthy. I may cut them down, because he went into conspiracy from one end to the other. As a matter of fact, I could either pull out what I am going to use or let you look at the whole document.

Mr. Fisher: Where is that found?

The Court: I don't know as it has ever been published. There have been printed copies kicking around here. I have a printed copy and I will be glad to let you take it overnight and you can look it over.

Mr. Fisher: We would appreciate that.

The Court: You knew Judge James?

Mr. Fisher: Yes.

The Court: You have a good idea that they are pretty thorough, then. That's the trouble with them. They are rather extensive.

5 is the monopoly question.

6 is proximate cause.

Public injury, 7.

8, statute of limitations.

Now, the defendants have proposed no instruction on the statute of limitations. I take it by that that you waive presentation of that question to the jury. Actually, it is a legal question.

Mr. Dixon: I don't think it is in the case.

The Court: Although it is treated as a defense.

I don't think it has any bearing with the jury, and if agreeable we will just strike it out of here.

Mr. Fowle: My recollection, your Honor, is that we did not propose an instruction on the statute of limitations question because I, at least, I think in the middle of the night somewhere along the line, assumed that your Honor's prior rulings had disposed of the matter.

The Court: That is my view. The only reason I left it in here is that you have it listed as a defense and I assumed you were not offering any because it is really a matter of law. I don't know as there is anything for the jury to decide on that. Either the pleadings are proper or they are not. It is a pleading question and not a proof question. I don't think there is any question of fact there, but I just call it to your attention in passing.

Mr. Fisher: May we reserve that?

The Court: All right, but you have proposed nothing on it and I think it has no place here.

9, that the damage must result from the specific acts or conduct alleged.

10, damages generally.

11, the defendants' exemptions.

12, how they lose the benefit of them.

13, the co-conspirators. [3452]

14, burden of proof on plaintiff.

You can strike out the form of verdict on the third count.

Now, that's a very broad outline. I think that we ought to keep it in mind in trying to work on these instructions.

Mr. Williams: I assume the attempt to monopolize is out in view of the amended complaint.

Mr. Dixon: Yes.

The Court: Were you basing that on the language of the Times-Picayune case?

Mr. Dixon: Yes, your Honor. I think it would probably be confusing to the jury in particular to have the attempt to monopolize charged in the case. That is the reason why I amended the complaint, to eliminate it.

The Court: Are you a mind reader?

Mr. Dixon: No, I am not, your Honor.

The Court: Because I just got through reading the Times-Picayune case.

Mr. Dixon: Well, I could have saved you the reading of it, your Honor. But there are sometimes some fine distinctions that can be drawn from the combination to monopolize and attempt to monopolize. I think in the present status of the law they are distinctions that are not perhaps warranted and are based on the assumption an attempt to monopolize requires a greater degree of proof in that it requires the [3453] proof of a specific intent.

The Court: Pardon me just a minute.

I think we will first take up these form instructions and run through those.

If you have any objections to them we will stop and you can make your objections, and I will rule on them as we go along.

I will identify them by this form number that we use.

Incidentally, in that connection you have this problem: When the instructions are read to the jury of course the record as read is really the instructions, and I never file, very seldom file the instructions that I read from, because they are all marked up, so after the instructions are read they appear, of course, without any numbers, and I have had this problem come up before with counsel, and I think the simplest thing to do, in the event there is an appeal, is to go through them, have available my scratched-up set, and you can then insert in the record, if you want to, the numbers that we use in our conference. Then you have a record where you can refer to the instructions. Otherwise you have the problem of having to use the language. And you can save a lot of time if you will later number your instructions. As a matter of fact, the reporters might do that, or it could be done with ink in the record.

I am referring to the instructions after they are given to the jury. I think the easiest way to do would be for [3454] counsel to take my rough draft and merely number the transcript.

Mr. Fisher: That is agreeable.

Mr. Dixon: That is agreeable to plaintiff.

The Court: I propose to give Court's 1, the province of the Court, and Court's 2, province of the jury. And in the blank that you have there, where it says "the complaint of the plaintiff," I would insert "Winckler & Smith Citrus Products Company, and Ronald Walker, Trustee and Intervener."

That is right out of the caption of the complaint. And then in the other blank, "the defendant

Sunkist Growers, Inc., a corporation, sued as the California Fruit Growers Exchange, and the Exchange Orange Products Company, a corporation."

Court's 2-A, all persons equal.

Mr. Fowle: If the Court please, on No. 2-A it just occurred to me that that didn't quite fit this situation. I mean it is as though an individual were suing a corporation. I just wonder—I wouldn't say we have any specific objection to it.

The Court: We can change it.

Mr. Fowle: You see what I mean. You don't have an individual.

Mr. Dixon: Take the words "persons including" out if you want to.

The Court: The trustee is a person. [3455]

Mr. Dixon: That is true.

The Court: Actually the thing is put in to guard against a situation where some juror may say, "The defendant is a corporation, so what are we worrying about?"

That is what it was put in for.

Mr. Fowle: Yes.

The Court: You do have an individual here as a trustee, one of the plaintiffs.

Mr. Fowle: He stands in the shoes of the plaintiff, does he not?

The Court: Or the plaintiff stands in his shoes. I don't know which it is.

Mr. Fowle: His rights are no greater or no different, as far as the defendants are concerned, than the rights of the Winckler-Smith company.

The Court: I seriously question whether the corporation, itself, has any right. I think the intervening trustee has probably all the rights.

Mr. Fisher: I am not so sure that that is true. I remember investigating it at the time it first came up, and the trustee, I believe, had one of two choices: either to be substituted as party plaintiff or to intervene. I think in either event he would have no greater rights in the lawsuit than the corporation would have.

The Court: What about just using the first sentence? [3456]

Mr. Dixon: I think the whole thing——

The Court: I see no harm in that.

Mr. Dixon: The first sentence is all right as far as the plaintiff is concerned.

Mr. Fisher: I think the first sentence would be preferable.

Mr. Fowle: All right.

Mr. Dixon: Take the second and third out?

Mr. Fisher: Yes.

The Court: All right.

Court's 3, preponderance of the evidence.

These are the ones I propose to give.

Court's 4, direct and indirect evidence.

Mr. Fowle: I had one question about that, your Honor. The reference to presumptions, here; are there going to be instructions with respect to presumptions?

The Court: First the question is, are there any presumptions in the case, and I have often wondered about it, too. But the obvious answer is that you have the presumption of a witness telling the truth. Any time you have a live witness you always have that presumption.

What other presumptions there are, I don't know. I customarily give it.

Mr. Fowle: Well, I don't suppose we have any objection to it. [3457]

The Court: Court's 5, evidence and stipulations.

Court's 6, credibility of witnesses, discrepancies.

Court's 6-A, opinion evidence.

Court's 7, impeachment.

Court's 8, burden of proof, demonstration not required.

Mr. Fowle: I would have one comment to make there. As your Honor knows, we have submitted a couple of proposed instructions that are related to this, and I think we would want an instruction which tells the jury that if their minds are in even balance they must find for the defendants, or if they are faced with a situation from which you can draw one of two inferences, one, that the conduct in question was lawful, one that the conduct in question was unlawful, they must draw the inference that the conduct in question was lawful, provided the two inferences are equally—or the conduct is susceptible of the two inferences on an equal basis.

The Court: That is why I go over these things first and then get them out of the way, and then certain of your instructions are eliminated, from both sides, and whether I give that, or not, we will see when we get there. We will take yours up later.

That is a customary instruction in criminal cases but you don't have a request for it very often in civil cases.

And in criminal cases, the one instruction they always used to request was that the verdict must be consistent with [3458] all reasonable hypotheses of guilt and inconsistent with all reasonable hypotheses of innocence, and Tom Clark here within the last year in a decision by the Supreme Court analyzed the criminal cases and held it was a confusing instruction, and we have eliminated it in our criminal instructions. It is not exactly the same problem. We will get to that later.

No. 9, the number of witnesses.

No. 10, a single witness.

Now, 12-A, we would have to change. I don't know whether either one of you have done any work on it or not. Maybe 12-A is not the one. There is one of them we have to change.

Mr. Fowle: It deals with proximate cause.

Mr. Dixon: I think, your Honor, I noticed that what follows appears to deal primarily with personal injury cases. I am not sure whether that was the intention of the instruction.

The Court: That is the one I was talking about to modify.

Mr. Fowle: Is that 12-B?

The Court: Yes, 12-B.

12-A is a general definition of proximate cause.

12-B is more than one proximate cause.

I had roughed up an instruction to the effect that the burden was on the plaintiff to show that their injury, if any, was the result of acts and conduct, but that there might be more than one cause, and on the question of causation if the jury found that acts and conduct were not any cause, [3459] then the verdict should be for the defendant. But if they found that acts and conduct of the defendants were one cause, co-operating with other causes, then the verdict on the issue of causation would be for the plaintiff. In other words, as long as wrongful acts of the plaintiffs were one of the proximate causes——

Mr. Dixon: You mean the defendants?

The Court: Of the defendants, was one of the proximate causes, then the plaintiff is not out on the question of causation.

Mr. Fowle: Might we wait until we see the instruction?

The Court: Yes, I think we had better lay 12-B aside and consider it later. [3460]

Now, 12-C. Some instruction along this line should be given, but whether this is the one or not is the question. It may have to be changed. If we use this, negligence would have to go out.

By the way, can you stipulate that this 16 man executive committee acted as agent for the defendants?

Mr. Dixon: I think the record shows, Your Honor, not only the 16 man executive committee, but also the so-called four member management committee was actually operating the business of Sunkist and Exchange Orange.

Mr. Williams: Are you taking into consideration the Capper-Volstead scope of exemptions?

Mr. Dixon: This is on agency.

Mr. Fowle: As I recall it, the evidence is that the 16 man joint executive committee ran the products department of Sunkist and that's all, and the evidence with respect to the so-called four man management committee is to the effect that it really wasn't a committee at all. It was just four managers who met. They had no formal status and it was not a committee that ran a business or anything.

Mr. Dixon: It certainly ran the business of Sunkist and Exchange Orange.

Mr. Fowle: I agree you tried to make it look that way.

Mr. Dixon: If they didn't, who did? They testified they had the sole function of setting prices, and so on, and [3461] so forth, and they all were responsible to your 16-man executive committee.

The Court: Well, let's take one thing at a time.

Mr. Fisher: We couldn't stipulate to anything like that.

The Court: First, as far as the 16 man executive committee composed of officials of Orange and Lemon, can it be agreed they acted for and in behalf of Sunkist?

Mr. Williams: How do we get Lemon in there?

The Court: That is what the 16 man committee was made up.

Mr. Fisher: The 16 man executive committee was made up of eight from the board of Exchange Orange Products and eight from the board of Exchange Lemon Products.

The Court: That's right, and they acted for and in behalf of Sunkist, didn't they?

Mr. Fisher: No. As a matter of fact, their duties, their organization, with respect to what we have here in controversy, their function was the products department of Sunkist and not the processing by Exchange Orange Products at all.

Mr. Dixon: Let me ask this question. Is it the position of the defendants that the acts complained of here were not performed by officials of Sunkist and Exchange Orange pursuant to the performance of their duties? You have put in nothing thus far to indicate that. [3462]

The Court: Well, let's pass it up if you can't get a stipulation. I will rough up something here. I don't think either one of you has proposed anything. I will use part of 12-C and I will probably say something like this.

That Sunkist and Exchange Orange, Exchange Lemon, Silzle, TreeSweet, or whatever it is, are corporations; that corporations can only act through their officers, agents or employees, or through boards or committees, and so forth, that may be set up.

That is a question of fact for the jury to determine, in whose behalf the 16 man executive committee and the so-called four man committee—probably just call it the four man committee, not executive committee—acted. That leaves it wide open.

I thought probably there might have been some agreement on it and I could put your stipulation in, but I am afraid you are not going to be able to agree. I will rough something up on that.

Are there any other committees involved here, or boards?

Mr. Dixon: They have the executive committee of Exchange Orange in addition to the 16 member executive committee.

The Court: All right. Pass up 12-D also because that is slanted towards a negligence case. What I was thinking [3463] about were the various concurrent causes.

I will give 13, striking out reference to the accident, and changing his to its. It will be something like this.

Plaintiff alleges that it has sustained injury resulting proximately from the six specific items or matters set forth in the second amended complaint, and has sustained general damages in the sum of—what did your complaint pray for? $600,000?

Mr. Dixon: I think so, Judge. Six or eight.

The Court: Well, I have got it right here.

Mr. Fisher: I think it was eight.

Mr. Dixon: I think it was eight, judge. Yes, it was.

The Court: $800,000. Not prayed. Your prayer would be trebled.

Mr. Dixon: Well, claimed.

The Court: Strike out the additional damages, and so forth. These allegations are not evidence of the plaintiff's claim and must not be considered by you as evidence.

Mr. Fowle: I am not quite sure I follow this. In the general sum of——

The Court: The same, general damages in the sum of $800,000 period.

Mr. Fowle: That's all there is to the first paragraph?

The Court: It will read: [3464]

The plaintiff alleges it sustained injury proximately resulting from the six specific items or matters set forth in the second amended complaint, which I am going to tell them about later, and has sustained general damages in the sum of $800,000. These allegations, and so forth, are not evidence.

Then 13-A is much the same.

13-D. I will have to change "him" to "it" and things of that sort.

Mr. Dixon: You will have to add, "the acts complained of" instead of "accident," won't you?

The Court: Yes, "acts complained of."

13-E, speculative damages, not permitted to award them.

13-G, polling plan, they cannot go in and write down averages.

15, court's comments on the evidence.

16, court's questions to the witnesses.

17, effect of instruction on damages.

18, duty to deliberate together. Verdict must be unanimous.

Mr. Fowle: May we pause for just a moment, your Honor?

The Court: Yes. Which one are you looking at?

Mr. Fowle: Looking at the last paragraph of 18.

The Court: 19, communications from the [3465] jury.

20, election of foreman and form of verdict.

Mr. Fowle: I would like to say in connection with that that we haven't yet, and perhaps won't be able to phrase them, but we have in mind submitting to your Honor requests for special interrogatories to the jury along with the general verdict.

The Court: What type of special interrogatories?

Mr. Fowle: Well, just as an example, we had in mind a special interrogatory which would ask whether or not the jury finds that there is public injury, and which would ask whether or not the jury finds that there is a conspiracy consisting of so-and-so, so-and-so, so-and-so, and so-and-so; whether or not each of the six acts performed were performed pursuant to the conspiracy with the purpose and effect of eliminating the plaintiff as a competitor. Things of that sort.

Until we had a conference of this sort with your Honor, we weren't quite ready to frame these interrogatories. It takes some pretty close work to get them exactly right.

The Court: I was thinking about this the other night. I am not as bad off as you fellows, but I wake up at night thinking about this case. I was thinking about, of course, the third cause, which is now out.

I was thinking about the first two causes, and if there was a general verdict for the plaintiff, I was thinking [3466] of possibly one interrogatory.

Have you based your verdict on, one, Section 1 of the Sherman Act, conspiracy, combination and contract; Section 2 of the Sherman Act, monopoly; 3, or both. I think the jury is entitled to base it on base or one or the other. However, I think the giving of special interrogatories is in the discretion of the court. I had a sad experience on special interrogatories. It turned out all right. But when I tried the treason case, I proposed 13 special interrogatories on the 13 overt acts in the case. Judge Mathes then went me one better and he proposed 104 special interrogatories. He took each overt act as applied to the indictment and broke the indictment down into the elements, and—what did he have? Eight acts. He had eight elements included, so he had eight times thirteen. He had 104 acts or interrogatories that he gave the jury. That almost killed me when that happened.

The windup of it may have been all right, because when the jury finally came in, they had been out a week and there was a contention made the jury had been coerced, but the jury found about 18 of the overt acts. They went down them, the first six, skipped seven, went to eight, filled it out, then skipped nine, went to eleven. So we had a beautiful argument that the jury couldn't have been coerced. They had 104 special interrogatories to fill out and it showed they [3467] had been deliberating, picking and choosing, and so forth.

But you can overdo this special interrogatory.

special verdict business. I think anything we do in that regard has got to be reasonable.

Mr. Fowle: We had not intended to submit anything like 100 interrogatories, I can assure you that. [3468]

The Court: I hope not.

Mr. Fowle: I don't have time, none of us have time, Judge, to put together 100 interrogatories. It is difficult enough to put together a dozen.

The Court: Tell me, on this law of civil conspiracy have you got any law to the effect that you have to have a finding on which of the specific acts in the complaint they base their verdict upon?

Mr. Fowle: I don't believe so.

The Court: You see, as a matter of fact on the criminal side where the rule is much stricter, it never opened that up, except possibly in the treason cases, where in a footnote the Supreme Court had indicated there should be separate verdicts, or interrogatories as to the overt acts. But in your criminal cases, for instance, if the man is charged with forging and uttering, while it goes to the jury on a general verdict of guilty or not guilty.

Some day a court may open it up in criminal cases, but they never have.

But I don't know of any civil cases, take a negligence case where you allege the plaintiff was speeding, that he didn't have his lights on, and half a dozen things, and it goes to the jury on a general verdict, and that is the end of it.

I would like to avoid making as much new law in this [3469] case as we can.

We will talk about it later when you get them ready.

When will you have them ready?

Mr. Fowle: I would think we would have them ready by Thursday morning.

The Court: I am going to take up plaintiff's instructions first, but pause for one minute on defendants' instructions.

You have a series of instructions on directed verdicts, and we can eliminate those instructions right now.

I propose to reject defendants' A and B. And C is out.

Is there any record that you want to make on that?

Mr. Fowle: In that connection, your Honor, we propose of course to make a motion for a directed verdict at the close of all the evidence, in any case, and we felt that in tendering instructions we would be remiss if we didn't include such instructions as this, and we will simply object, to make our record, to the refusal of the court to give such instructions.

The Court: You may also incorporate by reference the motion for directed verdict that you are going to make. This merely is putting in black and white and raising the same question another way. It is satisfactory to me that this motion you are going to make, and the grounds and reasons for it may be incorporated as part of your record why I should give A and B.

Is that satisfactory? [3470]

Mr. Fowle: Yes.

The Court: Now, skipping. Defendant's Instruction 26 is out, because of the dismissal of the third cause. These were all instructions for directed verdicts.

27 is out.

Mr. Fowle: I take it you are referring to the plaintiffs'?

The Court: No. Defendants'. I am just eliminating some of these matters.

28 is out.

29 is out.

30 is out.

31 is out.

32 is out.

33 is out.

They all concern the third cause.

Now, taking up the plaintiffs'.

Plaintiffs' 1 I would reject on the ground it has been covered by my general instructions.

Is that satisfactory?

Mr. Dixon: Yes.

The Court: Plaintiffs' 2.

Mr. Dixon: The words "of combining" should be inserted after the word "guilty" on line 5.

Mr. Williams: Object to this instruction upon the ground that under the evidence Exchange Orange and Sunkist [3471] Growers cannot conspire under the Capper-Volstead Act, because they are both co-operatives owned by the same growers.

The Court: Let me ask you, are you going to leave Lemon in the case?

Mr. Dixon: Only as a co-conspirator, your Honor. The subject matter of the restraint here, of course, is citrus products, primarily single-strength citrus juice. Exchange Lemon comes into the picture perhaps in two ways. First, as a processor at cost for Exchange Orange, which, standing alone, of course, would be perfectly proper and legal.

And, second, in making lemons available to TreeSweet under a basis other than a direct sale.

That is the only way in which they come into this case at all, and for that reason they were dismissed from the case.

The Court: Are you going to rely upon the two acts which are part of six that involve Lemon processing for Orange and Orange processing for Lemon?

Mr. Dixon: No. It is part of the evidence which shows the existence of a combination between two co-operatives. In other words, there isn't any question but what Sunkist and Exchange Lemon are separate corporations. It is obviously of aid to any combination of the kind alleged in the complaint here for Lemon to make its facilities available to Orange, and vice versa, and in addition thereto, to prefer and make available its product, as it did, to TreeSweet. [3472]

The Court: Are you going to withdraw those two items as causes of damage?

Mr. Dixon: Yes; I think they can be withdrawn, except as part of the agreement or combination charged in the complaint.

The Court: Well, you analyzed it. It seems to me in view of the Capper-Volstead Act and the Clayton Act, that these co-operatives could conspire with third parties.

Mr. Dixon: Could?

The Court: Yes; could.

Mr. Dixon: Yes.

The Court: But I have trouble seeing how they could conspire merely between themselves. In other words, they are given this broad exemption, and supposing they sat down—there are two boards of directors—and they said, Look, we have got protection under these two Acts, and my gosh, we are going to monopolize 100 per cent of the——

Mr. Dixon: They could do it, your Honor, by making the contracts that they made with Tree-Sweet and Silzle. That is perfectly easy. They could agree. In other words, the evidence here is that Sunkist sold the Valencias. Exchange Orange processed them. But the deal here that is complained of is made with Exchange Orange and TreeSweet and Silzle, as well as the control over the price of Valencias, which was determined by Sunkist. [3473] I mean the evidence here——

The Court: What I am thinking about is this, to sum it up: an instruction something like this I would give if there was added to it that they could conspire with third persons.

Mr. Dixon: We assume they can conspire with third persons. But my point is—the reason for this instruction, your Honor, is this: Let's suppose the jury felt, for instance, that Silzle was not a party to any conspiracy, let's assume that the jury felt that TreeSweet felt this was a good deal for them and went along with it because they got all these things, and so forth, that they got under the contract, that would still not preclude Sunkist and Exchange Orange from combining their joint facilities for the purpose of restraining trade in citrus juices.

The Court: By the use of the Silzle and TreeSweet contracts?

Mr. Dixon: That is correct.

The Court: I would go along with you on that.

Mr. Dixon: That is all this instruction means.

The Court: But then you would have to say more. In other words, as it now reads it would apply only to their own facilities, it wouldn't talk about any other contracts or any other conspirators. And I don't think they can conspire that way.

Mr. Dixon: Your Honor, let me say this. I would agree [3474] 100 per cent that this case wouldn't be before your Honor if Sunkist and Exchange Orange, and even Exchange Lemon, just operated between themselves as such in processing contracts, because they have a legal right to enter into processing contracts with each other.

But even there, assuming the evidence justified such a charge, a perfectly legal contract, which could be made between Sunkist or Exchange Orange and Exchange Lemon, to process, might be illegal if part of a combination between the co-ops to dominate and control the citrus juice market.

In other words, if you concede that they are separate entities, my point is this, your Honor—and that is the only purpose of this requested instruction —if you concede that they are separate entities, then I think you must concede that they are capable, even as between themselves, of combining to restrain trade and commerce. They do it by saying, Here, we will make a deal with TreeSweet. TreeSweet will take the deal.

It doesn't necessarily follow that TreeSweet has to be a member of the combination. Because it is always within the control of Sunkist or Exchange Orange to make or not make the deal. And that is my point.

It isn't necessary to establish liability on the defendant in this case, necessarily, that the jury would find that even TreeSweet was a party to the combination charged. Because [3475] under Section 2 of the Sherman Act, the second cause of action so-called, the charge is that they conspired together, of course with any others, as the evidence may justify, but it is sufficient that they could do it between themselves to monopolize the citrus juice market. Why? Because the evidence here is clear, and I don't think Mr. Finley is going to change it any, that they didn't have the facilities that they wanted to process all of their products into citrus juice themselves.

That they have a right to do, there is no question about it. But when they decide, Well, we will make a deal here, go out and make a deal with an independent processor and give them this kind of a deal, and don't include others, and the effect of their action is to restrain trade, or to add up to a combination to control and monopolize the citrus juice market, then they have violated the law. But it doesn't necessarily follow that the plaintiff could not prevail if the jury would decide that TreeSweet wasn't a member of the combination, or Silzle. That is my point, your Honor.

The Court: It boils down to this——

Mr. Dixon: That they made contracts.

The Court: ——that they can conspire, if they conspire with others other than the corporate units of the Sunkist marketing organization, or if they conspire concerning the use of processing facilities other than their own? That is what [3476] you are saying, isn't it?

Mr. Dixon: In substance; yes.

The Court: You are saying, supposing they found TreeSweet was not a conspirator, you say, nevertheless, they could conspire on TreeSweet facilities?

Mr. Dixon: Yes; which would give them a preferential deal which would enable them to control the citrus juice market. And that is where these contracts, and so on, come into the picture. Not as evidence, necessarily, of any damage to the plaintiff, but as evidence of the existence of the combination charged.

In other words, the evidence is not in dispute here that both Sunkist and TreeSweet and Silzle, all three of them, were in competition with each other in the single-strength market. And yet the contracts that were made here were such that the effect of them was that TreeSweet and Silzle sold the products allegedly purchased under the agreement at substantially the same price as the Sunkist selling price, which is tampering with the price structure, certainly, of the single-strength products sold by those three companies. [3477]

May I say this further, your Honor, that there is nothing in the Capper-Volstead Act or in any other act that I know of that gives to a marking co-op any rights except to combine together, for the growers to combine together and to market their products. That is the thing that the Capper-Volstead Act permits. It is a permissive act. In other words, if it wasn't for the Capper-Volstead Act, then the producers, that is the growers of the fruit, the so-called members, would be violating the antitrust laws by combining together to sell their products and to fix the price at which they will be sold. That is what the Capper-Volstead Act permits and that's all. They are not given a general exemption from the antitrust laws, any more than labor unions are, or anything else, although there is a little different situation there, or any more than the fishermen's organizations, combinations of fishermen to get together to sell their product or market their product. That doesn't permit them to fix prices in the market.

Sunkist in 1941 were indicted and a civil suit was filed against them to which they entered pleas of nolo contendere and a consent judgment in this court. However, in that case the facts were that they combined together with auction people in the various markets of the country to control the prices at which oranges would be sold. However, under the Keifer-Seagram case—— [3478]

Mr. Fisher: Of course, we will object to any reference to that.

Mr. Dixon: That isn't going to be injected in the case. I am not contending that. I am only using it as an illustration.

Under the Keifer-Seagram case, Sunkist and Exchange Orange, without anybody else, your Honor, can combine together to violate the antitrust laws.

The Court: Without the use of other facilities?

Mr. Dixon: Yes. Now, it is true that it depends again on what they did, as to whether what they did violated the law. The burden is still on the plaintiff to show what they did added up to restraint of trade or monopolization or combination to monopolize the citrus juice market represented by that part of it which is processed here in California.

But I don't want to be in the position in this case where, for example, the defendants could say, "Well, Silzle wasn't a party to this combination, and TreeSweet wasn't a party to the combination. Therefore, you fail in your proof." That is my argument. That is the reason for my position here. Because this whole case, your Honor, stems primarily from the fact that the evidence is not in dispute here that the product that was necessary for the plaintiffs to remain in business, namely, the Valencia oranges, was monopolized.

You may decide to leave that question to the jury. [3479] But that is the basic fact which under-lies this claim, and if the jury so finds or if your Honor so instructs, and I think you could do the latter properly on the evidence in this case, then it is the abuse of that monopoly power by the action of the defendants here, wholly apart from what they may have done, particularly in refusing, and Silzle didn't have anything to do with refusing, they weren't concerned with it, probably, in refusing to make oranges available to this plaintiff. That is the action of the defendant Exchange Orange as well as of Sunkist.

That is why I don't want to be in a position where we would be deprived of the right to make that argument. I don't think the law so provides, because they have no exemption here from the application of the law as laid down by the Supreme Court in the Seagram case, in my judgment. Merely because they are a cooperative organization, under the Capper-Volstead Act, does not put them in a different position than any other corporation or its subsidiary.

The Court: Let me ask you if you would be content with this. Your argument goes a step further, but I think this has everything in it you need to make your arguments. Taking it as it stands, and adding—well, picking up the last part of it——

Can accordingly conspire together to violate Sections 1 and 2 of the Sherman Act as charged in the first and [3480] second causes of action. If they conspire with other parties other than corporate units of Sunkist marketing system, or if they conspire concerning use of processing facilities other than their own, their activities solely within the Sunkist marketing system, standing alone, cannot constitute a conspiracy.

Mr. Dixon: I think that is misleading, your Honor, because it doesn't cover the situation I mentioned.

The Court: I have some other instructions I am going to give you tonight to take home with you, but I might say that I would, of course, instruct the jury that the instructions must be read together. I don't know whether I have a form instruction on that here. Is that included in there?

Mr. Fowle: I don't recall it.

Mr. Dixon: I don't think it is included in the ones you gave us, your Honor.

The Court: I generally give that. They can't pick out one instruction. Otherwise, if you tried to make each instruction a complete unit, you never could do it. Instructions must be read together.

Mr. Dixon: This instruction goes a—pardon me, your Honor.

The Court: So I may say just subject to other instructions which I give you concerning exemptions under the Capper-Volstead Act. [3481]

Let me ask the defendants if they object to an instruction that would have what is in 2, plus a statement, subject to other instructions.

Mr. Williams: Yes, your Honor; we would. Our view is that the members of the Sunkist system should be treated as a single unit, just as if they were one company. That means if they conspire with TreeSweet or with Silzle, they are subject to the antitrust laws, but under the Capper-Volstead Act, it is our position that they cannot conspire among themselves for this reason. The Capper-Volstead Act gives the exemption not to a corporation, but to the growers, and it states persons engaged in the production of agricultural products, as farmers or fruit growers, may act together in associations. That is a plural. It is not singular. It doesn't say act together in an association or the association, but it is plural. Here we have the same group of growers with a single exemption acting together through two or three corporations, depending on whether you consider Exchange Lemon as part of it.

Then the statute goes on to read, acting together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce such products of persons so engaged.

We are not concerned here with, say, a milk co-operative [3482] and a cheese co-operative conspiring, which is a question that has not been decided by the courts. We are dealing here with whether or not co-operatives that are in several different corporate forms but are owned by the same set of growers and possess a single exemption, can conspire. It has never been decided. Our position is under the language of the Capper-Volstead Act they must be treated as a single unit.

So your instruction in our estimation should state that these companies cannot conspire between themselves, but they can be considered as acting as if they were a single co-operative, and to that extent, of course——

The Court: I think you are wrong, that they can't conspire among themselves. Apparently what I proposed didn't satisfy Mr. Dixon, but I think the easiest example of that would be, suppose there were no other conspirators except the two co-operatives, and suppose they sat down, and let's take a clear-cut, agreed-upon conspiracy, and they said, "We will use our facilities and we will go out and make contracts with every other processor except A, B and C. We will run A, B and C out of business. They have been giving us the most trouble. Then by the use of your facilities together with ours, we will do so-and-so."

There they have plainly stepped outside, I think, of their statutory exemption, and yet there is no other—on [3483] the supposed facts—no other conspirator except them.

That is why I was trying to say something about using other facilities, or other co-conspirators might do it. I think that is an example that I don't think you would argue.

Mr. Williams: Yes, your Honor; I would argue that the example you gave—suppose we treat it as a unit, like I suggested. As a unit they could be guilty of attempted monopolization or monopolization. The example, I take it, the one you gave, would fall under one of those. That would be an offense under the antitrust laws.

But my point is they are not guilty of conspiracy.

They are guilty of either attempt to monopolize or monopolizing. If you treat it as a unit, they are subject to the antitrust laws to the full extent Congress intended them to be.

The Court: I am going to give something. I am going to do one of two things, I think. I am either going to give this instruction with the tag on it that they can conspire with others, or they can conspire to use other processing facilities other than their own, or I am merely going to give it with, "subject to other instructions concerning the Capper-Volstead Act and Section 6 of the Clayton Act and the exemptions contained therein." Then when I get to these acts, I can take up the exemptions.

Mr. Fowle: I might add this one statement. We wouldn't say for a second that these co-ops couldn't conspire with third parties [3484] but none of these cases have gone any further than that. None of these cases have gone so far as to say they couldn't conspire among themselves.

The Court: You should decide how many questions you want to put into this case. I thought what I had inserted there gave you a right to argue everything you want to argue, anyway.

Mr. Dixon: Your Honor, you limit it to processing, and that is the very question raised in a sense by the TreeSweet and Silzle contracts. Are they proper processing contracts? As I have indicated, in some of the instructions I have submitted to your Honor, I do not question the fact that a co-op can enter into a processing contract.

The Court: I have got an instruction on that where I start out and say that these defendants could process between themselves and with each other, but as soon as they enter into processing contracts with third parties, then questions may arise, and then go ahead and develop that.

Mr. Dixon: Let me illustrate my point, your Honor, by this statement, which is also covered in some of our suggested instructions here. Let's assume that they can make that type of a contract, and they can, without any question, between another co-op, a processing contract. It is a basic and fundamental principle of law that is particularly applicable to antitrust cases, that a legal contract that would be [3485] within that category, when used for or to perfect an illegal purpose, which is an unreasonable restraint of trade, or to perfect a monopoly, or to exercise monopoly control for the purpose of restraint of trade, and so on, becomes illegal.

As I said, I have tried some cases on co-ops, the Fishermen's Co-op, and so forth, and there is nothing, I say to your Honor, in the Supreme Court cases or any other case to my knowledge that says what the defendants are contending for here, namely, that they cannot conspire between themselves or with their subsidiaries for the purpose of restraining trade or for monopolizing a particular phase of the market.

Now, what your Honor has suggested is that they can conspire and violate the law by other means. My only objection to your Honor's suggestion is that that instruction, I think, and I don't believe that the Capper-Volstead Act or any of these exemptive acts, so-called, ever intended to give the corporations involved or the producers involved any exemption from the antitrust laws other than to exempt them from its operation where they combine together, which would otherwise be an illegal conspiracy——

The Court: Excuse me. I have a telephone call.

(Interruption.)

Mr. Dixon: To finish my sentence—for the purpose of processing and marketing the products of their grower members. I wanted to finish the sentence. [3486]

The Court: All right.

Mr. Dixon: You will see that it reads all right.

The Court: Let's pass it and I will look at it further. You look at some of the stuff I worked up. Plaintiffs' 3. That looks all right to me. Do the defendants have any objection to it?

Mr. Williams: We have another one to suggest in its place.

The Court: Is it one you submitted?

Mr. Fowle: It is a new one.

The Court: How many new ones are you going to submit?

Mr. Fowle: Not very many.

The Court: I would like to have them submitted so that I can be looking at them. If you only have a few, I will not glang the gate on you, but don't bring me a flock of them at the last minute.

Mr. Fowle: No, sir.

The Court: Well, they are both general statements, I suppose, but I don't see anything wrong with the plaintiffs'.

Mr. Williams: For one thing, we don't think there should be any reference to foreign trade. There is no foreign trade involved here.

The Court: All right. Strike out foreign trade. Interstate trade and commerce. I will give Plaintiffs' 3 and probably reject your 35. [3487]

Mr. Fowle: Are you rejecting this one, your Honor?

The Court: Yes. Do you want to make a record on it? We will do it while we are at it.

Mr. Fowle: We wish to record an objection to the refusal to give this instruction.

The Court: All right. Plaintiffs' 4.

Mr. Williams: We object to this one, your Honor, on the ground that it stresses the private injury over the public injury, when the purpose of the Sherman Act is to protect—the paramount purpose is to protect the public, not private individuals, and that is well pointed out in the Paramount Famous Lasky Corporation case, which was cited in support of jury instruction No. 3 of the plaintiff, in which the court said:

"Founded upon broad concepts of public policy, the prohibitions of the statute"—that is the Sherman Act—"were enacted to prevent not the mere injury to an individual which arises in the doing of the prohibitive act, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented." [3488]

The Court: Well, I have a note here on this. I was going to give this one and add to it this statement:

"This is a general statement and is subject to the more particular instructions contained herein."

It is a very general statement. I don't think it is an error, but I think it is one of those cases where you ought to flag it with more particular instructions, which, of course, will be private injury, and that sort of thing.

Mr. Williams: We would like to request that there be some statement coupled with it and incorporated in the same instruction that points out that the purpose of the statute was not to prevent mere injury to an individual, but was to prevent public injury. It is founded upon broad conceptions of public policy, and thus address the public part of it.

The Court: Objection overruled. I will give it with the addition that I added.

No. 5.

I have it listed as okay. What is the defendants' objection to it?

Mr. Williams: We have several objections to that. The first is that the jury should pass upon the issue of fact as to whether citrus juices produced in California constitute a market which is an area of effective competition subject to being monopolized.

This instruction assumes that California citrus juices [3489] and single-strength orange juice are such products, and we think it is an issue under the evidence.

The second objection is that under the complaint it should be citrus juices, and not citrus juice products.

A further objection is that the instruction assumes that it is unlawful to monopolize a product produced in a certain geographical area.

That is not true under the statute.

The statute strikes at monopolizing a particular market. It may be a geographical market; it is never a producing area.

That can be illustrated. Supposing, for example, there were two companies manufacturing pencils in a state such as California, and there were a thousand companies manufacturing pencils elsewhere, suppose one of those companies drove the other out of business—or supposing there were three companies and two conspired to drive the other one out of business, it would not be an offense, because you could not say that they had conspired to monopolize pencils produced in California.

We have to deal only with selling markets and not where items are produced.

Those are several of the objections that we have to No. 5.

Mr. Dixon: If this isn't a violation, then we have [3490] been wasting about two months here in court.

It seems to me quite clear that we have, and the record shows, really two places where citrus juices and juice products are made, in California and in Florida. Now, certainly all of the citrus juices which are processed here are the subject of restraint and monopoly, particularly if they could not be produced by competitors of the defendants, and TreeSweet and Silzle as the record shows.

In other words, the next instruction, your Honor, makes it clear that Sections 1 and 2 of the Sherman Act, not just Section 2, but Sections 1 and 2, have a geographical and distributive significance, and the Supreme Court has so stated, not only in the case cited in requested instruction No. 6, but many other cases where the occasions arose.

You don't have to monopolize the whole market or all of the products that go into the market, in order to violate the Sherman Act.

If there were true you would never get a violation under the Sherman Act.

If defendants aren't capable here of restraining trade in commerce in citrus juices and juice products processed in California and sold in commerce, then I am frank to say that we should have been dismissed out of this case months ago.

The Court: What do you say to the fact about citrus [3491] juice products?

Mr. Dixon: That might be changed, your Honor. I referred to them I think in the complaint in that manner. Citrus juice products, I think, as defined in the complaint means frozen concentrates, and so on. Let me see.

The term used here originally was citrus fruit juice, referring to natural and frozen concentrate.

The Court: In paragraph 2, Section 1 of the Sherman Act, you say "canned citrus fruit juice."

Mr. Dixon: Yes. I think I used, perhaps, the language there. I have no objection to changing it to "citrus fruit juices" instead of citrus—and other citrus fruit juices.

Mr. Williams: That would meet that point.

The Court: Under the allegations of the complaint——

Mr. Dixon: That would mean natural and frozen concentrate.

The Court: Do you understand that?

Mr. Williams: Yes.

Mr. Dixon: I have no objection to amending it to conform to the complaint, citrus fruit juices.

Mr. Williams: As we understand the complaint, it charges restraint of citrus fruit juices.

Mr. Dixon: But it would have to be combined with what it meant.

Mr. Williams: Not just Valencia orange juice. It is [3492] all juices.

Mr. Dixon: As used in the complaint. If you want me to use that term, all right. I used it here in the interest of making it unnecessary to have any further definition of it, but if you are not satisfied with the words "citrus juice products" I have no objection to changing it.

Mr. Williams: It raises a question as to the scope of the complaint and how the instructions are to be phrased. Now, the complaint speaks of citrus juices, not of single-strength orange juice or single-strength Valencia orange juice.

Mr. Dixon: It refers to single-strength.

Mr. Williams: The instruction ought to be consistent with the complaint. Unless the complaint is, amended to limit it to Valencia single-strength orange juice.

Mr. Dixon: I am perfectly willing to use the language of the complaint.

Mr. Williams: We ought to strike "single-strength orange juice" and say "citrus juices."

Mr. Dixon: I don't agree at all. The subject of the complaint all the way through is particularly single-strength orange juice, but this plaintiff was also engaged and was about to expand its operations into the frozen concentrate field, and that is one of the elements of damage here.

Mr. Williams: That is included in the term "citrus [3493] juices."

Mr. Dixon: If it is, all right. I thought it was clear in this instruction, but I have no objection to anything that will make it more clear, if you think it needs clarification. As long as it doesn't change the substance of it.

The Court: The defendants say this takes from the jury a question of fact. It refers to single-strength orange juice and other citrus fruit juices produced in California and sold in intra and interstate commerce, and states that they constitute part of the total trade in commerce and may be the subject of restraint and monopoly.

I don't see that it takes any question of fact from the jury.

Mr. Dixon: I don't.

Mr. Williams: It takes from them the question, your Honor, whether California juices are so different competitively from Florida juices that they do constitute an area of effective competition, such as the Supreme Court referred to in dealing with Standard Oil of California vs. United States, 337 U.S. 293. You will find it in note 5 on page 299. Also, United Shoe Machinery case, 110 Fed. Sup. 259, dealt with this problem of defining a market which is subject to monopoly. And that is the question that should go to the jury here.

The Court: You mean there should be an instruction to the jury that there is a question of fact for the jury [3494] whether or not there is a separate market in California single-strength orange juice and other citrus juice products?

Mr. Williams: Distinct from Florida single-strength orange juice and other citrus juices, so that it is subject to be monopolized.

Mr. Dixon: I don't agree with that.

Mr. Williams: It is like the illustration I gave. You don't violate the Sherman Act if one or two companies conspire to monopolize the pencils produced in California, if all pencils produced elsewhere are just the same.

The Court: What was your citation of this footnote in the Standard Oil Case?

Mr. Williams: 337 U.S., page 299, footnote 5. I believe United Shoe Machinery refers to an identifiable segment of the market.

Mr. Dixon: The Standard Oil case that you referred to is under the Clayton Act, and the District Court clearly held it was part of the trade and commerce and subject to restraint. It was made clear, if it needed to be made clear, in the Indiana Farmers

Guide Publishing Company case, which is directly in point, and the next case cited in the next instruction, which is in a sense a combination.

The Court: Let me read this note.

Mr. Dixon: Yes, your Honor. I am sorry.

The Court: In case you are not familiar with the note, [3495] it is hard for me to get much out of it (handing Mr. Dixon a book).

Mr. Dixon: I am familiar with the case, your Honor, because I tried it in the trial court.

There is no question, in my judgment, that could possibly be involved in this case that was involved in this appeal.

The Supreme Court was answering the question as to whether the commerce involved in the Standard Oil case was substantial, comparatively speaking, in line with the International Salt case, and various other decisions, where the court had held that $500,000 worth of commerce was sufficient.

The Court: Let's approach it from the standpoint of logic. The question is this: Is it a question of fact for the jury, or a question of law for the court, whether the single-strength orange juice and other citrus fruit juices produced in California are part of the total trade and commerce and subject to restraint?

Mr. Dixon: To me there can't possibly be any question. Based upon the Indiana Farmers case.

The Court: What was the gist of the holding in the Farmers case?

Mr. Williams: We concede it could be subject to restraint, but our point is that it cannot be subject to monopoly, and that is the point that should go to the jury.

Mr. Fowle: The point is whether or not you are dealing [3496] here with a situation in which you have to monopolize all citrus fruit juices, all orange juice, whether or not the California juices can be segregated out. You have to monopolize or attempt to monopolize an entire market, or an identifiable segment of the market. If the California juice is part of the whole juice in the United States, and there is nothing to distinguish it from other juices, then it is not an identifiable segment of the market for significant fruit juices. And we are just saying that we think it is a question of fact for the jury.

Mr. Dixon: I would go even further, your Honor. The record in this case, the defendants' own witnesses, tends to indicate that there is a particular market in this area only for juices processed.

The Court: You can argue that, but the question still is, is this a question of law for the court——

Mr. Dixon: I would say definitely——

The Court: ——or a question of fact?

Mr. Dixon: ——on the basis of the undisputed question of fact.

The Court: Are you relying on the Times Picayune case, which has this statement:

"The market, as most concepts in law or economics, cannot be measured by metes and bounds, nor [3497] does the substance of the Sherman Act violations typically depend on so flexible a guide. Section 2 outlaws monopolization of any appreciable part of interstate commerce, and by Section 1 unreasonable restraints are banned irrespective of the amount of commerce involved."

Is that the distinction you are drawing on now between restraint and monopoly?

Mr. Williams: That is right. We are not raising the question on restraint; we are raising it on monopoly.

The Court: Then the question is whether this is an appreciable part of a market or——

Mr. Dixon: The evidence is not in dispute here, your Honor, particularly with single-strength juices involved. It is all produced in this area that goes out of this area. Because there are really only two places where the product is produced. Florida and California. Now, they are poles apart geographically, but the juice which is processed here in California is a distinct part of the citrus juices that are sold in the national market. Because if you eliminated the juices processed here in California, then of course the only juices that would be remaining for sale would be those produced in Florida.

I don't see any problem, I am frank to say, and the defendants have admitted that this market or this trade can be the subject of a restraint under Section 1, nor certainly [3498] under Section 2 there is no difference, because the Supreme Court has said that Sections 1 and 2, not just Section 1, have a distinctive effect, a geographical and distributive significance is the language used.

The Court: All right. We have got to go on and make some decisions here.

I am going to do this to 5. I am going to put at the beginning of it this statement:

"The complaint defines citrus fruit juice as natural and frozen concentrate juice produced from by-product fruit."

And then take the instruction as it is.

The first two lines will read:

"I charge you that the single-strength orange juice and other citrus fruit juices," and so forth.

I am going to give the instruction as modified. The objection is overruled.

Now, plaintiff's 6.

Mr. Dixon: I have made a few changes there, your Honor, due to the fact that ELP is now out of the case.

The Court: What changes do you propose?

Mr. Dixon: So it reads in line 4:

"If you find that either or both of the defendants combined with ELP, Treesweet or Silzle to eliminate," [3499] and then I have struck the words, on line 13: "on the first cause of action."

The Court: Let me read it. You have "citrus fruit products"; it should be "citrus fruit juices."

Mr. Dixon: I think we should strike out on line 10 there, "in the first cause of action."

The Court: Strike out what words?

Mr. Dixon: "in the first cause of action." So it reads "by such defendants were performed."

Is your Honor going to charge on the first and second causes—this may save a little time on all of these subsequent instructions. I might say, of course, when the complaint was filed here originally it did set up a complaint to have five causes of action. In my judgment any violation of Section 1 or 2, or both, of the Sherman Act, just gives rise to one cause of action. Of course the Robinson-Patman Act is a separate cause of action. But I didn't draft this complaint originally. It was then drafted as one cause of action alleging a violation of both sections. Because, of course, there can be only one recovery here. I mean they are not the subject of judgment under Section 1, and then an additional judgment under Section 2.

If it were a criminal action, then of course there could be as many as five different counts in the indictment. [3500]

The Court: Well, I think that there should be a verdict now that we have got the third count eliminated, a form of verdict for the plaintiff and the interrogatory, "Do you base this upon Section 1, Section 2 or both." That is my view of it right now. If there is one cause of action, they either find for or against the plaintiff with that interrogatory.

Mr. Dixon: That is the only reason I made that suggestion.

The Court: How do the defendants feel about it?

Mr. Williams: Our theory of the cause of action is a little different. Our theory is the cause of action arises from each act causing injury, and if there is more than one act of injury here claimed by the plaintiff, then there is more than one cause of action, but as far as the conspiracy itself goes, it seems to us it is only one conspiracy and you prove one set of facts to prove a conspiracy under Section

1 and you prove something else to establish it under Section 2 of the Sherman Act.

The Court: Or both?

Mr. Dixon: We can do both.

The Court: Wouldn't both come in there?

Mr. Williams: Yes. The same conspiracy might violate both acts.

Mr. Fowle: The jury has been told a number of times [3501] that there are the separate causes of action, the one dealing with restraint of trade, one dealing with monopoly, and one dealing with price discrimination. The third is out now. But I wonder if the jury isn't going to be confused if the whole matter of combinations and conspiracy and restraints of trade on the one hand, and monopolies and conspiracies to monopolize on the other hand are lumped together, and whether it would not be clearer to the jury to instruct them on the two separate causes of action as they are set forth in the complaint.

The Court: You suggest we eliminate the words, "in the first cause of action" from this?

Mr. Dixon: That was my thought, your Honor, yes.

Mr. Williams: Is there any charge of individual monopoly or monopolizing now, or is it just conspiracy to monopolize as far as Section 2 is concerned?

Mr. Dixon: That's right. And, of course, the allegation not only to conspire, but they did monopolize.

Mr. Williams: In other words, the conspiracy was successful.

Mr. Dixon: Yes, that's right, but the allegation of attempting to monopolize is out of the case under Section 2.

The Court: What is the defendants' objection to plaintiff's 6, the instruction as amended?

Mr. Williams: The first objection is our Capper-Volstead [3502] point that we raised with respect to Plaintiff's Instruction No. 2. I would like to incorporate that by reference insofar as conspiracy with ELP goes.

The Court: I will overrule that, because the instruction proceeds on, "to eliminate the competition of the plaintiff."

Mr. Williams: Our point is that ELP, EOP and Sunkist are all owned by the same growers and therefore cannot conspire under the Sherman Act and they may be treated as one entity under the Sherman Act. It is the same objection we made.

The Court: You want to ignore the corporate entities, then?

Mr. Williams: Yes. Under the Capper-Volstead Act we feel that is the correct law, although it is a novel question. It has never come up, as far as we know.

The Court: I don't see how you can do that.

Mr. Williams: This is not a case of stockholders in the corporation. It is a case of the growers, the same people, actually running the three associations.

The Court: But they are not the same people. The people that grow lemons are not the same people that grow oranges.

Mr. Williams: Many of them are.

Mr. Fisher: Most of them are. [3503]

Mr. Williams: They all stem through Sunkist. They are the same group of growers and, therefore, they can't conspire among themselves only. Therefore, we object to this which would permit a finding for the plaintiff if you had a conspiracy only among Sunkist, Exchange Lemon and Exchange Orange.

The Court: That is why I thought it would be better if ELP were out of this instruction.

Mr. Williams: If it were taken out of this instruction, we wouldn't object to it.

Mr. Dixon: I will take out ELP. I don't want to confuse the issues.

Mr. Fowle: You are taking ELP out of this instruction?

Mr. Dixon: If that is the only objection you have.

Mr. Williams: That isn't the only objection.

The Court: What is the other objection?

Mr. Williams: The other objections are our objections which we made with respect to an identifiable market and whether juice produced in California constituted such a market, with respect to the preceding instruction, and we would like to incorporate those objections in our objections to this instruction.

Mr. Dixon: Well, that doesn't bother me.

The Court: That is overruled. I have passed on that. What is the next one? [3504]

Mr. Williams: There is no statement of public injury and we object, of course, unless it is connected up with a suitable public injury instruction.

Furthermore, this does not in and of itself identify the acts that are charged to have been performed by the defendants that caused damage. It should be specific.

The Court: Elsewhere I am going to list those acts and they will know what I am talking about.

Mr. Williams: I have the objection that there is no statement that the act causing injury must be performed in furtherance of an illegal combination or conspiracy. There is also no statement that there must be a substantial restraint upon interstate commerce, because in this case any conspiracy here is entirely intrastate, so the plaintiff must be proceeding under the affecting commerce theory and not the in-commerce theory, and under the Las Vegas decision and other cases the jury must find, therefore, there is a substantial restraint of interstate trade.

The Court: You can't put everything in one instruction.

What about public injury? Should that be inserted in here?

Mr. Dixon: Well, I assumed, your Honor, again——

The Court: You say this comes into the category of what you would call formula instructions?

Mr. Dixon: Yes. [3505]

The Court: Formula instructions as distinguished from instructions on general principles present quite a problem. I don't like to give any more formula instructions than I can.

Mr. Dixon: Well, your Honor has stated the problem. I ran into it with considerable difficulty in some of the subsequent instructions which I have submitted, because I found if I didn't proceed further with the instruction, it had no meaning. If I just left it cold without putting in any context, it wouldn't have much meaning. [3506]

I think that this instruction would be certainly proper. If your Honor is going to charge generally, as I assume you will, with reference to what the plaintiff must show to recover under violations of the Sherman Act, that is one of the reasons why one of the additional instructions here is on the so-called public injury, not as such, but that is where the stabilization of price and interference with price structure instruction comes into the case. Not as a matter of damage, but certainly it is one of the elements, perhaps, that should be shown in making a case. Price fixing need not directly affect the plaintiff in this case, and it couldn't, because there was no product for the plaintiff to sell. But that doesn't mean that the instruction wouldn't be proper.

This was an effort, your Honor, to apply 5 to the specific facts of this case, to give 5 some meaning as applied to the case.

Mr. Williams: We think, also, the first sentence is surplusage.

The Court: You have only used the word combine here, haven't you?

Mr. Dixon: Yes. The statute is combined or conspired. It is in the alternative. It doesn't make any difference.

The Court: I am going to make three suggestions and see how it reads. On line 8½, according to what I have [3507] here, although it probably should be

8, after the words "in interstate commerce," insert, "and that public injury has been proved."

On line 10, after the words, "to have been performed," insert, "in furtherance of said combination."

Mr. Dixon: This is No. 6, Judge?

The Court: Yes.

Mr. Dixon: I have line 8. I didn't have anything there. Oh, I have line 9.

The Court: I said 8½.

Mr. Dixon: I am sorry. What was your suggestion?

The Court: "and that public injury has been proved."

Line 10½, after the word "performed," insert, "in furtherance of said combination," and on line 12——

Mr. Williams: It should be illegal combination.

Mr. Dixon: I don't think that's necessary.

The Court: Let's get what I have here first. On 12½, where it says, "you should find for the plaintiff," strike out "for the plaintiff," and insert, "there was a violation of the antitrust laws and proximate causation and you should proceed to the question of damage."

Now, reading it all together:

"Sections 1 and 2 of the Sherman Act have both the geographical and distributive significance and apply to any part of the United States as distinguished [3508] from the whole and to any part of the classes of the things forming a part of interstate commerce. If you find either or both defendants combined with TreeSweet or Silzle to eliminate the competition of the plaintiff in the market for single-strength citrus juice products, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that public injury has been proved, and that any of the acts charged to have been performed by the defendants were performed in furtherance of said combination, and that the performance of any of such acts was the proximate cause of any injury to the plaintiffs, you should find there was a violation of the antitrust laws and proximate causation, and you should proceed to the question of damage."

As now constituted, what are the defendants' objections? The same ones you made heretofore, that aren't affected by these changes, and what other?

Mr. Williams: Do you wish us to repeat those?

The Court: No, you need not repeat that. That is in the record.

Mr. Williams: The only additional one in the first sentence is surplusage.

The Court: Has plaintiff any objection? [3509]

Mr. Dixon: No, your Honor.

The Court: I will give it as modified.

Mr. Fowle: And our objections——

The Court: Your objections are overruled.

The next one is 7.

Mr. Dixon: I modified this one, your Honor, in view of the dismissal of Exchange Lemon, as follows: Strike out the words, "any two or more of the defendants."

The Court: On line 4?

Mr. Dixon: Yes.

The Court: And insert what?

Mr. Dixon: Insert the words, "either one or both of the defendants combined together with Exchange Lemon Products, TreeSweet or Silzle."

The Court: With ELP?

Mr. Williams: We have the same Capper-Volstead Act objection to ELP being included.

The Court: We took it out of the other one.

Mr. Wiliams: And we have the further objection here, and that ~~is~~ this says the defendants combined together. The last one just said combined and conspired.

The Court: The last one said combined——

Mr. Williams: With TreeSweet or Silzle, and we object to this under the Capper-Volstead Act, to any combination together. [3510]

The Court: I don't think "together" adds anything.

Mr. Dixon: I will take it out, if you want it out.

The Court: It doesn't add anything. You are leaving in the first and second causes of action there.

Mr. Dixon: Well, either that, or charged in the complaint, your Honor, as I suggested.

The Court: All right.

Mr. Dixon: I presume on line 13 the words should be "such act."

The Court: Line 12, you mean?

Mr. Dixon: It is 12½, Judge, maybe. "become the act of all members."

The Court: I don't like these instructions that you should find for the plaintiff or you should find for the defendant. You both have done a lot of that. I am going to suggest this before we discuss it. On line 13, after the word "combination," you add, "and would bind and make liable," and then dropping down to 14, "such defendants as were members or parties to the combination," and then strike out beginning with the word "combination" on 13, "and if you find that such acts damaged the plaintiffs, you should find for the plaintiff and against"——

Mr. Dixon: Yes.

The Court: What is the difference between a combination and a conspiracy? Is there any legal distinction? [3511]

Mr. Dixon: No, I don't think so, your Honor.

The Court: Do you know of any?

Mr. Fowle: No.

Mr. Williams: We know of none. We would prefer to use the word conspiracy instead of combination.

The Court: The statute uses both of them.

Mr. Williams: How about using both of them then, combination and conspiracy? I assume your instruction on conspiracy will be the same as to combination, so there will be no confusion in the jury's mind whether combination is a lesser offense than a conspiracy.

The Court: Yes, I want to do that. I will instruct the jury that combination and conspiracy mean the same thing. I was going to add on line 5, "combined or conspired," because further down it says, "part of the conspiracy or combination."

To be consistent, we will also have to put in, "and that public injury is proved."

Mr. Fowle: Where will that go, your Honor?

The Court: Well, wait a minute. That isn't necessary here because this is a different proposition. This only says—well, after "second causes of action" on line 8, "and that public injury was proven."

Now, I will read it as I now have it.

"I charge you that acts lawful in themselves may become unlawful when part of an illegal scheme or plan or when [3512] used to accomplish an illegal purpose. If you find as a fact that either one or both of the defendants combined or conspired with"——

Shall we leave out ELP? You left it out in the other one.

Mr. Dixon: That's all right. Let's take it out.

The Court: "——combined and conspired with TreeSweet or Silzle as charged in the first or second causes of action to perform any of the acts alleged by the plaintiff to have been performed as part of the conspiracy or combination charged in the first and second causes of action, and public injury was proved, and that any one or more of the acts alleged by the plaintiff to have been committed pursuant to the combination or conspiracy was committed by any one or more of the defendants that you find was a party to such combination or conspiracy, that the act or acts so committed would then become the act of all members of the combination or conspiracy, and would bind and make liable such defendants as were members or parties to the combination or conspiracy charged in the first and second causes of action."

Mr. Williams: Well it sounds as though there are more than two defendants. Actually, liability only goes to the two defendants, and this talks like there was a big conspiracy where you have the question of distributing liability. It seems to me line 10 down could be greatly abbreviated. It [3513] confuses the jury to use language as though there were more than two defendants liable.

The Court: But one or both—make it either one or both instead of any one. Either one or both.

So then line 10 would read, "pursuant to the combination or conspiracy were committed by either one or both of the defendants. [3514]

Mr. Williams: In line 13 it speaks about becoming the act or acts of all members of the combination.

The Court: That is true. It would become the act of the co-conspirators.

Mr. Williams: Isn't that immaterial here?

The Court: Yes. But they are going to be told that. They have to know that to understand conspiracy.

> "and would bind and make liable such defendants as were members."

Mr. Williams: It is these defendants.

The Court: Well, you can't say "these defendants," because they may find one was a party and one was not.

Mr. Williams: How about "the defendant that was a member"?

Mr. Dixon: "Such defendant or defendants."

The Court: "would make liable each defendant who was a member."

Mr. Dixon: Wouldn't it be better, your Honor, "to make liable such defendant or defendants"?

It doesn't make any difference——

The Court: "make liable"——

Mr. Dixon: The idea being either one or both.

The Court: "make liable each defendant who was a member."

Mr. Williams: "of the combination," and strike "or [3515] parties to."

Mr. Dixon: Are you limiting it by separating it out to one?

My thought was this, that such defendant or defendants as you find——

The Court: All right. I think that is better. "such defendant or defendants as were members or parties."

As it is now constituted, what is the defendants' objection to the instruction?

Mr. Williams: We have the same objections that we made with respect to instruction No. 5, relating to the market and the competition of California juice. I wish to incorporate those here as if fully stated.

The Court: You may. They will be incorporated by reference.

What others?

Mr. Williams: Perhaps, your Honor—do you wish us to repeat each one?

The Court: Just repeat them by subject matter and they will be repeated by reference. The subject matter can be repeated by reference by a general stipulation here.

Mr. Williams: I was wondering whether we couldn't have a general stipulation on those objections and just apply them across the board, and then we wouldn't have to refer to them each time. [3516]

The Court: As long as you don't wind up with some other general objection. If that is what is going to be what you call your general objection.

Mr. Williams: Sometimes——

The Court: You can say it in a sentence, just as you did, that you incorporate by reference the objections relating to the market.

Mr. Williams: We can recite it each time.

The Court: What is the next one?

One of those times one of those objections might apply to an instruction. I mean in my opinion. I wouldn't want to pass it over when the time comes.

Mr. Williams: We feel that the acts claimed to have been the proximate cause of injury are not adequately identified.

The Court: Before I start talking about these acts, probably what I will do will be to put in a list of these acts. You can't put them all in one instruction.

Let the record show that I have handed counsel the Court's B.

Mr. Dixon: The third line from the bottom, "and such bearing." It says "bearings" on there now.

Mr. Williams: We have further objections.

The Court: Just a minute.

All right. Going on with the objections to 7, we will talk about "B" later, but somewhere along the line I am going [3517] to tell the jury what these acts are. For instance, I just added in pencil—"complains of six matters," and added, "which will be referred to in these instructions as the acts alleged by the plaintiff," and then we will go into these instructions where they keep talking about the acts alleged, and so forth.

Mr. Williams: I should note for the record that we may take the position that the only act that should go to the jury is No. 8 of Court's B.

The Court: We will take that up later.

What is your further objection to 7?

Mr. Williams: There is no statement that there must be a finding that there was a substantial restraint upon interstate commerce.

Mr. Dixon: That isn't a necessary reading of this charge.

The Court: This is merely pointing out that each conspirator is bound. None of these instructions can be complete in themselves.

I have yielded on this public injury business.

Any other objection?

Mr. Williams: No. That is all.

The Court: I will give 7 as now constituted and overrule the objections. [3518]

* * *

Tuesday, January 31, 1956—7:00 P.M.

The Court: Plaintiffs' 8.

All right, for the record what are the defendant's objections to Plaintiffs' proposed 8?

Mr. Williams: Well, the first is that our position is that under the facts here there must be a specific intent to restrain trade, because the necessary effect of what was done would not restrain trade.

Now, that is apparent from the fact that if these same contracts had been entered into in 1951, and Morgan Ward had chosen to give oranges to Winckler & Smith, instead of giving them to Case-Swayne, we wouldn't have had any lawsuit here, and we wouldn't have had any restraint of trade. Therefore, you have to find here specific intent to restrain trade in order to have a violation of the statute.

We have other objections. That is the first one. Do you wish to consider that first, or have them all stated?

The Court: Give me the rest of them.

Mr. Williams: It has "citrus juice products."

The Court: I have changed that to "citrus fruit juices" on line 6.

Mr. Dixon: I think the words, your Honor, again, "in the first cause of action," line 8, should probably be eliminated in view of the fact that we no longer have an attempt [3520] to monopolize charge in the case under Section 2.

Mr. Williams: Which words are these?

Mr. Dixon: Line 8, the words, "in the first cause of action," I think should be stricken.

Mr. Williams: We also have an objection that no public injury is stated, as a requirement.

The Court: This isn't a formula instruction on that point.

Mr. Dixon: This is one on intent.

The Court: This is just one principle alone.

Any other objections?

Mr. Williams: Yes. There is no statement that the act must be the proximate cause of injury.

The Court: That, again, wouldn't be applicable, because this is just on the question of intent.

Mr. Williams: And the question of substantial restraint of interstate commerce, and then the Capper-Volstead Act objection, also, applies here, I think, because it relates to a combination—it might relate to a combination between Exchange Orange and Sunkist.

The Court: Your view, Mr. Dixon, as to intent, briefly?

Mr. Dixon: It is the contention of the plaintiff that it is not necessary in any private suit for damages for the plaintiff to show a specific intent to violate either Section 1 or 2 of the Sherman Act, unless the complaint charges or [3521] deals with an attempt to monopolize under Section 2, which under the language of the decision in the Times Picayune case, a specific intent as distinguished from an objective attempt presumed from the presumption, that one intends the natural and probable results or consequences of his conduct or business arrangements, does not apply.

And, further, in support of this position the plaintiff relies upon United States vs. Patten, 226 U.S. 525 at 543;

United States vs. Masonite Corporation, 316 U.S. 265 at 275;

United States vs. Columbia Steel, 334 U.S. 495;

United States vs. Paramount Pictures, 334 U.S. 131;

Swift & Company vs. United States, 196 U.S. 375 at 396;

And see, also, United States vs. Aluminum Company of America, 148 F. 2d, 416, in which the court held that Section 2 of the Sherman Act as it was applied to that case did not require a specific intent to monopolize.

The Court: That is enough of the citations.

Line 6, the line will begin "citrus fruit juices," striking out the word "products."

On line 8 the words, "in the first cause of action" will be stricken out.

The objection is overruled. I will give instruction 8.

Mr. Williams: May I also cite for the record the Lorain [3522] Journal case as one on which we rely, because this relates to a refusal to sell, and there you must have the intent to monopolize before the refusal becomes unlawful.

Mr. Fowle: Your Honor, might I add a statement at this point?

Our principal objection is that in our view specific intent is necessary since the results complained of here do not follow necessarily and directly from the acts complained of.

Now, it seems to me if the court does not see fit to adopt that view, that at the very least it would be proper to submit to the jury as a fact question whether or not the results in this case do follow from the acts complained of, whether they follow directly and necessarily, and that is a fact question that the jury perhaps should consider. And if they find that they do not follow directly and necessarily from the acts complained of, that the jury should then be instructed that a specific intent is necessary.

In other words, that is a correlary of the principal objection that we have to Plaintiffs' Jury Instruction No. 8.

The Court: I have your point.

Of course this instruction says, "if you find that any acts * * * actually resulted" in this. There is left, then, to the jury the question of the actual result, and the very language of the talk about refusal implies a deliberate act [3523] and not an unintentional one.

Mr. Williams: It isn't the intention to commit the act; it is the intention with respect to the results of the act of refusal.

You might change the language here to say "necessarily resulted." [3524]

The Court: How about "actually and necessarily resulted" in line 8?

Mr. Williams: That wouldn't meet all of our objections, but it would be an improvement.

Mr. Dixon: I don't think that makes any difference, Judge.

The Court: I will add "and necessarily" after the word "actually."

The Griffith case used the word "necessarily."

Mr. Dixon: That is all right. I have no objection to that.

The Court: The objection is overruled to 8 now. Plaintiffs' 9.

Mr. Williams: This is the one that you were going to give us a form on, wasn't it?

The Court: Yes; this squints at some of the matters in that.

I would suggest that we pass this.

Plaintiffs' 10.

Mr. Williams: We have no objection if it is coupled with some proper statement about the use of circumstantial evidence.

The Court: We will pass this, also, because it involves the same problem as 9, in the sense that it may be covered by this general instruction. [3525]

Plaintiffs' 11.

Mr. Dixon: There is an error.

The Court: Where is that?

Mr. Dixon: On the bottom there. It is Judge Hall.

The Court: I had a question mark on that. It wasn't me.

It is in the same category.

Mr. Dixon: Yes; all these instructions deal with the kind and type of proof that is necessary in a conspiracy case.

The Court: We will pass 11.

Plaintiffs' 12.

Mr. Dixon: This is a form type of instruction. After the words "per se" the words should be "if such exclusion was the proximate cause of any damage to the plaintiff," Strike the words "on the first cause of action."

Mr. Fowle: Where does that phrase go?

Mr. Dixon: Right after the words "per se."

The Court: "such exclusion would be unreasonable per se," and what?

Mr. Dixon: "and if such exclusion was the proximate cause of any damage to the plaintiff, you should find for the plaintiffs."

The Court: I don't get any connection between what you added and what is above. [3526]

"If you find," and so forth, and then you get down to line 11, the conclusion is, "such exclusion would be unreasonable per se," and what?

Mr. Dixon: "and if such exclusion was the proximate cause of any damage to the plaintiff, you should find for the plaintiffs."

Mr. Williams: Isn't this instruction out by reason of the fact that the attempt to monopolize is taken out?

This is the individual act of Exchange Orange, which can only be an attempt to monopolize.

This instruction is no longer applicable.

Mr. Dixon: You have still got your Section 1 charge.

Mr. Williams: That requires conspiracy, and there is no conspiracy in this charge.

It requires two people to make a contract.

The Court: He speaks of the contract between Exchange and TreeSweet, and Silzle.

Mr. Williams: What it really deals with is a refusal to sell, which is an individual offense of Exchange Orange.

If it dealt with contracts, we would be dealing with the legality of each particular contract, which, as I understand it, there is no dispute about that, that they are each per se lawful.

The Court: Why don't we wind up, "such exclusion would be unreasonable per se and [3527] illegal"?

Mr. Dixon: That is satisfactory.

The Court: Then it leaves it open for other instructions.

Mr. Dixon: I will accept that.

The Court: Do you think the jury knows what "unreasonable per se" means?

Mr. Williams: We object to the use of that phrase, because we don't think the law is that it is unreasonable per se. All this deals with is an individual act of Exchange Orange Products in refusing to sell, based in a certain setting, and no court has ever held that a refusal to sell is unreasonable per se. It depends upon the facts.

The Court: There is more than a refusal to sell in there. It starts out with the contracts between EOP and TreeSweet, and Silzle, and then it brings in the refusal to sell.

Mr. Williams: What it leaves out is the specific intent to monopolize, which is necessary to make a refusal to sell unlawful.

This relates to individual acts of Exchange Orange Products, just in the setting. There is no element of conspiracy in this charge. An element of agreement is necessary.

The Court: There is agreement between Exchange and TreeSweet.

Mr. Williams: But there is no rim on the wheel, is what it comes down to, to make the [3528] conspiracy.

The Court: I don't follow you. This doesn't have to be conspiracy. Section 1 speaks of combinations, conspiracies or contracts.

Mr. Williams: But in that case, your Honor, you must find the illegality in the contract. Here we talk about the contract between Exchange Orange and TreeSweet.

As I understand it, there is no dispute that that contract, standing alone, is lawful. So it is not in restraint of trade.

The same is true of the Silzle contract, standing alone.

So that the contract part of Section 1 of the Sherman Act does not apply to our factual situation here, because that will go to invalidating either of these two contracts, and all we have in this case is a conspiracy either under Section 1 or Section 2, and therefore the element of conspiracy should appear in this instruction.

The Court: Before we go any further, what do you say to that objection?

Mr. Dixon: It is our position, your Honor, that the contracts standing alone, and taken separately, might be valid, but when taken in connection with a refusal, so that the contracts and the refusal result in the exclusion of a competitor from the market—and that is a question of fact for the jury—that under the cases cited any exclusion of a competitor [3529] from a substantial market by means of contracts—and in this particular case any additional act—is unreasonable per se.

It is true the refusal is one of the acts alleged as having been performed here. It is also true that the act of refusing to supply or to make a comparable arrangement was in the opinion of the plaintiff, at least, one of the reasons for the elimination of the plaintiff from that market.

That would be wholly true whether it was done as the result of a combination or conspiracy, or whether it was done as a single act or series of acts by Exchange Orange. [3530]

The Court: The words "unreasonable per se," when you read antitrust cases, talk of per se violations, price fixing and dividing markets, are per se violations which, as I understand, means that they can't be explained.

Mr. Dixon: That's right.

The Court: What is unreasonable per se? Do you use per se there in a different sense? Do you mean unreasonable in itself?

Mr. Dixon: In and of itself.

The Court: Or do you use it with some of the connotations we use around the violations in price fixing and dividing markets?

Mr. Dixon: Well, I think we would have to concede and would concede that the contract, Tree-Sweet taken separately, would not necessarily have the effect of excluding the plaintiff from a substantial market. It might tend to have that market, if they would give them all their oranges and therefore couldn't under any circumstances make any available to the plaintiff, but it is the combination of those acts and the refusal and the effect, which is a question for a jury to find under this instruction, and the effect, if it was in fact, to exclude the plaintiff from the citrus juice market; in other words, these things alleged here, I mean covered by these instructions, I think it would come within the cases cited. Now, it is one of those instructions—— [3531]

The Court: I am talking particularly now about the per se.

Mr. Dixon: Yes.

The Court: I think we should strike out per se and say it would be unreasonable of itself or in itself.

Mr. Dixon: In and of itself; yes. That per se perhaps wouldn't have any meaning to the jury.

The Court: If we use it, we probably have to define it.

Mr. Dixon: Define it; yes.

The Court: What further objections do you have to 12?

Mr. Williams: The same objections concerning the market in California juice and Florida juice that I made with respect to requested instruction No. 5, and no statement of public injury, and no statement that the cause of injury must be performed in furtherance of an illegal combination or conspiracy. There is no requirement of the specific intent, and substantially to restrain interstate trade and commerce. There is no statement there must be a substantial restraint of interstate trade and commerce.

The Court: Most of your later objections are on the basis this is a formula instruction, and I have taken out the last part of it, so it now reads, "such exclusion would be unreasonable in and of itself and illegal. So it isn't a formula instruction when it pertains to one element. What it pertains to actually there, is a statement that this [3532] combination of facts and circumstances, with the exclusion of plaintiff as a competitor, would be a violation of the antitrust laws.

Mr. Dixon: As a matter of law.

The Court: Yes; still leaving present the question of——

Mr. Dixon: Of causation and damage.

The Court: Of causation of the elements of special acts causing damage and various other elements. It is just on one particular phase of the case. Objection overruled.

Mr. Williams: I would add the objection, also, there is no specific intent to create or maintain a monopoly included. I think that completes [3533] it.

VOLUME VII

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER. Trustee,

Appellees.

Transcript of Record
In 9 Volumes

Volume VII
(Pages 2901 to 3254)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

The Court: All right. Plaintiffs' 13.

Mr. Williams: This assumes that the defendants have a monopoly power, and that is a question for the jury.

Mr. Dixon: That is true, counsel, but this is a general statement.

The Court: Well, I am willing to add to it, "whether monopoly power existed in a defendant or defendants, and whether such power was misused is a question of fact for the jury."

Mr. Dixon: I might say in general, your Honor, that there are some requested instructions which deal with monopoly power, what it is, and doing precisely that. This is just intended to be a general statement of what the law is with reference to the use of monopoly power, however lawfully acquired, because one of the defenses of the defendants here is that whatever monopoly power they have is lawfully acquired because they are a marketing co-op, and as to that I would have no disagreement.

The Court: Any other objections to 13 as proposed by the plaintiff?

Mr. Williams: Yes.

The Court: I will hold up my suggestion for an addition to it to see what else we have got.

Mr. Williams: We don't believe there is any evidence that justifies the instruction here because this instruction [3534] is applicable to an offense committed by someone possessing monopoly, where the only charge left in the case of conspiracy——

The Court: In the case——

Mr. Williams: Yes; the only question left in the case of conspiracy.

The Court: Conspiracy and actual exercise of monopoly power.

Mr. Williams: No. Exercise of monopoly power, your Honor, is not an offense under the Sherman Act. It is attempt to monopolize, conspiracy to monopolize, and monopolize.

Mr. Dixon: That just isn't my view of the law.

Mr. Williams: It is in the language of the statute.

Mr. Dixon: We will discuss that in a moment, counsel. If you have a lawful monopoly and with it monopoly power, you may use that power to restrain trade and commerce, and if you do, that constitutes a violation of Section 1 of the Act.

The Court: An individual act?

Mr. Dixon: Yes; indeed.

Mr. Williams: Section 1 of the Act requires an agreement between two persons to have a violation.

Mr. Dixon: No; it doesn't, counsel. Well, you may agree to use your monopoly power to restrain trade and commerce.

The Court: Well, now, I don't follow either one of you. [3535] Section 2 says, "Every person who shall monopolize"——

Mr. Williams: This is an individual they are talking about.

The Court: Yes. If one person can do it, then two people can do it.

Mr. Williams: That doesn't follow, your Honor. Two people would get you into conscious parallel action, which has been rejected by the Supreme Court in the Paramount Theatres case. If you have two people monopolizing, it has to come under conspiracy to monopolize, which is also part of the same section. That is monopolizing by agreement, you might call it, in other words.

Mr. Dixon: Let me make the plaintiffs' position clear here for the record, now, your Honor. It is the contention of the plaintiff that the defendants have monopoly control over product oranges. Now, we start from there. The charge isn't that they monopolized product oranges. The charge is that they had monopoly power over the amount of product oranges that was available for processing, a perfectly legal situation. We start from there. Then we allege in the complaint that they abused the monopoly power. How? By, one, violating Section 1 of the Sherman Act and doing the things alleged, namely, fixing the price, stabilizing it, the price at which they would be made available to processors, and a lot of other things which they could only do if they had monopoly [3536] power.

And under Section 2 of the Act, then they used the monopoly power over the product oranges to follow a plan and a scheme to monopolize the citrus juice business. Not the product oranges, not at all, but the citrus juice market or industry in this area, so that both Section 1 and Section 2 allege violations.

The jury must determine, unless your Honor instructs them on that point, whether they had just the monopoly power to do these things, or the power, just call it, the power to do it. If they didn't, then, of course, they couldn't do it. But that is why this case in both Section 1 and Section 2 of the Sherman Act charges deals with the use and abuse of monopoly power over the product oranges. That's all.

We are not claiming that they have monopoly power over anything else, but they used that power as part of the combination and conspiracy under Section 1 to restrain trade and commerce in citrus juices, particularly Valencia juices, and under Section 2 to monopolize the citrus juice market represented by the citrus juices processed——

The Court: Conspired to monopolize.

Mr. Dixon: That's right, conspired to monopolize, and as part of it they used the monopoly power over the product oranges.

The Court: I have your point. In other words, you [3537] contend that there was monopoly power to start with.

Mr. Dixon: That's right, which could have been legal.

The Court: Or could have been misused.

Mr. Dixon: Yes.

The Court: Let's consider the objections on 13.

Mr. Williams: Misused only by agreement, because it is misused only by conspiracy under the charges.

The Court: That is what counsel just said.

Mr. Dixon: That gets us back to the original question of Sunkist and Exchange Orange, your Honor, agreeing to use that power for this purpose.

Mr. Williams: There is no statement there must be a substantial restraint upon interstate commerce.

The Court: Would the section read better if it said, "the use of monopoly power however lawfully acquired through combination, contract or conspiracy, to foreclose competition"?

Mr. Dixon: I don't think it would, your Honor, because this instruction is intended solely to acquaint the jury with the fact that monopoly power, and then it is not defined here, because it is taken care of in subsequent instructions, however acquired, if used for these purposes, violates the Sherman Act, and that is the law, not only in this case cited, but in any other number of cases we might cite that deal with this question.

The Court: Any other objection? [3538]

Mr. Williams: It also should state that the power is used with specific intent to monopolize or to restrain trade.

Mr. Dixon: Not if the jury finds they haven't, counsel.

The Court: Overruled. I will give 13. I will pass up for the time being the suggestion I have at the end. [3539]

Paragraph 14?

Mr. Dixon: 14 may not be necessary, your Honor, in view of the fact that you have already given the other one, that this industry in California is properly subject to restraint.

The Court: All right. 14 withdrawn. Don't hint about withdrawing an instruction, either one of you, because if you do I am going to jerk it right now. 15?

Mr. Dixon: I will keep quiet, your Honor.

The Court: Feel free to speak up, but I am warning you. 15?

Mr. Williams: We object first to the use of the word regulation, because the Sherman Act does not regulate the business. It prohibits certain acts. Regulation is a misnomer. That applies to administrative agencies that have continuing supervision. So that should be changed.

Mr. Dixon: You mean it is not absolute? I have no objection to that change.

The Court: What change? Strike that?

Mr. Dixon: No.

Mr. Williams: Strike "nor exempt from regulation."

Mr. Dixon: It would have to say "is not absolute."

Mr. Williams: "is not absolute." That would improve it somewhat.

Mr. Dixon: This is the language of the cases, but I [3540] have no objection to striking the regulation part.

Mr. Williams: Again, this whole instruction is directed towards an individual offense by Exchange Orange, and it should under the amended pleading relate only to something done pursuant to conspiracy or combination. There is no longer any question of an individual offense by Exchange Orange or by Sunkist.

The Court: Does that complete your objections?

Mr. Williams: No. We also state the evidence does not show that Sunkist had a monopoly of product oranges or of any citrus juices, and so the instruction is thus surplusage and should not be given. Also, it assumes that the defendant does have a monopoly.

The Court: Well, the only objection there that interests me is this question of whether or not this refers to some individual offense by an individual defendant apart from combination or conspiracy, and as I understand now, plaintiff disclaims any claim of an offense by an individual.

Mr. Dixon: Well, yes, your Honor; under the attempt part of Section 2, we do not claim that there was any attempt to monopolize here which applies to individuals.

The Court: What do you say to the objection?

Mr. Williams: We will hint it should be withdrawn.

Mr. Dixon: This requested instruction, I think, is most necessary because it deals with a refusal-to-sell charge of [3541] the complaint, and the defendants are going to, of course, argue that they don't have to sell the plaintiff, and they could select their own customers.

Now, I think we should have some instruction upon the right to do that, in other words, to indicate it is not an absolute right, and that where it is exercised as a purposeful means of maintaining a monopoly, that it is prohibited by the Sherman Act.

Mr. Williams: The language "purposeful means of maintaining a monopoly."

The Court: Does this go back to the distinction we have been making between what might be called the general situation of violation of antitrust laws as contrasted with the problem as to whether or not a particular cause of action had been proved? In other words, from the cause of action standpoint, you say you are relying on the conspiracy.

Mr. Dixon: The conspiracy, that is correct, and combination.

The Court: The combination.

Mr. Dixon: That's right.

The Court: Now, further back of that, of course, is the general problem of whether the antitrust laws have been violated.

Mr. Dixon: That is the basic problem.

The Court: One of the instructions I had was you [3542] couldn't recover by merely showing alone that the antitrust laws had been violated.

Mr. Dixon: That I would agree to.

The Court: You would have to go further. Is this a correct statement? This would be a violation of the Sherman Act?

Mr. Dixon: Yes; it is, in my judgment. It is taken direct from the cases, your Honor, the two cases cited.

The Court: What do you say, Mr. Williams?

Mr. Williams: It is trying to state a violation of the Sherman Act by a refusal to sell. Both the Lorain Journal and the Fairfax Linen cases involve refusals to sell by an individual defendant. The Fairfax was an attempt to monopolize, and the Lorain Journal was also that.

This has no place any more. It can only prejudice the jury and mislead them.

The Court: This doesn't talk about an attempt to monopolize. It talks about maintaining a monopoly which might be already existing.

Mr. Dixon: That is our contention.

Mr. Williams: The only monopoly in this case, your Honor, as counsel conceded a few minutes ago, from his position the only monopoly in the case is one on product oranges and there is nothing in the complaint about miantaining a monopoly on product oranges. [3543]

Mr. Dixon: The complaint alleges in Section 2 they combined to monopolize and monopolized.

Mr. Williams: But it doesn't charge they combined to maintain a monopoly in juices. That is what this relates to.

Mr. Dixon: Certainly. They were maintaining a monopoly. They would have to combine together to do it and they did. I mean the facts show that there was a monopoly, and it is applied to certain of the single-strength juice and it was maintained by reason of the refusal here to—one of the things was the refusal to sell to the plantiff or make an arrangement available to him.

The Court: Objection overruled. I will give 15. 16?

Mr. Dixon: I think, your Honor, this one may be perhaps withdrawn. It was drawn at the time of the attempt——

The Court: Strike "perhaps" from the record. Withdrawn.

17? Well, I suppose the word "creating" would come out on line 7 for one thing.

Mr. Dixon: Yes.

Mr. Williams: Our first objection is that this again is stating the attempt-to-monopolize theory and should go out because that is out of the case.

Mr. Dixon: This is a violation of both Section 1 and Section 2 of the Act, counsel. [3544]

The Court: First this creating would come out, wouldn't it? Creating a monopoly control? That would be part of the attempt.

Mr. Dixon: Conspiracy, your Honor, to create. The Section 2 count as it now stands is that they conspired to monopolize and did monopolize. In other words, the act of conspiring again without any factual action there.

The Court: They are not talking about conspiracy here. This is predicated entirely on refusal to give a comparable contract.

Mr. Dixon: Oh, yes; I see your point.

The Court: One defendant refusing to give a comparable contract for the purpose of creating or maintaining.

Mr. Dixon: Yes.

The Court: I wonder, to start with, if creating oughtn't to come out of there?

Mr. Dixon: Your Honor, let me make this suggestion. Let's pass this.

The Court: You might withdraw it?

Mr. Dixon: I might withdraw it. Let's pass this for the time being, because I have some more specific instructions which I prepared later which will present this problem a little more specifically.

The Court: All right.

Mr. Fowle: Have we received those? [3545]

Mr. Dixon: Yes; you have, counsel.

The Court: 18. Read it over first. That is very similar to 17.

Mr. Dixon: Yes. Let's pass that for the moment.

The Court: Pass 18. 19?

Mr. Dixon: This instruction, your Honor, relates to the degree of proof required, the type of proof, rather, required in this kind of situation as applied to the facts of this case.

The Court: It involves the intent, doesn't it? Intent is necessary. I am just paraphrasing it to get the substance of it.

Mr. Dixon: Yes.

The Court: The plaintiff need not show by direct evidence that the refusal of EOP to enter into a comparable contract was pursuant to a purpose of EOP or Sunkist to eliminate. It is not necessary to show by direct proof the purpose to eliminate competition of plaintiff or to create and maintain a monopoly.

Mr. Dixon: The hub of the instruction is the last sentence.

The Court: Well, let's see whether it applies to this.

Mr. Dixon: This is a conspiracy charge here, your Honor.

Mr. Fowle: It looks to us like intent to monopolize. It is discussing the specific intent which is necessary for [3546] the attempt to monopolize. It deals with an individual act of Exchange Orange.

Mr. Dixon: Let's pass this, if you want to, for the time being, your Honor.

The Court: Pass 19. 20?

Mr. Dixon: Again we can pass this, because of the withdrawal of the attempt charge, but I don't want to leave it out entirely at this time, but let's pass it until we get to the new ones.

The Court: All right. 21?

Mr. Dixon: Well, this is out because it is a Robinson-Patman Act charge.

The Court: That would be attempt there, wouldn't it? The third cause of action is out.

Mr. Dixon: Yes.

The Court: 21 is out. 22.

Mr. Williams: That is Robinson-Patman, isn't it?

Mr. Dixon: Yes. Take this out.

The Court: 22 out. 23?

Mr. Dixon: This is on damages.

The Court: What are the defendants' objections?

Mr. Williams: The most recent case in this Circuit on the subject of damages is this Wolf against National Lead Company, 225 F. 2d, 427. That uses the language we would [3547] prefer to this language. It states that the rule which precludes the recovery of uncertain damages applies to such as are not a certain result of the wrong, not to the damages which are definitely attributable to the wrong, but only with respect to their amount. That is a simpler statement than the one in the instruction.

The Court: Have you presented an instruction on it?

Mr. Williams: No; we haven't as yet.

The Court: It might be possible to use them both if there are no inconsistencies between them, but this is a correct statement of the law, isn't it? [3548]

Mr. Fowle: As it is cast it has certain aspects of it that I think would be prejudicial.

The Court: I see one line that I am going to suggest come out.

Mr. Fowle: Because the instruction starts off dealing with this particular case, it refers to the plaintiffs' business or property being injured, then in the next sentence, "Since proof of the damages suffered may be difficult, 'The wrongdoer may not object to the plaintiffs' reasonable estimate,' "—that assumes in three different places here that the defendants are wrongdoers.

The Court: I don't follow you on that.

In these general instructions where you state principles, you can't state that they are assuming anything. They are stating principles of law. The jury may find that it applies or may not apply.

The sentence that I think doesn't belong in there, though, is the one that starts at 4. You are going to help the jury, now, estimate damages. "If you as jurors should determine that plaintiffs' business or property was injured by activities in restraint of trade, the question will arise as to how plaintiffs' damages should be computed." Then comes this sentence:

"One whose business or property has been injured by the activities of a combination in [3549] restraint of trade is entitled to damages."

Standing by itself that is a very general statement and is subject to a lot of ifs and ands.

Mr. Dixon: That is right, your Honor.

The Court: And I think that should come out. Then you would go from the first sentence, how should they be computed.

Mr. Dixon: Then you can start——

The Court: "since the proof of damages may be difficult, 'The wrongdoer may not object to plaintiffs' reasonable estimate * * *' "

There is no assumption that anybody is a wrongdoer. It starts out with "If." "If you as jurors." If you reach this part of the case.

Mr. Fisher: It is coupled right there——

Mr. Fowle: The first sentence is not just a statement of a general principle of law. That is referring to this particular case, and the next thing we are talking about wrongdoers in three different places. You have a statement that relates to this particular case, coupled with principles of law——

The Court: If you determine that plaintiffs' business was injured by activities in restraint of trade, the question will arise how should damages be computed.

Now, if you reach that far, then you have concluded that [3550] there was a wrongdoer. So even on your argument I don't see any point to that.

Mr. Williams: It should be "interstate trade and commerce," rather than just "trade."

The Court: All right.

Mr. Williams: I think it should be "substantial restraint of interstate trade and commerce."

The Court: I will insert in the second line, so that it will read, "by activities in restraint of interstate trade and commerce."

Mr. Williams: We also ask that "substantial" be inserted in front of "restraint." Actually it should be "substantial and unreasonable."

The Court: There could be another instruction, if that is proper, somewhere else. That doesn't have to go in this one.

This one is if you reach this question.

Mr. Williams: I suggest "substantial and unreasonable."

The Court: "If you as jurors," insert "based on all the instructions in this case."

Mr. Fisher: Your Honor, may I advert again to this word "wrongdoer," because it disturbs me?

This is a quotation from a case, but it appears just before the words "the plaintiffs' reasonable estimate." The jury hearing that is going to couple it with us. [3551]

The Court: Would you feel better if it said, "the defendants may not object"? That pins it down closer. Isn't there something in the Eastman case on this matter of damages, also?

Mr. Dixon: I think so.

This language, I think, is generally used.

I don't have the language of the Eastman case before me. But the purpose of this instruction is to——

The Court: I instruct the jury, on this question of damages, that they only consider this instruction if they reach that point in the case, and there is no intimation that when I give this instruction that they reach that question.

Mr. Williams: I suggest lines 14, 15 and 16 come out, and then after the three stars in line, I guess it is 13, it is irrelevant that the principle is an ancient one and is not restricted to proof of damage in antitrust suits.

Mr. Dixon: I will take that out. I don't care about that.

The Court: All right. That may go out. Starting with "That principle is an ancient one."

Change "The wrongdoer" to "A wrongdoer." It makes it a little more general.

Mr. Fowle: It is in a quotation.

The Court: Start the quote with the word "Wrongdoer." That doesn't present any problem. A wrongdoer. [3552]

What are your objections to 23? Is there anything more you want to add?

Mr. Williams: I think that covers our objections.

The Court: The objections are overruled. I will give 23 as modified.

24.

Mr. Williams: I suggest that in line 12 the three stars come out and the rest of the line. So it reads, then:

"these are governing principles applying to compensatory damages if unliquidated." [3553]

The Court: I think compensatory or exemplary doesn't add anything.

Mr. Dixon: No. I have no objection to taking that out.

The Court: That may go out. Leave the stars in to show an excerpt. I won't read the stars to the jury.

I think on line 5 it should start out, "If plaintiff is entitled to damages," then recoverable damages include.

Any objection to that?

Mr. Dixon: No.

The Court: By agreeing to some of these changes, you are not agreeing to the whole instruction. That is understood. We are just trying to work these over.

Mr. Dixon: Plaintiff is entitled to damages?

The Court: Actually there are two plaintiffs.

"If plaintiffs are entitled to damages, then recoverable damages include," and strike out the "therefor."

Actually this covers proximate cause, as well as damage.

Mr. Dixon: Yes.

It is a very good instruction, I think, on damages.

The Court: You are modest, aren't you?

Mr. Dixon: Yes.

Mr. Williams: Should "defendant" be "defendants" in line 7? "arising from wrongful acts committed by defendants"? [3554]

The Court: Insert "all defendants."

You have omitted so much there beginning on line 11 that the sentence doesn't make good grammatical construction.

"These are governing principles applying to compensatory damages if unliquidated, when determined by the trier of the facts their propriety cannot be governed"——

Mr. Dixon: There should be a new sentence there, Judge, although this is a quote.

The Court: There should be a period after "unliquidated."

Mr. Dixon: Yes. And then a new sentence.

The Court: Are there any objections now to 24?

Mr. Williams: No. That is all.

The Court: I don't know whether you still have objections or not, but if you have, they are overruled.

I think we have obviated most of them.

25.

Mr. Williams: This is repetitious of 24.

Mr. Dixon: It relates to profits.

The Court: I don't think it is repetitious. This takes into account damages in the future.

Mr. Williams: 24 includes loss of business. Doesn't that include loss of profits?

Anything that is in 25 that is not in 24 should be added to 24, rather than give them separately.

The Court: They are read along. I try to group these [3555] logically when I decide what I am going to give. I shuffle them around. How these wind up it is pretty hard to say, except the chances are that it will follow 24, and it will sound like it is part of 24.

Any other objections to 25?

Mr. Williams: No.

The Court: Now, in the file that I gave you, I gave you revised 26.

Mr. Dixon: I withdraw that, your Honor, because we have agreed not to have you charge on this subject at all.

The Court: What I did was to modify the bottom part of the section by just striking out "threefold," and then striking out the first sentence, and then letting the second sentence start with the following: "If plaintiff is entitled to recover," and then picking up again, "your interest will be," and so forth.

Do you want to pass it, or withdraw it, or what?

Mr. Dixon: I understood that you were not going to charge on this treble damage feature, and so on, and this was put in before we had that discussion.

The Court: In the set I gave you there is a revised 26. You will find a revised 26. It follows the lettered instructions.

Mr. Dixon: That seems to be all right, as far as the plaintiff is concerned. This one could be used for our [3556] proposed 26, and we will withdraw ours.

Mr. Williams: We will request that the entire section be read, including the treble damage part. So we are willing to accept instruction 26 as originally submitted by the plaintiff.

The Court: The law is pretty clear on that, Mr. Williams, isn't it?

I just picked up the Law Week the other day——

Mr. Dixon: There is a recent decision on that, that you are not supposed to instruct, actually.

Mr. Williams: I haven't been able to read Advance Sheets for quite a while.

The Court: Whether this is necessary or not might be a question, but I am going to approve the redraft as is, and the only thing would be whether it adds anything to what we have got.

Mr. Williams: I think there is a technicality here. I believe Section 7 was repealed in the last session, and the technical reference is under the Clayton Act.

Mr. Dixon: Here is an Advance Sheet on the treble damage instruction.

The Court: I think it is the same case that I saw.

Mr Dixon: It is Sabolsky

The Court: That is it.

Section 7, you say, was repealed? [3557]

Mr. Dixon: It was changed.

Mr. Williams: It was repealed.

Isn't the same language found in Section 15?

Mr. Dixon: The substance has not been changed.

Mr. Williams: The substance has not been changed, but I think the language is identical.

The Court: Let's say, "The law provides, in part," and strike out "Section 7."

Mr. Williams: I think that will do it.

The Court: Then I will reject 26 as proposed and give, instead, 26 redrafted, subject to the question of whether I will give it at all.

Lots of times you go over these instructions, and when you start to work them over you find repetitions, you find that you think something is covered. I may pull some instructions out later.

Plaintiffs' 27.

Mr. Dixon: This is the one, your Honor, that deals with the so-called price fixing part of the case.

The Court: Where you say on line 16 "to monopolize," do you mean, again, a conspiracy?

Mr. Dixon: Yes.

The Court: Insert "a conspiracy" in front of "to monopolize," on line 16.

Before we start discussion on it, the only question I had [3558] on it was the first sentence, stating something is not in dispute.

I personally think there isn't much dispute, but I just wonder. If I give it, it has to be given by virtue of a stipulation.

I could say that and tell the jury that I was only commenting.

Mr. Williams: We would rather not stipulate to it.

Mr. Dixon: Of course, I don't want you to stipulate to anything that you don't want to stipulate to, but if there is anything that is not in dispute in this record, I would say this is it. But I understand the judge's position on it.

I asked them specifically, Finley, MacMillan, and Silzle, and the answer was yes.

Mr. Williams: If we say this one is not in dispute, I think we can think of some more.

I think it is better to leave out all stipulations in instructions.

Mr. Dixon: I am not asking you to stipulate, counsel.

The Court: Start it out with, "You are to determine whether." I suppose you are going to have to tell them what illegal per se means.

Mr. Dixon: It is illegal per se, or in and of itself and without more.

I mean it is illegal per se, or in and of itself it is [3559] in violation, then go on from there, the Sherman Antitrust Law.

The Court: Insert after "per se," "that is, it is illegal in itself."

All right, the first sentence reads: "You are to determine whether TreeSweet and Silzle were selling," and so forth, and then after "per se" on line 5, insert, "that is, it is illegal in itself and in violation," and so forth.

Line 16, after the words "commerce or" insert "a conspiracy."

What is defendants' objection to 27?

Mr. Williams: Our first objection is that there is no necessary or probable connection between the proposition that TreeSweet and Silzle contracts may have had the effect of fixing prices, and the proposition that such contracts may have been processing contracts, which is the relationship that it tries to state.

The Court: You could skip some of that. You could say, "If you find that the contracts had the necessary intended effect of fixing or tampering with the price or price structure at which Sunkist, TreeSweet, or Silzle sold single-strength orange juice in interstate commerce, you may consider such fact in determining," and then drop down to, "whether such contracts were in fact entered into."

I agree with Mr. Williams that they could be, in fact, [3560] processing contracts, or not, and your contention would still be tenable.

Mr. Dixon: I have no objection to that.

The Court: Strike out in line 14 "in fact processing contracts or whether."

Mr. Williams: I didn't get that change.

The Court: Line 14, after the words "in determining whether such contracts," and then strike out "were in fact processing contracts or whether they."

Mr. Dixon: "entered into."

The Court: Yes; that is the way it reads. [3561]

Mr. Fowle: I was going to say, your Honor, I don't think there is any logical connection between the first part of this sentence, if you find there was price fixing, and the second part of it, which is, "you may then find that the contracts were in fact entered into as part of the conspiracy to restrain interstate commerce or conspire to monopolize."

Then skipping down a little bit, "as charged by the plaintiff," because the conspiracy that is charged by the plaintiff in the amended complaint doesn't say anything about price fixing. All of which illustrates the point we were trying to make earlier today, that this matter of price fixing is simply being dragged in by the heels here in an effort to show public injury when it was never pleaded.

The Court: Why don't we do this? I am not agreeing with what you say about being dragged in by the heels, Mr. Fowle. Beginning about 9 you can say, "You may determine whether these contracts," and so forth, so it would read, "You may determine whether the 1951 TreeSweet and Silzle contracts had the necessary or intended effect of fixing or tampering with the price structure," and so forth.

Of course, as far as what you are saying, Mr. Fowle, the plaintiff is merely limiting his position by this instruction. In a way, it is a little hard for you to complain about it, because he is saying in substance, if you consider price fixing, you have got to consider whether it was a [3562] part of a conspiracy to restrain interstate commerce or a conspiracy to monopolize. That is what he is saying.

Mr. Fowle: Well, I am not sure I get your point.

The Court: The plaintiff limits this for those purposes. He tells first it is illegal per se, if you find this situation, it is illegal per se and you may consider such fact in determining such contracts were entered into as part of a conspiracy, so it is a limiting instruction.

Mr. Fowle: Well, I don't really quite follow that, your Honor. You have got a charge here that they were contracts entered into which were said to be in restraint of trade, and it is claimed in the amended complaint that they were offered to some and withheld from others.

The conspiracy that was set forth in the amended complaint itself prior to the amendment seems to me to be one to favor certain persons and to eliminate competition of others, that there was a conspiracy to do that. It says nothing whatsoever about price fixing.

It seems to me that this proposed instruction illustrates, to use the phrase I used before, how price fixing is being dragged in by the heels. It has nothing to do with the conspiracy that was alleged in the amended complaint, nor is it charged it had any injurious effect upon the plaintiff. Obviously, it couldn't have had any injurious price effect upon the plaintiff. A price fixing arrangement wouldn't have [3563] injured the plaintiff. It would have benefited him.

Mr. Dixon: It has the same relevancy and application, your Honor, in connection with the determination of whether there was a conspiracy as charged, as does the Hyland Stanford-General Foods contracts.

Mr. Fowle: Then we make the same argument about the Hyland Stanford contracts.

Mr. Dixon: Yes; I know.

Mr. Fowle: We come back to this.

The Court: Would this do it? Beginning line 9 with the "if," and then, "you may determine, therefore, whether the 1951 TreeSweet"—and so forth—"had the necessary and intended effect"—and so forth—"in determining whether there was a violation of the antitrust laws."

Mr. Williams: Isn't it conceded they didn't have the necessary effect of fixing prices, that the contracts were lawful standing alone? So that isn't in issue, whether they had any necessary effect.

Mr. Dixon: Oh, yes, it is. I think that is the very point.

The Court: You haven't answered my suggestion. Why not limit it to a question of whether there was a violation of the antitrust laws. That is really the only place it has in the case.

Mr. Dixon: Yes. [3564]

The Court: It isn't part of the thing causing damage to the plaintiff.

Mr. Dixon: No; but that would be part of the acts alleged to be one of the reasons for the combination and conspiracy, Judge. In other words, we do not claim that, assuming that these contracts had the effect of fixing prices and determining prices and eliminating price competition between Sunkist and TreeSweet and Silzle, as the amended complaint now alleges, that the plaintiff suffered any damage as a result of that fact.

The Court: You use it entirely on the matter of the violation of antitrust laws.

Mr. Dixon: That's right.

The Court: Why not say that, then?

Mr. Dixon: Except to merely say it is the violation of the antitrust laws without applying it to the question, the ultimate question to be determined by the jury, and indicate how or why they should consider it, I think would be kind of leaving it up in the air. That is the reason I have used this application of it. I think that certainly is as far as it could be considered by the jury in this case.

Mr. Fowle: I think your Honor has really put your finger on the heart of this problem, that he should say in effect that if you find there was price fixing, you may consider that in determining whether there was a violation of the antitrust [3565] laws. If there was price fixing, I expect that would be violation of the antitrust laws, but what has that got to do with the case? It hasn't been charged. If price fixing was a violation of the antitrust laws, that violation of the antitrust laws did not injure the plaintiff in this case, it seems to me, and it has no place here and it was not pleaded.

Mr. Dixon: It would be one of the reasons, it certainly could be argued, why this arrangement was entered into, your Honor.

The Court: I have this view on that general subject. I may be wrong. But it seems to me my view is that in this kind of a case the plaintiff is entitled to go in and first show the violating of the antitrust laws top to bottom, whatever they were. Then I instruct the jury that isn't enough. He must go in and show particular things that caused damage. But he can't recover unless you have violated the antitrust laws, and he has to then allege particular things that damaged him. But I don't know that you have to tie one of the particular things with every violation you made of the antitrust laws.

Mr. Fowle: I would think you do. I would think you have to show any violation of the antitrust laws which was claimed to have occurred itself had an impact on this plaintiff and injured him with resultant damage, and if that isn't so and can't be established, the claim that there was a particular [3566] violation of the antitrust laws has no place in the case even if it had been pleaded.

I might say our principal objection to this instruction No. 27 is that the matter of price fixing was not pleaded in the amended complaint.

Mr. Williams: Your Honor, the statute supports the position of Mr. Fowle, because Section 7 of the Sherman Act, which is the same as the Clayton Act statute now in effect, says:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor"—and so forth.

So that the gist of this action is the injury to the plaintiffs' business or property by reason of something forbidden or declared unlawful by this Act. Now, other matters are immaterial.

Mr. Dixon: It seems to me, at least, it is perfectly clear to me, your Honor, the gist of the wrong here is that the defendants combined and conspired, to do what? To restrain trade and commerce in citrus fruit juices and to monopolize citrus juices processed in California. Now, that is the charge.

Now, the combination then is made specific as to what it was and what acts damaged the plaintiff, assuming that there [3567] was a combination and the jury finds that there is a combination alleged.

Now, this instruction 27 is pointed to the fact that the jury are going to have to determine as a fact, and it will be the ultimate fact here, whether there was the violation charged in the complaint of Section 1 and Section 2. That is the first thing they must do.

Now, in reaching that conclusion, which they must reach before they ever get to the question of proximate cause and damage, they may consider whether these contracts were entered into as part of a price fixing scheme, as well as the other things that are charged.

Then if they find that there was the conspiracy or combination charged in violation of both Sections 1 and 2, then they must still determine that the plaintiff suffered damage as a result of some of the acts done pursuant to that conspiracy.

In other words, it is not the position of the plaintiff in this case that if all there was was a price fixing conspiracy, that the plaintiff would necessarily have a cause of action based upon that illegal act, unless we were able to make juice and they so stabilized the price and undersold us, and so on. Then the damage would be caused as a result of the price fixing conspiracy. But the damage here resulted from the inability of the plaintiff to have access to the [3568] product oranges so that it was unable to make any single-strength juice. The reason why it didn't have access is the basis of the complaint. But it certainly isn't price fixing. That is why this particular angle of it is limited merely to the consideration which the jury may give this, if any, in determining whether there was a conspiracy and combination charged in violation of both Sections 1 and 2.

The Court: Well, what about this point? I granted your motion to amend, over objection, on the ground that you had alleged at page 10 that for many years last past the defendant in the course of interstate trade and commerce combined and conspired with each other, and have entered into contracts which have had the purpose and effect, and so forth, of restraining interstate trade and commerce.

Since these were the contracts of the defendants and they had been charged in the complaint, I didn't feel that anybody was taken by surprise on price fixing.

Now, would it serve your purpose to pick up there about line 13:

"You may consider such fact," that is price fixing, "in determining whether such contracts," and then pick up the language of the complaint, "had the purpose and effect of unreasonably restraining interstate trade and commerce." [3569]

Of course, I can answer my own suggestion right now, because prior to that allegation you say combined and conspired with each other and have entered into contracts.

Mr. Dixon: I don't think your Honor's suggestion would cover the purpose.

The Court: It clears my thinking, because the language I now have, omitting this thing I just read to you, now have in this instruction is, "in determining whether such contracts were in fact entered into as part of a conspiracy to restrain interstate commerce or a conspiracy to monopolize"——

Mr. Williams: Isn't that the ultimate question?

In other words, at 9 it starts out, "If you find that the TreeSweet or Silzle contracts had the necessary or intended effect of fixing or tampering with prices," and then you conclude from that there is a conspiracy. It seems to me you should start out, "If you find that the TreeSweet or Silzle contracts were entered into as a conspiracy," then some connection would follow, but this has the cart before the horse.

The Court: My thinking is a little bit clarified, but reading this allegation listed as 2 on page 10 of the amended complaint. Are you satisfied with this now, "whether such contracts were in fact entered into as part of a conspiracy"?

Mr. Dixon: You mean and end it there, your Honor? I am sorry. I didn't get the [3570] suggestion.

The Court: Starting line 13:

"You may consider such fact in determining whether such contracts were in fact entered into as a part of a conspiracy to restrain interstate commerce or a conspiracy to monopolize or control production and sale of California single-strength Valencia orange juice in interstate commerce as charged by the plaintiff."

Mr. Dixon: Yes, your Honor, that is satisfactory.

The Court: In fact, I think that that——

Mr. Dixon: That is as far as we could go on it, frankly.

The Court: I think that corresponds more nearly to the complaint.

Mr. Dixon: To the complaint, yes.

The Court: Than what I proposed.

Mr. Dixon: Yes.

The Court: Any other objections?

Mr. Williams: Yes. We have quite a number of them.

The Court: All right.

Mr. Williams: The first is the same objection that I made with respect to proposed Instruction No. 5 relating to the market and the effect of competition from Florida juice, and I ask that those objections be incorporated with respect to Instruction No. 27

The Court: They may be incorporated [3571]

Mr Williams: The next one is that 27 relates only to single-strength Valencia orange juice, when the complaint relates to citrus juice The next one is that——

Mr. Dixon: Well, you can add that, if you want to, "or citrus juices." I don't care about that, your Honor.

Mr. Williams: It also raises the point that——

Mr. Dixon: After the word "Valencia orange juice," or, rather, "citrus juices." I think that is the language of the complaint, the amended complaint. I don't have it before me.

Mr. Williams: We think it should be just citrus juices and omit any reference to single-strength orange juice.

The Court: Which part? At the bottom part or in the middle?

Mr. Williams: All the way through. It should be citrus juices.

The Court: I go along with eliminating it at the end, but the specific thing I call attention to is the single-strength juice was part of a conspiracy, and so forth, to control the production and sale of canned citrus fruit juices. It would seem to me you might change it at the bottom part.

Mr. Dixon: That's all right at the bottom part, your Honor. California citrus juices?

The Court: California, yes, produced and processed in California. California citrus fruit juices.

Mr. Dixon: Production and sale in interstate commerce. [3572] Can we add after the word "sale," "in interstate commerce"? Or are you going to leave it in at the end?

The Court: Leave it in at the end.

Mr. Fowle: How would your Honor have that read now?

The Court: Line 17, "control the production and sale of California citrus fruit juices in interstate commerce as charged by the plaintiff."

What other objections?

Mr. Williams: The Capper-Volstead Act objection that was made with regard to proposed Instruction No. 2. I ask that that objection be incorporated.

The Court: It may be incorporated. Any other objections?

Mr. Williams: That's all, I think.

The Court: Objections overruled. I will give 27 as modified.

Let's see. We have 28 to 34. Do you want to stand up and stretch a minute?

(Interruption.)

The Court: Now, what about 28? Is that a correct statement of the law?

Mr. Williams: We have the general objection, of course, that it was not pleaded, that we raised before. In fact, I think we have substantially the same objections to this instruction that we had to Instruction No. 27, except some of the particulars relating to that language. [3573]

The Court: Haven't you covered this?

Mr. Williams: It is almost a restatement of what is in 27.

The Court: Not 27.

Mr. Dixon: This is the price maintenance, the potential power for price maintenance as against the actual price fixing itself.

Mr. Williams: There is no evidence in this case that indicates any agreement creating a potential power for price maintenance.

Mr. Dixon: I think that is just the trouble now.

The Court: What's that?

Mr. Dixon: I think that is precisely the trouble, that the pricing provisions of the contracts certainly contain the ingredients of potential power for price maintenance.

Mr. Fowle: 15 per cent discount and 7 per cent discount on top of that? It seems to me that is a pretty wide margin.

Mr. Williams: There is no evidence of actual exertion of the power for that purpose.

Mr. Dixon: Well, as I said, I don't insist too much as far as the plaintiff is concerned. It is coupled with 27.

Mr. Williams: May we incorporate by reference the same objections to 27, except those going to the language of 27?

The Court: All right. Objection overruled. I have made a note "Give, but may not use. If do so, use in connection [3574] with 27." When I look these over again, I will see what has been covered.

Now, 29?

Mr. Dixon: This is the classic and basic statement on price fixing, your Honor. It relates to any tampering. The language here is particularly applicable, any combination which tampers with price structures.

The Court: What is the objection to 29?

Mr. Williams: Our objections are the same as those just made to 28. They include it was not pleaded, and the others that were stated.

The Court: Objection overruled.

Mr. Williams: It incorporates the specific ones to 27 by reference, except the precise language of 27.

The Court: Objection overruled.

30? [3575]

Mr. Williams: Again we have the same objections that we had to 27, except for the precise language of 27. We incorporate them by reference.

The Court: Is this covered in any other?

Mr. Dixon: This is the direct application, your Honor, of the law to the particular contracts. There is nothing to prevent, in other words, under this instruction, defendants from arguing that they were not price fixing contracts.

There, again, it is a question for the jury under the previous instructions. But without the related instructions, it wouldn't mean much.

The Court: What was the other objection, Mr. Williams?

Mr. Williams: It doesn't state clearly that conspiracy is involved.

In lines 6 and 7 it refers to entering into by Exchange Orange as part of the scheme or plan. It should be as part of a conspiracy. That would be a clearer statement, because you have to find the agreement.

The essential part of the conspiracy is not mentioned.

The Court: Can we add "conspiracy, scheme or plan," and tell the jury they all mean the same thing?

Mr. Williams: We object to "scheme or plan," and ask that the word "conspiracy" be inserted for them, instead of added.

The Court: Is there any objection to that? [3576]

Mr. Dixon: No, I don't think so, your Honor.

What was that now?

The Court: Insert "conspiracy," in place of "scheme or plan."

The objections are overruled.

Mr. Fowle: I would like, also, to urge this objection to this series of instructions: It seems to me that to give three or four or five instructions on the subject of price fixing places undue weight on the subject of price fixing, particularly in view of its late addition to the complaint, and to the statement of counsel for the plaintiff that they don't claim it harmed anybody anyway.

Mr. Dixon: Counsel have made much of the fact that this complaint nowhere alleges any public injury.

I think it did to start with, but certainly this is public injury, if any public injury is required. And you have emphasized that point to an extent that I thought I had to emphasize the existence of it, or at least let the jury decide whether there was that type of thing in the case. Because it is illegal per se, and certainly that makes it a public injury.

The Court: Mr. Fowle's objection is overruled. However, I will read these all over together and see what the effect of them is.

Mr. Dixon: I think if we strike "scheme or plan," we [3577] should add the words "combination or."

The Court: All right. I have added that in. The objection is overruled. And I will read them all over to see if there are some that I can eliminate.

31 I went over, and the last part of it I think is wrong, "that you might consider such refusal as evidence of the existence * * *."

I think it has to be in connection with all the evidence in the case.

Maybe it is all right.

I revised 31 in those that I handed you. Let me see what you have got here, first.

What I objected to was, "you might consider such refusal as evidence of the existence of the combination and conspiracy."

The way it sounds is they may consider that evidence alone as evidence that the conspiracy and combination existed.

Mr. Dixon: I see your point.

The Court: If you look at 31 in the group that I handed you, it is about the fourth or fifth from the end, I don't think I made any changes, at least I told the girl not to, until she got down on the proposed instruction, to line 21, "agreements with Exchange Orange," and then appears, on line 22 in my proposed one,

"then you are entitled to consider these facts together with all the other evidence in the case [3578] in order to determine if the defendants and alleged coconspirators combined or conspired to violate the antitrust law and to determine if the defendants monopolized, attempted to monopolize * * *"

Mr. Dixon: I think, your Honor, if I may make this suggestion, that you have, of course, particularized a little more than I have. This instruction is based on the assumption, of course, that the court has previously advised them of the nature of the charges and the conspiracy which it claims was entered into in violation of Sections 1 and 2 of the Act. Therefore we end up with the application of it to that charge.

The Court: My objection, you see, was that it sounded as if this could be the evidence——

Mr. Dixon: I have no objection to the addition. I didn't intend it to have the effect that your Honor apparently thinks it has, or received from it, that this alone, without more, would be enough to constitute a violation. We don't make that contention.

The Court: How about this? "as evidence bearing on the question of the existence or non-existence of the conspiracy," and so forth?

Mr. Dixon: I would suggest this, your Honor. On line 22, "you might consider such refusal along with the other evidence in the case." [3579]

The Court: I think you have got to go further. Not as evidence of the conspiracy, but as evidence bearing on the question of the existence or non-existence of the combination——

Mr. Dixon: That is essentially the same thing that I intended to say here, your Honor. You may have made it more clear.

The Court: I propose that the latter part read as follows, beginning about line 21:

"Silzle under their 1951 agreements with Exchange Orange, that you might consider such refusal along with the other evidence in the case as evidence bearing on the question of the existence or non-existence of the combination and conspiracy alleged by the plaintiff,"

and so forth.

Let's take you first, Mr. Dixon. Does that meet with your approval?

Mr. Dixon: That is all right, your Honor.

The Court: What are the defendants' objections?

Mr. Williams: I think, in the first place, the instruction is deficient in not stating that refusal to sell or refusal to give such arrangement may be justified if it is made for ordinary business reasons, and in that case it cannot be considered as any evidence of the existence of a combination [3580] or conspiracy.

A combination and conspiracy can only be established by agreement. And it does not follow that if the plaintiff was unable to secure Valencia oranges from other sources, for reasons which are unexplained, that there was anything necessarily unlawful in the conduct of defendants, and that, therefore, the whole instruction should not be given, because their inability to obtain oranges from other sources must be attributed in some way to the defendants before it constitutes evidence of existence of a combination and conspiracy.

In other words, supposing that Winckler had been buying oranges 100 per cent from Morgan Ward for the past 20 years, and one year Morgan Ward doesn't like the color of his hair and refuses to sell to him, so he comes around to Sunkist; now, under this instruction this would say that that refusal of Sunkist to sell to him was evidence of a conspiracy.

It wouldn't be without some explanation of why he was unable to get oranges elsewhere.

The Court: It doesn't say that. It says in this particular set of facts you may consider such refusal as evidence bearing on the question.

Mr. Williams: It says, in line 16, "I charge you that if the plaintiff could not have secured California Valencia oranges from any other source"—our point is that any other source should be due to some act of the defendants. [3581]

Mr. Dixon: No, your Honor. This, again, illustrates the importance of the monopoly power over the raw product. In other words, that is why I have closed the door here to the possibility of getting it from any other source. And the testimony shows there wasn't any other place they could get it. And that is the basis of an obligation.

Mr. Williams: If Morgan Ward didn't like the color of his hair and wouldn't sell to him, you can't consider that as being any evidence of conspiracy whatsoever.

The Court: It doesn't say that.

Mr. Williams: Now, we have other objections, also.

The Court: What are they?

Mr. Williams: The first one is the objection we made with respect to No. 5 relating to area of effective competition, and the market and the Florida juice, and we incorporate those objections here.

The Court: You may incorporate them.

Mr. Dixon: May I get the last part of the instruction? As I have it, the only additions were made after the word "evidence," "along with the other evidence in the case as bearing on the existence"——

The Court: No. "as evidence," then insert, "bearing on the question of the existence"——

Mr. Dixon: I see. "or non-existence of the combination and conspiracy alleged by the plaintiff to be in violation [3582] of Sections 1 and 2"?

The Court: Yes.

Now, what are the other objections, Mr. Williams?

Mr. Williams: There should be a specific intent to restrain interstate commerce alleged in connection with the refusal before it can be considered as evidence of conspiracy.

I believe it also raises the Capper-Volstead question that we referred to in connection with the proposed Instruction No. 2, and we incorporate that objection, also.

The Court: All right.

What about this matter of a good business reason? Should that be in there, somewhere up about line 9, "Sunkist or Exchange Orange without a valid business reason refused to make"——

Mr. Dixon: I don't think it should be in here. I think if the defendants have in mind any charge on that, they should prepare one.

I would like to know what it is. That is why I had the one specifically submitted about a refusal to do business with the plaintiff in the early part of the entire series of requested instructions.

Mr. Fisher: Certainly it seems to me it should be in. Otherwise without some language it makes the refusal itself, regardless of the reasons for the refusal——

Mr. Dixon: Where you have monopoly power, and exercise [3583] it, the reason why you exercise it, or the motive with which you exercise it, is not material, if the effect of it is to restrain or eliminate competition then it doesn't make any difference how good your motives were.

The Court: Do you think it would be an erroneous statement of the law to insert on line 9 after "Exchange Orange" "without a good business reason"?

Mr. Dixon: Well, I would like to think about that, your Honor.

The Court: All right. [3584]

* * *

Wednesday, February 1, 1956—10 A.M.

(The following proceedings were had in the absence of the jury:)

The Court: The record will show the jury absent. Is there some problem you want to take up?

Mr. Strachan: Just a question about those two exhibits that we discussed yesterday, and on which your Honor reserved ruling. You suggested we might change the caption from "Grower Participation." Overnight I have talked with Mr. Finley and found that the term "grower participation" is one that is in common use in the industry, it was derived from Florida and has been in common use for many years. I expect him to define what "Grower Participation" means, and in light of that I would want to reoffer the exhibits in their present form with the understanding, of course, that instructions could be given on the subject if Finley's testimony weren't enough to identify the limitations, which I think it will be.

The Court: I don't think it ought to be on. Growers participate in everything that EOP does. That is what EOP operates for, that is what Sunkist operates for.

Mr. Strachan: But this is an instance in which the growers and the processors participate in the ultimate disposition of the fruit in the processed form. It is a term that I think Mr. Dixon has used. He talked about [3589] participation contracts.

The Court: Finley may testify what term they use. If that is a term they use, that is one thing, but here you have an exhibit that concerns the two particular contracts that are really the guts of the plaintiffs' case, you bring an exhibit in and you want to characterize those contracts on the exhibit. All through the trial they have been talked about as the TreeSweet and Silzle contracts. Now, you want to call them Grower Participation contracts, because that, you say, is what they call them in the trade.

I don't think it is proper, and I will again sustain the objection. The objection, however, only goes to your characterization of it. You could use some other term.

You could take any number of examples. Supposing you had a case, just to give you an example of what I mean, supposing you had a case where a trucking company is being sued for negligence, and the trucking company had a particular number of drivers that they called their Careful Driver Unit. They might have called them their Careful Driver Unit forever, but when the case comes to the jury as to whether one of those drivers was negligent, do you think it would be proper to characterize him in an exhibit, that this was a truck driven by the Careful Driver Unit, when the very issue before the jury was: Was the driver negligent?

Mr. Strachan: I think clearly, on that hypothesis, it [3590] wouldn't be admissible, but I don't see that that really bears a close analogy to what we are proposing here.

In your Honor's view, if we struck out "Grower" and just called it "Participation," would that tend to obviate the difficulty? [3591]

The Court: I am not going to take a lot of time on this. If you want to think about other terms, you may do so. I don't know that that answers it either. Take it up at some other time.

Mr. Strachan: All right. There is a little stipulation to correct the record. I don't think that we need to bother the jury with it. We can do it now.

Mr. Dixon: I think it can be handled right now.

Mr. Strachan: Transcript page 387 should be corrected at lines 9 and 10 by changing the figure there appearing as 32,007 to 7,622, and changing the figure which appears as 37,106 to read 15,330.

As to transcript page 38——

The Court: 38?

Mr. Strachan: Thank you. 388, line 10, where the figure appears 2,397,000, that figure should be made to read 5,400,000.

The Court: The corrections will be made. [3592]

* * *

(The following proceedings were had in the hearing and presence of the jury:)

The Court: The record will show the jury present in their proper places.

Ladies and gentlemen of the jury, in your absence there has been received in evidence a series of exhibits, and for the purpose of the record—it won't mean much to you now—I will read the exhibit numbers.

CS, CU, CV, CY, CZ, DC, DD, DF, DG, DH, DI, DJ, DL, DM, DN, DO, DQ, DR, DS, DU, EA, EB, EC, ED, EE, EF, EG, EH, EI, EJ, EK, EN, EP, ES, and FD.

As to those exhibits, this first comment I have to make, the first instruction I give you, rather, concerns, for instance, DO. I will use this as an example. There may be others in there of like import. This is similar to other exhibits heretofore received which we spoke of as letters from brokers, where brokers wrote letters to Winckler & Smith complaining or stating something about the juice or the taste of it, or some complaint. Those brokers' letters are not received as any evidence of the facts contained therein, the truth or falsity of the facts. They are offered as impeachment of the witness Winckler. He gave certain testimony about what complaints he had and what complaints he had not. These are offered for impeachment purpose solely as to Winckler and [3593] not for the truth of the facts contained therein.

If it was to be proved that this juice was bitter or that something that was contained herein was true, then a witness would have to be brought before you to be examined and cross-examined on that subject matter.

This DO and any other exhibits in this list I read to you of similar character are admitted for impeachment purposes only and not for the truth of the facts contained therein.

Now, there is another series of exhibits, EJ, EK, EL——

The Clerk: EL is not admitted.

The Court: EJ, EK, EM, EP, and ES, which concern excerpts taken from minutes kept by the—are they all Exchange Orange?

Mr. Strachan: No. I think there may be some that are the executive committee.

The Court: Well, they are minutes of meetings of executive committees or board of directors—one of them speaks of a special executive committee meeting of Exchange Orange, another a meeting of joint executive committees of Exchange Orange and Lemon, board of directors of Sunkist, board of directors of California Fruit Growers Exchange, which became Sunkist—it is the same thing, board of directors of Orange Exchange. There is no argument about the fact that what is contained herein, as far as the retyping of it on these exhibits is concerned, is what appears in the minutes. But in these exhibits there will appear two kinds of things. One [3594] will be some action taken by a board or a committee, and the other type of thing will be some statement made by somebody who came before this group and made certain statements. [3595]

Now, the exhibits are not offered for the truth of the statements contained therein. They are admitted for the purpose of showing action taken and what was said may be considered by you solely for the purpose of understanding and interpreting what action was taken, but they are not offered for the truth of the facts contained therein.

That may seem difficult for you to follow, but let's take an example that may not even appear here. I will try to suppose one.

Supposing that some man came before one of these boards and said, "Last night there was a heavy frost and three-fourths of the orange groves in Southern California were frozen out, and I propose that certain action be taken." And then there would appear some action taken by one of these boards. They are in evidence to show what action was taken, and you can read what the man said as understanding what was presented to this board or committee when it took action. But it is not to be considered for the truth of the fact that three-fourths of the orange groves in Southern California were froze out in last night's frost.

Do you follow me on that?

You have to understand when an official board of directors or committee takes action, you are entitled to know what they had presented to them when they took action. But that doesn't necessarily mean that what the man said [3596] to them was true or false.

Do you follow me on that?

Therefore, these statements are not evidence of the facts contained therein, but may be considered in connection with the action taken by the official body of either of the defendants that may be involved in the particular minutes.

I think that covers this matter of exhibits. Is there anything further on this matter of exhibits?

Mr. Strachan: No, I don't believe so.

The Court: All right. Call your next witness.

Mr. Strachan: Mr. Robert Clark.

ROBERT VICTOR CLARK

called as a witness on behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Strachan:

Q. What is your name?

A. Robert V. Clark.

Q. You were previously called as a witness in this cause and examined on direct examination by Mr. Dixon, is that correct? A. That is correct.

Q. You are the secretary-treasurer and general manager [3597] of E. A. Silzle Company?

A. That is correct.

Q. Are you appearing this morning pursuant to a subpoena served on you on behalf of the defendants? A. I am.

Q. Have you reviewed the invoices of Silzle sales of single-strength orange juice for the year 1951?

A. Yes, I have.

Q. Will you tell us what the price per case of 12/46 ounce Valencia orange juice was in April of 1951? A. It was $3.75 per case.

The Court: The witness is now talking about the price that Silzle sold it at?

Mr. Strachan: Yes, your Honor.

Q. Following that, the prices declined into the summer months, isn't that correct?

A. That is correct.

(Testimony of Robert Victor Clark.)

Q. What was the date of the first invoice for a sale made out of the state at a price of $2.20 per case or less? A. July 26th.

Q. What was the date of the first sales invoice showing a sale of orange juice in the 1951 season, out of the state, at less than $2.20?

A. Would you repeat that question, please?

Q. What was the date of the first sales invoice showing [3598] a sale of orange juice at an out of state price less than $2.20 per case?

A. Didn't I just previously answer that one?

Q. Did you have an invoice dated August 3, 1951, quoting a price of less than $2.20?

Mr. Dixon: If the court please, I object to counsel leading this witness. The records and invoices, if they have been subpoenaed, should be here in court to demonstrate the fact that this witness is testifying to, so we can know how many of them there are in this category, for example.

The Court: Well, this would save some time.

Is this going to be lengthy, counsel?

Mr. Strachan: No, sir.

The Court: Overruled.

Q. (By Mr. Strachan): Isn't it a fact that on August 3, 1951, there was a sales price at $2.13½ per case? A. Yes, sir, that is right.

Mr. Dixon: If the court please, I object to that. It is leading the witness.

The Court: It is leading, and your objection is correct, but in an effort to save time I am overruling the objection.

(Testimony of Robert Victor Clark.)

Mr. Strachan: Your answer was "Yes," was it?

The Witness: Yes.

Mr. Strachan: That is all with this witness.

Mr. Dixon: I only have one or two questions, if the [3599] court please.

Cross-Examination

By Mr. Dixon:

Q. Mr. Clark, this August the 3rd sale that you testified to was made at what price?

A. $2.13½ per case.

Q. Was that after allowing for any discounts, swell allowance, and so forth?

A. That was before any allowances normal in the trade.

Q. Did you find any other invoices at $2.13?

A. There were other invoices in that same range. I can't say that I remember any at that same price.

Q. Do you recall to whom this sale was made at $2.13?

A. I believe it was the Nabob Food Company in Canada.

Q. Your testimony, though, that you gave here before, where I asked you the question, still stands, does it not, with reference to the price at which substantially all the sales made by Silzle from the juice processed under the Silzle-Exchange Orange contract in '51 took place—it still stands, does it?

A. I believe my testimony was that it was basically patterned the same, it was in the general price range.

Mr. Dixon: That is all.

The Court: The same as what? Basically the same as [3600] what?

The Witness: Well, the question he asked me.

Q. (By Mr. Dixon): I believe your testimony, when you were here and I was examining you with reference to the selling prices, was that selling prices by Silzle of the juice processed under the Exchange Orange contract were substantially the same as the Sunkist selling price, with some few exceptions to that price; is that correct?

A. There were some less and some more.

Mr. Dixon: Thank you.

Mr. Strachan: No further questions.

The Court: You haven't answered the question. Read the question and answer.

He answered part of your question and didn't answer the rest of it.

(The question and answer thereto were read by the reporter.) [3601]

Q. (By Mr. Dixon): You can answer that yes or no for the record.

A. I wish you would repeat that. I did not get one of the words in there.

Mr. Strachan: I don't think Mr. Dixon's question has been fair either. The witness has said sometimes the price is more and sometimes less, and that is identical to what he testified to on his first appearance here. Mr. Dixon, I think, is trying by a

(Testimony of Robert Victor Clark.)

summary statement to put a meaning on the prior testimony that it is not susceptible of.

The Court: The objection is overruled. This is cross-examination. There was an interruption when this was read, so I didn't get the answer. The witness now asks it be read again. Read the question. You answered part of it. You did not answer all of it.

(The question was reread.)

Q. (By Mr. Dixon): Now, will you answer my question?

The Court: The point is this. The question was first, were the sales substantially the same, and then the question also had the part with some up and some down. You answered the latter part, some more and some less.

Mr. Strachan: I will object to the first part, your Honor, on the ground it calls for a conclusion and is not based upon his prior testimony.

The Court: Overruled. This is [3602] cross-examination.

Q. (By Mr. Dixon): Do you understand my question, Mr. Clark?

A. Whether the price was substantially the same?

Q. I asked you whether that was your testimony when you were here before.

Mr. Strachan: I think that is improper. The record will show what his prior testimony was.

The Court: Overruled.

(Testimony of Robert Victor Clark.)

The Witness: Yes, I believe that was the testimony I gave.

Mr. Dixon: That's all. Thank you.

Redirect Examination

By Mr. Strachan:

Q. It is true, is it not, that the price at which Silzle corporation sold Valencia orange juice during the summer of 1951 was sometimes more and sometimes less than the Sunkist price?

A. That's right. [3603]

* * *

JAMES A. FINLEY

called as a witness on behalf of the defendants, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Strachan:

Q. What is your name?

A. James A. Finley.

Q. You previously were sworn and testified under adverse examination by Mr. Dixon in this cause, is that correct? A. I was.

Q. What is your occupation, Mr. Finley?

A. I am presently manager of Exchange Orange Products Company.

Q. How long have you been employed by the Orange Products Company?

(Testimony of James A. Finley.)

A. Since February of 1926.

Q. Prior to that employment, what was your education?

A. I graduated from Pomona College with a major in chemistry.

Q. When were you first employed by Orange Products Company and in what capacity?

A. I was employed in February, 1926, in the capacity of control chemist.

Q. Will you tell us briefly the history of your employment from that time down to the present?

A. First I was the control chemist. In those days we just had one chemist in the whole plant. It also involved some production work in co-operation with the superintendent.

Then in 1929 I was made plant superintendent. I was plant superintendent in charge of production, receipts of fruit, and shipping, everything that has to do with that, until 1946. Upon the retirement of the manager, I was made manager of Exchange Orange.

Q. Now, as manager of Orange Products Company, will you review briefly the duties and functions that you perform?

A. The duty of the manager is varied. It is more long range planning, making estimates of the ensuing crop, sales estimates of products, working with the sales department, making plans for the next year's crop, not so much the current crop, as being able to get rid of the fruit that is turned over to us, and making all those arrangements.

(Testimony of James A. Finley.)

Q. Now, what is the principal function performed by the Orange Products Company as a member of the Sunkist system?

A. Well, the Exchange Orange Products Company takes all the fruit that is left over from the Sunkist Growers after the fresh fruit is taken out, and any sales to outside processors, and then, why, the fruit is turned over to Exchange Orange. We have no control, we do not go out and say how much [3605] fruit we want. We take what fruit we get.

Q. And what is the purpose or the object of the Orange Products treatment of so-called by-product fruit that is turned over to it?

A. The treatment of the fruit itself?

Q. Why is the fruit turned over to the products company if it is not sold in fruit form?

A. It is a salvage operation primarily. The fruit is turned over to the Exchange Orange to salvage what money they can out of it. The growers have their money in the crop, and anything that we can get out is just that much to them. If it wasn't for the products plant, the same oranges would have to be dumped in the wash, as we call it, which was very common back before 1940. They are small sizes, scarred fruit, frosted fruit, that type of fruit that the fresh fruit market will not accept, and it has to have a home, and rather than run it into the dump, why, we process it.

Right at the start of it, we just took out the oil, which was the valuable product in those days, and

(Testimony of James A. Finley.)

then developed the juice business and the dried meal, until about 1940, when the war years came along and the Government took all of our fruit, and since then, with the days of frozen concentrate, there is a home for all the fruit. It has just been since then that we have really saved all the juice and all the peel from the fruit. [3606]

Q. Since the introduction and acceptance of the frozen concentrate? A. Yes.

Q. Will you tell us into what products Orange Products Company converts the fruit?

A. Well, we have a number of different products, but to simplify it, the orange, in the center of the orange, of course, you have your juice portion, and then your white portion and peel is what we call albedo, and the outer portion, the yellow portion, is the flavedo. We have the three portions.

The juice portion, we make different types juices. We make the concentrated juice, single-strength juice put up with heavy pulp, canned orange juice, frozen concentrate. Those juices can be made of different degrees of concentration. They can also be made with different pulp content.

And then when our customers want it, they want it with a different oil content, so you get a multiplicity of product. You can have about 200 juice products, but they all come from the center portion of the orange.

The white portion, the albedo, is where the pectin is obtained. That is what jells jellies and jams.

Then the oil is in the outer portion of the peel,

(Testimony of James A. Finley.)

the yellow portion. When you peel an orange, that yellow stain on your hand, the oil is what caused the yellow stain.

Now, we have those parts. We do not have enough sale [3607] for all the peel in the form of pectin, so the excess we run through a dryer where it is dried down to dryness, sacked, and sold as dairy or cattle feed in the same field with beet pulp and barley. It is feed for cattle.

Then recently, why, there is the pharmaceuticals, the bio-flavinoids, as we call them. That is a new development that has been occurring for the past 15 years, so we have that pharmaceutical field.

Q. What plant facilities does the Orange Products Company operate under your management?

A. The facilities of the Orange Products, we have the main plant at Ontario, and then we have a branch plant at Lindsay, California. That is just the other side of Bakersfield in the citrus area called Central California.

Then we have a plant at Tempe, Arizona, right out of Phoenix. That is primarily a grapefruit plant just for canned juice, canned grapefruit juice, although we do have some oranges, and we make a blend.

Those three plants are under my supervision.

Q. Is the Orange Products Company operated for the purpose of gain or profit to the corporation?

A. There is no profit to the Exchange Orange Products Company. Juice returns go back to the

(Testimony of James A. Finley.)

grower. Exchange Orange Products does not pay dividends or make any profit at all. [3608]

Q. That is, you receive the fruit, you arrange for processing of it and disposing of it, and pay the cost of processing and disposing of it, and if there is anything left that is returned to the contributing growers, is that correct?

A. That's right, on a per-ton or per-solids basis, depending upon the fruit they send in. If they do not send fruit in, they do not get returns.

Q. Has the Orange Products Company ever paid any dividends to its stockholders?

A. No, it never has.

Q. Does it restrict itself to handling fruit of members of the Sunkist Growers organization?

A. The members only. We do not handle anybody else's fruit.

The Court: You said it paid dividends to its stockholders. You don't really have stockholders, do you?

The Witness: You have revolving fund stock. That is, the stockholders——

The Court: Well, you don't have stockholders in the sense of a profit corporation.

The Witness: As a private corporation, no. It is a revolving fund so that the current growers hold the stock in it, but it is what we call revolving fund stock.

The Court: Actually, it is returned pro rata to the [3609] growers to the extent that they participate.

(Testimony of James A. Finley.)

The Witness: To the extent that they participate, quality of fruit taken into consideration.

The Court: All right.

Q. (By Mr. Strachan): Will you describe the annual harvesting of crops for different kinds of fruit that are to be processed, if not sold as fruit, through the products organization? Take the yearly cycle.

A. Well, we have got the different areas. Starting in with the navels, the navels from Central California, that is between Bakersfield and Fresno, start in between the 15th and 20th of November, and they try to get those harvested by, oh, the first of February.

The Southern California navels start during the first and the 15th of January, and they are harvested and are through, oh, the first two weeks of May, depending upon the size of the crop.

Then the Central California Valencias start in in April, and they don't have too many up there, so it is about a six-weeks season, so it goes in April and the early part of May.

Then the Southern California Valencias start, which is the major crop as far as products are concerned. It starts about the middle of May and goes to about the, oh, the first or the middle of November, depending upon the size of the [3610] crop.

Then we have, well, there are some miscellaneous varieties, as we call them, not very much volume, that come in the spring of the year.

(Testimony of James A. Finley.)

There is the grapefruit, what we call desert grapefruit, that is Coachella Valley, Imperial Valley, and the Phoenix area. That fruit comes on starting about December and going over to the middle of June. [3611]

Then we have the summer grapefruit, which is through this area, that comes on about the middle of June and goes through about the middle of September. It might be of interest that all those blossom at the same time. It just takes longer to make an orange.

Q. (By Mr. Strachan): Will you tell us how that annual rotation of crops fits into the crop season of Florida?

A. The Florida season, they break it down to what they call their early season, mid season, and Valencias.

Their early season Valencias start in about the middle of October, it goes over to some time in January, middle of January.

The mid season, around the first of January, and it goes to about the middle of February, first of March.

Then the Valencias start about the first of March and they are through sometime anywhere from the first of June to the third week in June.

Their grapefruit follows about the same pattern, starting in October and finishing in June.

Q. Will you tell us what your regular procedure is for studying in advance the crop prospects and the market conditions which will face you during a Valencia packing season?

A. Well, we can tell or get a guess, not in cars or boxes, but we can tell along in August, September, whether it is going to be a large crop coming up, starting in the [3612] next May and June, or a small crop, or an average crop. That is, if we don't have a freeze in January. So that gives us some indication. We watch that, and then about October or November the government estimates come out about the growing conditions of the crop, that gives a better estimate. We start making pretty close plans then in case we haven't got enough facilities, or if it is a short crop we start making plans on how to distribute the juice to our customers.

We get a pretty good estimate then of the number of cars, boxes of fruit, after January and February. We have to wait until after that, because those are the two months we have the danger of frosts.

As soon as we get that—I say "we," that is Mr. Wilcox of the Sunkist Growers gets that estimate from the Government and they figure then about the number of cars that can be sold fresh.

That estimate also takes into account the size of fruit, that is, projected size of fruit. They take monthly measurements and compare the growth this month, compared to last year the same month, and a five-year average, so they make a pretty close estimate of the size of the fruit in the summer

(Testimony of James A. Finley.)

months. From that they estimate how many tons then will be turned over to products plants. [3613]

Q. And do those studies and statistics relate only to California crop and market conditions, or do they also include the Florida crop and market conditions?

A. Well, the estimate of the amount of Valencias going to products is pretty well set, but the products that we figure on making, the products it goes into, is determined to a large extent upon the Florida crop.

Q. What studies do you make of the Florida conditions?

A. Well, I go down to Florida about three times a year. Usually in the latter part of November, at the beginning of their season; I also go down in February, just about the peak of their season before the Valencias, and at that time they have a pretty good estimate on their crop for that year; and then I go down again in June at the end of their season to see how they came out, and also to see what kind of a set they have got for the following year.

Q. When do you start making plans and determinations for allocating the fruit which you expect to be available between the various classes of citrus products? A. Of citrus products?

Q. Yes.

A. Usually after February and after I take the trip to Florida, I determine whether they are packing an excessive amount of single-strength juice or

(Testimony of James A. Finley.)

frozen concentrate, because those are primarily the only two products they make [3614] in Florida; and if I think that they are, you know, short on frozen concentrate, I will make plans to pack more frozen concentrate here during the summer; if they are long on single-strength juice, less. Or if it looks like they are not overpacking on single-strength juice, and the market will be maintained, I plan on putting up more single-strength juice. It depends on their finished pack.

I make the plans so that we are flexible, because we don't pack those two items until starting about the 1st of July.

Q. When did you commence making your estimates and your tentative plans with respect to the Valencia season for the summer of 1951?

A. Well, that was the winter of 1950, November and December of 1950, we knew we had a large crop coming up and we were discussing it, then we waited on any final decisions, I think, until after the cold weather was over. But we had definite plans in November and December, because we knew it was a large crop and small sizes.

Q. When did you begin to make a determination as to what classes of juice products you would allocate the available fruit to?

A. It was about that same time. The frozen concentrate business was a growing business. They just started three or four years before that, and the consumers accepted it, and [3615] the purchases were greater than what Florida was producing or ourselves. We knew from the Florida estimates, which we could get in November and December, because they make an estimate on the number of gallons that they are going to pack, by taking the gallons moving out of warehouses, and the way the consumers were taking it, we knew there would be a shortage of Valencias, so that determined our thinking that we should put up as much frozen concentrate as possible.

Q. Did you also determine that there should be some production of hot concentrate?

A. Yes. Hot concentrate is an item that goes to the beverage trade. It is a pretty steady market. That is, it is about the same number of tons that goes into that market a year. It will vary, oh, five, ten per cent up or down, depending on whether we have a warm summer or a cold summer. That is a beverage. So that product is more or less what we call a stable product that we can depend upon year in and year out taking the tonnage.

And it will also take the early season fruit, that is May, June, even late navels with a high acid, because there is also more acid added to the product, so it really doesn't make any difference there. So we can tell a year or two ahead of time pretty near how much hot concentrate we will make, that is within ten, fifteen per cent.

Q. Then you made your plans to provide for an [3616] allocation of the necessary fruit for hot concentrate as one of the first items to be produced, is that correct?

(Testimony of James A. Finley.)

A. That is the first item to study.

Q. What can you say of the return that hot concentrate production will yield for the growers?

A. Well, the hot concentrate return is, I would say, a good average return; that is, that product goes into a five-cent carbonated beverage, or five or ten-cent drink now, but what they can afford to pay for it is a pretty constant figure, while these other products, they will go up or down. Frozen concentrate may be high one year and low the next, so it could be higher or lower. Taken over a period of years, five years, we feel that the hot concentrate will average as well, if not better, than the other products, and it will also take the early season fruit, which frozen concentrate and single-strength juice will not take.

Q. The Orange Products Company has facilities, has it, for making hot concentrate which it sells to the trade?

A. Yes, we have facilities for the so-called hot concentrate.

I might say the hot temperature is boiled down, it is 105 to 110, so it really isn't hot, but it usually is a pasteurized product. We have the facilities to make that. We make bases out of it for our own label, for customer label, according to their specifications. They will give us [3617] their formulas and we will make it. We also sell that concentrate in 50-gallon cans to supply houses that buy the straight concentrate and then they add the citric acid and oils and put it up in the finished container.

(Testimony of James A. Finley.)

Q. There are facilities for the production of hot concentrate in California other than those that are owned by Orange Products Company, is that correct? A. Yes, there are.

Q. Mention some of the plants that in the year 1951 had such facilities.

A. Mission Dry Corporation had facilities for hot concentrate. They turn out the Mission beverage. Hyland-Stanford had facilities, and they sell under the name of Tru-ade. Bireley's had facilities for hot concentrate, as well as frozen. Nesbitt, that is Nesbitt Fruit Products Company, had facilities for hot concentrate. Mutual Orange Distributors at Anaheim had equipment for hot concentrate. Winckler & Smith had some facilities for hot concentrate. Paramount, up in San Fernando, had facilities. I think they could make either hot or cold. Ventura Processors up in Ventura, they had facilities.

That is all I can think of now.

Q. In anticipation of the Valencia season of 1951, you said you determined that policy should be to pack a maximum volume or quantity of frozen concentrate, is that [3618] correct?

A. That is correct.

Q. What was the policy that you determined on with respect to the amount of single-strength juice that you desired to have packed during the coming season of 1951?

A. Well, any fruit over and above what we would need for the hot concentrate, frozen concentrate, we decided to put into single-strength juice, because we didn't have enough facilities for the frozen concentrate, and the single-strength juice being the lowest priced item—the frozen concentrate at that time was selling for about $2.11 a dozen ex-warehouse, which would reflect $40, $45 a ton, so it was obvious that we would make all of our effort to put in the product into the frozen concentrate. In addition, we bought a third vacuum pan, particularly, for that purpose.

Q. Were you able, with the facilities that were owned by Orange Products Company, to keep your single-strength production at its maximum while you were also producing the maximum quantity of frozen concentrate?

A. No, we weren't. We had ~~the~~ juice room to get through the maximum amount of fruit. We added a third vacuum pan, which threw us out of balance, which permitted us to take more juice to the vacuum pans and less to single strength, so we ran the vacuum pans to capacity, then any surplus juice over and above what the vacuum pans would take would go into [3619] single strength. Or when we cleaned up the vacuum pans. You have to have cleanup, so you would boil them out and sterilize them, then we could run single strength at that time. But it was just a surplus deal. [3620]

Q. That is, the production of single strength was only a surplus deal?

A. It was only surplus.

(Testimony of James A. Finley.)

Q. As far as your own facilities were concerned?

A. We knew we had enough. We wanted some single strength, because if you have got a label on the market you want to keep the label alive, but you don't want to push it. So you want some, but you don't want to push it.

Q. What labels were there under which California single-strength juice was being marketed on a national scale at that time?

A. Well, in the case of our own, we had the Exchange label, which we marketed nationally, and then for the first time we used "Sunkist" on the can. So we figured on going nationally with the name "Sunkist" as being our first label, and our "Exchange" the second label. With the short pack, we didn't get very far nationally. We did ship some out of the state, but very little.

Then there was the TreeSweet label, which was an old label. In started in 1937 or so. That was an accepted label nationally, and had the name "California" on it.

Case-Swayne, I think, is mostly just local.

Winckler, I think, sold nationally before that.

Silzle was more of a private-label packer. I think they did have their own label, but they gave that up before 1951. [3621]

And the Mutual Orange Distributors sold some single-strength juice under the "Real Gold" label, and they sold that nationally. But they put in equipment for frozen concentrate, and they con-

(Testimony of James A. Finley.)

centrated their efforts on frozen, and I don't know whether they went nationally in '51 with the Real Gold, or not. They had previously.

Q. It is a fact, isn't it, that the TreeSweet label in 1951 was a better known and a more productive label than any other in the United States, of California juice? [3622]

* * *

The Witness: Yes. It was the most popular California juice label in the United States, due to their active sales and production over the great number of years. They had a very good sales force organized, and they also turned out grapefruit juice under that label. They had a pretty [3625] well-rounded business.

Q. (By Mr. Strachan): Now, can you refer to any statistics to indicate to the jury the growing importance of the frozen concentrate form and the relative decline in the importance of single-strength juice down to and through the 1951 season?

A. Well, I have some figures here. The growth of frozen concentrate nationally was phenomenal at that time. To go back to what I consider the first year of frozen concentrate, the two previous years being more or less experimental, the first year was 1948, 2,300,000 gallons. I am leaving off the odd figures.

1948-49 ran about 12,200,000.

1949-50 ran 25,000,000.

1950-51 ran 35,000,000.

Today it is around 65,000,000.

(Testimony of James A. Finley.)

So the growth right during that time was the time of the major growth, in Florida as well as in California.

Q. You reported, did you not, during September that in your opinion it was an important policy matter to keep some California single-strength juice on the market even though the return did not yield as much to the growers as did the frozen concentrate?

Mr. Dixon: Now, if the court please, it seems to me that question is certainly not proper. [3626]

The Court: Overruled.

The Witness: Yes. As the fruit dropped off, our estimate of fruit that year——

The Court: We will save time if you will answer the question.

The Witness: Yes. I reported to the board to that effect.

Q. (By Mr. Strachan): Now, you say that the $40 price that was posted as the sales price of products oranges by Mr. Kelly was fixed so that hot concentrators could afford to pay that price and operate profitably, is that correct?

A. I don't know how he fixed the price, because I was not in on that, but the hot concentrators could afford to pay that price, yes.

Q. How about the frozen concentrators?

A. They could afford to pay that price, if not higher.

Mr. Dixon: If the court please, it seems to me, your Honor, that this is clearly a conclusion of this

(Testimony of James A. Finley.)

witness without any basic facts or evidence to support it, that these processors could pay it. It is hearsay unless this witness can testify of his own knowledge.

The Court: Overruled. I think the witness with his background and experience is qualified. This is opinion testimony.

Q. (By Mr. Strachan): Will you tell the jury upon [3627] what your testimony to that effect is based?

A. It is based on the hot concentrate which we made and our sales price. We knew they could afford to pay it. And, also, that the hot concentrators were willing to and did buy their supplies that year at $40 a ton.

Q. Did the frozen concentrators also buy?

A. The frozen concentrators that made it, what they bought from Sunkist, they paid that. I don't know what they paid other producers of fruit.

Q. When you decided to use EOP facilities for the production of hot concentrate and frozen concentrate up to the full capacity of those facilities, did you have enough capacity then arranged for, or did you have enough capacity to process all of the products oranges that you expected would be sent to you? A. No, we didn't.

Q. Will you tell us what steps you took to make other processing facilities available for the handling of this excess of products fruit?

A. Well, I contacted some other processors of single-strength juice.

(Testimony of James A. Finley.)

Q. What about hot concentrate first? Did you make any arrangements?

A. I made arrangements with the hot concentrators which were customers of Sunkist or we had previous arrangements with [3628] to run hot concentrate for our account when their plant was being shut down, because they just buy so many tons and quit. So I made arrangements when they were through that we would take over.

Q. With whom did you make that sort of arrangement?

A. We made arrangements with Mission, Hyland Stanford, and Bireley's.

Q. And were those arrangements simply to process as a contractor and deliver the product to you upon payment by you of the processing cost?

A. Yes. We furnished the fruit, they charged so much a gallon for making the concentrate, which is custom packing, and we took the concentrate off their hands.

Mr. Dixon: If the court please, may I just register an objection for the record at this point? We have specific contracts here which can speak for themselves.

The Court: The contracts speak for themselves, but this is merely a summary of reference to these contracts. The jury will look to the contracts that are in evidence in the matter. You may proceed.

Q. (By Mr. Strachan): When did you first start making these custom packing arrangements with Mission Dry?

(Testimony of James A. Finley.)

A. The first contract we had with them was in 1947.

Q. Did you have contracts in each of the succeeding years with Mission Dry down to and including 1951? [3629]

A. Yes. I think every year without exception we had some working arrangement with them and they did some custom packing.

Q. Now, will you tell us briefly the history of your custom packing arrangements with Hyland Stanford?

A. Well, they were also customers of Sunkist on fruit, and when they got through running that, they usually ran early season fruit, they were through for the rest of the year. If they had additional capacity, and we could use it, instead of us putting in vacuum pans to run it, we would hire them at cost plus a little profit to run for our account.

Q. For how many years did that sort of an arrangement operate between Orange Products Company and Hyland Stanford?

A. Oh, that started back in 1946, 1947, 1948, too.

Q. Were the arrangements any different or the reasons which you had for arranging these custom packing contracts any different in 1951 than they had been in the prior years?

A. No, they weren't.

Q. You also had a custom packing arrangement with Bireley's division of General Foods, did you not? A. Yes, we did.

(Testimony of James A. Finley.)

Q. Will you tell us briefly the nature of that arrangement? A. You mean in 1951?

Q. Yes. [3630]

A. We had a previous one before that. But in 1951, knowing that they had hot concentrate capacity and frozen, we made an agreement with them that when they got through running what they needed for their own account, they would run hot concentrate for us until the fruit was mature enough that we figured it would go into frozen, and then they ran frozen concentrate under our label. We paid them so much a dozen. We furnished the fruit and took the merchandise off their hands.

Q. For how many years had you had an arrangement with Bireley's for custom packing of hot concentrate?

A. We had an arrangement shortly after the war, 1946, 1947, in there, and then there was two or three years we didn't have one, but they bought mostly Sunkist fruit. We didn't need them in those war years. We had enough capacity lined up. When we saw we were going to have more fruit in 1951, why, I approached them.

Q. Did you have any reasons or intentions when you entered into the contract with Bireley's for the 1951 season for entering into that arrangement that year, other or different reasons or intents than you entertained when you contracted with Mission Dry and Hyland Stanford? A. No, there wasn't.

Q. Now, you have mentioned that you entered into a contract with Bireley's for frozen concentrate in 1951. Was [3631] that frozen concentrate to be packed under their name or under the Sunkist brand?

A. It was packed under the Sunkist brand.

Q. That was strictly what you call a custom packing arrangement, where you paid the manufacturing cost plus a profit for manufacturing?

A. What I call a manufacturing profit.

Q. Now, will you tell us what other arrangements you made or efforts you made to arrange for additional frozen capacity?

A. Well, there was the Covina division of Exchange Lemon Products Company, which is a Sunkist organization. It is commonly known as Damerel-Allison. Exchange Lemon bought them just about that time, the year previous, for lemon products. We contacted the Exchange Lemon to see if they would have facilities available for frozen product, which we knew they had, because they produced, Damerel-Allison had already produced it under their own label.

Then there was next a company by the name of Cold Gold contacted [redacted] said they had lost their contract with Snow Crop in the previous year and wondered if we could use their facilities. That contract never went through because of quality of merchandise. [3632]

Q. Did you ship fruit to them and make a trial run to see whether the Sunkist specifications could be met?

A. We shipped three or four loads of fruit to

(Testimony of James A. Finley.)

them and sent men down there to help them, and their equipment was such that it was just going to cost too much to fix it up to make it, so they gave up.

Q. What other efforts did you make to arrange for frozen concentrate?

A. Well, then there was Harts, located at Brea, who contacted me through a broker to see if we wouldn't use their facilities that year, and we made a test run there, and they were able to make a satisfactory product, and we went ahead with a contract with them until we ran short of fruit.

Q. Going back a little bit, at what time of year was it that you contacted Mission Dry, Hyland Stanford, and Bireley's with respect to the hot concentrate?

A. Contacted Mission and Hyland Stanford, it was in March of '51; and then it was the early part of April that I contacted the manager of Bireley's.

Q. When was it that you had your discussions with Cold Gold that you have just described?

A. Cold Gold contacted someone in the Sunkist organization, either Mr. Wilcox or Mr. Armstrong, and said the facilities were available, and they passed the word on to me, and that was the early part of June, I think it was. I don't [3633] remember the date.

Q. When was it that you had your discussion with Harts Foods?

A. Harts came along about the middle of June, about that same time. I was approached through a

(Testimony of James A. Finley.)

broker that came to see me, that the Harts organization was changing hands right then, and wanted to introduce me to the new owner. And it was about the middle of June by the time I really contacted the owner. The contact was through the brokers before that.

Q. The arrangement that you worked out with Harts Foods, again, was an arrangement to have the merchandise packed for Orange Products Company's account under your label?

A. Yes, it was, under the Sunkist label.

Q. That was the arrangement also made with the Damerel-Allison Company?

A. Yes, that is all under the Sunkist label.

Q. What other contacts did you make in an effort to secure additional frozen concentrate capacity?

A. As the fruit was getting more mature, I contacted—I heard where Mutual Citrus Products Company organization at Anaheim, that they were through running lemon, so I contacted them to see if I could use their facilities the balance of the year; it was about the middle of July, the [3634] season was well along. I talked to them, gave them in terms about what the price would be. I went over their equipment to see whether it would be satisfactory to make the product and decided it was, and we decided to make a test run of the products, so I sent cans down to them.

Q. That was about what time of the summer?

A. The latter part of July. It was about the

(Testimony of James A. Finley.)

middle of July I made the contact, and sent cans down the latter part of July.

Q. All of the arrangements that you described up to the present are these custom-packing arrangements with the product packed for EOP or Orange Products Company's account; is that correct?

A. That is correct.

Q. Now, you also had arrangements with Hyland Stanford and Mission Dry which were called deferred-payment arrangements; will you describe those to the jury?

A. Well, the deferred-payment contracts, they bought the fruit from Sunkist at the going market price, put up the concentrate in barrels, and it was put into Lawrence warehouse, and then as they took the merchandise out of storage they paid for the concentrate coming out on a formula basis as to how much they paid for the fruit. That is, the Sunkist organization put up the fruit and got paid for it later as they took it out, and the concentrate was the security of the [3635] growers.

Q. Under those so-called deferred-payment arrangements the fruit is bought and the product is owned in these cases by Hyland Stanford or by Mission Dry; is that correct?

A. Yes, they own the concentrate, oil, and peel, the whole orange. It is a straight arrangement, and with just an arrangement for payment of the fruit.

Q. Now, will you tell us what arrangements you undertook to make for the production of single-strength juice during the summer of 1951?

(Testimony of James A. Finley.)

A. Well, shortly after that March period I was talking to all of them, probably about March or April, because we had previous contracts with TreeSweet since '47, it just took about a telephone conversation, and I told him or asked him if he wanted an arrangement, similar to the ones we had previously, for that summer. And as I remember it, he said he did. And he left for Florida, because they have a branch plant in Florida. Then later, we didn't start up until July sometime, we worked out the final detail, and the only detail on that one was just a change of figures, because of increased cost of cans, cases, and so forth, and any other minor adjustments.

Q. Basically, the contract and the operating arrangement that you worked out with TreeSweet was the same as those that had been in effect for prior years since 1947, is that [3636] correct?

A. Yes, since 1947, basically they were the same. [3637]

Q. Will you explain the circumstances under which the first TreeSweet agreement of this type was worked out in 1947, and explain your reasons for working out this arrangement?

A. It was in 1947 TreeSweet was buying the fruit, canning the product. Along about September, after he had enough packed, which he figured that he could sell at the then going price, usually about September we get preliminary estimates or feelings from Florida what their opening prices are going to be on single-strength juice in October and Novem-

(Testimony of James A. Finley.)

ber, and he did not want to pack for inventory, so in his discussions with Sam Kelly, the party whom he bought the fruit from, he told him he was going to have to shut down; there was a lot of fruit then, and Sam Kelly——

The Court: Were you present at this conversation?

The Witness: No, I was not, but I got it from Sam Kelly, as telling me why to go ahead with the deal.

Mr. Dixon: Your Honor, I made no objections to this general line of questioning, but I certainly think I must object to any hearsay testimony.

I object to the answer on that basis.

The Court: I am going to overrule it to save time.

It is admissible without respect to the truth of the content, to show why the witness did what he did.

Overruled. Go ahead. [3638]

The Witness: So with the threat of shutting down, Kelly contacted Armstrong or Wilcox, and in turn relayed the information on to me, to see if there was some kind of arrangement that could be made to keep them in operation.

Q. (By Mr. Strachan): What was the growers' interest in keeping them in operation if the fruit was not going to be sold?

Mr. Dixon: If the court please, I don't want to object to leading questions, but it seems to me there ought to be some limit placed upon these questions and answers. Counsel is certainly able to ask questions here that will elicit facts and not conclusions. It is a question for the jury, many of these questions. I think it is time, in this examination, that counsel confine himself to the question and answer method.

The Court: I will sustain the objection.

You may inquire why he did what he did and so forth.

Q. (By Mr. Strachan): All right.

You did, then, meet with the TreeSweet representative, is that correct?

A. I met with Mr. McCracken, president of TreeSweet.

Q. You worked out an arrangement under which, in substance, what was to be done by you and what was to be done by TreeSweet——

A. Worked out an arrangement whereby he would pack [3639] the juice at cost, then the product as it was being sold, depending upon the price being sold, if it was higher than the current price it was all right, but worked out an agreement where he would pack for the account of the EOP Company at cost, and then with our type of organization, because the EOP organization doesn't sell anything, it was sold through the Sunkist Products Department to TreeSweet at the then current price of Sunkist, with allowances for brokerage, cash discount, and some of his sales expenses. In the original cost there is no sales expense. So it is what you call —TreeSweet would pack it, then the growers and TreeSweet would participate in the returns at the

(Testimony of James A. Finley.)

current price. A grower participation plan with the processor.

Q. Will you tell us whether this term "grower participation contract" is a phrase that is in common use in the industry, not only in California but in Florida?

A. In Florida is where it is mostly used, I think. In California there is not enough processors to use it, although it is used in California. But I think the term originally originated in Florida. It is common down there.

Q. Will you tell us why, with the growers' interests in mind, you entered into this sort of an arrangement with TreeSweet in 1947?

A. They had the production facilities to do the job, as well as we had. If we didn't want to use their [3640] facilities we would have to have added more ourselves, that would have taken more capital. They had a sales organization that could move the merchandise.

With our type of operation, with no control over the amount of fruit coming in, the ups and downs, we have sales problems, and with a large crop that year, why, we used his sales organization, as well as his production facilities.

Q. Had you not worked out this sort of a participation arrangement, what would have become of the fruit and what would the effect have been on the growers whose fruit was shipped?

Mr. Dixon: If the court please, I certainly must

(Testimony of James A. Finley.)

object to that. That is obviously a conclusion of this witness.

There were plenty of other processors that were available, and so forth. For this witness to testify as to what would have happened to this fruit seems to me is clearly—if he testified that if he didn't have this deal he would have dumped it, that is all right.

The Court: There is no issue on this point, but maybe it will save time to overrule the objection. But the issue is not that this kind of a contract was not good, ultimately, for the growers. That is not the issue in the case. Everybody concedes that. We are just spending time on an issue here. [3641]

To save time I will overrule the objection, and let's go ahead.

Do you remember the question?

The Witness: What would happen to that fruit if we hadn't made that arrangement?

There are a number of things that could have happened to it, to come back that far.

One is that we could put up more hot concentrate, which would have given us an excessive stock to carry over into the ensuing year. Another, if we would have had the canning capacity ourselves, we could have canned it and put it in the market ourselves. And the third, we could have made a grower participation plan with other processors, because I don't think any others would have gambled any more than we would have. The fourth is it would have been dumped in the wash, no salvage value at all.

(Testimony of James A. Finley.)

Q. (By Mr. Strachan): Then this grower participation arrangement that you first worked out in 1947 was one that was intended as a means of further salvaging the orange crop for the growers, is that correct?

A. It was a further means of salvaging the grower crop for the growers, without the orange growers putting in a large capital investment. [3642]

Q. Now, did you at any time enter into one of these grower participation arrangements with any intent or any purpose other than the intent and purpose with which you entered into this first one which you have just described?

A. No. That was the sole intent.

Q. Did you ever enter into one of these grower participation contracts for the purpose of injuring any independent or private processor in the citrus industry? A. I never did.

Q. Getting back to the 1951 year, can you recall approximately when it was that production was commenced by TreeSweet under this participation arrangement? A. In 1951?

Q. Yes, sir.

A. It was the latter part of July.

Q. Can you fix approximately when in July?

A. I would say it was the last two weeks in July. It started up slow. They watch quality pretty close, and as you get the fruit at that time, some loads may be good and some a little tart. So they do pretty selective picking from certain packing houses in certain areas, and they usually start in early in the

(Testimony of James A. Finley.)

Redlands area, that being warmer. So that they start in pretty slow, and by the first of August they are going pretty good, full swing.

Q. In addition to having renewed your working arrangement [3643] with TreeSweet in the year 1951, what other steps did you take to obtain processing capacity on one of these grower participation arrangements with respect to single-strength juice?

A. About that same time in August, I contacted——

Q. In August?

A. In April. I contacted Case-Swayne. I contacted Paul Case of Case-Swayne, he had been customers of Sunkist for a number of years, and told him about the arrangements which we had with TreeSweet the previous years, and went over in a general way how it worked out, that we would pay him his cost and he would buy it back and we would give him these discounts, and wondered if he wanted to go into an arrangement like that.

He said that he would talk it over down back at the plant and let me know, and he let me know in about a week and said that they thought they would be just as well off if they didn't have it.

I just told him, "Well, if you need it, let me know."

Q. Had you before 1951 ever had any processing arrangements with the Case-Swayne Company?

A. We had a small one in 1950. We were running pretty heavy on a Government order of orange juice, I think it was——

(Testimony of James A. Finley.)

The Court: You have answered the question.

The Witness: Yes, we had. [3644]

Q. Will you tell us what that prior processing arrangement had been?

A. We needed a little bit of blend to fill a Government order. Our equipment was going to capacity. So I just telephoned to him and asked him if he would run so many thousand cases of blend for us if we furnished the fruit, cans and cases, and take the merchandise off his hands.

He said he would, and he did that. It just lasted a couple of weeks.

Q. Was the product that they produced satisfactory with respect to quality?

A. Yes, it was.

Q. Was the entire dealing satisfactory from your point of view? A. Yes, very nice dealing.

Q. Will you tell us what other arrangements you made to secure participation contracts with respect to single strength juice?

A. I contacted Mrs. Silzle, who was the operating head of the Silzle corporation.

Q. About when was that?

A. That was after the middle of June. That was between the middle of June and the first of July. She had been out of the state and I had to wait until then to contact her. We went over first the general terms of the contract, and she [3645] was willing and wanted a contract.

Q. When you negotiated the TreeSweet and the Silzle contracts, how did you arrive at the allowance to be made to the processor for manufacturing?

A. Well, we knew what our own costs were. That is, you don't get a discount, volume discount on cans, you know that, cases, and you pretty well know your own costs. In the case of TreeSweet, I had our controller, Mr. Smith, and their controller go over their cost to satisfy us that that was a reasonable cost figure. We were satisfied that was the cost, and I think they were, although lots of times costs are in the books.

Q. One of the basic elements of these participating contracts was that the processor should be paid cost and only cost for manufacturing, is that correct?

A. Yes, that is correct, on the manufacturing end of it, only cost.

Q. There was to be no profit made on the manufacturing as such?

A. Not on what he sold under his own label or his own buyers' label.

Q. The arrangement with TreeSweet was different, was it not, from the Silzle arrangement, in that Tree Sweet was to pack under its own label?

A. Yes, sir. It was to pack the majority of its product [3646] under its own label, although it did have some private label business, and they could still take private label. It didn't restrict them to the Tree Sweet label.

Q. Will you explain in what other respects the Silzle and TreeSweet contracts differed?

(Testimony of James A. Finley.)

A. Well, the TreeSweet contract was patterned for the TreeSweet label, while the Silzle contract was patterned more for a private label type of business. The TreeSweet was to carry an inventory over the winter, while the Silzle was more or less to cover what they sold currently, and not to pack any large amount for inventory. That is, they would make the sales and then run the product.

Q. Will you explain what reasons you had for arranging to have TreeSweet pack for inventory, whereas you did not arrange to have Silzle pack for inventory?

A. Well, I knew the type of sales organization with your own label and the California label, which we were primarily interested in, that would go in the TreeSweet label, while with private label, you may get a Florida label on it one time and California the next. So I felt that it was better for the California citrus industry to have the California high quality label on it.

Q. Do you know to what extent the public acceptance of TreeSweet products exceeded the public acceptance of the Sunkist or Exchange products in 1951? [3647]

A. Well, I always figured that TreeSweet was about a 600,000 case organization under the TreeSweet label, and Exchange was about a 400,000 case. It was the year 1951, and we didn't turn out any Sunkist at all until August of that year, so we had to feel our way along to see how acceptable the Sunkist label would be. We didn't know in August how acceptable it would be, because that was our first year that we were getting ready to build it.

Q. In view of the sales potential which the Tree-Sweet organization had and their national reputation, would you say that there was any other California processor, other than TreeSweet, with whom you would have been willing to make the same sort of a participation contract as the one that you made with TreeSweet?

A. No, I wouldn't have made the same type contract with anyone.

Mr. Dixon: I did not get the answer.

The Witness: I wouldn't have made the same type of contract with any other single strength canner.

Mr. Dixon: You would have made?

The Witness: I would not have made.

Q. (By Mr. Strachan): Now, at the time you had concluded making these various arrangements for the processing of Valencias in 1951, what was the total capacity which you thought you had arranged for in tonnage? [3648]

A. That is on hot concentrate, frozen, and single strength?

Q. You can break it down and get the total capacity.

A. I had what I figured was a total capacity arranged for of about 18,000 to 19,000 tons of fruit a week.

Q. And that time what was your expectation

(Testimony of James A. Finley.)

with respect to the fruit which would be delivered to you for disposition in by-product form?

A. According to estimates and running it out on a weekly basis, we figured we would have about 15,000 tons a week.

Q. Now, will you tell us how the 18,000 tons of capacity was broken down, eighteen or nineteen thousand?

A. Among the different processors?

Q. Yes. No. As between various types of product.

A. Well, between the hot—I will have to refer to my notes. About 5,000 tons a week outside of our own capacity.

Q. How much total capacity did you have for frozen concentrate?

A. Had about between eleven and twelve thousand tons a week of frozen capacity lined up, including our own capacity.

Q. And what capacity for single strength?

A. We had about 3,000 tons a week—wait a minute. About 3,000, 3,200 tons a week in addition to our own capacity. I consider in our own capacity Exchange Lemon, so it would run up to about 4,000, including Exchange Lemon. [3649]

Q. Then how much hot concentrate capacity did you have arranged for?

A. About 4,300 or 4,500 tons a week, which includes Bireley's that when they would be running on hot concentrate, of course, they couldn't run on frozen, so when I put them on frozen, they couldn't

(Testimony of James A. Finley.)

stay on hot. 3,300 tons a week, not counting the Bireley's, and Bireley's could go either way for me.

Q. When you concluded those arrangements, did you feel that you had provided sufficient capacity to process the maximum amount of fruit that might be delivered to you for processing during a week?

A. Yes. We figured that we had, with the arrangements that we had made or contacts we had made, enough to carry any week throughout the balance of the season.

Q. Can you tell us what processing facilities, capacity of facilities, there were other than those which you had made available to Orange Products other than your own, and other than those that you had contracted for?

A. The capacity of the other plants outside those of our own and those which we made arrangements with, was 14,580 tons a week, compared to ours of 18,600.

Q. Can you tell us roughly what the percentage of the outside capacity was?

A. The total capacity per week would be 33,000. The [3650] Exchange was 56 per cent. So the outside capacity would be 44 per cent.

Q. When you say the Exchange, you mean that which you owned, as well as that that you contracted for?

A. Yes. It includes Exchange Orange and Exchange Lemon, Sunkist organizations.

Q. Can you tell us what policy you followed over the years down to and including 1951 with

(Testimony of James A. Finley.)

regard to making use of and having available to Orange Products the facilities of outside or independent processors?

A. I don't quite get your question, Mr. Strachan.

Q. Put it this way: Over the years and down to and including 1951, did you have a policy to make use of outside facilities to the full extent that you could, rather than to provide in competition with those facilities your own equipment and plants?

A. Well, our policy—I say our policy, that is the board policy was to, as the crop increased and the amount going to products, was to use the present facilities of the plants. A number of them wouldn't be run the whole year, so it would be to use their equipment instead of the growers putting in capital to enlarge our operations. When they got through; why, instead of leasing their plant or making some other arrangement, it seemed to work better to go into custom packing or grower participation methods. So it was the [3651] general policy at that time to hold down the Exchange Orange expansion and use the other facilities [3652] first.

* * *

Q. Mr. Finley, in stating the capacities of the Orange Products facilities, and the facilities which it had arranged to use under various processing contracts, there was some overlapping. Would you state the capacities and eliminate the overlapping of functions?

(Testimony of James A. Finley.)

A. Taking the place of a juice plant, the capacity of the total plant may be the juicing capacity——

The Court: That isn't what counsel is referring to, I don't believe.

You talked about one plant that might have been used for one purpose or another, and you gave certain figures. Isn't that what you are talking about, Mr. Strachan?

Mr. Strachan: Yes, your Honor.

The Witness: Bireley's plant, I think I referred to, that they could run either on frozen concentrate or straight [3653] concentrate. When the question was asked on the amount of concentrate, I may have overlapped.

The same thing applies to the Exchange Orange Products. We can run either frozen or straight concentrate, but we can't always run at the same time. So you get an overlapping of those, so when you total up the capacity on the frozen concentrate and single-strength juice separately, you may get more than the total the plants can run at any one time.

Q. (By Mr. Strachan): You stated approximately 18,000—I think you said 18,000 or 19,000 total tons of capacity?

A. 18,600 is the way I figured it.

Q. Does that involve some overlapping?

A. No, that doesn't involve overlapping. They can run either one or the other.

(Testimony of James A. Finley.)

Q. That is the maximum capacity that you obtained?

A. That we had arranged for, contracted for.

Q. You said that these participation arrangements were entered into because it was not known what the realization from the product might be because of the uncertainty of future market conditions. Will you tell us how, in practice, those contracts have worked out?

A. The one grower participation contract over a period of years was the TreeSweet, and there was one year, I remember, that it paid more than—as a result of the contract we got more than the C. D. P. sold fruit for. [3654]

The Court: "C. D. P."?

The Witness: Citrus Distributing Plant.

Q. (By Mr. Strachan): That is Mr. Kelly's department? A. Yes, as fruit.

The Court: You mean more than fresh fruit or more than product fruit?

The Witness: More than product fruit.

The Court: Fresh fruit, of course, always brings more?

The Witness: Yes.

Q. (By Mr. Strachan): In carrying out and supervising the performance of these contracts, such as the TreeSweet and the Silzle contracts, did you take any steps to determine at what prices the processor was actually selling the processed juice?

A. No, we took no steps to follow that.

Q. The amount that was returned to Orange

(Testimony of James A. Finley.)

Products under these contracts in no way depended on whether the price of the processor was higher or lower than the Sunkist posted price for the juice, is that correct?

A. Sold to them at the Sunkist price of juice, less the discounts, and they could sell it at any price they wanted to after that. If they wanted to speculate in the market, that was their business.

The Court: I don't think you have answered the question. Now, listen to the question. [3655]

Mr. Strachan: The answer is acceptable to me, your Honor. I don't think it should go out. I think it is relevant.

The Court: All right. Then it may remain in. Read the question again, and answer the question.

> (The question referred to was read by the reporter as follows: "The amount that was returned to Orange Products under these contracts in no way depended on whether the price of the processor was higher or lower than the Sunkist posted price for the juice, is that correct?")

The Witness: That is correct.

Q. (By Mr. Strachan): After you had arranged to have available processing capacity for the '51 season, based upon your estimates as to the quantities of fruit that would be received, will you tell us how the actual receipts of the fruit compared with the anticipation or the estimate that you had made in advance?

(Testimony of James A. Finley.)

A. We never did reach the anticipated quantity of fruit that we had originally set up in our estimate.

Q. Do you have before you Exhibit FD?

A. Yes, I do.

Mr. Strachan: I would like to have a copy of that distributed to the jury so that they may follow the testimony. [3656]

The Court: It may be distributed.

(The copies were distributed to the jury.)

Q. (By Mr. Strachan): Mr. Finley, as I understand it, Exhibit FD is a graphic chart showing for the years 1947 to 1951 the weekly tonnage receipts of by-product oranges received by the Orange Products Company, is that correct?

A. Under the control of Exchange Orange Products Company, not outside sales.

Q. The heavy line, which is the highest there, shows the receipts for the season 1951, is that true?

A. That is true.

Q. I believe you said you had estimated that the receipts would be at the rate of something like 16,000 tons a week?

A. Figured between fifteen and sixteen thousand tons would be the pack.

Q. With reference to the curve that is plotted on Exhibit FD, will you tell the jury what significance this chart has with reference to the estimates and planning you had done beforehand?

A. I think it shows that we were planning, had

(Testimony of James A. Finley.)

plans made for a larger amount, that the peak was reached the fifth week in July, just a little over 14,000 tons, and then leveled off to the third week in August, and then started down the first week in September, was down to 12,800, and then the [3657] fourth week in September, it hit clear down to about 8,500, at which time it started going back up again.

The Court: I understood you to say you estimated the peak at fifteen to sixteen thousand tons. You didn't estimate that for every week?

The Witness: No, just for the peak weeks.

The Court: All right.

The Witness: From, oh, the middle of July on to the middle of September.

Q. (By Mr. Strachan): Do you recall having a conversation with Mr. Winckler in the summer of 1951, some time in July? A. Yes, I do.

Q. Was that a personal conference or was it a telephone conversation?

A. It was a telephone conversation.

Q. Can you fix the time of that conversation?

A. Yes. It was, within a day or so, around July 15 or 16, 1951.

Q. Did he call you or did you call him?

A. He called me.

Q. Tell us what was said in that conversation.

A. He asked me if he could get fruit through Exchange Orange Products Company, and I told him we did not sell fruit, that we did not have a

(Testimony of James A. Finley.)

surplus of fruit at that time to handle, and for him to contact Mr. Kelly of CDP. [3658]

Q. During that conversation did Mr. Winckler make any mention to you of there being a price quoted of $2.20 per case of 12 46-ounce cans of single-strength juice? A. No, he did not.

Q. Do you recall what the price of juice was at the time of your talk with Mr. Winckler?

A. It was around $2.65 a case, $2.65 a case of 46-ounce. It was $3.00 just before that, and I don't remember when he called, just where that break was, but I remember the break came during that period of time.

Q. You told Mr. Winckler that you had——

The Court: Just ask the question.

Q. (By Mr. Strachan): What did you tell Mr. Winckler at the time you talked to him with regard to your own supply of fruit and the facilities that you had available for processing?

A. I told him that the supplies were coming in irregularly, I didn't know how they would come out, and I had plenty of facilities to handle the crop as I saw it.

Q. Was that true at the time you stated it to Mr. Winckler?

A. That was true at the time I stated it in the middle of July.

Q. Will you tell us what was done after the third week in August when the supply of available products oranges [3659] started to decline in re-

(Testimony of James A. Finley.)

gard to what you did with the capacity that you had arranged for?

A. Which week was that?

Q. You pointed out this decline started about the third week in August. What did you do following, during the ensuing decline?

A. Well, we shut down Hyland Stanford, which was running on hot concentrate for us on a custom packing basis and——

Q. As of about what time was that?

A. That was about August 18.

Q. What other measures did you take then?

A. We slowed down Mission, and they ran for another week or so after that, and then we shut them down.

Q. What did you do in regard to the arrangements you had made with Mutual Citrus Products Company for frozen concentrate?

A. The cans which we sent to them on July 25, we never made the test run which we anticipated, and by August 25, we knew we wouldn't need them as processors and had the cans returned to Ontario, and we filled them there, so we knew that we would not hit the 15,000 then.

Q. What, if anything, did you do in regard to the arrangements you had made with Harts when the fruit was in short supply?

A. As soon as the fruit became short, we shut down [3660] Harts, slowed them down first, and finally shut them clear down.

Q. Do you remember when you finally cut back

(Testimony of James A. Finley.)

the supply of fruit that you could make available to them?

A. We started cutting down about the middle of September, September 15, and then they were through about a week or 10 days after that, through for the season.

Q. What did you do in regard to Bireley's?

A. Bireley's, we slowed them down about one-half and wanted to hold them in case the fruit picked up again, and finally they were shut down completely and then they started up on their own account, not our account.

Q. When you say they started up on their own account, you mean that when you suspended the operation of the custom packing deal or the arrangement for packing for your account, they bought fruit elsewhere?

A. They bought from Sam Kelly or other independent shippers. I don't know where.

Q. That was to pack what product?

A. That was to pack Bird's-Eye frozen concentrate.

Q. At the time you were talking to Mr. Winckler in the middle of July, how did the supply of fruit relate to the processing facilities that you had arranged for?

A. Arranged for around 16,000 tons of frozen and single-strength juice and had arranged for a total capacity [3661] for canned and hot concentrate of about 18,600 tons, not counting any ar-

(Testimony of James A. Finley.)

rangements that we could have made on frozen concentrate with MCP. [3662]

The Court: That is per week?

The Witness: Per week, yes.

Q. (By Mr. Strachan): By approximately how much did that available processing capacity exceed the fruit available?

A. Fruit available, maximum, hit 14,300 tons, and we had available 18,600, so it would be about 4,300 tons that we had definitely arranged, not counting the empty cans for test runs.

Q. You talked with Mr. Winckler again in the month of September, is that correct?

A. Yes, I did.

Q. Do you remember having had any conversations whatever with Mr. Winckler between the telephone conversation you mentioned in July and the talk that you had in September?

A. I don't remember of any telephone conversations at all.

Q. Or any personal conversations?

A. No personal contact, official contacts.

Q. When and where, and under what circumstances, did you have your talk with Mr. Winckler in September?

A. He called again by telephone. I can set that date pretty well, because it is the time when we cut TreeSweet and Silzle down one-half in their production. McCracken of TreeSweet was in Florida, and he called me from there and wondered what it was all about. And that occurred, I [3663] know, the week that we cut the processors down, because I was flooded with telephone calls to know when they could start up again, and what they should do with their labor, and things like that. So it sets the date in the middle of September.

Q. Was this a telephone conversation with Mr. Winckler?

A. That was a telephone conversation.

Q. Will you tell us, in substance, what each of you said in that telephone conversation?

A. Well, that is the first that I knew that he knew that we had working contracts with Tree-Sweet and Silzle, and he asked if he couldn't have the same type of contract. And I told him no, that he couldn't, I was having plenty of trouble right at that moment with those that we did have contracts with wanting more fruit, rather than less fruit, so I just couldn't give him a contract and cut off our old customers.

Q. Was that the first conversation, the only conversation which you had with Mr. Winckler in which he asked you for one of these participation contracts on single-strength juice?

A. Yes, that is.

Q. Will you tell us when it was that you first heard that single-strength juice was being sold or quoted at a [3664] price of $2.20 per case of 12/46's?

A. It was shortly before Sunkist came out with opening prices on August 3rd. It may have been within the week before that. And that is the first

(Testimony of James A. Finley.)

time I heard of a $2.20 price. The Florida price was $1.75 f.o.b. Florida. We add on 75c for freight, putting it in California at $2.50. So we were ready to come out with opening prices on August 3rd, and it came up in those discussions at that time, and we came out with an opening price of $2.50 in the State and $2.20 out of state to meet other competition.

Q. The quotation of $2.20 had been made before you came out with your opening price?

A. I think it was.

Q. Mr. Finley, in the year 1951 when you were busy arranging for processing capacity, did you have any matters in mind which bore upon your opinion as to whether the Winckler & Smith Company would be qualified to enter into and carry out any sort of a processing contract with Orange Products Company? A. Yes, I did.

Q. Will you tell us what some of those matters were?

A. Well, I had had business dealings with Mr. Winckler, and we had some product made by him, and then what I heard from others in the industry.

Mr. Dixon: If the court please, I move that the latter [3665] part be stricken as purely hearsay.

The Court: Do you propose to go into this hearsay?

Mr. Strachan: What?

The Court: Do you propose to go into the hearsay?

Mr. Strachan: It is not hearsay. It is reputation

(Testimony of James A. Finley.)

in the trade, and we are going into state of mind of the man who is responsible for conduct here.

The Court: I disagree about the hearsay, but it may be proper to go into it. I am just asking you if you are going into what I have characterized as hearsay?

Mr. Strachan: I wouldn't expect that any of this would be hearsay. If it seems to you that we are getting close to the line I will be very glad to discuss it.

The Court: Whether you call it that, or whether I do, my question to you is are you going into those matters?

Mr. Strachan: Going into what he heard? Yes, I will go into what he heard.

Mr. Dixon: I, of course, object to that, your Honor.

The Court: I think it is permissible, but, on the other hand, I think the jury has to be told that what he heard and what he might repeat is in no sense evidence of the truth of those facts.

Mr. Strachan: I quite agree that it is your Honor's duty to instruct the jury——

The Court: It is a dangerous kind of testimony, and the [3666] jury should know how they may use it and how they may not.

Mr. Strachan: I quite agree with that, your Honor.

Mr. Dixon: If the court please, how can plaintiff answer this kind of testimony without having an opportunity to cross-examine the person who alleg-

(Testimony of James A. Finley.)

edly made these statements? How are we to refute them?

The Court: That is why it is dangerous.

Mr. Dixon: It would seem to me we would be here for another month if we go into hearsay testimony of this kind. I don't see how it could possibly be permissible.

Q. (By Mr. Strachan): You said, Mr. Finley——

The Court: Now, wait just a minute.

Mr. Dixon: If the court please, I would like to be heard on it in the absence of the jury.

The Court: I think we will let the jury remain here in the courtroom in the custody of the bailiff, and we will adjourn to chambers with the reporter.

(The following proceedings were had in the chambers of the court outside the presence of the jury.)

The Court: The record will show, Mr. Reporter, who is present.

(The following persons are present: Mr. Dixon, Mr. Strachan, Mr. Fisher, Mr. Stark, Mr. Irwin, the clerk, and the reporter.)

The Court: What do you propose to show that Finley [3667] heard, just a summary?

Mr. Strachan: What he heard, I believe, will come in only in corroboration of some of the things that he learned in other ways, which was a statement by a former sales manager of Winckler &

(Testimony of James A. Finley.)

Smith Company, who, when asked whether Winckler was watering his product, this fellow said, "I don't know, because I was instructed never to go into the plant."

The Court: When did this conversation take place?

Mr. Strachan: This took place in, I think it was the fall of 1950.

Mr. Dixon: You think, counsel? Don't you know?

Mr. Strachan: I don't go around with testimonial knowledge.

Mr. Dixon: This is important to this plaintiff.

Mr. Strachan: It is prior to the Valencia season of 1951.

Mr. Dixon: If that is the testimony, the witness should be here to so state, and if he did so state——

The Court: Have you looked up any law on this?

Mr. Strachan: Well, I haven't for this particular purpose, but I have at other times. State of mind testimony, reputation is admissible on state of mind. Not to show that the reputation is well founded, but to show what the effect of that reputation was on the person's mind. [3668]

The Court: The only probative value of this is to explain why Finley did or did not do something.

Mr. Strachan: That is right.

The Court: Therefore, your argument would be that it assists the jury in determining how he did it. But how do you escape the fact that that puts in issue the credibility or the truthfulness of what he heard?

Mr. Strachan: It doesn't seem to me that that puts that in issue at all. He heard it and he believed it, and that accounts for his state of mind, your Honor.

Mr. Dixon: Your Honor, if this kind of thing is permissible, we have a file of letters from consumers complimenting the product of this plaintiff, that were wholly unsolicited. I would not even suggest that they could be admitted in evidence. Yet, if this kind of thing is to be permitted, I see no end to, not only this kind of testimony, but any rebuttal that may be required to prove it.

I don't even know how, at this time, we could rebut it, in the absence of the witness. He is not here, this silent witness who allegedly said something to this party, who was never placed on the stand for cross-examination.

Now, furthermore, it seems to me that in view of the testimony of Mr. Finley already in the record, that it made no difference to him what happened, in other words, his testimony, as I recall, was that Finley would not give the TreeSweet contract to any other processor. [3669]

In my mind, when that testimony was put in the record, that effectively blocked any further consideration, if it be relevant and if this be permissible, which I do not admit, in this lawsuit.

Mr. Strachan: This will go further than that, of course.

(Testimony of James A. Finley.)

Mr. Dixon: No, unless you are trying to bring in the back door now what you couldn't get in before.

Mr. Strachan: No. This is why they hadn't even given him the Silzle contract.

The Court: Now, wait a minute. Since you don't offer the things that Finley may have heard as truth of the facts contained therein, why shouldn't you be limited to asking Finley whether he had heard certain matters, without stating what they were?

Mr. Strachan: I would certainly emasculate any showing as to what it was, "Yes, I heard certain matters." The jury might infer he had heard what Winckler said, that Winckler was a fine, high-grade operator, made nothing but high-grade juice.

The Court: You admit you are not offering it for the truth of the facts purportedly contained?

Mr. Strachan: No, but what he heard should be before the jury to see whether on the basis of what he had before him and what he knew and what his state of mind might have been that he was warranted in conducting himself as he did. [3670]

The Court: Do you contend he based a refusal on these things he heard?

Mr. Strachan: I contend not entirely on the things he heard. The things he found out for himself through experience.

The Court: He has already stated why he based his refusal.

Mr. Stark: Not an exclusive reason.

(Testimony of James A. Finley.)

Mr. Strachan: He said what he told him.

The Court: He has already testified he told Winckler why he wouldn't give him a comparable contract.

Mr. Strachan: That was true at the time in September when he asked him for it. Now we are going back to see why it was that he didn't regard him as being eligible for a TreeSweet or Silzle or any other kind of contract when he was securing additional capacity in anticipation of a bumper crop.

The Court: All right. You say he is going to repeat what some former sales manager told him.

Mr. Strachan: That will be one little detail.

The Court: Have you tried to subpoena the former sales manager?

Mr. Strachan: No, but I can get him in here if Mr. Dixon will agree that the conversation between these two is admissible and that the former sales manager will testify to what he knew about the quality of the product. That has been excluded so far. [3671]

The Court: Whether Mr. Dixon agrees to it or not has nothing to do with the question of whether he will be brought in as a witness.

Mr. Dixon: Mr. Finley has already testified that the reason given at the time, which is certainly the best evidence, was, as I recall, he had already made arrangements and that the second time he talked to him was in September. Now, that is his testimony.

Now they are trying to again inject into this case,

(Testimony of James A. Finley.)

to the prejudice of the plaintiff, through the back door something that Finley says he heard, not as the basis of the reason for what he did, though.

Mr. Strachan: Mr. Dixon, will you agree we were justified in not giving him the contracts on those assigned reasons at the time of those two conversations?

Mr. Dixon: No, I don't.

Mr. Strachan: That's just it. That is the reason it is essential for me to go further and show there were other reasons.

The Court: What other things by other witnesses were told Finley?

Mr. Strachan: I don't think of anything else that even comes close to hearsay in the entire line, of examination I propose.

The Court: I may not agree with you. What is it you [3672] propose?

Mr. Strachan: I think that is the only thing that he says was told him. The rest of it is matter that he learned on his own.

The Court: What did he learn and from whom?

Mr. Strachan: Do you want me to put the case in out of the presence of the jury and let you pass on it?

The Court: That is what I am suggesting to you. I think you had better make an offer of proof right, now of what Finley would testify to on this subject matter.

Mr. Strachan: All right. I will have to get my notes, if I may.

The Court: All right. Let me ask you one other question before you start or, rather, ask Mr. Dixon.

Are you going to contend that Finley or EOP should have gone voluntarily to Winckler & Smith and offered comparable contracts? Or are you going to base your contention solely on such requests as were made, according to the evidence, at least, most favorable from your standpoint?

Mr. Dixon: That's right.

The Court: Not on any contention they should have gone around to him in the spring?

Mr. Dixon: If that is going to be part of the evidence, yes, of the existence of the conspiracy, that they went to everybody except Winckler, yes, your Honor. [3673]

The Court: And you are arguing inferentially, therefore, that they should have gone to Winckler?

Mr. Dixon: Well, by reason of their control, and so forth, yes. This contract, which was made and which has been in existence now for five years, is the hub of this case. They call it one thing. I would give it a different name.

The Court: All right. You have answered my question.

Now, make your offer of proof.

Mr. Strachan: The witness would testify that he did not regard the Winckler-Smith organization as being in any way comparable to TreeSweet.

He would mention in that connection that the TreeSweet company was a company that had been

(Testimony of James A. Finley.)

in existence and successfully marketing California Valencia products since 1937, had a well-established brand name and a marketing organization with a demonstrated ability to pack for inventory and to maintain sales on a nationwide basis throughout the year, which he did not believe Winckler & Smith could do.

He would also testify that he had personal experiences with Winckler-Smith. The first experience was in 1947 when he came back from a trip and found that the plant superintendent in his absence had arranged to have Winckler-Smith process some 65 degrees Brix concentrate for the Exchange Orange Products account.

That under that arrangement Sunkist furnished the fruit [3674] and paid a fixed fee for processing. During the performance of that agreement testing showed that the product was wholly unsatisfactory, that there were black specks which were due to insufficient cleaning of the fruit before processing; that in order to remove the specks, the product had to be diluted and reprocessed.

In addition, it was found on testing that some of the product was not properly sterilized and was in the process of decomposing, had yeast and mold in it, and some of it was so badly deteriorated that it had to be washed away, and the balance had to be reprocessed.

He would testify that during the performance of this arrangement in an effort to establish satisfactory quality, a sanitation engineer and bacteriologist were sent to the Winckler-Smith plant to suggest means of improving the sanitation.

That following that, in August, 1947, a second contract was entered into for processing hot concentrate. For a short time the quality was satisfactory, but before long the product became unsatisfactory in that it was not sterile, had yeast and molds in it, and that product also had to be in part run down the sewer.

He would also testify that following that experience with Winckler-Smith he never entered into any other processing arrangement with Winckler-Smith. [3675]

He would also testify that he had contacts with Mr. Winckler during the period of the Chapter XI receivership; that the occasion for those contacts was this: Mr. Wilcox and Mr. Armstrong learned that Winckler-Smith company had made a bid on a school lunch contract but was not able to secure fruit and in consequence was going to default. Wilcox and Armstrong felt that the industry as a whole should see to it that there was no default on a Government contract, and told Finley to try to work out some arrangement which would enable the contract to be completed.

Finley, with legal counsel and with court approval, worked out an arrangement with the receiver, and that arrangement was one under which Sunkist would furnish the fruit and American Can furnish the containers. Moneys due from the Gov-

(Testimony of James A. Finley.)

ernment were assigned to a bank for the payment of the EOP and American Can charges as a first lien, and the contract was performed on that basis.

This arrangement was not a processing agreement, but was a sale of fruit to the receiver, and the deferred payments were on a secured basis.

During the performance of this arrangement, Finley was first in contact with Winckler, but shortly after that he was instructed by Lynch, the receiver, not to do any business with Winckler; he said that the arrangement was not the Winckler-Smith arrangement, but was one strictly [3676] between the receiver and Finley, and that Winckler was not to have anything to do with working out the details of this transaction.

Also, in the fall of 1947, Mr. Winckler called Finley and said he was short of cartons. Finley said he was short of cartons, too, that they were very hard to get, and he couldn't sell any.

Winckler told Finley that if he couldn't buy any, he would like to borrow some, because he had an order to deliver, but had no cartons, although a carload was due to arrive the middle of the following week, and that the borrowed cartons would be returned at that time.

By the end of the following week the cartons had not been returned. Finley contacted Winckler. Winckler claimed that there had been a delay in the delivery. Weekly thereafter for a matter of several weeks Finley tried to get the cartons returned, but was always told that Winckler didn't have any on hand and couldn't return them.

In the spring of 1948 when the Winckler-Smith company went into Chapter XI proceedings, the cartons had not been returned, so claim was filed for the cartons in the bankruptcy proceeding. The cartons had a value of $328, for which in June of 1949 Orange Products Company received a dividend of $36.20. No part of the balance has ever been paid by Winckler-Smith or any other person. [3677]

Finley was also aware that Winckler-Smith had been in financial difficulties and had uncertain financial ability and had been dealt with by CDP on a cash in advance basis.

He also had doubt as to the quality of products produced by Winckler-Smith company.

In the first place, he knew that the Winckler-Smith plant did not have adequate grading and sorting tables and equipment, and that the fruit was not properly graded before it went into the processing room.

The Court: When did he know that?

Mr. Strachan: He knew that in—well, some time prior to 1948, your Honor. I think it was 1946 or 1947.

Mr. Dixon: Had he been in the plant since that time, counsel? [3678]

Mr. Strachan: No. But shortly after the Winckler & Smith—it is in 1946. In 1946 they were working on a navel crop that was running very high in decayed fruit. Finley had objected to it and advised

(Testimony of James A. Finley.)

C. D. P. that if the quality of the fruit that was being sent over couldn't be improved he would simply have to quit trying to process it, because he didn't have sufficient force to eliminate the decays.

He was told by Mr. Young that if Finley didn't want it, it could be sold elsewhere.

Finley told him to sell it wherever he could, but not to send any more to E. O. P.

Following that, when the Winckler & Smith Company went into Chapter 11 proceedings, Young of C. D. P. met Finley and said he wasn't surprised that Winckler & Smith had gone broke, because of the way he knew in which they were operating their business. He reminded Finley of the time that Finley objected to the rotten fruit and told him to sell it elsewhere; that Winckler-Smith had bought that fruit that Finley had objected to, and Young became curious to know how Winckler-Smith could handle it when Finley couldn't, so he went out to the plant——

The Court: Who went out?

Mr. Strachan: Young.

Mr. Dixon: When was this?

Mr. Strachan: 1946. [3679]

(Continuing): ——he went out to the plant and saw that the fruit was being sent to the extractors without any sorting or culling whatever. He looked the plant over and saw the condition of the plant and the manner in which it was operated, and was given some juice to take home. But after what he had seen he was afraid to drink it, and poured it all out.

The Court: Is Young alive?

Mr. Fisher: Yes.

The Court: All right. Go ahead.

Mr. Strachan: Finley also knew that the Winckler-Smith plant was equipped with only Citromat extractors, and that these extractors are not satisfactory for the production of single-strength juice. The Citromats, operating as they do through the pressure of rollers, are unsatisfactory for single-strength juice, because if the tension on the rollers is reduced so as to keep the contents of the peel from getting into the juice, the yield in juice is so low that they can't be profitably operated. On the other hand, if the tension is set sufficiently high to extract substantially the same amount of juice as other extraction machinery will, the content of the oils and so forth from the peel will be extracted with the juice.

Mr. Dixon: May I interrupt, counsel?

Was Mr. Finley ever in the plant of Winckler & Smith to [3680] see the de-oiling equipment that was on the Citromat?

Mr. Strachan: You can ask him that.

Mr. Dixon: Is he talking about the same thing?

Mr. Strachan: He will also testify that he had made experiments with Citromats, and that his experiments had convinced him that you could not satisfactorily produce single-strength juice with Citromats. He knew that Winckler-Smith was the

(Testimony of James A. Finley.)

only concern that had ever undertaken to sell single-strength juice from Citromat machines.

That at one time the Bireley Company, who owned the patents on the process, had tried it, but had given up, and that no other processor had ever sold Citromat-extracted juice for single strength, except Winckler & Smith. [3681]

In 1950 Finley became convinced in his own mind that Winckler-Smith products were watered to the extent of 25 or 30 per cent. He came to this conviction in 1950 when he made a trip to the Phoenix area in Arizona to try to salvage a crop of frozen grapefruit. The prices at which Winckler-Smith Company were selling grapefruit juice at that time was—I think it was about 40 cents lower than the Sunkist price, and the Sunkist grapefruit juice was being extracted and otherwise processed to the can in Arizona with no hauling charges to account for, and the price of the grapefruit at that time was $22.50 a ton. When Finley got to Arizona he learned that Winckler-Smith was buying grapefruit and shipping it to Anaheim, with shipping charges of approximately $9 or $9.50, I have forgotten which, which brought the total cost of the fruit at the processing plant to something over $30 a ton.

Finley made a computation at that time, and he has the computation which he would go through, to determine how the juice extracted from a ton of grapefruit could be sold at the prices that Winckler-Smith was quoting on the grapefruit juice, and his computation indicated that Winckler-Smith was having to realize approximately 30 per cent more, or stretch their product, as he puts it, 30 per cent more than the juice that could be extracted from the grapefruit, in order to break even on the sale of the juice at the price [3682] that they were quoting.

He would also testify that after he had made this computation, and taking that in connection with what he knew about the characteristics of Citromats and the product of Citromats, he concluded that it was only by adding water to orange juice that Winckler was able——

The Court: Grapefruit juice, you mean?

Mr. Strachan: No. After he made the computation with respect to the grapefruit juice, and thinking back over the fact that Citromats only were used in juice extraction, he became convinced that it was through watering the juice extracted on Citromats that Winckler was able to produce and sell what he branded as orange juice.

> (The following statement, which had been interrupted, was read by the reporter: "* * * and taking that in connection with what he knew about the characteristics of Citromats and the product of Citromats, he concluded that it was only by adding water to orange juice that Winckler was able"——)

Mr. Strachan (Continuing): ——was able to manufacture the product that he sold under the label of orange juice.

(Testimony of James A. Finley.)

He would also testify that after a board meeting at which he had reported on his efforts to get sufficient capacity to process the bumper crop, he was asked by a board [3683] member, whom he cannot identify, "What about Winckler-Smith?" And he told the board member he couldn't enter into an arrangement with them because he wouldn't have enough inspectors available to police the operations of Winckler-Smith.

He would also testify that having all these things in mind in the year of 1951 he would not have been willing at the time he talked with Winckler on either occasion to enter into any kind of a processing arrangement with the Winckler-Smith Company, even though fruit had been available at those times. And for the same reasons it never occurred to him to contact Winckler-Smith in advance of the season.

The Court: Is there objection to the offer of proof?

Mr. Dixon: Yes, there is, your Honor, to most of it.

The Court: I am going to exclude certain parts of it now. That will save some time.

The objection is generally on what grounds?

Mr. Dixon: On the grounds that some of it is hearsay evidence and not the best evidence, and to permit it in this case would deprive the plaintiff of the right of cross-examination, and so forth.

The Court: All right.

Mr. Dixon: Second, that much of the evidence contained in the proffer is too remote in point of time and not based on direct knowledge of the witness making the statement. [3684] And, third, that that part of it which relates to the belief that the product wasn't good, according to the witness' standards, is not supported by any test of the product, which could readily have been made by the witness at the time he said he had these views, with all of the facilities available to Exchange Orange in their laboratories and so forth, and that it is, therefore, inadmissible on the further ground that it is purely an unsupported and apparently a biased opinion of this witness, which was unfounded on any personal knowledge or examination of the product itself, which, if permitted, would again inject into this case the question of the quality of the product processed and sold by the plaintiff.

Mr. Strachan: Your Honor, there are a couple of matters that I recall now, which I didn't recall at the time that I was making the offer, and I would like to add now, if I may.

The Court: Yes.

Mr. Strachan: Some time after the computation made with reference to the Arizona grapefruit, and after he had come to the conclusion that the only way Citromats could be used for making an adequate quantity of palatable orange product was by watering, he talked to Charles Sisk, who was at one time a sales manager for Winckler-Smith and had left Winckler-Smith and had come to the Sunkist organization. [3685] Finley told Sisk of the computations he had made and the conclusions he reached, and asked him what about it, does Winckler-Smith water their products? And Sisk said, "I couldn't prove it in court, but I am sure they do. Winckler, though, ordered me strictly never to go out in the plant, and I was never allowed in the plant while I was sales manager."

In addition to that, the witness will testify that inasmuch as 25 or 30 per cent of water was added to the citrus fruit juice, it would so reduce the acidity and the Brix that it would be necessary to add sugar or some similar substance to raise the Brix, and it might be necessary to add acid to increase the acidity, but that there is no analytical method known by which it can be determined whether water, sugar, or acid have been added to natural juice in order to compare that with the finished product. It is only possible to determine whether adulterants of that sort have been used by comparing an analysis made before and an analysis made after.

Mr. Dixon: Do you mean there is no known way of determining whether what you claim was done here was done? [3686]

Mr. Strachan: There is no way known of analyzing a finished product to determine whether water, sugar and acid have been added to natural juice.

Mr. Dixon: That is the best answer to my objection, your Honor.

Mr. Strachan: Furthermore, the witness would also, if permitted to do so by the rulings of this court, testify that he has examined the records of Winckler-Smith, being the laboratory statistics I-1 to I-4, inclusive, and the production records, Exhibit J, and that his examination of those confirms the estimates and personal convictions he arrived at with respect to the adulteration of the Winckler-Smith product.

Mr. Dixon: If the court please, may I just add this comment? I want to be sure the record shows my objection previously made to this testimony on the ground it is irrelevant and immaterial because the witness has already testified that it wouldn't have made any difference, he wouldn't have given this contract or anything comparable to it to anybody except TreeSweet.

The Court: Well, I am going to cut down part of this right now. The offer of proof in connection with any of the conversations with Young is sustained. If you want to bring Young here as a witness, we will pass upon that question at that [3687] time.

The objections to the offer of proof are sustained about where you started about Finley becoming convinced of watering, and when he made certain calculations, as the opinion of a witness, injecting an issue into the case of which there could be a dozen and one answers, to mention one was the fact that the grapefruit could have been sold by Winckler & Smith at a loss.

Mr. Strachan: What is that?

The Court: The grapefruit could have been sold by Winckler & Smith at a loss, and the witness is injecting whatever he can be convinced of, and so forth. That objection is sustained.

Objection sustained as to his conversation with the board member, what he said to the board member and what the board member said to him.

Objection sustained, as to conversation with Charles Sisk, the former sales manager. If you want to bring Sisk in, we will cross that bridge at that time, as to what he can testify to.

Objection sustained as to his opinions and conclusions and calculations about adding water and sugar, and with reference to the records I heretofore rejected and offers of proof heretofore rejected upon them.

It also seems to me there ought to be some time limit on matters of this sort. [3688]

Well, let me ask first, is there objection to the offer of proof with the parts I have indicated deleted?

Mr. Strachan: Is that addressed to Mr. Dixon?

Mr. Dixon: I am sorry, Judge. You say is there any objection to the offer of proof?

The Court: After these parts are deleted, are you still objecting?

Mr. Dixon: Well, I am not sure, Judge, whether this 1946 conversation——

The Court: I sustained an objection to that.

Mr. Dixon: That is sustained. As I recall the offer, as I was trying to follow it, I think that effectively takes care, as far as the plaintiff is con-

(Testimony of James A. Finley.)

cerned, of the so-called testimony we regard as hearsay and objectionable.

The Court: All right. That will be the ruling of the court. You can make your proof.

Mr. Strachan: Just so I understand the rulings, can I have the witness testify how he became convinced in 1950 that the Winckler-Smith products were being——

The Court: I sustained the objection to that, that he became convinced they were watered, that line about following a computation he made about grapefruit in Arizona, and so forth.

Mr. Strachan: You won't let him testify in 1950 he believed the Winckler-Smith products were watered? [3689]

The Court: That is what I have ruled in view of the issues it injects into the case, in view of the basis for what you said were his calculations, and on the offer you made.

Mr. Strachan: Of course, that effectively precludes us from showing what his state of mind was at the time he neglected to offer a contract.

The Court: I think there is merit to the other point of the objection that has been made here, that the testimony shows he said unequivocally he wouldn't have given a contract to Winckler because of the capacity that was involved. I don't think that this does anything but add and inject into the case other issues.

Mr. Strachan: In addition, Mr. Dixon isn't going to stop at that. He is going to say that is a

(Testimony of James A. Finley.)

trumped-up and phony reason, that there was no basis for it, that Finley, when he did that, was intending to injure Winckler, intending to pursue an unlawful course of conduct. Unless I can show the reasonableness of what he did and the state of mind with which he approached his business problem, I am absolutely helpless before that jury.

The Court: I have already sustained the objection to similar matters on the further ground it is an issue that was never called to the attention of the court, was not listed as an issue that you intended to produce at this [3690] trial, was raised for the first time during the trial, and my previous comments on objections will be incorporated here at this point.

Mr. Stark: Your Honor, in connection with that last statement, could we have clarification? If the only reason which can be given for this refusal is the reason at the time of the refusal, then it is correct to state that the failure to search out Winckler is not an issue in the case?

Mr. Dixon: I think so.

The Court: Mr. Dixon hasn't made too unequivocal an answer, but I don't contemplate I am going to let him argue anything about the duty on the part of——

Mr. Dixon: I don't intend to, your Honor.

The Court: ——the duty to search him out.

Mr. Dixon: I don't intend to do that.

The Court: His answer wasn't too unequivocal, but I don't think that is an issue in the case, be-

(Testimony of James A. Finley.)

cause if that was all that was involved, if the pleadings had shown they didn't search him out, I think the thing would have gone out on the pleading. So I don't think that is an issue. I think the issue is the refusal, and the instructions we have been working on—and you haven't been here and you haven't either, but we have been spending some time on this refusal business, and not anything about searching him out.

Mr. Dixon: I will not argue that, your Honor, that [3691] there was any obligation to search him out.

The Court: Well, let's go ahead then.

Mr. Fisher: But, your Honor, the reasonableness of the intent that he had in mind at the time he made the refusal is certainly important in this case.

The Court: You have a good bit left in your offer of proof besides what I have taken out.

Mr. Fisher: We had before, I think it was in connection with the admissibility of the brokers' letters to show the intent, and the rule is, and I remember the California cases cited, that for the purpose of showing the intent, what a person had in mind, that they could rely upon hearsay.

The Court: There is a general rule which smacks in this problem, but there are other problems in the case as well as that. One is the question of whether you can proceed to try a case of this magnitude upon issues which you raised for the first time during the trial, not put in the pleadings. I am content with my ruling, so let's go ahead.

Mr. Dixon: Your Honor, I wish to add this, because there may be some misunderstanding about it. If I understand the testimony of Mr. Finley, he has already stated he would give no other processor, he didn't mention Winckler & Smith particularly, but he wouldn't give anybody, any other processor, any contract comparable to the TreeSweet.

Mr. Strachan: This has reorganized the proof to such [3692] an extent that I wonder if we couldn't take the recess early. I will have to get together with Finley.

The Court: Why do you have to get together? You have an outline of what you have got there, and all you have to do is eliminate what I have sustained the objection to the offer of proof on. I don't follow you on that.

We will take the recess very shortly here, but let's go ahead now.

Mr. Strachan: I would like to look over these notes for a moment to see where I go next.

(Short recess.) [3693]

(The proceedings were resumed within the hearing of the jury as follows:)

The Court: The record shows the jury present. Proceed.

Q. (By Mr. Strachan): Mr. Finley, are you familiar with the statistical data that is collected in the Exhibit FE, and with the charts called "Pattern of Valencia Orange Utilization," contained in Exhibit FF?

A. I am familiar with the chart or the figures on FE, but I haven't got FF.

Q. I will just show it to you. Do you recognize it? A. Yes; I am.

Q. Those are correct representations of facts taken from the books and records of Orange Products Company, are they? A. Yes; they are.

Q. Before the recess you testified that you had had some dealings with Mr. Winckler of the Winckler-Smith Company; will you tell us about the first of those experiences?

A. I think the first experience I had with him was in '47.

Q. In what connection was that?

A. He called me up by phone and wanted to borrow some cartons, he had an order which he wanted to turn out within that week or the first of the next week. I told him that [3694] cartons were short, I didn't want to release any cartons.

He said that he had a carload coming in the following week and he would return the cartons.

I told him I wanted the cartons back and not the money, right now, because cartons were too hard to get.

He promised me he would return the cartons the middle of the following week. And it was not done.

And I called him a number of times after that to have those cartons returned, and it wasn't until he

(Testimony of James A. Finley.)

went into bankruptcy in 1948 that we finally sent him a bill for them.

Q. Do you remember the amount of the bill that was sent for those cartons?

A. It was a little over $300. 325 or so.

Q. How much was ever paid of that bill for the cartons?

A. I believe we got about 11 cents on the dollar. $30, $29 or $30.

Q. You got that from the receiver in the Chapter 11 proceedings? A. That's right.

Q. In 1949; is that correct?

A. Yes; we received our money in '49.

Q. You received the $30? A. Yes.

Q. Was the balance of that indebtedness ever paid? A. No; it was not. [3695]

Q. Did you ever have any experience with Winckler-Smith Company as a producer of hot concentrate under a contract with Orange Products Company?

A. Yes. In 1947 we had Winckler-Smith Company run hot concentrate for us on two separate contracts, one early in the season and a small one later.

Q. Will you tell us about what happened during the performance of the first of those two contracts?

A. That first contract was started about the 1st of June. We wanted the hot concentrate made, so we delivered him fruit and he returned the concentrate. We took the analysis on the concentrate. It had too many small black specks in it; it had a

(Testimony of James A. Finley.)

high yeast and bacteria count, which showed poor pasteurization, and then it had some larger black specks which we could look at under the microscope, which I think showed very poor sorting of fruit.

Q. Will you tell us what caused these large black specks that you found in the finished product as it was delivered from Winckler & Smith's plant?

A. It was caused by poor sorting of fruit before the fruit would go to the extractors to have the juice extracted.

Q. Mr. Winckler testified that in the Orange Products plant you had a lighted glass sorting table by which you would remove such spots; is that correct?

A. We have what we call a de-specking table, which is [3696] a glass table with lights underneath, and girls sit there with vacuum tubes to pick out small, immature seeds out of a pulpy type of product. Not out of a product such as this concentrate. We never run any concentrate over this table. It was what we call a pulpy type juice. [3697]

Q. How is it that you control the specks or eliminate specks from the hot concentrate that is packed in your plant?

A. Well, we have a better washing system where we can wash the fruit, and then run it through the separators, and being clean all the way through we keep the black specks out.

That is always a problem, though, in any plant.

Q. Will you tell us what you did with the products that were delivered to you under that first ar-

(Testimony of James A. Finley.)

rangement, the product that had the specks in it and that had the yeast and mold in it; what was done?

A. We got that into processing as soon as we could to repasteurize it; that that had the large black specks in it, we rescreened it and reprocessed it to get it in shippable form.

Q. Did you do anything in an effort to improve the sterility and cleanliness of the product of Winckler & Smith Company during that period that they were performing the hot concentrate contract?

A. Yes; we did.

Q. What did you do?

A. As soon as we knew it, shortly after the start of the contract the 1st of June, within a day of it, at the time you have your samples—it takes four or five days to run a bacterial count, and then you recheck it and make [3698] sure you are right, so we sent down our plant sanitarian and bacteriologist down to their plant to give them some suggestions as to how they could correct the condition.

Q. Following that did you enter into another contract for processing hot concentrate with the Winckler-Smith plant? A. Yes; we did.

Q. When was that?

A. That was the first of August.

The Court: The same year?

The Witness: 1947.

Q. (By Mr. Strachan): Will you describe what was done by Winckler-Smith in the performance of that arrangement?

(Testimony of James A. Finley.)

A. Well, they started out in pretty good shape bacteriologically, although in the middle of the thing we had a few batches that ran very high in yeast and bacterial count, and then it was brought down.

Q. What did you do with the bad batches that were brought in on that second transaction?

A. Those bad batches we just had to run them down the sewer. We wouldn't use them.

Q. Following that experience did you ever again enter into a processing arrangement with the Winckler-Smith Company? A. Never again.

Q. You did have some dealings with Mr. Lynch as [3699] receiver under the Chapter XI bankruptcy proceedings, did you not? A. Yes; in 1948.

Q. Will you describe how those dealings came about and what was done?

A. Well, that dealing, it was on a school lunch program, as we call it, and Mr. Wilcox or Mr. Armstrong had word from Washington, it was one of the California processors that wasn't able to fulfill a contract, they called me in to see what could be worked out, because they did not want to have a California processor fall down on the contract when it was promised, and I worked with Mr. Lynch. I didn't work with Mr. Lynch directly, at first, but first went to the attorneys to see if we could be properly protected on fruit if we turned it over to a bankrupt company, and the attorneys, with Mr. Lynch, the receiver, and the court, all set up so that the money received from the fruit and cans would be turned over to the bank, and then we would get our money from that source. That was our protection.

Q. Did you offer to allow other suppliers of by-products oranges to participate in furnishing fruit for this school lunch program?

A. Yes; we did. We felt that it was an industry problem, and Sunkist at that time being 65, 70 per cent of the industry, the contract was going to take about 5,000 [3700] tons of fruit, so Mr. Armstrong asked me if I would contact the other suppliers of fruit, such as Morgan Ward, M.O.D., and see if they wanted to supply their percentage. We were just interested in our proper percentage. Mr. Morgan Ward said he had an outlet for all his fruit and didn't want any of it. The M.O.D. said they would take theirs. So between the two of us we fulfilled the contract. [3701]

Q. As I understand it, this arrangement that you worked out with the receiver was not what would be called a processing agreement?

A. No. It was more of a deferred payment. We sold the fruit to the receiver and waited for our money until he got his money from the Government.

Q. So that the receiver in carrying out that contract was not processing the fruit for the Sunkist account or for a joint account in which Sunkist was interested?

A. No. Just for their own account or the account of their creditors.

Q. During the performance of that arrangement

(Testimony of James A. Finley.)

or carrying out of the arrangement, to what extent were you dealing with Mr. Winckler?

A. Well, I wrote the Winckler-Smith company, and Mr. Winckler as president, a letter giving the proposal for the benefit of the court records, I suppose, and then the next time it was after the court order and the court agreed to go ahead with it to the satisfaction of our attorneys, which is Farrand & Farrand, and we met up in Knox Farrand's office—I say we. It was Mr. Lynch, Mr. Winckler, Knox Farrand and myself, to go over the details of getting started and work out the balance of the contract.

Q. After the contract was completed and you were performing it, did you deal with Mr. Winckler or did you deal [3702] with Mr. Lynch?

A. I dealt mostly with Mr. Lynch's assistant. I don't know what they call them in court procedure, but it was a Mr. Mechlenberg that was running the plant for Mr. Lynch. I contacted Lynch right there at first and he turned me over and said to work out the balance of it, getting fruit and all that, with this Mr. Mechlenberg.

Q. He instructed you you were to deal with Mechlenberg rather than Mr. Winckler; is that correct? A. Very definitely.

Q. Will you tell us what the standards of quality are in the Sunkist organization with respect to single-strength juice?

A. Well, you have a standard, a U.S.D.A. standard, which is the minimum standard for juice, and the Sunkist standard or, you know, advertised brand, one that you are proud of, is limited so that it is what we consider better than U.S. Grade A. U.S. Grade A has a minimum of 10½ Brix. Our minimum of Sunkist is 11½ to 12 Brix, which is whole Brix more.

The maximum on standard U.S. Grade A is 1.4 acid. We have acid maximum, I think, in our Sunkist of 1.3.

It is a narrow range. There isn't the wide variation in flavor, Brix and acid in Sunkist as there is in U.S. Grade A. [3703]

Q. What about the oil content?

A. Well, the oil content, U.S. Grade A is less than three hundredths per cent. Sunkist is less than that.

The Court: Three hundred?

The Witness: Three hundredths.

Q. (By Mr. Strachan): In 1951 did you have in mind whether or not the equipment of the Winckler & Smith plant was such as would permit the production of single-strength juice of a quality to meet the Sunkist standard?

Mr. Dixon: If the court please, I object to that question unless counsel can testify of his own knowledge to inspection of the plant and what the facilities of the plant were at that time.

The Court: You may cross-examine on that when the time comes. Objection overruled.

The Witness: Well, I knew at that time, in 1951, and before that Winckler-Smith had Citromats,

(Testimony of James A. Finley.)

which is a type of juice machine like a wringer that you cut the orange in half and the juice is squeezed out, and the oil from the outer portion of the peel then gets into the juice.

We have Citromats ourselves and still have them. When the Citromats first came out experimentally we tried them for single-strength juice, but they would never turn out a quality product. There was too much oil and bitterness. If you loosen up the rolls, as they call it, so your yields [3704] of juice per ton would go down to a very inefficient point, you would improve the quality of the juice, because you would cut the oil, but it would be an operation you wouldn't even think of.

Q. What do you mean, you wouldn't even think of?

A. The juice yields would be down so low per ton it would be an uneconomical operation. So we would never do it.

Q. Based upon your familiarity with the Citromat machines, the experiments you conducted, were you of the opinion that there could be produced with Citromat equipment single-strength juice to meet the quality of Sunkist standards?

A. I was sure it could not meet those specifications. We worked on it ourselves. The inventor of the Citromat, which happened to be Bireley's, the first one, and we got the second one, they experimented with it and they did turn out some single-strength juice one year and gave it up.

(Testimony of James A. Finley.)

Q. Except for that and except for the Winckler-Smith operation, were there any processors in the California industry who attempted to produce single-strength juice on Citromats?

A. Not to my knowledge.

Q. Mr. Finley, at any time in 1951, assuming that you had had a surplus of fruit available for processing, would you have been willing to enter into any kind of a processing [3705] agreement with the Winckler-Smith company?

A. I would never have entered into a processing agreement with the Winckler-Smith company.

Mr. Strachan: That's all on direct.

The Court: Cross-examine.

Mr. Strachan: And on the basis of that testimony, your Honor, I offer Exhibits FE and FF.

The Court: Did you strike the one word off?

Mr. Strachan: No. I think they go in in the form they are in. Perhaps we can have a conference later as to a modification, but I should like to offer them in their present form.

Mr. Dixon: Well, subject to the previous objection made with reference to the exhibit, your Honor, I have no objection to it.

The Court: FE and FF received in evidence.

> (The exhibits referred to were marked Defendants' Exhibits FE and FF and received in evidence.)

The Court: On each of these exhibits, there is the word "grower participation." If you will see on

FE, that term refers to the products under the TreeSweet contract and the products under the Silzle contract.

In FF, which is a colored chart, you will have to be careful to look at the blue and the green which are fairly close. I trust none of you are color blind. If you are, [3706] those with good sense of color can pick them out.

Mr. Strachan: I wonder if I could reopen. Have you finished?

The Court: I haven't finished yet.

Mr. Strachan: I am sorry.

The Court: I think the blue on the chart refers again to grower participation. That again refers to products processed under the TreeSweet and Silzle contracts. This is a term, grower participation, which the defendants apply to these two contracts we have been talking about. You will draw no inference whatsoever from the words grower participation. It is just a tag to identify the products produced under the Silzle and TreeSweet contracts.

You may reopen.

Mr. Strachan: I would like to reopen and have copies of FF distributed to the jury and just let Mr. Finley explain the indications on the charts.

The Court: All right. Distribute FF.

(The copies were distributed to the jury.)

Q. (By Mr. Strachan): Referring now to the five charts that are included in the Exhibit FF, I would like to have you explain the manner in which

(Testimony of James A. Finley.)

those charts have been prepared and what the indications on the face of those charts are, what is represented by them?

A. They were prepared from our books according to the [3707] tons distributed through our different contracts to these companies by weeks. This is tons per week.

The Court: One chart for each year from 1947 through 1951, inclusive?

The Witness: That's right.

The Court: And the orange colored material represents the Valencia oranges processed by the processing plants of EOP?

The Witness: EOP at Ontario.

The Court: By weeks?

The Witness: That's right.

The Court: And the green, the next color, represents Valencia oranges processed for EOP's account, right?

The Witness: That's right.

The Court: That is where you had a contract with some organization or some arrangement with an organization to process goods for you, for EOP?

The Witness: We furnished the fruit and took the product, custom packing, as we term it.

The Court: That is the case there with the part of the chart on ELP, Lemon?

The Witness: Yes; that is for EOP's account.

The Court: The second part of that Lemon column—is that green or blue? Is this also green?

The Witness: That is also green. [3708]

(Testimony of James A. Finley.)

The Court: The same color. Then the yellow squares represent situations where you furnished the fruit and then took a warehouseman's lien, Lawrence Warehouse or otherwise, to secure your money and payment was deferred until the goods were sold?

The Witness: Until the goods were taken out of the warehouse.

The Court: Until the goods were taken out of the warehouse?

The Witness: Yes.

The Court: In those instances the goods were not processed for your account?

The Witness: No.

The Court: But for the account of the person who did the processing, but you had security for your payment?

The Witness: That's right.

The Court: And the fourth is the blue, growers participation, and refers solely to the Silzle contract and the TreeSweet contract?

The Witness: That's right.

The Court: Which the jury has already heard described.

The same plan has been carried over in each of the years, right?

The Witness: That's right, 1947 to 1951, inclusive.

Q. (By Mr. Strachan): Mr. Finley, one of the things [3709] that is shown by these charts is that

(Testimony of James A. Finley.)

you were using the facilities of outside processors to process not only under grower participation, but also for Orange Products Company account, even at times where the Orange Product facilities were not being used to full capacity; is that correct?

A. That is correct.

Q. Is that in accordance with the policy that you described this morning about making use of existing facilities rather than trying to monopolize or keep a large share of the product processed in your own plant? A. That's right.

Mr. Strachan: That's all. Thank you, Mr. Dixon.

Cross-Examination

By Mr. Dixon:

Q. Mr. Finley, Echange Orange Products is a corporation that does have stock, doesn't it?

A. It has what is called revolving fund credits or stock.

Q. Please answer my question. It does have stock? A. Yes. It is stock in that term.

Q. What is your answer?

A. You would call it stock. [3710]

Q. And that stock is all owned by Sunkist?

A. That stock is owned by Sunkist.

Q. And Exchange Orange does all of the processing of the by-product oranges, and what is left is turned over to Sunkist for distribution to the growers; is that correct?

A. Ask that question again.

(Testimony of James A. Finley.)

The Court: What is left, do you mean what is returned?

Mr. Dixon: Yes, sir; what is returned?

The Witness: What is returned is returned back to Sunkist.

The Court: I don't know whether the jury understands. By "returned" you mean the money returned?

The Witness: Yes; goes back to Sunkist, back to the growers, through that channel.

The Court: All right.

Q. (By Mr. Dixon): Then the growers are the real stockholders, are they, of Sunkist and Exchange Orange?

Mr. Strachan: I object. That is not the fact, and it is contrary to the stipulation that Mr. Dixon has entered into.

The Court: Reframe your question.

Mr. Dixon: All right.

The Court: There is technically only one stockholder, and that is Sunkist; is that it?

Mr. Strachan: That's right. [3711]

Q. (By Mr. Dixon): Would you say, Mr. Finley, that growers are in a sense comparable to stockholders in corporations for profit?

Mr. Strachan: I object. That involves a legal conclusion. It has nothing whatever to do with direct.

The Court: Sustained.

Q. (By Mr. Dixon): In any event, these operations of Exchange Orange and Sunkist are carried

(Testimony of James A. Finley.)

on for the profit of the growers, are they not, Mr. Finley?

A. Well, yes; they are carried on so the growers can make a profit.

Q. I didn't get your answer.

A. They are carried on so the growers can make a profit.

Q. If there is a profit, then, it goes to the growers?

A. There is no profit by Exchange Orange Products Company, though.

Q. Well, if there is any profit or any money left over after all the expenses have been paid of operating Exchange Orange and Sunkist, what is left goes to the growers each year; is that the theory under which you operate the Exchange Orange Products?

A. I think I testified that we received the fruit, and when we take out——

Q. Can you please answer that yes or no? If you can't [3712] answer it that way, just say so.

A. It is not profit. The money which we have left over goes back to Sunkist for distribution to the growers.

Q. That is where it goes eventually?

A. Sure.

Q. After the expenses are paid?

A. That is correct.

Q. Mr. Finley, I think you testified that 1951 was one of the largest Valencia crops in the history of California Valencia production; is that correct?

(Testimony of James A. Finley.)

A. It was the largest for the by-products plant in the history.

Q. In other words, according to your Exhibit FD —do you have that before you? A. Yes.

Q. That chart, if I read the big black line, indicates the extent to which there were more product oranges available in 1951 as compared to the previous years indicated on the black lines below the line marked 1951; that is correct, isn't it?

A. That's correct.

Q. I think you testified that before the price was set in 1951, that various processors, I think you said, also customers of Sunkist, were contacted with reference to the price at which it would be sold, I mean at which [3713] Valencia oranges would be sold? A. At which Valencia oranges?

Q. Yes.

Mr. Strachan: I don't believe this witness testified on that subject.

The Witness: Mr. Kelly testified about that. I have nothing to do with setting the price of oranges.

Q. (By Mr. Dixon): I understand that. But didn't you testify here, I think this morning, that you knew that the hot concentrate processors could afford to pay $40 a ton for oranges in 1951?

A. I knew that.

Q. And you so stated that you knew that of your own knowledge, did you?

A. I knew what we were selling hot concentrate for, and I knew that they could afford to pay for it.

Q. How did you get this knowledge that the

(Testimony of James A. Finley.)

processors of hot concentrate could afford to pay this price that was established by Sunkist for oranges in 1951?

A. I didn't contact them to see whether they thought they could. I told Sam Kelly that we could, that our prices were that we could pay $40 a ton on that.

Q. So you were basing your statement this morning on your knowledge of the operations of EOP and what it could do with the $40 fruit; is that correct? [3714]

A. Yes, sir; I so testified to that effect.

Q. But you never inquired, yourself, and determined of your own knowledge anything with reference to this matter with other processors, such as Mission and Hyland-Stanford and Bireley's, did you?

A. That is Sam Kelly's responsibility. He was selling them the fruit. Not mine.

Q. You did furnish them some fruit——

A. On a deferred payment plan.

Q. Under the deferred payment plan?

A. Yes.

Q. I think you said that Exchange Orange Products had two or three different types of arrangement with independent processors during the various years 1947 through '51?

A. Yes; we had different types of arrangements.

Q. And those arrangements set forth in Exhibit FE are divided into three groups; is that correct?

A. That is correct.

(Testimony of James A. Finley.)

Q. The first one is that where Exchange Orange furnishes the oranges to the independent processors and pays them for the processing operation and receives the processed product and sells it under the Sunkist label?

A. The Sunkist, or through our Sunkist sales department. It could go under the Exchange label, or any other label. [3715]

Q. And Sunkist has a pretty substantial sales department, doesn't it, Mr. Finley?

A. Yes; it has a sales department.

Q. It is larger, to your knowledge, than any other independent processor in Southern California?

A. Yes; it has more volume of business than any other that I know of.

Q. You have already anticipated my next question.

With reference to the volume of business handled by your sales department, do you know how that compares with reference to your nearest independent processor that might be a competitor of Sunkist in any of the products that you sell and that they sell?

A. I don't know the relative size of the two. TreeSweet, they have a Florida operation, they sell Florida juice in California, but they have one sales department. But to compare the size of the two, I couldn't do that. But I am sure that ours is probably larger.

(Testimony of James A. Finley.)

We have a more diversified line of products, more fields to cover.

Q. In dollar volume in 1951 the total sales of your products department, that is, those processed by Exchange Orange, were approximately twenty-five millions of dollars, weren't they?

A. I don't remember what that figure is. That sounds [3716] a little high and too good to be true.

Q. I think Mr. Armstrong testified, if I recall it, that in 1951 the total sales of fresh fruit and product fruit was approximately $150,000,000, of which about 18 per cent, 17, 18 per cent were of the product fruit, I mean products from the product fruit.

A. I didn't get to hear Mr. Armstrong's testimony.

Q. Do you think, from your own knowledge, that would be about correct?

A. Yes; 16 to 20. 25 seems a little high. But you have a record some place.

Q. So that all of these products that were processed by Hyland Stanford, Harts, and so forth, under the heading "For EOP's Account" on your Exhibit FE, were actually sold through the Sunkist selling organization; is that correct?

A. That is correct.

Q. Then the second type of arrangement that you mentioned was the so-called deferred-payment arrangement with Hyland Stanford and Mission Dry on your Exhibit FE. Now, under the so-called deferred-payment arrangement the processors acquired the oranges at a stipulated price, based upon

(Testimony of James A. Finley.)

the Sunkist selling price, and paid for them after they took the processed product made therefrom from storage or inventory and sold it; is that correct? A. That is correct. [3717]

Q. So under that arrangement the processor did not have to pay for the product oranges at the time they were delivered; is that a fact?

A. That is correct.

Q. And was it necessary for, say, Hyland Stanford and Mission Dry under their arrangement to pay any interest or carrying charges to Sunkist on any amounts that might be due for the fruit purchased under this deferred-payment arrangement?

A. No; there wasn't.

Q. So that no payment was required under that type of deal until the product processed from the oranges was actually sold?

A. Until they withdrew it from the Lawrence warehouse. Not when they sold it.

Q. It is a fact, is it not, in connection with the Hyland Stanford and Mission Dry contracts that you entered into with those companies under this so-called arrangement, that you also required them to take all of their requirements of oranges from Sunkist and to make their processing facilities available to Exchange Orange, if you wanted to use them and they weren't otherwise being used by Hyland Stanford, or the processor with whom you had that arrangement; is that correct?

A. Well, they would process the Sunkist oranges up to [3718] a certain price, after which time they

(Testimony of James A. Finley.)

were released if it went above that, for their protection.

Q. My question, Mr. Finley, is as to whether or not when you made this deferred-payment arrangement with these independent processors, that you also made this second agreement pursuant to which they agreed to make their facilities available to Exchange Orange on call of Exchange Orange, if those facilities were not being used by the independent processor with whom you had this arrangement.

A. Yes, that is correct; to offset the deferred payment. For the favor which we paid them, they would pay us one.

Q. This third type of arrangement, the kind that you had with TreeSweet back in 1947, TreeSweet is the only one that ever had this arrangement, isn't it, Mr. Finley? A. The only one in 1947.

Q. And the only one in 1948? A. Yes.

Q. '49? A. Correct.

Q. '50? A. Yes.

Q. Did TreeSweet ever go into the frozen concentrate business?

A. They did in Florida; not in California. [3719]

Q. Their plant here doesn't produce any frozen concentrate, does it? A. No; it does not.

Q. So, they don't sell any frozen concentrates in this market, processed in their plant here, in competition with any processed by your plant and sold through Sunkist, do they?

A. No. They compete with us with their Florida concentrate.

(Testimony of James A. Finley.)

Q. Do you know whether Silzle sells any—made any frozen concentrates in 1951?

A. No; I am sure they didn't.

Q. And they didn't sell any frozen concentrates in competition with any processed by Exchange Orange and sold in this market and any other states of the country during the year 1951, did they?

A. No; they didn't.

Q. And none of the fruit that was processed under either the TreeSweet or Silzle contracts was sold by TreeSweet or Silzle under the Sunkist label, was it? A. No; it was not.

Q. I believe you stated that no other independent processor had this type of contract up until 1951, except TreeSweet? A. That is correct. [3720]

Q. Under this so-called grower-participation contract, TreeSweet, I think, was paid for the processing operation by Sunkist, was it not? By that I mean it is paid for processing oranges which are made available to it and by TreeSweet processed into single-strength juice, and put into cans with the TreeSweet label?

A. It was paid for the processing and then we got the difference between that and their sales price.

Q. They were paid for the processing?

A. Yes. They were not——

Q. And they didn't have to pay, then, for any oranges that were thus made available to them under this arrangement that had been in effect since 1947?

A. They were not paid for the——

Q. Did they?

(Testimony of James A. Finley.)

A. They did not pay for the oranges until such time as the merchandise was sold, and the processing, they were not paid for that until the merchandise was sold, either.

Q. After the Valencia season was over, there was still considerable canned single-strength juice that was carried in inventory by TreeSweet under the warehousing arrangement, was there not?

A. Yes; there was.

Q. And TreeSweet didn't have to and didn't pay Exchange Orange or Sunkist anything for financing the carrying of that [3721] inventory, did they?

A. They paid for the cans, cases and labels. They did not have to pay for fruit.

Q. I said for financing.

A. That is financing if they pack an inventory.

Q. It wasn't, in fact, necessary, was it, under this arrangement for TreeSweet to finance any inventory factoring of accounts, say, with a bank, by pledging warehouse receipts for loans from a bank to carry on operations until the product thus processed was sold?

A. They told me they had to borrow from the bank for cans, cases and labels, but how much I don't know.

Q. The inventories, as far as you know, Exchange Orange and Sunkist were not paid anything by TreeSweet for carrying this inventory until it was sold by TreeSweet?

A. That is correct. Sunkist was not paid until it was sold.

(Testimony of James A. Finley.)

Q. Now, you said something about how this arrangement got started with TreeSweet back in 1947. Was that a rough year for independent processors financially, do you know, or don't you remember?

A. I don't think it was a rough year for processors. I think it was a good year for processors if they sold at the time of the pack. It may have been a rough year for those that wanted to carry an inventory over into the next [3722] year.

Q. I think you said the reason this arrangement was entered into was because TreeSweet told Exchange Orange or Sunkist that they weren't going to pack any more inventory and carry it and take the risk, shall we say, of a loss or drop in the market by having money tied up in a pack; is that correct?

A. Yes; that is correct. You usually sell your pack from the Valencia season about 60 per cent during the packing season and 40 per cent is carried over into inventory, and they would not be willing to buy fruit for the 40 per cent.

Q. So to permit them to avoid any risk in the dropping of the market price on any inventory that might be carried by TreeSweet, assuming they processed it themselves, this arrangement was entered into with TreeSweet back in 1947, wasn't it?

A. It was.

Q. Did you state at that time to other independent processors that this kind of arrangement was being made available to TreeSweet?

A. No, I did not.

Q. Did you state to any independent processors

(Testimony of James A. Finley.)

in 1948 that you had this kind of arrangement with TreeSweet? A. No.

Q. 1949?

A. No, I did not, not up until 1951. [3723]

Q. And 1950, then, you did not say anything about it? A. No.

Q. They were the only ones that had it during those four or five years, is that correct?

A. That is correct.

Q. It is a fact, is it not, Mr. Finley, that right here in the Los Angeles market TreeSweet outsells Sunkist in single-strength juice and has for a good many years? A. You mean before 1951?

Mr. Strachan: In 1951 and prior?

Mr. Dixon: Yes.

The Witness: We didn't have Sunkist until August, 1951. We had Exchange before that.

Q. (By Mr. Dixon): ~~I am~~ talking about the single-strength juice that was sold.

A. They outsold the Exchange label in the Los Angeles market.

Q. And with reference to those sales, Sunkist sales were about one-fifth of those of TreeSweet during those years, were they not? I am talking now of single-strength Valencia orange juice.

A. Sunkist sales one-fifth of TreeSweet?

Q. About one-fifth of the TreeSweet sales of single-strength Valencia juice here in Los Angeles?

A. Oh, in the Los Angeles market? [3724]

Q. Yes.

A. I don't know. I haven't followed that.

(Testimony of James A. Finley.)

Q. Well, this TreeSweet arrangement that you call grower participation carried, did it not, a substantial part of the operating overhead of TreeSweet when Sunkist paid the processing costs billed to it under these contracts during these various years?

A. It carried its proper share of the overhead.

Q. Under this arrangement with TreeSweet, you generally knew, did you not, where the product that they processed was being sold?

A. We did not follow where they sold it, although in the market I knew that it was being sold up and down the Pacific Coast and eastern markets.

Q. Well, under the two-price system that we are familiar with in this case, you at least, that is Exchange Orange at least new whether, by the selling price paid by TreeSweet when they made the sale, you knew where the product sold by TreeSweet was going?

Mr. Strachan: I object. The witness has testified repeatedly that they did not know what the selling price was.

Mr. Dixon: I ask that the question be answered, if he knows.

The Court: Overruled. If you know.

The Witness: We knew how much we sold to TreeSweet for [3725] at the two-price system and how much went in state. California-Arizona, and how much went out of state, but how much was within the state or out of it, we did not know.

Q. TreeSweet had the option, did they not, or the

(Testimony of James A. Finley.)

right under this arrangement, that if they were selling this juice up in Washington, to get a lower price under the Sunkist selling price, did they not?

A. That is correct.

Q. And Sunkist got the higher price from TreeSweet when TreeSweet was selling the juice within the states of California-Arizona, did they not?

A. That's right.

Q. So that to that extent you knew where the sales were being made by TreeSweet, did you not?

A. I personally did not know. The money would come in and the accounting department would handle that. I don't know as it was ever compiled for how many cases were in state and how much out. We were more interested in dollars and what was being sold.

Q. You knew, did you not, during this entire period when this arrangement was in effect with TreeSweet, including the year 1951, that the TreeSweet selling prices as published in their bulletins to the trade, were the same as those of Sunkist or Exchange as it used to be prior to 1951?

A. It would vary, I would say. It wasn't always the [3726] same, not necessarily. I don't know what their prices were except through brokers and our own sales department. We never received any of TreeSweet's bulletins. I don't know that they have one.

Q. That was a matter, then, that was handled by your sales department. Mr. Henderson, was it? Thompson? A. Thompson in 1951.

(Testimony of James A. Finley.)

Q. Now, you have referred in your testimony, Mr. Finley, to the fact that Valencia oranges were, I think you said, in short supply in 1951. By that you didn't mean that there was any less amount of oranges available in 1951 than in prior years in view of your previous testimony, did you?

A. No, not at all. There was more. But when I reported short supplies, why, it would be with the outside processing arrangements we would have shorter supplies at EOP at Ontario than normal.

Q. By short supply, you said something about the Valencias became in short supply, you mean as the season went on there became fewer and fewer tons available for processing, is that correct?

A. Well, what do you refer to, that I said short supply?

Q. It is a fact, is it not, Mr. Finley, if you will refer to Exhibit FD, that there was more fruit available in all months during the processing season in 1951, up to and [3727] including the beginning of the second week of November of that year, 1951?

A. Yes. The chart shows there was more fruit each week.

Q. So you don't want this jury to believe that there was any shortage or the fruit was in short supply for general processing purposes in that year, do you?

A. No, not for general purposes. The reason I asked the question is, where did you get the short supply, because I would report to the board monthly and, of course, in the report, if a question came up,

(Testimony of James A. Finley.)

I would say we have got short supplies this week of fruit, meaning that the outside facilities were going efficiently and EOP company at Ontario was probably shorter, and we could handle more fruit, and encourage the packing houses to go ahead and get more fruit in.

Q. The Exchange Orange processed about twice as much Valencia oranges into single-strength juice in 1951 than in the previous year 1950, did they not?

A. Twice as much into single-strength juice?

Q. Yes.

A. Exhibit CH shows 460,000 cases 1948-49, 210,000 in 1949-50, and 400,000 in 1950-51, so 1949-50 was a freeze year and we did not pack very much because we were not satisfied with the quality of the juice.

Q. Well, there was, in fact, twice the tonnage of [3728] Valencia oranges processed by Exchange Orange in 1951 than was processed by Exchange Orange into single-strength Valencia orange juice in 1950, wasn't there, Mr. Finley?

A. That is true, but still that is below what we processed four or five years previous, so it was not what I consider a large pack.

Q. So when you said that you talked to Mr. Winckler of Winckler & Smith at a time in September when, I think you said you were cutting down TreeSweet and Silzle in half, you didn't want this jury to believe there was less fruit available to Exchange Orange for all processing purposes in Valencia orange juice or other products, did you, than in previous years?

A. We had just about half the fruit available, or less than that, for single-strength juice, and we tried to keep our frozen facilities going, so we cut them one-half.

Q. Again, with reference to FD, that isn't what your figures show generally, is it?

A. This is total receipts.

Q. I am not talking now about total.

A. Total receipts.

Q. At that time you said, I believe, that this was the first time that Mr. Winckler told you that he knew about this, what you call this grower participation agreement with TreeSweet and Silzle, is that correct? [3729]

A. That is the first time he ever told me he knew we had it, was about the middle of September.

Q. Did he refer to it by that term?

A. No. He just referred to it by some kind of a participation or joint arrangement plan. He did not have any name for it at all. He didn't know.

Q. You hadn't told him about any of the details of this arrangement before, had you?

A. No, I hadn't, because I did not——

Q. And you hadn't told any other independent processor about this kind of a deal that was available to TreeSweet, had you, even at that time?

A. I told all the customers of Sunkist the previous year about the deal in 1951.

Q. I think you testified something about con-

(Testimony of James A. Finley.)

tacting Case-Swayne and they told you they weren't interested in 1951. Did you present to them at that time, Mr. Finley, a copy of the kind of contract that you then had had with TreeSweet in 1951?

A. No, I did not. They were not interested in seeing it.

Q. Did you tell them that you had had that kind of a contract?

A. I told them I had a contract and we could sit down and work on it if they were interested, but they were not interested in going any further with it. [3730]

Q. Did you tell them all the details of the proposition that you had in mind and which you subsequently put into your TreeSweet contract?

A. I told them enough so that they could make up their own minds.

Q. You said that the 1951 contract with TreeSweet was, I think you said, basically the same as the one in 1950. There were some differences, weren't there?

A. Yes, there were some differences, refinements.

Q. And one of those differences was that in the 1951 contract you gave TreeSweet a seven cent per case allowance for advertising purposes, isn't that a fact? A. That's right.

Q. That did not appear in any of your previous——

A. It did not appear in any previous one. 1951 was the first one we had Sunkist and Exchange, one

(Testimony of James A. Finley.)

being an advertised brand and another an unadvertised brand, so we set the seven-cent differential.

Q. TreeSweet did not advertise any Sunkist product with this money?

A. They used that seven cents to advertise TreeSweet or to do anything they wanted to with the seven cents.

Q. You don't know what it was used for?

A. I don't know.

Q. They were not required under this arrangement that [3731] you made with them in 1951 to use it for advertising purposes, were they?

A. No, they were not required to use that for advertising purposes. They were selling lemon juice, which is very popular with them, and grapefruit juice, and all that, and they advertised the name TreeSweet more than they did any one item. They advertised the name, and advertising TreeSweet lemon juice is good for advertising TreeSweet orange juice.

Q. I think you testified something with reference to this 1947 arrangement you had with Winckler & Smith. We went into that, I think before. But I don't think you stated at that time that you dumped this down the sewer.

A. Dumped a couple of batches down the sewer.

Q. A couple of batches. Did you ever tell anyone at Winckler & Smith that you were dumping what they had processed down the sewer?

A. We didn't dump it down the sewer until the contract was over and they were paid.

(Testimony of James A. Finley.)

Q. Did you ever take it up with them at that time? A. No, we did not.

Q. Did you ever ask them to make good for any of this that you dumped down the sewer?

A. No. They were in bankruptcy by then.

Q. So that you never let them know or anyone at Winckler & Smith, until this case? [3732]

A. Not that I know of.

Q. That you had, as you say, dumped some of this down the sewer. How many cases or cans was it? A. In barrels.

Q. A couple of barrels?

A. No. It was made up in about 500-gallon batches. We dumped about two batches down the sewer.

Q. Now, you said something about Citromats. Have you ever been inside of Winckler & Smith's plant, Mr. Finley? A. Yes, I have.

Q. When was the last time you were in the Winckler plant?

A. I think I was in there during their bankruptcy in 1948, the winter of 1948.

Q. You mean while it was being operated by the receiver or trustee?

A. The year the receiver operated it.

Q. But you haven't been in there since, have you? A. No, I haven't been there since.

Q. Did you know as a matter of fact that there was a de-oiler attached to the Citromat equipment in Winckler & Smith's plant?

A. Yes. I heard they had a de-oiler. The year

(Testimony of James A. Finley.)

they put it in, somebody said they put it in and were having trouble with it. [3733]

Q. You never inquired of Winckler & Smith about it or how it worked?

A. I know how de-oilers work. I did not have to ask them.

Q. I assume that you know all about it, of course, but I am asking you the question. Did you ever inquire of Winckler & Smith or anybody at that plant how it operated or how it worked?

A. I never asked them, no. [3734]

Q. You were satisfied that no equipment of that type could possibly work on a Citromat, is that correct?

A. It would not make a satisfactory juice, with Citromat juice, I am satisfied of that in my own mind.

Q. The Silzle contract wasn't quite like the TreeSweet contract, was it?

A. No; Silzle is a different type of organization, so the contract is a little different.

Q. Did they have as big a sales organization as Winckler & Smith?

A. I don't know how large a sales organization Winckler & Smith has, but I would say relatively they are probably about the same size.

Q. They got 12½ per cent, didn't they, instead of 15 per cent?

A. Yes. They did mostly business with private label people, so there is less brokerage to pay.

(Testimony of James A. Finley.)

Q. No Sunkist labeled products were sold by—I withdraw that.

None of the products processed by Silzle under its contract with Exchange Orange in 1951 was turned over to Sunkist for selling, was it?

A. No, it was not.

Q. So that all of the juice, single-strength Valencia juice, processed by Silzle under its contract with Exchange [3735] Orange in 1951, just like the TreeSweet arrangement, were sold by Silzle itself?

A. That is correct.

Q. And under any labels that they wanted to put on them? A. That is right.

Q. This was California juice, wasn't it?

A. Yes, it was.

Q. Do you recall what year TreeSweet returned more to Exchange Orange than it got from the sale of fruit through Sunkist?

A. It was '49 or '50, it was one of those years, in that area. I don't remember the specific year.

Q. But during 1950, which was a year in which there was a lesser production or lesser availability of Valencia oranges to independent processors, TreeSweet got more, did they not, than the previous year, for processing?

A. 1950 they got more than in 1949?

Q. Yes.

A. I think they got about the same.

Q. About the same?

A. I haven't got it in front of me, the total for the year. I have just got it by the weeks. They were considered around a sixteen to twenty thousand-ton plant, 16 to 25. I thought it was in the same range those two years. [3736] I don't remember.

Q. I think you testified, Mr. Finley, that this so-called grower participation contract that you had with TreeSweet all these years, you would not have made a contract of that type with any other canner except TreeSweet; is that correct?

A. In 1951 I would not have made that with any other canner, because they carried the inventory, and the others I sold just on a monthly basis, and at the time of production. And I didn't know enough about their sales department, their organization, to have done it.

I had five years' experience with TreeSweet and I knew more about them at that time.

I could have taken Case-Swayne, and maybe with a year's experience with them, maybe later would have done it. But I never had the experience.

Q. I take it you didn't offer them the same kind of a deal in 1951 that you did TreeSweet?

A. We never got down to that much discussion, because they said they didn't want it.

Q. So, under no circumstances, then, would you have offered a contract, or any arrangement, to any other independent processor comparable to that which you made available to TreeSweet in 1951, in that year; is that correct?

A. Yes, sir, that is correct. [3737]

Mr. Dixon: That is all.

(Testimony of James A. Finley.)

Mr. Strachan: May I hear that question, please?

The Court: Read it.

(The last question and answer thereto were read by the reporter.)

Redirect Examination

By Mr. Strachan:

Q. As I understand it, that answer means that you didn't regard any processor as being comparable to TreeSweet in its ability to produce and market the product; is that correct?

A. Produce and market.

Mr. Dixon: Just a moment. Is that a construction of his answer, your Honor, by this witness?

This is redirect, I know——

The Court: It is a leading question, but the objection is overruled.

Q. (By Mr. Strachan): When you said that the volume handled by the Sunkist sales department exceeded the volume of sales of TreeSweet, did you intend that to apply to the volume of single-strength orange juice sales?

A. No. The volume of single-strength orange juice sales—TreeSweet is normally a 600,000-case plant, and we run about 400,000 cases, and their sales department, we [3738] wanted the use of their sales department, they have a larger sales department than we have, when it comes to the sales of single-strength juice. So we used theirs.

Q. I think you said——

(Testimony of James A. Finley.)

The Court: You said you used theirs?

The Witness: Used their sales department and processing facilities. We didn't use it, but I mean——

The Court: Under the contract?

The Witness: Under the contract.

Q. (By Mr. Strachan): One of your objects in entering into this agreement with TreeSweet was to have available for the marketing of the growers' oranges the TreeSweet trade name, sales organization, and marketing potential; is that correct?

A. That is right.

The Court: Just a minute.

Mr. Dixon: If the court please, I think that question is obviously leading, a conclusion, and a matter for the jury to determine.

The Court: Sustained.

Q. (By Mr. Strachan): Were there any other considerations other than getting the oranges processed that led you to enter into the contract that you did with TreeSweet?

Mr. Dixon: I object to it, your Honor. It has been gone into fully on direct examination, and this is redirect. [3739]

The Court: Overruled.

Is there something new and different?

Mr. Strachan: It arises out of the last question that Mr. Dixon put.

The Court: You covered this all on direct, did you not?

Mr. Strachan: I want to clarify this thing, after

(Testimony of James A. Finley.)

the inference that Mr. Dixon's last question left with me, at least.

Mr. Dixon: The inference is that which is to be drawn by this jury, not to come from the mouth of this witness.

Mr. Strachan: I don't want it to come from Mr. Dixon's mouth, either.

Mr. Dixon: It is for the jury to determine.

The Court: I will sustain the objection. This has all been covered. Redirect is to take care of new matters brought out in cross.

Q. (By Mr. Strachan): Under the arrangements made with TreeSweet and Silzle, were those processors free to sell the product made under those arrangements at any price they saw fit?

A. They could sell at any price they saw fit.

Q. Did you know any more about the actual prices quoted by TreeSweet or Silzle than you learned about the prices of any other competitors in the market? A. No, I did not. [3740]

Q. I think at one point you said that TreeSweet and Silzle didn't pay for the canned juice until it was sold. They paid for it when they drew it out of stock, isn't that correct?

A. That is correct.

Q. When they purchased it, rather than when they sold it, that they paid the price? A. Yes.

Mr. Dixon: What is that, counsel? I don't think this witness so testified at all, your Honor.

Mr. Strachan: That is the fact, isn't it?

Mr. Dixon: I move the answer be stricken.

(Testimony of James A. Finley.)

The Court: Read the question and answer.

(The record was read by the reporter.)

The Court: Isn't this covered in the contract?

Mr. Dixon: It is, your Honor.

The Court: Doesn't the contract provide expressly what the situation is?

Mr. Strachan: That is right. But Mr. Dixon asked the witness, "Then they didn't pay for the juice until it was sold?" and that is directly contrary to the fact, as shown by the contract. I just wanted to clear that up.

The Court: The jury will have the contract. They can read the contract.

Q. (By Mr. Strachan): As I understand it, you had no [3741] business dealings, nor business negotiations, with Winckler-Smith Company, or Mr. Winckler, after the fall of 1947, until the two conversations you have testified to in 1951?

Mr. Dixon: If the court please, I think this is, again, going over something that has already been covered.

The Court: Counsel is almost through. Objection overruled.

Did you or did you not?

The Witness: I did not have any business dealings with him after that time. [3742]

* * *

The Court: Let the record show the jury absent.

Mr. Stark: We have some exhibits, your Honor, which have been identified and not offered, and some exhibits which have been offered and as to which we desire to make a reoffer. We thought possibly in the absence of the jury we could proceed with this and then simply inform them.

The Court: All right. [3749]

* * *

The Court: Received in evidence, Exhibit FG.

(The exhibit referred to, marked Defendants' Exhibit FG, was received in evidence.)

Mr. Stark: As to the documents which were identified primarily in the course of cross-examination of Mr. Winckler [3750] and Mr. Hodge, the first is Exhibit A, the file of the Winckler & Smith corporation application from the Corporation Commissioner's office. You will recall that Exhibit A is the entire file. Exhibits A-1, A-3, A-4, A-5 and A-6 have already been received in evidence. At this time the defendants would offer Exhibit A, and for clarity Exhibits A-2 and A-7. These are all part of the Exhibit A, but I think probably they should remain identified separately.

The Court: I don't understand. Are you offering all of A?

Mr. Stark: Offering all of A, yes, the entire file. [3751]

Mr. Dixon: If the court please, I certainly object to the introduction of the entire file. I haven't even see it. It seems to me——

The Court: It is the file of the application before the Corporation Commissioner, and in my opinion would obviously contain a lot of material that would have no bearing. I will sustain the objection to the entire file.

Do you have other parts of it you want to offer?

Mr. Stark: Then we would offer Exhibit A-2, which is the Winckler & Smith balance sheet of January 31, 1949.

Mr. Dixon: I might say, your Honor, I don't have a copy of that.

The Court: Then supply copies later if it goes into evidence.

Mr. Dixon: I have no objection to it.

The Court: All right. A-2 received in evidence.

(The exhibit referred to, marked Defendants' A-2, was received in evidence.)

Mr. Stark: And A-7, which was the covering letter on the audit of January 31, 1946.

The Court: That is just a two-paragraph letter?

Mr. Stark: Yes.

Mr. Dixon: I don't have a copy of that, either.

Mr. Stark: It is the covering letter on A-1.

The Court: Here is the letter. It is two paragraphs. [3752] You can read it.

It is the covering letter for which balance sheet?

Mr. Stark: For A-1, for the balance sheet of January 31, 1946.

The Court: All right. A-7 received in evidence.

(The exhibit referred to, marked Defendants' Exhibit A-7, was received in evidence.)

Mr. Stark: Exhibit B, which is the Hodge audit of January 31, 1951, is offered in evidence.

Mr. Dixon: Again, counsel, I am sorry, I don't have a copy. Is it the same thing that is already in evidence?

Mr. Stark: Mr. Dixon, I wonder if it would inconvenience you if you can work here. I have a set of these exhibits. We can both look at it.

The Court: Look at it over there, Mr. Dixon. And if they are received in evidence the defendants will furnish a copy.

Mr. Dixon: Is that already in evidence now?

Mr. Stark: It is identified, yes.

Mr. Dixon: What was it, again?

The Court: B.

Mr. Stark: B. Was Exhibit B admitted, your Honor?

Mr. Dixon: I have no objection to it, as long as it is part of the Hodge report.

The Court: Exhibit B received in [3753] evidence.

(The exhibit referred to, marked Defendants' B, was received in evidence.)

Mr. Stark: And Exhibit C is the same type of document. It is a financial statement of July 31, 1951. It is offered in evidence.

Mr. Dixon: No objection.

The Court: C received in evidence.

(The exhibit referred to, marked Defendants' C, was received in evidence.)

Mr. Stark: Then Exhibit D is the contract of August 27, 1948, between the receiver Lynch and

Exchange Orange Products Company. The defendants offer that in evidence.

The Court: Offer it now?

Mr. Stark: Yes.

Mr. Dixon: Do we have a copy of that somewhere?

Mr. Stark: It is my recollection that copies of all these were furnished at the time that they were identified.

The Court: Not the "A" exhibits.

Mr. Stark: Not the "A" exhibits.

The Court: Nor B or C, financial statements. This might have been. Check on that. If not, furnish a copy.

Mr. Dixon: We don't have it, I am informed.

The Court: Furnish a copy. Exhibit D received in evidence.

(The exhibit referred to, marked Defendants' D, was received in evidence.) [3754]

Mr. Stark: Exhibit E, which is the letter of October 29, 1948, from the receiver Lynch to the Exchange Orange Products Company, is offered in evidence.

Mr. Dixon: We don't have a copy of it, but I do remember something about the letter, your Honor. I think it would be wholly irrelevant to any of the issues of this lawsuit, what the receiver said or didn't say.

The Court: Let's see the letter. I haven't a copy, either.

(Clerk handing exhibit to the court.)

The Court: Here is the letter, if you want to look at it.

Mr. Dixon: Thank you. Well, I would object to it on the ground it is irrelevant and immaterial, doesn't tend to prove or disprove any of the issues of the lawsuit, your Honor.

The Court: It shows the amount of the contract.

Mr. Dixon: That is already provided for in the contract which is in evidence.

The Court: Objection sustained.

Mr. Stark: Your Honor, may I state a further ground of materiality? May I be heard on this? One of the charges involved here is a conspiracy or attempt to put this plaintiff out of business, and this letter written by the receiver, the court officer in possession for the plaintiff, indicates that in a period of severe financial difficulty the defendants, rather than attempting to put the plaintiff out of business, actually entered into the contract and performed to the [3755] satisfaction of the Trustee.

The Court: Well, it is the Trustee's characterization of the matter, and you are offering it apparently for the truth of what the Trustee says. If it was written by Winckler & Smith, it would be an admission. Written by the Trustee, it is not. It is a third party's characterization. It is like a schoolboy writing to his teacher, "This is a very fine thing for EOP to do."

I don't think it hurts and I don't think it helps, but I am trying to cut down the number of exhibits. Objection sustained.

Mr. Stark: May the record show it is also material, apart from the truth of the contents, as impeachment of the testimony of Mr. Winckler that the dealings in this case, in the case of the 1948 contract, were between him and the Trustee, that being of some significance in view of Mr. Finley's position that after the 1947 agreement he did not thereafter deal with the Winckler-Smith corporation?

The Court: It may be offered also for that purpose and the objection is sustained.

Mr. Stark: The next exhibit which has been identified and which the defendants at this time offer in evidence is Exhibit F, which is the tax returns, Federal and State tax returns of the Winckler & Smith Corporation.

The Court: Weren't they offered once [3756] before?

Mr. Stark: So far as I know, they have not been offered in evidence and they are not in evidence.

Mr. Dixon: I will object, your Honor, to the offering into evidence in this case of any tax returns of this corporation. I don't think they are relevant or material to any of the issues of the lawsuit. I think the only tax return that I can remember that is in evidence at all, for a limited purpose, is that to rebut an issue raised by the defendants as to the two types of appraisals or the two different methods of appraising this property, which are set forth in the tax return, and which were offered for that purpose only.

The Court: Objection sustained. It is sustained upon the ground that the computing of Federal tax returns is on a basis under the Federal tax statute and does not necessarily follow the same methods that a company would in its set of books. There has been an examination of the financial returns, there have been computations made, adjustments made by the defendants of what they thought the financial reports would show, and it would inject further issues in the case with little, if any, effect upon the ultimate issues of the case.

The objection is sustained.

I think I have already gone over this matter, and wherever I refer to it in the record, I incorporate whatever remarks I then stated about Federal tax returns.

Mr. Stark: In that regard, your Honor, we have attempted, [3757] as you are aware, the transcript is rather voluminous, to determine whether there has been prior discussion on a particular point and not to repeat it. I will attempt not to do so. I was not aware that there had been.

The Court: It has been discussed, and I said something at that time like what I say now, that then we would have to go into informing the jury about the statutes under which the return was made, and why the return was made in a certain way that might be different from the way a financial set of books were kept, and you would have a whole series of issues then on a matter that adds nothing. That is what I have in mind. The next one is what? G? [3758]

* * *

Mr. Stark: The next is Exhibit J, and as to that, your Honor, that is the book which was somewhat thicker than this, it was described in the testimony as a summary of fruit receipts and production records. The book which has been marked contains photostats of some other records, and we have checked this and find that starting with the page marked in pencil 206 it is the beginning of the production records. We should like permission to physically—to have the clerk physically take the pages ahead of 206 out of the book, and as so abbreviated we would offer Exhibit J in evidence.

Mr. Dixon: If it is what I think it is, and I haven't yet had a chance to go over it, I would object to it on the ground that it is irrelevant and immaterial to any of the issues of the lawsuit. [3760] What is it offered for, counsel?

The Court: It runs from 206 to how far?

Mr. Stark: To the end of the book, which is—these are page numbers which I believe were put on for photostat purposes. It runs to 306 inclusive.

Mr. Dixon: They appear to be photostats——

Mr. Stark: They are photostats of the original ledger sheets.

Mr. Dixon: On counsel's representation, it is enough for me, but I don't see any relevancy to them.

Mr. Stark: The relevancy of these production records, among other purposes, is that they contain the actual daily production records which are material to the testimony and the issue as to what Winckler's production capacity and what his utilization—rather, what his utilization of production capacity was throughout the period involved in the lawsuit, which is directly material to the damage issue insofar as there is any question of the amount of fruit he did or could have run had he had fruit available in 1951 under this contract, or otherwise.

The Court: Didn't you have summaries made of such material as you were interested in from these?

Mr. Stark: Not of this record, no. We have fruit receipts, but not the production record. The record gives the production by product, by days, can sizes, and so forth, [3761] and is the only complete picture of Winckler's—not his theoretical capacity, but his actual utilization of facilities during this period.

The Court: The record doesn't show what use you want to make of this, there is no chance for rebuttal; the last day of the trial you want the original records put in, which leaves the matter wide open as to what issues might be raised.

Mr. Stark: I believe, your Honor, I have stated the issue for which we propose to use the document. If, in fact, it is used before the jury it will be used on that issue of the actual production record of Winckler & Smith during the period.

Mr. Strachan states that we have no present intention of referring to this exhibit before the jury, but we do feel that it is a part of the record which we should have available.

The Court: It has been available, and so far the only reference to it was on page 292. The only reference made to it in the transcript is on page 292.

Mr. Stark: I believe that is correct, your Honor.

The Court: Now, the last day of the trial the matter is offered, when you have had chances to make summaries, and have made summaries—for instance, you just offered one of fruit received, and there are numerous other exhibits [3762] which you have made. What is the plaintiff's objection?

Mr. Dixon: Plaintiff's objection——

The Court: Or is there objection?

Mr. Dixon: Yes, there is definitely, your Honor. I frankly don't know what these hundred or so, or how many pages there are in here containing literally thousands of figures might mean or be used for.

I submit that the record in this case is already replete with statistical information on production, the type of production of the plaintiff. And counsel said they don't intend to use this before the jury. If it isn't for use before the jury, it seems to me it is wholly irrelevant and I object to it on the grounds that coming at this stage I don't know what use could be made of it. [3763]

Mr. Stark: May the record show that this exhibit has been identified and available since the 3rd or 4th day—no, I correct that—since the early part of Mr. Winckler's cross-examination. It is offered not only on this issue, but is offered as statistical material from the plaintiffs' records, from records which the plaintiff not only had in his possession, but actually furnished to the defendants, and that it constitutes the original record. As I understand, there is no objection to the foundation.

Mr. Dixon: No, counsel, but if everything that was furnished——

The Court: Sustained upon the ground that defendants have had this sheet apparently photostated since long before the trial of this action, and that during the trial reference was made only to page 292, that defendants now disclaim any intention to use anything in it for argument to the jury, that it involves pages and pages and conceivable issues that would take considerable time to determine, and that plaintiff should have a right to have attention called to whatever matters were going to be referred to. Again 292 was the only page to which any reference was made.

Further, that they are not complete records. 206 starts out with a date in June of 1948 and then jumps from there to July of 1949.

Mr. Strachan: That is the period the company was in [3764] receivership, your Honor.

The Court: June, 1948, and jumps to July, 1949. It would add nothing to the summaries which the defendants have already offered in evidence and which they have had opportunity to offer in evidence. Objection sustained.

What is the next one?

Mr. Stark: The next is Exhibit K, which was the minutes of the special meeting of the board of directors of the plaintiff on June 24, 1949. That is the minutes relating to the forgiveness of indebtedness and related financing, and the defendants offer that exhibit in evidence, and probably to be considered as a companion exhibit with it, Exhibit L, which was the waiver of notice from the minute books covering the same meeting of June 24, 1949.

The Court: Is there an exhibit of the meeting held in January or prior to the termination of the receivership?

Mr. Stark: January 18, 1949, is the next exhibit I had in mind, which is AY.

The Court: AY?

Mr. Stark: Yes: That is the minutes relating to the Rubin sale, and we propose to offer those minutes, also. In fact, we will offer those so that the court may consider K, L and AY.

The Court: That meeting was January 18th?

Mr. Stark: AY is the meeting of January 18, 1949. [3765]

The Court: May I have that, Mr. Clerk?

Is there any exhibit in evidence as to any of the orders made in that reorganization proceeding? I have heard you gentlemen argue here. I have never looked at any of that court file. Plaintiffs apparently rely on some matters that occurred during the Chapter XI proceeding, and you rely on some matters that occurred after the Chapter XI proceeding. Has anybody taken the trouble to go and look at the court file?

Mr. Stark: Yes. I think the court file has been examined. There is, in fact, considerable testimony in the record through Mr. Lynch regarding his examination of the court file. There may be a statement or two by Mr. Fisher. Neither ourselves nor the plaintiff has offered any part of that file so far as I am aware. We don't propose to.

Mr. Dixon: Your Honor, there is, if I understand, or was an order made by the Trustee in the

Chapter XI proceeding conditionally confirming the sale, dated February 14, 1949, by David Head, Referee in Bankruptcy. I suppose we had better mark it for identification.

Mr. Stark: May we see that?

Mr. Dixon: Yes.

The Clerk: Plaintiffs' Exhibit 84 for identification.

(The exhibit referred to was marked Plaintiffs' Exhibit 84 for identification.) [3766]

Mr. Dixon: Which relates to this sale and plan of reorganization pursuant to which the sale was made, which, if these other documents are to go in, probably should accompany it so that the complete record is available on this point. We don't like to encumber the record further with documents, but if these others are to go in, I would say that the Plaintiffs' Exhibit for identification 84 should be offered. This exhibit is excerpts from the order, and we will put in the whole order if counsel wants this.

Mr. Fisher: Let's see it.

Mr. Stark: Exhibit 84, as to that may any ruling be reserved until we have had a chance to inspect it, and if a portion of the record is to go in, perhaps we will want to offer some part of that record, too. There has been none offered before or identified, so we did not plan to go into it.

Mr. Dixon: We were waiting to see whether this was to go in.

Mr. Stark: I believe K, L and AY, however, are minutes from the corporate records which can, in light of the testimony in the case, stand on their own merits apart from the amount of the record in the bankruptcy proceeding which would be offered. We accordingly offer K, L and AY.

The Court: Have you seen AY?

Mr. Dixon: I am not sure, your Honor. I don't have [3767] copies of any of these.

The Court: I am willing to give you time to work out what might be agreeable as to 84, that is, how much of the order. Plaintiff has merely excerpted parts of the petition and order. But I will admit some kind of an order in that connection. While I am telling the jury about K, L and AY, I want to tell them also about 84, even though we haven't agreed to the form of it at that time.

As I understand your point, there is no objection to parts of that file, but it is a question of how much you want or how little we can get by with. Is that it, Mr. Stark?

Mr. Stark: It is a question of, if we are going into the file, we want a complete picture of what is in the file. I personally have not reviewed the file. I have talked to Mr. Lynch and Mr. Fisher regarding their review of the file.

The Court: All right. K received in evidence. L received in evidence. AY received in evidence.

84 will be received in evidence when the form of it is agreed upon.

The Clerk: You reserve the admission, however, until later?

The Court: Yes.

The Clerk: K, AY and L.

(The exhibits referred to, marked Defendants Exhibits K, AY and L, were received in evidence.) [3768]

Mr. Stark: 84 is not received, but an exhibit of that type will be received?

The Court: It will be received when we can agree upon the form of it. [3769]

* * *

Mr. Stark: The next three exhibits are in a somewhat different group. They relate to the testimony of Mr. Marvin Walker from the Florida Citrus Canners Co-Operative. The first is Exhibit BU.

BU is——

The Court: B?

Mr. Stark: B as in Betty.

The Court: Let me find my notes here.

Mr. Stark: BU is a graphic representation of the price pattern on Florida unsweetened orange juice, which was testified to in the record by Mr. Walker.

We offer this as a graphic representation of that testimony.

Mr. Dixon: Counsel, I am sure you gave it to us, but I don't seem to be able to find it right at the moment.

The Court: Here is what it looks like, Mr. Dixon.

Mr. Dixon: Yes, he has just shown me what he has referred to. Thank you.

Mr. Stark: Defendants offer BU in evidence.

Mr. Dixon: I don't see that it has any relevancy to the issues of the case. It is cumulative to say the most.

Mr. Stark: It was our thought that particularly insofar as his testimony related to trends——[3772]

The Court: BU received in evidence. [3773]

* * *

EX received in evidence. EX has the single sheet as previously identified, and two large photostatic sheets. [3777]

* * *

The Court: Magazine, newspaper, car cards, posters—pardon me—radio, $472; television, $17,000.

Well, let's save time. Can it be stipulated, Mr. Dixon, that if a witness were called from the accounting department [3783] of Sunkist, that he would testify in substance that his job was to make what might be well called a cost accounting on advertising expenditures, and that these records attached to EX represent his cost accounting between various products, and that EX is a summary, and that the matter—if you want to even it up—on cross-examination he would admit that this was a matter of his judgment as to how the accounting should be distributed.

Mr. Dixon: We will so stipulate to save time. Is there anything else you wish, counsel?

Mr. Stark: The only thing that bothers me a little bit, your Honor, is the implication, if there could be one drawn, that there was an element of judgment in determining what product is advertised. There is an element of judgment in any cost allocation of general items, but whether or not you advertise a particular product on the radio or in a newspaper doesn't involve the element of judgment.

The Court: As to certain items, there wouldn't be judgment. I am just trying to save some time. If he was here on cross-examination, I would imagine if he was asked that question he would have to admit that the matter of judgment was involved. Certain items there wouldn't be much problem about, and on others he would have to use his judgment as an accountant or bookkeeper in making the cost accounting.

Mr. Stark: The only thing I was wondering was if it [3784] would be possible to add, judgment as to those matters which required allocation.

The Court: All right. That's satisfactory. And then call attention, for example, that as far as TV was concerned—well, I don't know. If we get into this, this is argument. If I was plaintiffs' counsel and you argued this matter, that there was 15/100ths of one per cent for single-strength juice, I think I would be able to make quite an argument that you are advertising the Sunkist name even in connection with other products and spent these figures, $64,000, and that certainly there was a slop-over value for every other Sunkist product.

Mr. Stark: I think that is certainly arguable from the exhibit as it stands, your Honor, without a need of explanation.

The Court: That's right. I am not suggesting that to the jury, but it is one of these exhibits—

what do you get out of it? If you take the trouble to argue and pinpoint the 15/100ths of one per cent, and if there is time—query—probably there will be the argument on the other side, then, and you would have to come back and rebut it.

Mr. Stark: I will be frank, your Honor, I was surprised when I saw that 15/100ths of one per cent myself.

Mr. Dixon: So was I.

Mr. Stark: The way I feel about it, it doesn't matter [3785] how much you blow up 15/100ths of one per cent, it is a pretty insignificant thing.

The Court: All right. Are you satisfied, first, to stipulate if the witness was called—Mr. Dixon, are you satisfied if the defendants called a witness, he would testify substantially as I have indicated?

Mr. Dixon: Yes, the plaintiff is satisfied.

The Court: Are you, Mr. Stark?

Mr. Stark: Yes. Could you indicate this was a record kept in the usual course of business? I mean it is not a record prepared for this trial.

The Court: All right. The exhibit is again received in evidence. It was already received in evidence.

I will try to flag it to say something about it and not say too much, and then if you fellows want to argue more about it, you can.

What is the next one?

Mr. Stark: The next series, I believe we can take in a group and dispose of fairly quickly, your Honor. That is related to exhibits which have previously been offered and rejected, and as to which we wish to clarify the offer and to reoffer them for purposes of clarifying them.

The first is Exhibits I-1, I-2, I-3, I-4, CM and CN. Those are the laboratory analyses and the two exhibits which were introduced in connection with the offer of Mr. Higbee's [3786] testimony. I don't wish to repeat the long argument that we had relating to the original offer, but I would like to extend their purpose, and the purpose for which they are offered as corroboration of the testimony similarly offered yesterday as to what Mr. Finley would have testified to with regard to his computation and determination of watering of the juice, and his analysis of these laboratory records, and once again to state that we feel in total that these exhibits show a consistent operation in violation of public policy, which precludes the plaintiff from the protection of the antitrust laws.

With that short addition to the statement, we would reoffer those exhibits.

The Court: You may call the objections heretofore made? May those objections be incorporated?

Mr. Dixon: Yes, your Honor.

Mr. Stark: Yes.

The Court: Objection sustained without commenting at length. The public policy problem was not plead. The defense of violation of the food and drug laws was not plead. This type of matter was not raised as an issue, was injected in the last few days of the case, and for all the other grounds stated, the objection is sustained.

Mr. Stark: The next short series of documents which were previously offered and are now being reoffered are the [3787] exhibits introduced in connection with Mr. Lynch's testimony and Mr. Regan's testimony. First of all, as to Exhibit BA, the allocation of the partners' interests in connection with the write-up of the assets.

The Court: All right. The same——

Mr. Stark: May I just clarify the purpose of our offer in that regard? We feel that the write-up insofar as it relates to plant value is material to the issue of damages, that the allocation between the partners is material to that issue, because it tends to show that the write-up was not for the purpose of a bona fide reappraisal of the value of assets, but rather was for the collateral purpose of wresting control of the corporation by Mr. Winckler from the other stockholders, and, accordingly, it tends to impeach the validity of the write-up. [3788-9]

The Court: Objection sustained, on the present state of the record, and as an additional reason for sustaining it, it is now only cumulative in view of all the evidence in the record.

We are incorporating the prior objections.

Mr. Dixon: May the record show at this time, if I fail to make an objection to these exhibits that have already been passed upon, that I am renewing my objections as they are reoffered, on the same grounds already stated and in the record?

The Court: All right.

What is the next one?

Mr. Stark: The next is perhaps something that I should have some clarification on.

BH and BJ, particularly as to BH, was the summary of the cost of the lease and repurchase of the plant. BJ, you recall, was the summary of earnings, which was a comparison between the Hodge figures, the prospectus figures, and Mr. Lynch's figures.

Your Honor indicated at the time that these exhibits were excluded, that they were excluded, among other reasons, because they were argumentative and were the type of matter which could better be presented to the jury on argument.

I don't know clearly whether there will be proposed such a use of them, but as to the summary of earnings I am [3790] wondering, procedurally, whether your Honor will have objection to furnishing to the jury, in connection with argument, summaries of that nature which are summaries of testimony, where they have not as yet been introduced in evidence. If that procedure is not possible, we would reoffer these exhibits as summaries of the testimony, as summaries of the statistical material, which, although it appears in the record, appears in a somewhat disjointed form, so that they may be available for purposes of assisting in presenting the picture to the jury.

Whether they are in evidence or whether they are merely used in aid of argument is more or less immaterial to us.

The Court: I am not going to permit any further exhibits or written summaries to be passed to the jury after the evidence is closed. I will, however, as is customary, permit either counsel to scribble on a blackboard, in those instances where you argue to the jury. You can use the blackboard. It is not an exhibit and it doesn't have to be preserved. It is merely your effort to point up some point that you are making, to be pointed out to the jury. I will not, however, permit any new documents to be received.

However, incorporating the objections heretofore made, the objection is again sustained to BH and BJ. And for the additional reason that they are cumulative in view of all the evidence now in the record. [3791]

Mr. Stark: In the case of BI, which was the summary of the withdrawals by Nicholas J. Winckler, as to which testimony was introduced in evidence covering all of the figures other than the forgiveness of indebtedness, we wish to again offer that exhibit, and particularly the figure of $38,000 forgiveness, calling to the court's attention the fact that this was not only a so-called forgiveness of past indebtedness, but involved forgiveness of sums which had not yet been paid, the last of the payments for the Smith stock being made not until October of '49, the forgiveness being in [3792] June.

We reoffer Exhibit BI, to show the total diversions from the corporation of funds, or the total payments made by the corporation to Mr. Winckler.

The Court: The objections that were heretofore made when it was excluded, which are incorporated by reference, are sustained; and on the further ground that the matter is cumulative.

Anything further?

Mr. Stark: We have one last group.

The Court: Are these ones that have been ruled on before?

Mr. Stark: What I am referring to is the broker letters. Some broker letters have been admitted, some broker letters have been rejected. And as to those which were admitted, a substantial number of them, substantially all of them, I believe, were admitted for the limited purpose of impeachment. We should like to reoffer at this time—I have the letter designations, but I think they have been referred to enough in the record as the broker letters.

The Court: Is it satisfactory to call them broker letters?

Mr. Dixon: That is satisfactory, your Honor.

Mr. Stark: The broker letters, both those admitted in evidence, and those rejected, offered and rejected, are reoffered for all purposes, including proof of the contents [3793] of the statements contained therein.

The Court: The truth of the facts, alleged facts contained therein?

Mr. Stark: Yes. On the ground that the brokers reporting and being corresponded with are agents of Winckler & Smith Corporation. That these were communications in the normal course of business, and that they constitute admissions of the plaintiff.

On that further ground we reoffer the broker letters for all purposes.

The Court: The objections heretofore made will be incorporated. The objection is sustained. And on the further ground that you skip over this agency thing with a very light and nimble touch.

I would imagine that the broker would not be an agent of the company, any more than a broker who sells insurance is an agent of the [3794] company.

* * *

The Court: Incidentally, I don't know how consistent I was on the broker letters, but I think you knew the pattern that I was trying to follow. If I have overlooked some that fit in a category, one or the other, I will be glad to look at them again.

I was trying to follow this theory, that they were proper [3808] as impeachment of Winckler where they related to matters other than navel orange juice, because Winckler had admitted that he had had complaints about navel orange juice. That they were not admissible for the proof of the matters contained therein.

That was the pattern that I was trying to follow. Whether I did it successfully or not, I am not now prepared to say.

Mr. Stark: I thought that was pretty thoroughly threshed out, and I didn't mean this offer either to change our position as previously stated or to reopen the full discussion, but merely to state the broader ground of offer, which was not perhaps fully stated at that time, although it was indicated in the record.

The Court: I understand.

I take it that generally you are content, let's say with minor deviations or errors, that I tried to be consistent on that pattern of broker letters?

Mr. Stark: To the extent that one who is on the short end of a ruling concedes consistency, I suppose so, your Honor.

It certainly was clear what your Honor was expressing. [3809]

* * *

Mr. Fisher: As the defendants' next exhibit in order, I desire to offer a copy of the amended Articles of Incorporation of Sunkist Growers, Inc., and of the Bylaws, as existing in 1951. They are contained in a booklet which we are offering in evidence, and there was attached in the booklet a copy of the 1940 Exchange District Exchange Association agreement, which is already in evidence, so rather than tearing the book apart I have simply marked that out, and a copy has been shown to the plaintiff.

The Court: The Bylaws and the amended Articles are all in the same booklet?

Mr. Fisher: That is correct.

The Court: What is the next exhibit in order?

The Clerk: Defendants' Exhibit FH.

The Court: FH received in evidence.

(The exhibit referred to was marked Defendants' Exhibit FH, and received in [3811] evidence.)

Mr. Fisher: We next offer a copy of the Articles of Incorporation of Exchange Orange Products Company as in effect in 1951.

The Court: That will be FI.

FI received in evidence.

> (The exhibit referred to was marked Defendants' Exhibit FI, and received in evidence.)

Mr. Dixon: I hope the jury finds this stimulating reading, Ross.

Mr. Fisher: Finally, as the next defendants' exhibit in order, I offer a copy of the Bylaws of Exchange Orange Products Company, as in effect in 1951.

The Court: FJ in evidence.

> (The exhibit referred to was marked Defendants' Exhibit FJ, and received in evidence.)

Mr. Fisher: May it be stipulated, Mr. Dixon, that they are true and correct copies?

Mr. Dixon: Yes.

The Court: Does that complete it?

Mr. Fisher: That is all I have.

The Court: And defendants rest?

Mr. Strachan: Yes, your Honor. [3812]

* * *

> (The following proceedings were had in the hearing and presence of the jury.) [3816]

* * *

The Court: That was at a time when they were still in Chapter XI.

* * *

I call to your attention, and this is a comment of mine which you may disregard, but in considering some of the issues in this case, Exhibits K, AY and 84 should be considered together. L is rather immaterial. It is one of these waiver of notices of a meeting and doesn't add much one way or the other. So those are in evidence.

BU is in evidence, which is an exhibit concerning Florida price trends. [3817]

EX is in evidence. That exhibit I have agreed to say something to you about. The parties stipulated that had one of the accountants for Sunkist been called to the stand, he would have testified he prepared two large sheets that are part of Exhibit EX as a—I guess we might say they are what he would call a breakdown analysis, something like a cost analysis, but an expenditure analysis of the moneys spent by Sunkist for product advertising in 1951, and that as to certain of the matters, if he were examined on cross-examination by the plaintiff, he would say that as to certain of the matters they fell into place very easily because of the nature of the items, and as to others he used his judgment as an accountant in making the allocation to the particular product, that the allocation made to Sunkist had a number of products they were selling, and this was some attempt to allocate the advertising to the various products.

The defendants would call attention to the fact that according to these computations, 15/100ths of one per cent was allocated particularly to the advertising of single-strength orange juice.

Have I said what I said I would?

Mr. Stark: Would your Honor add that the witness would also testify that the record, the allocation record, was one prepared in the normal course of business apart from this lawsuit? [3818]

The Court: That's right. The records of the company from which the accountant made these larger sheets were records kept in the regular course of business of the Sunkist company prior to the happening of this lawsuit.

Is that what we agreed I would say?

Mr. Stark: Yes.

* * *

Mr. Stark: It is stipulated as a fact that the selling price, that is the gross selling price on Sunkist frozen concentrated orange juice during the period from July 9 to October 22, 1951, was $2.11 per dozen, and when I state gross selling price, that is the price which would be billed and would be subject to any trade discounts or allowances [3819] which might exist, and as to which there is no knowledge or stipulation.

Is that correct, Mr. Dixon?

Mr. Dixon: Yes. I am sure that is agreeable, Mr. Stark.

The Court: Now, the good news I have for you is that the defendants have rested and the plaintiffs expect to rest today.

* * *

NICHOLAS J. WINCKLER

called as a witness in rebuttal by the plaintiffs, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Dixon:

* * *

Q. Directing your attention to Defendants' Exhibit FG, which purports to cover the amount of Valencia oranges obtained by Winckler & Smith during the year 1951, I notice that you [3820] start to show, or the record apparently starts to show the obtaining of Valencias in February of 1951. Testimony heretofore given in this case is, generally speaking at least, that the Valencia season opens around about June or July, the middle of June.

Will you state to the jury by way of explanation of this exhibit what those items running through and up to the early part of June were, insofar as the Valencia oranges are concerned?

A. In February and March, there are no Southern California Valencias available. Further more, in February there are even no Central California Valencias available. So the fruit indicated here in February and March was either navel or must have been, if it is earmarked Valencias, Arizona fruit, either Valencias or sweets, or some miscellaneous variety of oranges.

Q. Will you state to the jury, Mr. Winckler, what those oranges were processed into or what

(Testimony of Nicholas J. Winckler.)

products they were processed into, if you can now recall?

A. These early Valencias or winter oranges were processed in some blended juice.

Q. I direct your attention to the price column there. I notice that there is some variance in the price. Will you state to the jury, if you know, the basis pursuant to which the price of the tonnage set forth in Exhibit FG was determined? [3821]

A. I don't understand the question. You mean if it was an agreed price between buyer and seller, or if it was based on soluble solids or not?

Q. Yes. What was it based on, Mr. Winckler, if you recall?

A. The early fruit in April, and so on, where the prices, for instance, I read the price on the top right-hand side column, $34.23, and that undoubtedly indicates that it was determined based on the soluble solids.

But whenever we started to go into Valencias in June, where the price is a round figure, like $35, and so on, that was just determined by the ton and not on soluble solids.

The Court: When you say the round figures, you mean the figure without some cents?

The Witness: Without some cents, $35 even.

The Court: Yes, I understand. Because, if you were figuring it out on a solids basis, it would probably come out with a few cents, to be exact.

The Witness: A fraction. We have a figure here of $32.28, which clearly indicates soluble solids.

(Testimony of Nicholas J. Winckler.)

The Court: All right.

Q. (By Mr. Dixon): Now, Mr. Winckler, you may have heard some reference in this case from Mr. Finley concerning the term grower participation contract. Have you ever heard that term used in the industry, the processing industry in [3822] this area, while you have been in business?

A. Never before.

Q. Now, when was the first time, Mr. Winckler, that you had any actual knowledge of the contents of the contracts between TreeSweet and Exchange Orange? By contracts I am referring to the contracts that are now in evidence in this case as Plaintiffs' Exhibits and covering the supplying of Valencia oranges to TreeSweet by Exchange Orange, particularly during the years 1948, 1949, 1950 and 1951?

A. Not till defendants furnished photostatic copies of these contracts and they were shown to me by counsel.

The Court: You mean after the suit was filed?

The Witness: After the suit was filed.

Q. (By Mr. Dixon): You had no knowledge of the existence of those arrangements as set forth in those contracts at the time you had your discussions with Mr. Finley or with Mr. Kelly concerning the acquiring of oranges in 1951?

A. I would answer it that way. I had no knowledge whatsoever of the contracts for 1947, 1948, 1949 and 1950. I had some second-hand knowledge that some kind of a contract must have been made between——

Mr. Strachan: I object to his testifying as to his second-hand knowledge and what he thought was meant.

The Court: Overruled. You may cross-examine. Go ahead.

The Witness: That some kind of a contract must have [3823] been entered into between Silzle and the defendants and TreeSweet and Sunkist. Otherwise, they couldn't have offered orange juice for $2.20.

Mr. Strachan: I move to strike that.

The Witness: But I had no knowledge.

Mr. Strachan: I move to strike that as argument and conclusion.

The Court: That last statement, after the word "otherwise," may go out. The jury is instructed to disregard it. You have answered the question. Ask another one, Mr. Dixon. [3824]

* * *

The Court: Why don't we give this a new one, if you agree, 69-A, and give it to the jury instead of 69, but leave 69 marked for identification here.

Mr. Strachan: And the record should show, I believe, that we have all of the objections to 69-A which we had to 69, except to the extent that objectionable language has been removed from 69-A.

The Court: Oh, yes.

Mr. Strachan: There is no reference here to Winckler & Smith's damages.

The Court: That's right. 69 would then be pulled out of evidence but kept as an exhibit.

Mr. Strachan: That's right. It is a part of the record of the case.

The Court: I see now the line has been changed. It said Winckler & Smith damages, and that has been obviated. Let's do it that way. Is that satisfactory?

Mr. Strachan: Suits me.

The Court: Mark it 69-A in evidence, reserving to the defendants all objections they had to 69.

(The exhibit referred to was marked Plaintiffs' Exhibit 69-A and received in evidence.)

The Court: Then take 69 out of evidence but keep it [3828] as an exhibit for identification.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [3829]

Thursday, February 2, 1956—2:00 P.M.

The Court: The record will show the jury present.

Mr. Irwin: With regard to Exhibit 66, your Honor, Mr. Fisher has examined the revised, new 66-A, which has been mimeographed to put in proper form the changes and amendments that are noted on 66, and I believe it is agreed that that may be marked Exhibit 66-A.

The Court: Did you hear Mr. Irwin's statement?

Mr. Fisher: No, I didn't.

The Court: He said you examined the revised 66, which is now marked 66-A.

Mr. Fisher: Yes.

The Court: And that it is offered in evidence as 66-A, with all the objections you heretofore had to 66, and 66 will be withdrawn from evidence and will remain for identification.

Mr. Fisher: Yes.

The Court: 66-A will be received in evidence, subject to all the objections heretofore made, which are overruled, and 66 is now withdrawn and will remain for identification.

(The exhibit referred to, marked Plaintiff's Exhibit 66-A, was received in evidence.)

The Court: Did we do the same thing as to 69?

The Clerk: Yes, except it was done out of the presence [3830] of the jury.

The Court: The same procedure has been followed with 69. There were some ink corrections on 69 at the time it was used, there was certain language in the language part of the exhibit which had been changed, and 69-A, the revision, has been marked and received in evidence in your absence, and 69 is withdrawn from evidence, but will remain as an exhibit in the case for identification only, and all objections heretofore had by the defendants to 69 are incorporated as the objections to 69-A, if there were any—I don't remember—as to the document itself, and they are overruled. [3831]

* * *

ROBERT HODGE

a witness called by the plaintiffs in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Dixon:

Q. Now, Mr. Hodge, you have been sworn before in this case, is that correct?

A. That is correct, sir.

Q. Directing your attention to Plaintiffs' Exhibit 61 and the profit computed therein as resulting from the operations of the plaintiff during the fiscal year ending January 31, 1949——

The Court: Exhibit 61?

The Witness: It is 1950.

The Court: 1950.

Mr. Dixon: I meant January 31, 1949.

The Court: Then you have got the wrong [3833] exhibit.

Juror Berger: A question. Before we get started on these, are we interested in the footnotes on Exhibits 63 and 65, which are supposed to accompany these reports?

The Court: They are in evidence, and we have numbered them. They were accompanying letters by the auditor, and we have numbered them with a letter, so that the one as to 65, I think, is called 65-A.

Juror Berger: Do they have any bearing on these?

The Court: They are for your consideration, but

(Testimony of Robert Hodge.)

I don't think they have any bearing during this particular redirect examination.

The Clerk: You don't have copies of those; you just have one copy.

The Court: Do you want 50 instead of 61?

Mr. Dixon: No. It is January 31, 1950, is the correct statement. Fiscal year ending January 31, 1950.

Q. (By Mr. Dixon, continuing): And Defendants' BD, which shows a loss for the year. I believe the difference in the profit figure shown on 61 in the amount of $121,360.21 and the computed loss by the defendant of $91,220.20 is a difference of $212,520.41. Will you explain to the jury, Mr. Hodge, by referring to these two exhibits, why you are of the opinion that the loss as computed by the defendants in their Exhibit BD is incorrect as compared with your computations as set forth in Plaintiffs' 61? [3834]

A. In Exhibit BD, the loss on the sale of the plant of $170,579.56 has been included in income as if it were a normal loss of the company from operations. In my concept of the income account, I do not consider——

Q. Now, will you first state where you find that amount?

A. It is on Exhibit BD, under "Miscellaneous Expense" (depreciation on appreciation and loss on sale of assets) in the January 31, 1950, column.

Q. In the total amount of how many dollars?

(Testimony of Robert Hodge.)

A. $170,579.56.

Q. Thank you. Proceed.

A. In my opinion, that is not a normal operating loss. It was part of the reorganization proceedings and is in the court order dated—pardon me.

Mr. Strachan: Just a minute. I think he has to put the court order in if there is something in the court order that is relevant, and not put in his construction.

The Witness: It is Exhibit 84-A, your Honor.

The Court: Have you agreed upon the form of 84?

Mr. Fisher: We haven't yet, your Honor.

The Court: Then I am going to receive in evidence 84, subject to any amplification or additions to it as may be suggested later on.

Mr. Fisher: I may say, we would prefer to have the court [3835] order itself in, because only excerpts were submitted to us.

The Court: I am giving you the opportunity to have presented for consideration what you want in, but 84 is received in evidence, subject to that limitation.

(The document referred to, marked Plaintiffs' Exhibit No. 84, was received in evidence.)

Mr. Strachan: Then my objection becomes the one that the court order or Exhibit 84 will have to speak for itself, and it is not the function of this witness, however expert he may claim to be, to construe the court order and give his version and effect of it.

The Court: As an expert he may base his opinion upon various matters. That is a matter of cross-examination. Where did the answer leave off?

> (The answer referred to was read by the reporter as follows: "In my opinion, that is not a normal operating loss. It was part of the reorganization proceedings and is in the court order dated"——) [3836]

The Witness: ——February 14, 1949.

The Court: Keep your voice up.

The Witness: Yes, sir. Which in part states: "Ordered that as a condition for this order that this order of confirmation may be vacated and set aside without notice to the debtor or any other creditor or other party in interest if by March 11, 1949, the $40,000 now on deposit with the Title Insurance & Trust Company Escrow No. B11296 is not delivered and paid to the Receiver for the purpose of this confirmation pursuant to the terms of said escrow and debtor fails to pay and reimburse the Receiver for the monthly maintenance expenses from December 14, 1948, to the close of Escrow No. 368-8659, where money for that purpose is now on deposit."

Now, these two escrows mentioned in this order, one is the escrow with the Title Insurance Company, which covers the sale of the plant, and the other the escrow with the Bank of America, No. 368-8549, which turned over the balance of the pro-

(Testimony of Robert Hodge.)

ceeds to the company to be used for certain purposes.

Now, they are specifically mentioned in this order, so I naturally assume that they are part of the reorganization proceedings. Therefore, the loss occasioned by these escrows, or this sale, rather, is not part of the normal operations of the [3837] company.

The other large item of difference is the $38,000 forgiveness of debt of Mr. Winckler which we have discussed here a great deal and I am sure you are all familiar with it. I have considered it as part of the reorganization proceedings and not part of the normal operations of the company.

The other small difference is a matter of opinion between Mr. Lynch and myself as to the amount of depreciation that should be provided in the company's operations during that period.

Q. And those three items which you have mentioned amount in substance to the difference of $212,000 plus between your statement covering the operations of Winckler & Smith for the fiscal year —covering the income from operations of Winckler & Smith for the fiscal year ended January 31, 1950, is that correct, Mr. Hodge?

A. That is correct.

Q. In your opinion the manner in which you handled these items that constitute the difference at the time you set up the books for the plaintiff, Winckler & Smith, and made up the operating expense, I mean the statement of income, Plaintiffs'

(Testimony of Robert Hodge.)

61, was in accordance with sound accounting procedure, is that correct? A. They were.

Q. Now, directing your attention to Plaintiffs' 63 and the income account therein, which shows a profit to the [3838] plaintiff for that year ending January 31, 1951, your statement shows an operating profit of $40,845.53, whereas the defendant under its computations in BD shows a loss of $14,203.20, or a difference of $55,048.73.

Will you explain to the jury what items you disagree with in your opinion in those two statements from an accounting point of view as they are carried by you and set up by you during that year in Plaintiffs' Exhibit 63 and as they are computed in Defendants' Exhibit DD?

A. At the time I made the examination for the year ended January 31, 1951, it was determined that the company had quite a promotion program to promote the sale of new products. They had spent some $50,000 on that promotional program. We determined that the program was good for two years and so deferred half of it to the following year. That accounts for some approximately $25,000 of the difference.

The other large item is the unabsorbed preseasonal expense item of $22,443.84, which at that time we determined that the company had spent in advance for the succeeding season and so was a proper charge to the succeeding season's expenses and not this one's.

There is a small item of $3,550 which we carried

(Testimony of Robert Hodge.)

as an advance to an employee, which we determined at that time was due from the employee. Mr. Lynch in his statement has [3839] charged it off to expenses.

This amount represented a prepaid bonus. Mr. Lynch charges it off to expense. Even under his own accounting, it wouldn't have been earned, so how it could have been charged off to expense that year, I don't know.

Q. In your opinion, Mr. Hodge, and as you set up the income statement for the fiscal year ending January 31, 1951, at that time was the income account as prepared by you in Plaintiffs' Exhibit 63 at that time in your opinion in accordance with good accounting practice? A. It was.

Q. Directing your attention, Mr. Hodge, to Plaintiffs' 65, in which your statement of income for the fiscal year ended January 31, 1952, shows a loss of $184,523.20 in operations as against a loss computed by the defendants for that year in BD of $157,426.15, or a difference of $27,097.05, will you state to the jury what that difference represents?

A. The items that I mentioned that Mr. Lynch had written off in the year ended January 31, 1951, he has taken those items out of my loss for the year ended January 31, 1952, and thrown them into the year ended January 31, 1951. That results in a reduction of my loss of approximately $55,000.

Offsetting that credit, he has set up an item here under miscellaneous expenses, depreciation on ap-

(Testimony of Robert Hodge.)

preciation, a loss [3840] on sale of assets, of $21,536.74.

There already is reflected in the books a write-off of $21,416.51 on appreciation, so I believe that Mr. Lynch is in error in that he has duplicated the write-off that is already reflected in the books. In other words, he has made the same write-off twice, in my opinion.

Q. Now, Mr. Hodge, based upon the income statement as prepared by you for the plaintiff for the fiscal year ended January 31, 1952, at the time you prepared it and now do you regard the statement as prepared by you at that time and as set forth in Plaintiffs' Exhibit 65 as having been prepared in accordance with sound and good accounting practices? A. I do, sir.

Q. Directing your attention to Plaintiffs' 69, I believe the computations contained therein as prepared by you indicate that had an additional 12,000 tons of Valencia oranges been available to the plaintiff on the basis comparable to that at which they were made available to TreeSweet, that instead of sustaining the loss reported in 65, that is in Plaintiffs' 65, of $184,523.20, for the fiscal year ending January 31, 1952, that the plaintiff, Winckler & Smith, would have shown an operating profit of $25,231.45, as against an operating loss as computed by defendants in their CB of $212,829.03, or a difference between your computation in Plaintiffs' 69 and Defendants' computation in CB of $238,060.48, is that correct? [3841]

(Testimony of Robert Hodge.)

Mr. Strachan: May it please the court, I would like to have available, by reference, the objections which I made to similar testimony with respect to Exhibit 69, particularly on the ground that there is no comparability being shown, and the question of comparability is left to the witness.

The Court: That may be available.

Overruled.

Mr. Dixon: I think the record should show 69-A. Attention has just been directed to the fact that I apparently was referring to the old 69. 69-A. Mr. Hodge.

Is your answer still the same by referring to 69-A with reference to the difference?

The Witness: I am afraid you lost me. I don't want you to repeat it all——

Q. (By Mr. Dixon): Well, assuming the figures to be the same in 69-A, as in 69, to which I referred erroneously in my question, would your answer be the same? A. Yes, sir.

Q. Now, will you tell the jury wherein you disagree in your opinion with the computations prepared by the defendant and as shown on their CB, as against the computations prepared by you and as shown on Plaintiff's 69-A?

A. In defendants' computation of estimated Winckler & Smith processing cost they arrive at a per ton cost of [3842] $44.99. Now, included in this figure is $2.44 for ingredients.

As I understand it, it is not necessary to add ingredients to process unsweetened orange juice,

(Testimony of Robert Hodge.)

so, therefore, that cost is not necessary. Multiplying that out it is roughly some twenty-nine, thirty thousand dollars.

In the defendants' computation also is included an amount of $15.40 for plant expense. This is additional plant expense, now. If that were so, added to the plant expense that the company had for that year of $177,825.94, that would make a total plant expense of $362,625.94 to process some 20,000 tons of oranges.

In the year ended January 31, 1950, the company processed some 18,300-odd tons of fruit, and the plant expenses were only $203,906.26. Roughly a difference of about $159,000 to process some 2,000 more tons of fruit. Plus any additional costs—increase in costs that may have occurred during the two years.

Well, that to me is just absolutely impossible, that a company could spend that much more to produce roughly ten per cent more fruit. So I would estimate that Mr. Regan's plant expense is overstated by $110,000, $120,000.

I think the fallacy in his reasoning is that he does not take into consideration that the company had all of the more or less fixed maintenance costs already in their costs. They would not incur them again. The depreciation of the [3843] plant wouldn't be necessary again, and all such fixed costs like that. He has just got them in there twice, in my opinion.

Q. All right. Will you proceed further to point

(Testimony of Robert Hodge.)

out what further differences there are between your computations in 69-A and Defendants' CB?

A. Defendants' computation for selling expenses, he estimates that there should be $60,000 additional selling expenses to sell this 12,000 tons, had they been available.

If you add that to the actual expenses of $87,652.44, that would mean that the total selling expenses under his computation would be $147,882.06.

Now, this compares with the actual selling expenses in the year ended January 31, 1950, of $86,855.15, or a difference of some $61,000 additional.

Well, as I felt about the plant expenses, it just can't be, that is all. You just wouldn't spend that much money.

The only increased expenses, offhand, would be, in my estimation, a brokerage of roughly $22,500, plus a few incidentals here and there down the line.

The staff was there, the salesmen were there, they didn't need to hire anyone else.

It has already been brought out in testimony that the market was short that year. There would be no tremendous effort needed to sell the fruit. It was in great demand. [3844] Why would they have to spend all this money to sell it?

Mr. Strachan: I object to that. It is an argument under oath. There is no showing that it was in short supply. There is a showing it was a glut on the market. It would take an extraordinary amount of money to sell this additional juice.

(Testimony of Robert Hodge.)

The Court: Overruled. He is giving his opinion and his reasons.

Q. (By Mr. Dixon): Will you state to the jury what you are basing your opinion on as to the salability of the products of single-strength orange juice? A. Specifically?

Q. Yes. A. Mr. Finley's testimony.

The Court: You were here and heard it?

The Witness: No, but I read it.

The Court: You read it in the transcript?

The Witness: Yes.

Mr. Strachan: I move to strike the answer. It is not the function of even a claimed expert witness to interpret the testimony of another witness. The jury can do that.

The Court: Overruled.

Mr. Dixon: Counsel, your own exhibit——

The Court: Overruled.

Identify, though, which testimony. The last time he [3845] came in, or the previous time he testified?

The Witness: I am sorry, I didn't take notes of it.

The Court: When did you read it?

The Witness: Last night.

Mr. Strachan: Which testimony did you show him, Mr. Dixon?

Mr. Dixon: I don't recall, counsel.

The Witness: There were a tremendous number of pages. I am sorry.

The Court: Go ahead.

(Testimony of Robert Hodge.)

Q. (By Mr. Dixon): In any event, it was on that basis, was it, that it would not require any substantial additional sales force to sell the products, other than those that were already on the sales staff of Winckler & Smith in 1951—was it based upon that? A. It was based on my opinion.

Q. But on that assumption?

A. That is right, sir.

Q. That the additional sales expense set up by Mr. Lynch in his 69—in the amount of approximately how many dollars? A. $60,000.

Q. ——$60,000 would not be required?

A. Well, you would require the brokerage, and a few incidentals. But certainly $25,000, I think, would [3846] have covered all of them. So there is $35,000, in my opinion now, excess there.

Q. Are there any other items of substance, Mr. Hodge, that you wish to refer to in Defendants' CB, that you wish to call attention to when compared with your 69-A?

A. Yes, sir. There is an increase in administrative expenses of $40,000. Now, adding that to the actual amount of expenses for general administrative expenses for the year ended January 31, 1952. would make a total of $133,613.49 for such expenses, according to the defendants' computation. Now, this compares with the actual expense in the year ended January 31, 1950, of $56,417.38 for comparable tonnage, and I believe it is very high, and in my opinion there would not have been any additional ad-

(Testimony of Robert Hodge.)

ministration expense necessary, except a few minor incidentals.

Naturally, you are going to use paper and telephone and a few things like that, but certainly not in any amount like $40,000. The staff was all there, there was no need to hire additional exployees, or anything else.

Q. Are there any other items, Mr. Hodge, that you wish to refer to, or does that account, in substance, for the difference?

A. Mr. Regan in his Exhibit CB took in the gross loss on actual operations per Exhibit 65 of $10,000-odd that I didn't include. If we are going to go that far, I think we [3847] ought to give the company credit for the miscellaneous income shown on Exhibit 65 of some practically $7,000.

Q. Does that conclude it?

A. Those are the large items, substantial items.

Q. Having compared 69-A, your computation, with the one prepared by Mr. Regan, Defendants' CB, are you still of the opinion previously expressed, Mr. Hodge, that had the plaintiff had an additional 12,000 tons of Valencia oranges available to it for processing single-strength Valencia juice in 1951, that instead of sustaining a loss in excess of $184,000 from its operations in that year, that it would have recouped that loss, and in addition thereto would have shown an operating profit of approximately $25,000 for that year?

A. I am.

Mr. Dixon: Your witness, counsel.

(Testimony of Robert Hodge.)

Mr. Strachan: No, he is not.

The Court: The jury will disregard this. It is a very clever remark.

Mr. Strachan: It is a heartfelt remark.

The Court: Lawyers have a habit of saying at the end of their examination, "That concludes my examination," or "You may cross-examine," or "Your witness." In other words, he is tendering the other side the witness. Mr. Dixon used the formal phrase, "Your witness, Mr. Strachan," and Mr. [3848] Strachan said, "No, he is not my witness."

Mr. Strachan: Excuse me, please.

The Court: It is one of the things that makes life interesting in a courtroom.

Go ahead, sir.

Mr. Dixon: I missed the remark.

Cross-Examination

By Mr. Strachan:

Q. Mr. Hodge, in the selling expense as you set it up for the year ended January 31, 1952, you excluded, did you not, the carryover or deferred expense from the prior year in approximately the amount of $25,000?

A. That is correct, sir.

Q. None of that expense that was carried over into that year was carried over for the purpose of processing this mythical 12,000 tons of Valencias, was it?

(Testimony of Robert Hodge.)

A. That would be true of any of the selling expense in the statement, sir.

Q. What?

A. None of the selling expenses in Exhibit 65 were for the processing of this mythical 12,000 tons.

Q. You didn't at the time you made up that 1951 statement treat that 25,000 of deferred expense, carried over into the following year, as being deferred for the purpose [3849] of enabling the sale of the juice produced from the 12,000 mythical tons, did you?

A. I never even knew about the 12,000 mythical tons. [3850]

Q. So what was the total amount of the expense as it actually was incurred in the year ended January 31, 1952, excluding this expense of the prior year that you carried over?

A. It would be about 24,000 less. It would be 63,000 odd.

Q. What? A. 63,000 odd.

Q. You also have included in the expense as it was incurred in the year 1952, expenses incurred in connection with Florida sales, have you not?

A. Yes, they are in there. Yes. 87,000.

Q. What?

A. They are all in there, yes, sir.

Q. The expenses that were incurred in disposing of product of the Florida venture didn't contribute at all to the sale of the mythical 12,000 tons?

A. No, sir.

(Testimony of Robert Hodge.)

Q. You haven't adjusted your figures to take into account even those two items, have you?

A. No, sir. They are actually as shown by the two exhibits.

Q. Now, we go back to 69-A. You and I had quite an exhaustive, perhaps exhausting, session on the original 69. Basically, the method that was used in preparing 69-A was that [3851] used in preparing 69, is that correct?

A. The figures are exactly the same, sir, yes, sir.

Q. So that if I asked you with respect to the figures and the way in which you arrived at the figures in 69-A, you would give me the same answers that you gave me at the time I examined you with reference to 69, is that correct?

A. I would try to.

Q. Presumably that is where we would come out? A. That's right, sir.

Q. Now, referring to BD, starting backwards on that, we discussed in connection with your income accounts for 1952 and 1951 the question of where these undistributed factory expenses should fall as between the two years, didn't we?

A. You mean for the years ending January 31, 1951, and 1952?

Q. Yes. A. Yes, sir.

Q. So we have been all over that in connection with the others?

A. Yes. There was nothing new here today.

Q. Then getting back, your answers to questions

(Testimony of Robert Hodge.)

then would apply to the balance sheets today to the same effect as they did then?

A. Yes, sir. [3852]

Q. Now, we get back to January 31, 1950, and we have been over the forgiveness of indebtedness about as completely as we could?

A. I hope so.

Q. Yes. So you wouldn't want to change any of your testimony with regard to that, would you?

A. No, sir.

Q. Then we get down to this question of loss of fixed assets. You recall, do you not, that I showed you a report over your signature which stated that the loss of 169,000 resulted from sale as of March 1, 1949? Do you remember having said that?

A. Yes, sir.

Q. Are you familiar with the journal entry prepared by you which is Defendants' Exhibit BK, relating to that item?

Mr. Strachan: Have you BK and Plaintiffs' Exhibit 59, Mr. Clerk, please?

The Witness: I have a copy of it. July 31, 1949?

Q. (By Mr. Strachan): That's right.

A. Yes, sir.

Q. In that journal entry there is a reference made to Winckler-Smith plant sold to stockholders April 3, 1949; is that correct? A. Yes, sir.

Q. Do you recall this income, Federal income tax return [3853] for the year 1949 which bears the stamp of Hodge & Company?

A. July 31, 1949?

(Testimony of Robert Hodge.)

Q. Wait a minute. A. I am sorry.

Q. January 31, 1950? A. Right, sir.

Q. You recall, do you not, that in parallel columns in which you reported the loss, showing cost value in one and appraisal value in the other, coming down to the total loss of $169,000, that schedule entitled Sale of Property Other Than Capital Assets, April 3, 1949? A. Yes, sir.

Q. Do you recall that?

A. I recall it very well.

Mr. Strachan: That's all on cross. Thank you.

Mr. Dixon: Your Honor, no redirect.

The Court: All right. Mr. Hodge, you are excused. Thank you.

The Witness: Thank you.

The Court: Get away fast.

(Witness excused.)

Mr. Dixon: The plaintiff rests, your Honor.

Mr. Strachan: The defense has nothing further. We would like to enter a motion at the close of all the evidence.

The Court: All right. This matter of this court order [3854] in the reorganization proceedings, you will get at that promptly?

Mr. Fisher: I have been able to examine the file and I suggest that Exhibit 84, being a copy of the petition for leave to present third modified arrangement, filed February 14, 1949, in the Chapter XI proceedings, and the order confirming the third modified arrangement in the Chapter XI proceedings, filed the same day, that those two be Exhibit 84.

The Exhibit 84 as proposed is simply excerpts from the petition and the order.

The Court: Let me see the file.

Mr. Fisher: In order to have a complete picture, the petition and order itself should be in it.

The Court: Let me see that file. Well, we could take this up without the jury and work out something that is satisfactory. [3855]

* * *

(The following proceedings were had outside the hearing and presence of the jury.)

The Court: Let the record show the jury absent. The jury have been remarkably patient. They are citizens who leave their homes and business for the length of this case.

I notice in this file which was handed up to me a deposit [3856] slip to the account of Lynch, Receiver, dated March 1, 1949, of $40,000 in one check and $1,909.59 in a second check. Does that demonstrate the day on which Lynch got the money, the $40,000 and, secondly, does the $1,909 represent the reimbursement of that expense he was to get under the order?

Mr. Dixon: Is the question directed to the plaintiff, your Honor?

The Court: To anybody who knows. I see Mr. Hodge nodding. Have you looked this file over?

Witness Hodge: I looked over the escrow statement, sir, and that is what it stated.

The Court: This $1,909.59, was that the reimbursement talked about in the order?

Witness Hodge: Reimbursement of Lynch's expenses from December, 1948, to that date.

The Court: And the $40,000 was when Lynch got the money out of escrow?

Witness Hodge: That's right, sir.

Mr. Dixon: If it please the court, if I may rise to explain my views on this matter now that we finally have got this record here of the transaction into the record in this case, it seems to me almost as a matter of law the court, if there is any question about it, the court would be required to instruct the jury that the sale of this plant to the extent that it was in any way an issue in this case or on the books [3857] of account was effective during and was a part of the reorganization proceedings pursuant to which the sale would have had to have been completed and perfected before the trustee would have been discharged and the Chapter XI proceedings terminated.

The Court: I am in agreement with you. I was going to raise the same point, that I should probably as a matter of law interpret this order, and I don't think it is a debatable proposition. I will hear the defendants on it, but I will be much dissappointed, unless the defendants can convince me that there is any question of fact involved here, if it is the defendants' contention that the sale of the real property and the plant was something other and apart from the reorganization proceedings. As a matter of law, you might have a point, but otherwise, reading the matter over, it is the first time I have looked at it, it is clear to me this was an affirmation of the plan of reorganization on condition, a condition subsequent, which never happened, and the order was set up on such a basis that the escrows were already opened, and when this money came in it was to go to Lynch and Lynch was then to pay the bills set forth in the order, and so forth.

The fact that this happened on March 1, and when he got the money or that things happened at later dates thereafter, or that this reorganization proceeding was finally terminated and the receiver discharged in November, doesn't have anything [3858] to do with it.

I don't think it can be argued as a matter of law or as a matter of accounting that the sale of the assets of this business were a part of reorganization proceedings. The reorganization proceedings could never have been affirmed, this company would still have been in reorganization or in bankruptcy under that first proceeding, had that sale not been made. It was that proposed sale in escrow which made available the money to get the company out of reorganization.

As a matter of law and logic and what I know about accounting, I think a false issue was injected by the talk about the loss on the sale of the business being part of a fiscal year of the plaintiffs which started after they went out of reorganization.

Mr. Strachan: Just briefly stated, your Honor, I believe our position on that is that this was a voluntary sale by the corporation to its stockholders on terms agreed upon between the officers and the stockholders, and that the only interest of the creditors and the receiver in the proceeding was to obtain the proceeds of that sale; that as a matter of law and as a matter of fact both, the transactions occurred and were in fact transactions having to do with the capital assets of the fiscal year ending January 31, 1950. They were so recorded by Mr. Hodge in his journal entry. They were so reported by him in his audit report, and they were so [3859] reported in the income tax return, as having occurred in that year and should, therefore, have been reflected, and should in this proceeding be reflected precisely as they were in the books and records of account and the income tax return.

The Court: The income tax return, I don't know how that got in evidence.

Mr. Strachan: The plaintiff put it in.

Mr. Dixon: For a very limited purpose, your Honor. As I explained before, counsel had suggested——

The Court: Did you offer it?

Mr. Dixon: Yes; for the very limited purpose, your Honor, of showing the two methods of determining valuation and to support the appraisal only.

The Court: The income tax accounting problems are not decisive of how a company might maintain a set of books.

But, anyhow, let me ask you this, Mr. Strachan. Do you contend that there is a question of fact involved under this bankruptcy file, a question of fact for a jury, under this bankruptcy file?

Mr. Strachan: I think on the face of the evidence, there is no question of fact, because the evidence shows it occurred in the fiscal year in which the evidence shows it occurred.

The Court: Just limit yourself to my question. Is it a question of fact or a question of law?

If you show me where there are some questions of fact, [3860] maybe I will consider letting it go to the jury, but if there is no question of fact involved and it is a question of law instead, I should take the responsibility of saying what it means, whether I am right or wrong, and not leave it to 12 laymen to say what a court order means.

Mr. Strachan: I say that the construction of the petition and the order entered thereon are proper subjects for instruction.

The Court: What kind of construction? Legal or factual?

Mr. Strachan: Legal.

The Court: A question of law, then?

Mr. Strachan: Yes, sir; an instruction as to the legal effect only, and the court should not give any instruction which would direct the jury to find that the transactions occurred during the period other than that in which the records received in evidence showed that they did actually occur. [3861]

The Court: Mr. Fisher has suggested that the entire petition for confirmation of your third plan, and the entire order be made available as Exhibit 84 or as 84-A. What is your view on that?

Mr. Dixon: I have no objection to it, your Honor. If he wants the whole thing in, let's put it in.

We were trying to cut it down, but we have no objection to the whole petition and the whole order, but I want to correct one of counsel's statements here. This was not a sale to stockholders at all; it was bought by Mr. Rubin.

Mr. Strachan: That is what Mr. Hodge called it.

The Court: Who was the sale to?

Mr. Dixon: Mr. Rubin. He put up the money.

The Court: He was not a shareholder?

Mr. Dixon: He was not. He subsequently became a shareholder, but he was not at the time of the sale.

The Court: Mr. Fisher, you can have your option of being content with 84 that is now in evidence, or of getting a certified copy or a copy of the entire petition and order and substituting it.

Mr. Fisher: We will provide a certified copy of the petition and order. [3862]

* * *

The Court: The record will show the jury absent.

Mr. Williams: Your Honor, we don't plan to file formal papers on our motion for a directed verdict, so I will state the motion for the record.

The Court: Do you want to adopt the matter that you had in your previous motion, and then supplement it by such other matters——

Mr. Williams: I can adopt certain paragraphs of the motion, but in some of the others there have been changes.

If you wish to handle it that way, I can.

The Court: Where you can adopt, do so, and then add to it.

Mr. Williams: We will adopt the same motion that we made for a directed verdict at the close of the plaintiff's case, with respect to the following paragraphs of the first cause of action——

The Court: The following paragraphs which you list under the heading "First Cause of Action"?

Mr. Williams: Yes; in the motion we filed January 17th.

Paragraphs 1 and 4 through 9, inclusive.

Paragraph 2 will read as follows: Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for the defendants by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act. [3865]

Paragraph 3 will read as follows: Plaintiff has failed to prove tnat defendants, or either of them, engaged in a combination or conspiracy in restraint of interstate trade or commerce or entered into or performed any contract in restraint of such trade or commerce. Furthermore, any cause of action arising from any contract or refusal to supply plaintiff with Valencia oranges, that is pleaded in the first cause of action, except the TreeSweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint.

We will change the tenth paragraph to read as follows: Plaintiff has failed to prove the first cause of action attempted to be alleged in its second amended complaint.

We wish to add a Paragraph 11:

Plaintiff has failed to prove any fixing of prices of either fruit or of citrus fruit juices.

With respect to the paragraphs in our motion under the heading "Second Cause of Action," we will adopt the first, second, sixth, seventh, eighth, and ninth paragraphs of that motion.

The third paragraph will read as follows: Plaintiff has failed to prove that defendants or either of them, engaged in any conduct which was outside the exemptions provided for defendants by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act. [3866]

The fourth paragraph will be: Plaintiff has failed to prove that defendants, or either of them, combined or conspired to monopolize, or monopolized interstate trade and commerce in citrus fruit juices, or any citrus fruit juice processed in California and sold in interstate commerce in violation of the antitrust laws.

The fifth paragraph will read: Plaintiff has failed to prove that defendants, or either of them, had any specific intent or general intent or any intent or purpose to monopolize interstate trade and commerce in citrus fruit juices processed in California and sold in interstate commerce.

The tenth paragraph will read: Any cause of action arising from any contract pleaded in the second cause of action, or refusal to supply plaintiff with Valencia oranges, except the TreeSweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint.

The thirteenth paragraph of the motion will read—

The Court: 11?

Mr. Williams: Yes; 11 will read: Plaintiff has failed to prove the second cause of action attempted to be alleged in the second amended complaint.

Then we wish to add two more paragraphs. No. 12: Plaintiff has failed to prove that citrus fruit juices or, any citrus fruit juice, produced or processed in [3867] California, constituted an identifiable market or any area of effective competition that is subject to being monopolized.

And the thirteenth paragraph will read: Plaintiff has failed to prove that any appreciable part of interstate trade and commerce was monopolized or was the subject of a conspiracy or combination to monopolize.

The Court: Read the last one again.

(Record read by the reporter.)

The Court: With the exception of the last two grounds as to the second cause, 12 and 13, which you have just added, your motion is, in substance, with minor changes, the motion you heretofore made?

Mr. Williams: Yes; minor changes only, except for the last two.

The Court: Why don't you adopt your argument made upon the motion for a directed verdict at the close of the plaintiff's case, and supplement it by such other matters that you want to call my attention to?

Mr. Williams: All right. We will adopt the argument made at the close of the plaintiff's case, and I wish to state a few points to supplement that argument.

The first one relates to what is the cause of action in this case.

Antitrust actions are tort cases, as your Honor held in the Car Seal case. Therefore, they relate to injuries to [3868] the plaintiff due to acts of defendant.

In the first cause of action there are six acts, some of them being agreements and acts done under them that are alleged to have injured the plaintiff.

It is our position that the only one of those six acts, in view of the evidence in this case, that can be considered in any way to have given rise to a cause of action, is the refusal of Exchange Orange Products to give a processing contract to the plaintiff in 1951.

With respect to each of the other matters, there were no acts committed by the defendants that could have caused any injury.

The entering into of the several contracts could not, of course, have caused injury unless some act was performed to carry out the contract.

The Court: Doesn't the evidence show the contracts were carried out?

Mr. Williams: It does, but none of the acts in carrying out those contracts could possibly have injured the plaintiff for this reason: After the refusal the plaintiff did not have any single-strength orange juice to sell in the market, and therefore was out of the market, and the only acts performed in carrying out the contracts aside from processing—which could not have injured the plaintiff—was the act of selling in the market place, and the [3869] plaintiff wasn't there with his products to be injured, so that following the refusal there was no act of the defendant that could have caused the plaintiff injury.

The Court: But by the same token, there is no possible way in which the refusal could have caused him injury if it had not been for at least the existence of the TreeSweet and Silzle contracts; is that true? If plaintiff had not pled the TreeSweet and Silzle contracts——

Mr. Williams: That is the plaintiff's position, as I understand it.

The Court: If he hadn't pled those contracts, and had merely pled a refusal, he certainly wouldn't have had a case.

Mr. Williams: That is true. He is pleading the setting of the contracts——

The Court: Therefore, you have to view the refusal in the setting of the contracts. In other words, you can't chop it up piece by piece and look at it.

Mr. Williams: That is not what we are trying to do, your Honor.

Our point is that the only act which caused injury was the refusal.

Now, the effects of that act, and the intent of that act, have a bearing on this case. But that is the only act, itself, that caused the injury. [3870]

The Court: In other words, you treat the contracts as if those were sort of conditions, things that were done, and the carrying out happened, but they were conditions which became the background, so that your argument is, therefore, the only act that caused injury was the refusal.

Mr. Williams: That's it.

The Court: Is that about it?

Mr. Williams: That is about the argument.

The Court: All right.

Mr. Williams: That the only overt act and conspiracy that caused injury, in our view, is this refusal to give a processing contract to the plaintiff in 1951. Plainly, also, there was no injury to the plaintiff before that refusal. So that narrows it down to this one point.

Now, this refusal under the pleading is really a two-fold refusal. It is a refusal to give a contract like TreeSweet, and it is also a refusal to give a contract like Silzle.

Before going into the difference between those two things, I would like to discuss briefly the plaintiffs' conspiracy theory. At the present time, in the present state of the pleadings, plaintiff relies solely upon conspiracy. He has two conspiracy theories. The first conspiracy is said to be one to restrain trade. The second conspiracy is said to be one to monopolize. [3871]

Now, what is the difference between these two offenses? The difference is in the objective of the conspiracy. In this case we have no illegal means to achieve a lawful end, so we are dealing with an illegal objective sought to be achieved by lawful means. So the difference is in the objectives.

If your objective is to monopolize, that objective necessarily involves, by the meaning of the term monopolize, the engrossing of substantially all of the market, and conspiracy to restrain trade is one where your objective is less than that, is not to engross substantially all of the market. It is to substantially hinder the operation of the competitive forces.

Taking up first the conspiracy to monopolize, it is our position that we are entitled to a directed verdict on that conspiracy for several reasons. First is that there is no evidence here that the commerce in California citrus juices is an identifiable segment of the law. That is true because of the Florida competition of citrus juices.

In single-strength juice, the evidence shows, Exhibit CH, that 92.9 per cent of all the single-strength orange juice in the United States is produced in Florida. California only has the remaining 7.1 per cent.

With respect to frozen concentrated orange juice, 88 per cent is produced again in the State of [3872] Florida.

There is no data on hot pasteurized concentrate in the record.

There is no evidence in the record from which the jury can determine that there is any appreciable advantage either in Florida juice over California juice or California juice over Florida juice, technically speaking.

The Court: While you are talking, I am just thinking, if you don't mind my interrupting, there is evidence that the California juice was, if not always, in most cases marked as California juice. There is evidence that TreeSweet, from Finley just the other day here, Finley gave as the reason why Sunkist got in and helped out when Chapter XI was going on, was that they didn't want something to happen to a California producer. There is evidence also that Sunkist wanted some California juice on the market. That is one of the reasons they gave for supporting TreeSweet.

Now, with that evidence in the record, if this was a question of fact, wouldn't the jury be entitled to infer that, therefore, the California juice was an identifiable part of the market and that it was defendants' intention that it be so?

Mr. Williams: I don't think so, your Honor, for this reason: That the evidence you have just stated related to something like a brand name. If you put the brand XYZ on something, that might be an identifiable part of the market [3873] in the sense in which you refer to it. But in the sense in which I refer to it there must be some competitive advantage one way or the other so that when they see the word California, they say, "This is either a better juice than Florida and I prefer it," or, "I prefer the Florida juice, and even if it was the worst juice in Florida, I prefer that."

The Court: There is nothing in the record, but we will concede that California juice is better than Florida.

Mr. Williams: In this case we are limited to the record. There is nothing in the record before the jury.

The Court: Maybe that is facetious, but could it ever be an issue here as far as Sunkist is concerned or Winckler-Smith? Wouldn't everybody in this litigation claim that California juice was identifiable and was better juice than Florida juice?

Mr. Williams: Your Honor, if I can avoid answering the question, my point is that it hasn't been proved.

The Court: We are not trying to get you in bad with the Chamber of Commerce.

Mr. Williams: I daresay they would find it hard to concede that California was not better than Florida, but I daresay that if you talked to people in Florida, you would find that they would find it hard to concede that California juice was better than Florida.

The Court: And that leads to the inference that the [3874] California juice and the Florida juice were identifiable parts of the market.

Mr. Williams: That is merely advertising talk, your Honor. It isn't concrete enough to show that there is an advantage or disadvantage in the market place to one or the other.

The Court: One may think there is an advantage, but doesn't that all lead to identifiable parts of the market?

Mr. Williams: I think you would have to go to the physical characteristics. If the flavor is different, if you could show consumers had a preference, that there was some price differential normally between the two, say Florida was higher than California or California was higher than Florida, something that shows a competitive advantage, not just a claim asserted on the label or a can. It has to be some appreciable competitive advantage before you can separate out this market and say this market is subject to monopoly.

The Court: Competitive advantage would be the fact it has California on it. I don't know anything about juices, but when I was a United States Attorney, I had a letter from the United States Attorney in New Jersey who said, "Will you please find me the name of some supplier where I can get California oranges?" He said, "These Florida oranges drive me crazy with the seeds."

Mr. Williams: There is no question that navel oranges [3875] are a much better eating orange than anything that came out of Florida, but there you could show navels command a premium on the market place over Florida and Florida sold at a discount because they are poorer flavor and there are many seeds. But that has not been shown in this case. At least that is our position, your Honor.

The Court: I would be very interested in some cases on this point. We discussed it during instructions. You weren't here. The issue was simply this. Is this question of identifiable market, alleged California segment of the market, a question of fact or a question of law? We joined issue on that. Mr.

Dixon contended that it was a matter of law, and Fowle contended it was a matter of fact.

Mr. Williams: I think I was present, your Honor.

The Court: Maybe you were.

Mr. Williams: I was present.

The Court: Oh, yes; you were.

Mr. Williams: I think I also participated in contending it was an issue of fact.

The Court: Have either of you, you or Mr. Dixon, any authorities on that point?

Mr. Williams: Yes; I think we can find them. I recall a case of United States against Fairfax Linen Looms, in which one of the key points was the fact that linen rugs, which were involved in that case, had different physical [3876] characteristics than wool rugs. If you dropped a cigarette, it would merely scorch and not burn. The linen rugs wouldn't rot. You could have then in an entryway where people came in with wet feet and walked on them, or you could take them out on the lawn and use a hose to wash them and let them dry, and they would be all right. You couldn't do that with a wool rug.

The issue was whether this company that made the linen rugs, and they had a legal monopoly because they were the only ones making them in the United States, they had been enterprising, and there was no claim there was anything wrong with the monopoly itself, but the company was held guilty on the sale of linen rugs to the Government under a procurement contract.

A key point in that case was that these rugs constituted an identifiable segment of the market in rugs because they had these different physical characteristics which gave them a different price and different preference, and this demand in the market place, than wool rugs. That is the kind of thing I am talking about.

The Court: Did they decide whether it was a question of fact or a question of law?

The Witness: It was a civil case tried without a jury, and the findings of fact in the case and the decision show that the court noted that there were these different characteristics. [3877]

One of the defenses made in that case is the same defense we are making here. They said, "We can't be charged with an attempt to monopolize linen rugs. You can't identify a market by label, an identifiable market. You have to show facts to show it, and we obviously haven't attempted to monopolize all of the rugs and, therefore, we have a complete defense."

The Court: What is the citation? Do you have it?

Mr. Williams: 63 F. Sup. about 32 or 36.

The Court: 63 F. Sup.?

Mr. Williams: Yes.

The Court: Oh, I thought you were citing a Supreme Court case.

Mr. Williams: This is just a District Court case.

The Court: This is some other District Judge who had to wrestle with the problem?

Mr. Williams: It is a very well-written opinion, your Honor. Like Mr. Dixon, cases come readily to mind when you participate in them. I participated in this one.

Then there is the footnote No. 5 that was cited to you in the other case, the Standard Stations case.

The Court: I couldn't make any sense out of that. I couldn't figure what the court was saying.

Mr. Williams: Your Honor, there is also something— [3878] do you have a copy of the Attorney General's report on antitrust laws?

The Court: Yes.

Mr. Williams: I believe I can find the page and cite to you the discussion in there that relates to the identification of market.

Mr. Dixon: I don't mean to interrupt, but I think the case cited in our requested instruction is on the point, that the Sherman Act has distributive effect, I mean commerce can be local in its nature and be restrained or subject to monopoly, and it doesn't have to be on a national scale, because if that were so, it would be impossible for a plaintiff to ever support a case under Section 2 without showing monopolization of the national market.

The Court: Was that U.S. vs. Griffith?

Mr. Dixon: No. Just a moment and I will get it.

The Clerk: 293 U.S. 268, Indiana Farmers.

Mr. Dixon: That is the case I had in mind.

The Court: I don't know what was the matter with my reading of the footnote. I may have been tired. Ordinarily, even if I have to read it three or four times, I eventually understand, but I couldn't make much out of the footnote.

Mr. Williams: I readily concede it is hard to understand. The discussion in the Attorney General's report is found at page 44. [3879]

The Court: Attorney General's committee on——

Mr. Williams: National committee to study the antitrust laws, report issued March 31, 1955. I will be glad to loan you our copy, if you wish.

The Court: Leave it here, if you will. I think I have it, but if I haven't, I can use yours.

(Mr. Williams handing book to the clerk.)

The Court: All right. I got you off the track on your motion. Go on.

Mr. Williams: The next point relates to intent. Now, conspiracy to monopolize is nothing more than a joint attempt made by agreement of two or more people. An attempt to monopolize requires specific intent to accomplish the end.

Now, if your conspiracy to monopolize becomes successful and achieves a monopolization, then I do not believe you have to have a specific intent, because you have achieved the offense, which is monopolization, which does not require specific intent, but merely general intent, under the Aluminum Company case decision.

But in this case it is our position that even with the conspiracy to monopolize, you must have specific intent, because here the conspiracy, so-called, did not have the necessary effect of accomplishing the result of monopolization.

The Court: Are you using the word specific intent as a word of art? I mean do you mean something more than a [3880] general intent?

Mr. Williams: Yes; I do.

The Court: Specific intent comes into the law from the criminal side. It doesn't come in the law from the civil side. Maybe these lawyers and judges in writing about antitrust cases have appropriated the word and maybe it has some place, but as a matter of logic, it doesn't seem to me to follow.

The specific intent, we recently had the problem up here in this Circuit because of a decision in the Block case, and I went back and revised all my criminal instructions because of what the Circuit had said. When I got through revising them, I went back to the old mens re, the guilty mind, and pointed out certain types of crimes, felonies, required more than an intent to do the act, they required specific intent which, from the days of common law, was a guilty mind or an evil or bad motive. [3881]

That is what is meant in criminal law by "specific intent." And it is required ordinarily in felony cases, with three or four exceptions.

How "specific intent" finds its way into civil law bothers me, because you can't cite me any other civil field of law where there would be any requirement that there be a specific intent to commit a tort.

Mr. Williams: The reason for it is this, your Honor: This tort is an act committed pursuant to a criminal conspiracy. The attempt to monopolize is a criminal offense. It is a misdemeanor; it is not a felony, but it is a criminal offense. And it was held as early as the Swift case by Mr. Justice Holmes about 1906 that where you had an attempt to monopolize you had to have a specific intent.

L4

I believe the Times-Picayune decision that you were reading the other night also refers to specific intent, where you have an attempt to monopolize.

Now, my point is that because a conspiracy to monopolize is an attempt by two people, two or more, that you must also have specific intent unless the crime goes so far that it achieves monopolization—of course the same is true of an attempt to monopolize—you do not require specific intent to show monopolization, if you go that far. And that is found in a decision by Judge Learned Hand in the Aluminum case. [3882]

The Court: Do these cases follow any logic? For instance, take Section 1, conspiracy, combination or contract to monopolize. Now, if you approach it on the basis of logic, first of all you would say——

Mr. Williams: Section 1 is only to restrain trade, your Honor. Section 2 is conspiracy to monopolize, attempts to monopolize, and monopolization.

The Court: Let's take Section 1. It is your argument that there should be specific intent under Section 1——

Mr. Williams: No. Only under Section 2, conspiracy to monopolize. Not to restrain trade, but only to monopolize.

The Court: Then if you concede specific intent is not required under Section 1, then as a matter of logic should there be specific intent required to monopolize, monopolization being a step further than restraint of trade? That is, you wouldn't have to have as much for restraint of trade as for monopolization.

Mr. Williams: That is right. You require more proof to show a conspiracy to monopolize than a conspiracy to restrain trade. [3883]

The Court: As a matter of logic, why should you have a specific intent on a conspiracy to monopolize and not have a specific intent on a conspiracy to restrain trade?

Mr. Williams: I don't know the answer except that in the attempt to monopolize cases it is well settled you have to have a specific intent, and what the court says is you need the specific intent, because you fall short of achieving the result of restraining trade or of monopolizing in the case of attempting to monopolize. And if that is true, it is well settled that then it follows, we say by logic, that a joint attempt also requires a specific intent, where you fall short.

The Court: Could this be a distinction? That the attempt to monopolize, which could be committed by an individual without a conspiracy, is the act of one individual, and therefore to know whether his act rises to enough dignity to be considered this attempt to monopolize there has to be proved a specific intent, but when you get into conspiracy to monopolize the very word "conspiracy" indicates that there was express or implied agreement between the parties, so by the very use of the word "conspiracy" you are presupposing that there was agreement, express or implied, by two or more people, to do the thing?

Mr. Williams: That may well be the answer.

The Court: And, therefore, as to conspiracy to restrain [3884] trade or to monopolize, the specific intent is not required, but when you get to an individual who has aggrieved somebody and has done an act which attempts to monopolize, in order to relieve that individual from the onus of his civil violation the law says you have to show more than that he did an act, and that you can infer from it that there was an attempt to monopolize, you have to show that he had a mental content, which we call specific intent.

In logic does that make sense?

Mr. Williams: That makes sense to me, but I think that it does emphasize that in a conspiracy to monopolize you at least have to have the intent—you have to have proof of the intent to monopolize as part of your proof of conspiracy.

Perhaps "specific intent" is not the right technical term, but you have to have proof of intent.

The Court: Is there any case which has discussed that this matter of conspiracy, and conspiracy to restrain trade, or to monopolize, implies the meeting of minds, expressly or impliedly, for a certain purpose?

Mr. Williams: No, I don't know of any, except the general cases on conspiracy, which say you must have the agreement, and when you join the conspiracy you must have knowledge of the objective and join with that knowledge, which does imply the intent.

In this case we say there is no evidence of intent to [3885] monopolize whatsoever. In fact, there is even evidence showing that there was no intent to monopolize, because as Mr. Finley testified, and as Mr. Swayne testified, Exchange Orange offered a contract of the grower participation type to Case-Swayne.

If there had been an intent to monopolize, intent to engross all or practically all of the market, they certainly would not have gone to Case-Swayne and offered them a contract.

The Court: Before you pass this point now, and to be facetious for a minute, do you have any authorities on this specific intent being required on conspiracy to monopolize besides Williams on anti-trust?

Mr. Williams: No, I don't. I think maybe you convinced me I ought to take it back and change it.

I do think it requires intent. I will change my position from "specific intent" and claim there has to be intent.

The Court: I can go along with you on intent, because conspiracy implies intent.

Mr. Williams: Then we come to the point whether the evidence in this case supports submitting the case to the jury, is there enough evidence of intent to monopolize, and that is engrossing substantially all of the market. And certainly if you have this positive evidence of offering to [3886] Case-Swayne, it negatives the evidence of any intent to monopolize substantially all of the market.

The Court: You are not arguing to the jury now. If you were arguing to the jury, that would make a good argument. The jury can draw all kinds of inferences, and they can believe or disbelieve a witness.

Finley said, "We offered it to Case-Swayne, but they didn't want it." The jury doesn't have to believe Finley.

Mr. Williams: Case-Swayne said the same thing.

The Court: They don't have to believe him, either. There is no reason why I would think they would, but the jury might want to believe that neither one of them was telling the truth, and this was just a gesture they were talking about.

We tell the jury that they don't have to believe any of the witnesses.

Mr. Williams: Let's look at some of the other evidence bearing on intent.

Our point is that there is no substantial evidence on which to submit this case to the jury under the conspiracy to monopolize theory, because of the absence of evidence of intent in the record. There is no evidence at all of any intent to monopolize hot pasteurized concentrate, but the complaint relates to citrus juices, which does include hot pasteurized concentrate. [3887]

With respect to frozen concentrate, the record shows that all that was done was that Exchange Orange entered into contracts with various other companies to have them make frozen concentrate for Exchange Orange under the Sunkist label for sale by Exchange Orange.

It is just like a patent owner having somebody make material for him, but he does not license them to sell it, so he sells it himself.

Certainly there is no attempt to monopolize there, because their monopoly is no more than they already had by possession of the oranges.

So there is no attempt to monopolize frozen concentrate.

With respect to single strength, there is the Case-Swayne item I just mentioned, and there is another factor with respect to Case-Swayne, and that is that Case-Swayne consistently undersold Sunkist by about fifteen cents per case, according to Mr. Swayne.

Here was a price-cutter, and certainly if they were going to have a conspiracy to monopolize, he would be one of the first people to get out of the business.

During the year 1951, also, the single-strength orange juice was in surplus supply by reason of the large Florida pack. This is shown by the fact that the price in that year was lower than it had been in either of the two preceding years. It reached a new low in that year. [3888]

In fact, it was about the poorest year to try to monopolize a product, because it was a surplus commodity that no one wanted anyway.

If you look at Exhibit CH, which shows the amount of single-strength orange juice made each year by Exchange Orange for sale by it, or made for it by others for sale by it, from 1946 to '51, we find that in '51 they had 400,000 cases, the preceding year they had 210,000. Mr. Finley testified that was a freeze year and they couldn't get enough good fruit to make a high quality product.

In every year preceding that they had more cases. 460,000 one year. '46 they had 750,000 cases. They have a history of decreasing the amount of single-strength orange juice made.

This was only normal, of course, because of the expansion of the frozen concentrate market. [3889]

As further evidence bearing on intent, which indicates that there was no such intent, is the explanation of Mr. Finley for why he didn't do business with Winckler, his unhappy experience in 1947, that Winckler couldn't make a good single-strength product with Citromat machines, and that the fruit was already contracted for at the time Winckler came around to get it.

We just don't find anything in the record that indicates that there was an intent on the part of these defendants and TreeSweet and Silzle to monopolize the market for California citrus juices.

So without reaching the issue of whether or not there was, really, a conspiracy—by that I mean the basic conspiratorial agreement to monopolize, whether that agreement existed—I say without reaching that we are entitled to have our motion for a directed verdict granted on the conspiracy-to-monopolize charge.

I would just like to mention, since our motion raises it, that the original complaint filed in this case was quite a different charge than that which appears in the amended complaint and which also is now found in the second amended complaint. The original charge was not limited to citrus juices produced in California. It reads as follows:

"All of the defendants have for many years last past monopolized, attempted to monopolize, [3890] combined and conspired each with the other to monopolize the citrus fruit industry among the several states" * * *

The citrus fruit industry; not even citrus fruit juices.

"* * * among the several states and the District of Columbia, and have effectuated their monopolization of trade and commerce among the several states and the District of Columbia by doing, among other things, the acts set forth in paragraph 3 of the first cause of action herein."

That is all there was to the second cause of action in the original complaint. And we raise the question whether the statute of limitations bars the expansion of the second cause at this time. [3891]

The Court: It is not an expansion; it is a restriction.

The first complaint was shooting at the moon, and the amendments have further confined the issue.

If it would have been the other way around, I could see your point. If the complaint started out by charging you with conspiring to monopolize a small segment of the industry in California, and then they wound up with a second amended complaint charging you with monopolizing the whole industry, I would see some ground for complaint. But they have particularized more.

Mr. Williams: That is quite a different charge than monopolizing only citrus juices in California. It is quite a different conspiracy, if you treat them as two conspiracies.

The Court: I have your point.

Mr. Williams: My next point relates to the conspiracy to restrain trade.

The Court: Can you be through by 4:30?

Mr. Williams: Yes. I have very little more.

The statements I made with respect to intent to monopolize also pertain to intent to restrain trade. And again the question is whether there is enough evidence in the record to justify submitting to the jury the issue of whether or not defendants conspired to restrain trade.

There is no evidence that any of the defendants anticipated that the plaintiff was going to ask for a contract [3892] in 1951, there is no evidence that they consulted with each other about it before the request was made; there is no evidence that any of the defendants were informed that the Exchange Orange had refused the request of Winckler. There just isn't any evidence indicating any agreement, which is an essential part of conspiracy, any agreement to restrain trade or to refuse the contract to Winckler.

There is, also, no evidence to show any public injury with respect to the restraint of trade. That is particularly true, because as I pointed out in my original argument, there were so many oranges to be processed, they were processed, they went into the channels of interstate commerce.

Furthermore, the supply of single-strength orange juice was so low that year, lower than it had been in any of the two preceding years, that there was a clear indication that the public demand for single-strength orange juice was met and was not affected in any way by the conspiracy alleged here.

Now, the next point is one that I mentioned, also, on the original argument, and that relates to the Canella case, and the theory of the Kotteakos case. I read the Blumenthal case, and the Carrigan case referred to by your Honor, and in both those cases we find that they accept the statement of law in the Canella case and in the Kotteakos case, but they held that on the facts in those [3893] cases that they had proved a single conspiracy and had put the rim on the wheel, so to speak.

The Court: Yes, but can you imagine a bigger wheel with less rim than that Blumenthal case?

Mr. Williams: That goes to questioning whether the court was right in its decision, your Honor. I don't know whether they were or not, but what they said was they found the rim and they conceded they had to find it. And our point here is that that is the law as stated in the Kotteakos case, and there has to be evidence from whence the jury can find the rim before the case can go to the jury.

In this case we have a different situation than existed in any of these four criminal cases, in that there it was admitted that each of the spokes constituted a conspiracy in and of itself, so that if you did not put the rim on the wheel you then had a series of small conspiracies stemming out from a central conspirator. [3894]

In this case the spokes do not constitute conspiracies. Each one is a legal act per se. So unless the rim is placed on the wheel and you have this illegal objective, you don't have any conspiracy at all.

Our position is that there is not sufficient evidence upon which to go to the jury on the question of agreement, because there is nothing shown with respect to agreement over and above what appears within the written contracts. There is no showing of any discussions, whether Winckler would get a contract—the same points I made a few minutes ago.

There must be some evidence of agreement over and above the contracts in order to put the rim on the wheel.

The next point relates to proof of damages and to the point that proof is speculative, and is so speculative that it ought not go to the jury.

First I will refer to the Silzle contract. The plaintiff has put in no evidence whatsoever as to the damages that might have accrued or did accrue to the plaintiff in 1951 by reason of its not having a contract like the Silzle contract.

Mr. Hodge testified about the TreeSweet contract, but nothing at all was said about the Silzle contract.

So our point is that the jury should be instructed that it cannot find any damages for the plaintiff by reason of the failure to get a Silzle contract. [3895]

Now, of course, the plaintiff wasn't entitled to both the Silzle contract and the TreeSweet contract.

He was only entitled, if he was entitled to either, to one or the other, but not to both.

Now, as to the TreeSweet contract, there is a peculiar feature in the language of the contract. Paragraph No. 2 states that the quantity of oranges to be supplied under the contract is entirely within the discretion of Exchange Orange Products. If Exchange Orange had chosen not to deliver a single ton of oranges to TreeSweet, it would not have breached the contract, and TreeSweet would not have been able to sue for nondelivery of oranges.

Plaintiff has chosen to rest its case upon a failure to give it a contract of that kind. It is clear that if the plaintiff had received a contract like the TreeSweet contract, Exchange Orange would not have been required to deliver any oranges under the contract.

So we have to go further than saying that there was a duty upon Exchange Orange to give a contract. We have to say there was also a duty upon Exchange Orange to supply oranges under that type of a contract.

Then the question is, how many oranges are to be supplied in performance of that duty? I think there is a question as to whether that question is one of law for the court or one of fact for the jury. [3896]

Supposing that a company sued for loss on a contract to build a house. Part of the reason would be the loss of the contract to build the house. The contract would be identified. You would have a particular house. It would not be an abstract thing that had not been born. It would be something of a concrete plan. The only question for the jury would be, what would be the loss of profit on the building of the house?

So in this case, if there is a breach of duty here, that duty included not only the duty of giving a contract, but the duty of delivering oranges under the contract.

We raised the question whether that is a matter of law for the court, whether the court should decide how many oranges should have been delivered under such a contract, and should instruct the jury as to the number of tons. We frankly don't know the answer to the question we raised. It probably will rise again on the instructions.

Even if it is an issue of fact for the jury, is there enough evidence in this record to enable the jury to decide how many tons of oranges should have been delivered to Winckler & Smith in 1951? What standards would the jury have to decide how many tons should have been delivered?

The Court: Are these problems any different than those in the motion picture cases where there has been an exclusion of first-run pictures, for instance, and the question of [3897] damages comes up? Wasn't it the Eastman Kodak case where the Supreme Court said that plaintiff might show what business it had done and make estimates of its profit? Am I wrong about the case?

Mr. Dixon: That is correct, your Honor. The Eastman Kodak case is one and the movie cases are others.

Mr. Williams: They are a little different. You have a basis of past history of dealings there so you can estimate the profits.

In the Eastman Kodak case, the plaintiff had been a distributor of Eastman products for many years, and then Eastman tried to buy them out, and when the company wouldn't sell out, then Eastman put them on a different price list so that they had to pay more for their product. They had a much more definite standard to go to the jury than you have in this case.

The question here is whether you have any comparable definite standard or whether it is too speculative and too open to conjecture to go to the jury at all, or, on the other hand, the standards should be set forth in the court's instructions.

Those are the only points that we have to raise in addition to those made in our other argument.

The Court: I am not going to hear from Mr. Dixon.

The motion for a directed verdict is [3898] denied.

I am interested in this problem of whether an identifiable market is a question of law or a question of fact. I will look at what you have given me. That is a matter which we can consider on instructions. If either of you find anything more, let me have it. [3899]

* * *

Friday, February 3, 1956—9:00 A.M.

(The following proceedings were had in chambers outside the hearing and presence of the jury.) [3904]

* * *

Mr. Dixon: On 31, Judge, I have the note, but the record will show, I thought it was to be given with the modification, the insertion of the words, along with the other evidence in the case, after the word "evidence," in line 22, bearing on the question of the existence or nonexistence of the combination, and so on.

The Court: Well, let me see the transcript. I said, "Do you think it would be an erroneous statement of the law to insert on line 9 after Exchange Orange the words 'without good business reason?'

"Mr. Dixon: Well, I would like to think about that, your Honor.

"The Court: All right. What time has anybody got?"

And then there was the question of going home.

So we wound up on a proposed insertion of the words "without a good business reason."

All it does is say that, "You may consider these things in connection with all the other evidence in making a [3905] determination of fact." It is not, therefore, a formula instruction. So there would be no necessity to put in all the elements, and in that sense it wouldn't be necessary to put in the "good business reason," although I suppose the defendants will have an instruction along the same line, that "You may consider whether or not the defendants had a good business reason and you may consider it along with all the other evidence in the case as to whether or not there was a conspiracy."

Mr. Dixon: I don't think it is proper in this instruction. I would like to consider whether it is even proper in the case as a whole, your Honor. One of the charges, of course, in the complaint is that the refusal to make them available was one of the parts of the conspiracy. I don't think, if the jury would find there was such a conspiracy and that was part of it, the reason makes any difference, whether the motive was good, bad, or indifferent, because it is based upon the control which they had over the product.

The Court: You see, what you are doing by 31 is this: You are not stating any law to the jury.

Mr. Dixon: That is correct.

The Court: You are picking out what you would consider part of the gist of your case, and calling it to the jury's attention. It is in effect saying, "You may consider this along with all the other evidence in determining whether there is a conspiracy." [3906]

Mr. Dixon: That is correct.

The Court: That is all you are doing.

Mr. Dixon: That is correct. [3907]

The Court: By the same token the defendant would have a right to say—I am not going to give too many of these, but I am going to give enough of them to let each fellow show the theory of his case—the defendant, by the same token, would say, "You have a right to consider this and this and this in determining whether there was a conspiracy," which would be true. You are merely calling attention to parts of the case.

Mr. Dixon: I think, Judge, that is true in a sense. I think that is probably true in connection with any instruction which relates to any particular part of the case, that could be said of any instruction that relates to any particular part of the case.

The Court: You would have three general types of instructions, maybe more. You first would have an instruction of a statement of the law. That is on one extreme. On the other extreme, you have what is called the formula instruction: If you find, blah, blah, blah, blah, then you find for the defendant. Or if you find so and so, then you find for the defendant.

I don't like formula instructions. They are dangerous. They present problems.

Then in between you have got these instructions where you call attention to certain elements. Then you have, also, another kind of instruction, where you have some law, and [3908] also call attention to its application to certain facts.

I am going to strike out "without a good business reason" on line 9, the words that I put in.

Have you finished making your record on this instruction, defendants?

Mr. Williams: Just a moment, your Honor, please.

Mr. Fowle: If the court please, we are not entirely clear as to the extent to which we did record our objections to this proposed instruction, but there are three or four grounds on which I would like to make specific objections at this time. The first is that this instruction as drafted assumes that there is an obligation on the part of Sunkist or Exchange Orange to deal with the plaintiff.

Second, the term "refusal" or the expression "refusal to make oranges available" is used on several occasions throughout the proposed instruction without any qualification, and it is particularly used without any qualification as to the reasons for any such refusal.

Third, the instruction assumes that the plaintiff could actually have sold oranges or Valencia orange juice in competition, when the evidence actually is that he was insolvent.

Four, on line 16 I would point out beginning, "I charge you that if the plaintiff could not have secured Valencia oranges" and so on, it seems to me to be somewhat redundant, [3909] because it follows a sentence in which it is already said that such refusal operated to prevent the plaintiff from being able to process and sell.

Next I would suggest that the sentence beginning at line 16, to wit, "I charge you that if the plaintiff could not have secured Valencia oranges," and so on, is not really material here at all, because there is no showing in the evidence, or is there any indication in this instruction, that the defendants or the conduct of the defendants had anything to do with whether the plaintiff could have secured Valencia oranges elsewhere.

Next, there is no reference in the instruction or even so much as a hint that there were other reasons why the plaintiff was unable to secure Valencia oranges, that is, reasons other than the conduct of the defendants in the canning season of 1951.

When I speak of other reasons, I refer specifically, of course, to Morgan Ward and to the Florida situation.

The Court: The objection is overruled.

Most of your objections are based upon the contentions that the instruction assumes certain things.

There are no assumptions in it at all. There is no statement to the jury of any facts as existing. The instruction has to be viewed as just what it is, an instruction that calls attention to certain "ifs," if they [3910] find, and if they find, that they may finally consider these things if they find them in connection with whether or not there is a conspiracy.

I am going to give the instruction.

I am going to indicate here that I am going to give it, and I will consider later, as it fits in with other instructions, how many of these I am going to give. However, unless I advise you otherwise, it is going to be given.

Mr. Dixon: With the inserts your Honor made the other night on line 22?

The Court: Yes, they are already in the record.

Mr. Fowle: Just so that I might be sure at the moment. The only insert, as I understand, is the one in line 22.

The Court: Two inserts there. Line 22 reads: "might consider such refusal along with the other evidence in the case as bearing on the question of the existence or nonexistence of the combination and conspiracy.'

32.

Mr. Dixon: These instructions, your Honor, from here and the next two, three or four instructions deal with the general question of monopoly control and what it constitutes.

I started out in this manner so that there can be some explanation to the jury of just what is meant by monopoly or monopoly control.

The next one, 32, just deals with—it is one of the tests of monopoly, you might say. [3911]

The Court: Well, let's take up 32. You submit it as a correct statement of law?

Mr. Dixon: Yes, I do, your Honor.

The Court: And the other incipient monopoly doesn't infringe upon your withdrawal of the attempt to monopolize?

Mr. Dixon: No, I don't think it does. We might consider striking that part of it.

The Court: You have got the word "trying" on the first line.

Mr. Dixon: This case, as I recall it, was a conspiracy to monopolize case. I don't think it was an attempt to monopolize.

The Court: "Trying."

Mr. Dixon: I don't think the attempt to monopolize charge was in the case. I might be able to check it very quickly here. As I said, some of these instructions on that were drawn at the time when both attempting and the conspiracy were in the case.

The Court: Before you check it, let me ask you this. A lot of these matters I am going to try to approach on the basis of logic first, unless I find somebody has got an idea or a case that prevents it. That at least makes more sense to me than trying to fit it into other things. Your present case is this: You are relying on a conspiracy, combinations and contracts and/or to violate Sections 1 and 2. [3912]

Mr. Dixon: Correct.

The Court: You are relying on a conspiracy to monopolize.

Mr. Dixon: Correct.

The Court: Under Sections 1 and 2, and you are relying on monopolization.

Mr. Dixon: Yes. Well, a conspiracy to monopolize and the monopolization is the Section 2 charge, but it relates to the juice part of the business, primarily single-strength juice, whereas the other monopoly complaint that is in the case, your Honor, which is either a question of fact or a question of instruction by your Honor, that there was a monopoly——

The Court: Of product oranges.

Mr. Dixon: Of product oranges, yes.

The Court: Let's see if I can summarize that. Your case is this: You are going to argue to the jury that there actually existed a monopoly of product oranges by the defendants.

Mr. Dixon: Which could have been and was a legal monopoly, shall we say?

The Court: An illegal?

Mr. Dixon: A legal monopoly. In other words, I don't question how they got it.

The Court: Then you are going to argue that your violations are the conspiracy and/or combination and/or contracts [3913] to violate and restrain interstate trade and commerce under Section 1.

Mr. Dixon: In juice.

The Court: In juice.

Mr. Dixon: That's right.

The Court: And then you are going to argue that there was also a conspiracy to monopolize the juice, Valencia juice market, under Sections 1 and 2?

Mr. Dixon: As well as the other part of the market, the citrus juice market, which includes frozen concentrates, and particularly single-strength Valencia juice, that represents that part of the total juice processed in California and sold in commerce.

The Court: All right. But you are going to argue a conspiracy to monopolize and you are going to argue actual monopolization of the juice market?

Mr. Dixon: Yes.

The Court: So that is your case, then?

Mr. Dixon: That is, your Honor.

The Court: You have got monopolize in it in two ways, the monopolization which you claim to exist on product oranges, which is only a starting point——

Mr. Dixon: Right.

The Court: ——and which you concede could be legal if they didn't misuse the monopoly [3914] power.

Mr. Dixon: Right.

The Court: But in your final point, as we discussed it, they have misused it by monopolizing the juice market?

Mr. Dixon: That's right. Doing those things under one which prevented the plaintiff from getting or manufacturing single-strength juice.

Mr. Fowle: I believe, your Honor, there is one point that needs a little clarification here. I am talking about the first cause of action, where you say that the first cause of action depends upon combination, conspiracy or contract in restraint of trade. It seems to me that the first cause of action really turns upon a conspiracy, and a conspiracy or combination alone, because the contracts which you speak of, the contracts as being in restraint of trade, that is to say, the TreeSweet and Silzle contracts, are not by themselves in restraint of trade, and I think they would be a problem in this case only if they were entered into pursuant to the conspiracy, so that in our view the first cause of action is in essence the conspiracy charge, and that's all.

The Court: What do you say to that? In other words, his point is that here the contracts alone, without the benefit of the combination or conspiracy, can't avail you?

Mr. Dixon: I don't agree with that, your Honor. That is the reason for the amended complaint. As I have tried to point out before, if the effect of those contracts was [3915] to restrain trade by fixing the price or tampering with the price structure at which California single-strength Valencia juice was sold, that would be an illegal act in violation of the Sherman Act. It might not necessarily be the cause of damage to this plaintiff, your Honor, which is another question.

But I want to be in the position to argue, if necessary, that by reason of those contracts, pursuant to which Sunkist and Exchange Orange gave in effect practically all of the product oranges which they did not themselves process, to TreeSweet and Silzle, that the plaintiff therefore didn't have any of that available to it. Of course, they would have to perform the contract and deliver under the contract, so there wouldn't be any available to the plaintiff.

That was part of the combination and conspiracy, and by reason of the carrying out of those contracts, they gave all of the available product oranges that they had to TreeSweet and Silzle, rather than give any of it to the plaintiff.

The Court: I get your two theories.

Mr. Dixon: I am glad you mentioned that, your Honor, because it is confusing and is something that requires analysis and clarification, because it is not the position here of the plaintiff, and I again state it for the record, that any price-fixing contracts, I mean if these contracts had the effect of stabilizing prices, that they eliminated [3916] or damaged the plaintiff, because the plaintiff had nothing to sell in 1951 in the single-strength juice market.

The Court: Well, to boil it down, your contention is, although the contracts themselves may not have been the cause of damage, they were so tied in with the rest of the problem that they have to be considered as part of the whole.

Mr. Dixon: Definitely.

Mr. Fowle: Your Honor, under the statute, the plaintiff may not complain here of anything that didn't injure him.

The Court: If something was a part of the picture—we come right back to what we talked about yesterday, I may be wrong, but my thinking is clear on that—if it was the refusal, the only damage came from the refusal, that the contracts couldn't have caused damage, but the contracts were a condition, they were part of the background upon which the alleged refusal acted, without them, without the contracts being there, certainly the refusal would have been no cause of action at all. Since the contracts are there as part of the background, possibly the refusal might be a cause of damage. You have got almost a question of causation, a condition, created by the contracts. Along comes a refusal, acting on the condition, and the plaintiff says "I am hurt."

If the contracts alone had existed, there had been no request and refusal, plaintiff couldn't seek damage. If there had been a request for fruit, without the contracts, [3917] and EOP had been doing all their own processing, and Winckler & Smith then come along and says "Give me some oranges," EOP could have said "Go peddle your papers. We are doing our own processing."

So you have got those contracts as an integral part of this picture. You can't say it is one or the other did it. It is a combination of the two. My thinking is clear on that. I don't think there is any gap in the logic on that proposition.

Mr. Williams: May I raise another question there?

The Court: Yes.

Mr. Williams: It seems to me that the issue is a little sharper than just being a backdrop, that it is sharply cast in terms of, do the contracts impose a duty upon the defendant, Exchange Orange, to sell or to make available enough oranges under a contract like the TreeSweet, and they all go to the creation of the duty there. If they go to the creation of the duty, whether these contracts fix prices or not had nothing to do with the injury to the plaintiff. They had nothing to do with the creation of the duty. That is what seems to me to sharpen the issue, and so it comes down to that before the plaintiff can recover.

Mr. Dixon: I am glad that you—pardon me, your Honor, I did not mean to interrupt.

The Court: Go ahead. [3918]

Mr. Dixon: I am glad we have had this discussion, because we are getting down now to what I would call the guts of the case in this sense, that the monopoly power, and it is the contention of the plaintiff the monopoly power over the products available which were essential and necessary to this plaintiff if he was to stay in business, was vested in the defendants, that that power was represented by the fixing of prices at which the product was available, which is the only price at which they could be received from others, and so forth.

Now, starting with that premise, the defendants, exercising the power, made these contracts, particularly with TreeSweet, which took out and away from the open market, in other words, to that extent the plaintiff did not have access in a free market on free dealing terms, shall we say, to any part of the product oranges which went to the TreeSweet and Silzle under these two contracts. [3919]

Therefore, not being able to get then any oranges from any other source on a comparable basis to that at which the defendants made them available to TreeSweet and Silzle, the plaintiff was not able, not only for that reason, but also because the defendants refused to give them access to oranges on the same basis, and they couldn't, perhaps because they already, intentionally or otherwise, committed themselves to give all of their surplus to TreeSweet and Silzle, so the plaintiff was thus unable to get the product oranges from the defendants or any other source in this area, and hence was deprived of——

The Court: I understand your position.

Mr. Dixon: Now, to say that you can isolate——

The Court: I am in agreement with you. Let's save some time.

This is my secretary here, Miss Mahar. I am going to try to dictate something here as to what the plaintiff's theory of this case is, and we can put the same sort of thing in as to what the defendants' theory is. I think we have to somehow tell the jury what this is about. We will get this typed up and we will see what we can do with it.

The last letter I had was "I." This will be "J."

"The court will now attempt to inform you as to what is the plaintiff's contention and what is plaintiff's theory of this case. Please bear in [3920] mind that these are, as stated, the contentions and theories of the plaintiff. The court will subsequently inform you as to the defendants' theories and contentions.

"The plaintiff contends first, as a preliminary matter and as background for the entire setting of the case, that the defendants Sunkist and EOP had a monopoly on product Valencia oranges"——

Mr. Dixon: Judge, I don't want to interrupt your thought, but in the complaint is the charge that Exchange Lemon had a comparable monopoly, indicating 90 per cent of the product oranges available.

The Court: ——"product Valencia oranges in the Southern California area"——

Mr. Dixon: That were available in California.

The Court: ——"and that Exchange Lemon Products, not a defendant, but an alleged co-conspirator, had a similar monopoly on product lemons in the same area.

"Plaintiff concedes that under the statutory exemptions applying to marketing associations this monopoly which the plaintiff contends exists could have been legal or illegal, depending upon the manner in which it operated, or depending upon the defendants' acts and conduct in connection therewith." [3921]

Mr. Dixon: No, that isn't quite it, Judge. We don't contend that the actual monopolization of the product oranges and lemons in and of itself was illegal in any sense, since Sunkist and Exchange Lemon could legally monopolize——

The Court: Your question is on how they used it.

Mr. Dixon: That is correct. Then we start from the monopoly power.

The Court: I am just fumbling here.

Strike out the last thing you have and start again. [3922]

Mr. Dixon: May I make this suggestion?

"Plaintiff concedes that the defendants Sunkist and Exchange Orange could legally acquire a monopoly of the product oranges available for processing into citrus juice products in the California area, and likewise concedes that Exchange Lemon could also acquire a legal monopoly over the amount of lemons that might be available for processing into lemon citrus juice products in California."

The Court: Now, paragraph:

"We come, then, to what the plaintiff contends is the violation of the antitrust laws by the defendants, and what is the plaintiff's contention as to their alleged cause of action. Plaintiff contends that the defendants conspired, combined, and contracted to restrain interstate trade and commerce in violation of Section 1 of the Sherman Act."

Mr. Dixon: Maybe we had better add there, "in citrus juice products, particularly single-strength Valencia juice."

The Court: The term isn't "products." It is "California citrus juices."

Mr. Dixon: Particularly single strength.

Miss Mahar: "to restrain interstate trade and commerce"——

The Court: "in California citrus juices in violation of Section 1 of the Sherman Act." [3923]

Mr. Dixon: "particularly single-strength Valencia juice."

The Court: "Plaintiff further contends that the defendants"—I may have to go back over this, by the way.

"the defendants and co-conspirators conspired to monopolize the market in single-strength Valencia orange juice in violation of Sections 1 and 2"——

Mr. Dixon: There, Judge, "to monopolize the citrus juices, particularly single-strength Valencias."

The Court: Make that, "to monopolize the market in California citrus juices, and particularly in single-strength Valencia orange juice."

Mr. Dixon: "that are processed in California and sold in interstate commerce."

The Court: "that are processed in California and sold in interstate commerce in violation of Sections 1 and 2 of the Sherman Act.

"Plaintiff further contends that the defendants actually monopolized or exercise monopoly control over the California citrus juices, and particularly single-strength Valencia orange juice processed and sold in California in interstate commerce in 1951, in violation of Section 2 of the Sherman Act.

"Plaintiff further contends that the defendants did and committed certain acts and engaged in certain conduct [3924] contained in six specifications of matters alleged to have proximately caused plaintiff's damage."

Let me add to that.

"These six specifications will be referred to in these instructions as the 'acts complained of,' and I will instruct you further as to plaintiff's allegations and contentions contained in these six specifications."

That is very crude, but it gives us something to work on.

Mr. Dixon: Yes.

The Court: Now, let's go back to 32.

Mr. Dixon: In connection with 32, Judge, it is possible to have a monopoly which would try to exclude outsiders from the business. I concede, of course, that the word "trying" implies an attempt.

The Court: I have a suggestion on that. Let me see if I can formulate it in a sentence here.

32, as I see it, is a correct statement of law in general. I think we will all agree that it is a correct statement of law. The trouble that I see with 32 is the use of the word "trying" and the word "incipient," which it might be argued are talking about attempts to monopolize. I had in mind doing something like this, after the general statement of law—this is too long:

"Bear in mind that the plaintiff does not charge an attempt to monopolize, but charges the existence of a [3925] monopoly and the exercise of monopoly control by defendant over California citrus juices, and particularly single-strength Valencia juice, and it charges a conspiracy to monopolize in the same respect."

Mr. Williams: Your Honor, we can't agree that this is a correct statement of law, as applied to our present factual situation. This statement is taken from a case where you had 100 per cent of the market monopolized by these tobacco warehouses, and you had another warehouse trying to get into the market, and it was stipulated in the case that there was the buying time of buyers available to go to the other warehouse. So even though the statement may be correct as applied to the facts of that case, we object to its application to this case upon the ground that it is not a correct statement of the law as applied to these facts.

The Court: Your objection is generally that there is no basis in fact for any instruction on monopoly, isn't that what it amounts to?

Mr. Williams: It is more than that. For example, where it reads "trying to exclude outsiders," it ought to be "trying to exclude substantially all outsiders," not just "outsiders."

The evidence in this case only goes to one person.

The Court: Before you go ahead with your objections, let's clear up Mr. Dixon's end of it. He is proposing the [3926] instruction.

What do you think of some statement similar to what I suggested, excluding any consideration of attempt to monopolize?

Mr. Dixon: Yes, I think something like this, so that the jury will not be confused. The Section 2 part of the case charges a conspiracy and combination to monopolize the citrus juices processed in California, and the monopolization.

In other words, it was effected particularly as related to single-strength Valencia juice.

The Court: I know, but you can't say that time and time again in these instructions. I just dictated one that we are going to work on as to your contentions. All I am interested in here is to cure what I thought might be a misunderstanding about the word "trying." "Trying" might apply equally to conspiring, and it might apply to attempting.

Mr. Dixon: May I make this suggestion, then, your Honor, in addition?

"No claim or contention is made by the plaintiff herein that the defendants, or either of them, attempted to monopolize." [3927]

The Court: Period.

Mr. Fowle: That is a sentence to be added at the end of this?

Mr. Dixon: In other words, that sharpens it up. I think with the subsequent instructions, your Honor, it will be perfectly clear what that addition means, so there can't be any confusion about it.

The Court: No claim or contention is made herein that the defendants or either of them attempted to monopolize.

All right. Strike out my suggestion and take that one. Now, what are your additional objections to the instruction?

Mr. Williams: I stated one already.

The Court: Yes.

Mr. Williams: We object to this general statement, excluding outsiders from the business. Under plaintiff's claims it is confusing as to whether we are trying to exclude from the orange business, single-strength juice business, trying to exclude from the frozen concentrate business, trying to exclude from the hot pasteurized concentrate, or what it is. This phrase that plaintiff uses of "citrus juices, particularly single-strength Valencia orange juice," is confusing. Does that mean he is trying to limit the generality of the fruit juices phrase by saying "particularly single-strength orange juice," or does he wish to limit his case to only single-strength orange juice? [3928]

Is the jury going to have to consider whether there is a monopoly on hot pasteurized, a conspiracy to monopolize hot pasteurized? The same for frozen, the same for single strength?

It is highly confusing to use this general language, which doesn't specifically relate to what the charge is, and as yet the charge, of course, is not fixed.

Now, the phrase "incipient monopoly" has no application to this case. There is nothing in the evidence to indicate any incipient monopoly, and that phrase again is going to be confusing to the jury, to the prejudice of the defendants.

Then we have the objection there is no evidence any combination effectively excluded outsiders from any part of the industry or from all of the industry of citrus juices. It is not clear whether this statement relates to intent. In this particular case, the acts that are charged would not have the necessary effect of excluding the plaintiff or anyone else and, therefore, there should be some reference to intent in the instruction.

The Court: All right. Can't we eliminate that "incipient monopoly," and just read "a monopoly"?

Mr. Dixon: May I again answer counsel——

The Court: I don't care about answering, because I have overruled the objections. Let's save some time. [3929]

Mr. Dixon: All right, Judge.

The Court: The objections are overruled.

Mr. Dixon: If you will bear with me for just a moment, your Honor, it will help us in the consideration of the subsequent request. The plaintiff was just starting or embarking in the business of processing frozen concentrates. That is a part, of course, of the citrus juices processed in California from product oranges, as well as from product lemons. To the extent that it is eliminated from the market entirely, of course, it would be damaged, but the product again is primarily single-strength Valencia oranges.

Now, with reference to your Honor's suggestion that the words incipient monopoly be eliminated, the contention again of the plaintiff is in Section 2 that the defendants conspired to monopolize the citrus juice market, frozen and single strength, and monopolized.

Now, the jury might take the view that during the course of the conspiracy to monopolize, these acts were performed in the single-strength field which are complained of, and that they damaged the plaintiff, and they might at the same time take the view that the charge that they had actually monopolized the whole field here in California was not proved. In other words, it wouldn't be necessary for the plaintiff to prove nor for the jury to necessarily find that the monopolization was in fact accomplished, if they find that pursuant [3930] to the conspiracy to monopolize, which again might be called an incipient monopoly, these things were done which damaged the plaintiff.

The Court: Let me ask you this. If I strike out "or an incipient monopoly," which I don't think half of these jurors will understand anyhow, you could still argue what you just argued, couldn't you?

Mr. Dixon: Yes, I think I could, Judge. I don't want to take the time on it now but——

The Court: I will strike out "or an incipient monopoly."

Mr. Dixon: I don't have any objection to it.

Mr. Fowle: Your Honor, might I say the plaintiff should be compelled to decide and to make clear what it is that we are charged with having conspired to monopolize. To say we have conspired to monopolize the citrus juice market, particularly Valencia orange juice, seems to me to have an inherent fuzziness in it. We ought to be charged with having monopolized a particular market, and to add to it all the time, particularly single-strength Valencia orange juice, seems to me to suggest in the same breath you are charged with having monopolized area A, and especially a segment of it. It seems to me it has an inherent fuzziness in it and is bound to confuse the jury. That exists all the way through all of the instructions on the monopoly phase of this case. [3931]

The Court: All right. The same objections will apply to 32, with the words "incipient monopoly," stricken out. They will be overruled. I will give the instruction.

Mr. Williams: I have one other point. Reading this again, it seems to me what the court was doing when it made this statement, it said, "A combination effectively excluding is a monopoly, and a combination trying to exclude is an incipient monopoly," because certainly a combination trying to exclude is not a monopoly, because a combination may be, say, 10 per cent of the industry, and maybe they have great plans, but it is not a monopoly, so that the trying to exclude outsiders ought to come out.

Mr. Dixon: I agree with that.

The Court: All right. The objections are overruled. I will give 32.

33? I think it is a correct statement of law. What are the defendants' objections to it? Where you can, repeat by reference other objections you have made.

Mr. Williams: The first question is the application here of the matter of monopoly power. Are we talking about monopoly power only of oranges, or are we talking about monopoly power——

The Court: This is a general statement of law.

Mr. Williams: Our objection is to making a general statement of law that is not tied—in this case it should [3932] be tied, if it is to be given at all, to oranges.

The reason for that is this, that there is no allegation here, there is any power to fix the prices of oranges. I am afraid there is going to be confusion if this is given, because you are going to confuse that the monopoly power claimed over oranges involved some way a power to fix price of products, and that statement, of course, relates only to power to fix prices of the same products that are involved in the monopoly power itself. So it would relate only to the products oranges, and it would relate only to the power to exclude competition from the product oranges field, so we object to giving this instruction as a whole, because there is no indication of monopoly power over product.

The Court: Any further objections?

Mr. Williams: Yes. The word fix is ambiguous. It is possible it might be misconstrued to mean affecting, when it means the power actually to move prices up and down or to fix the price at a certain level desired by the person wishing to determine that price. There should be some statement relating to the existence of monopoly power to dominant concerns, if you are talking about power belonging to more than one concern.

Also, in this particular case, if there was any exclusion of the plaintiff, it was by refusing to give him a contract to supply oranges under it, and as a matter of law that type [3933] of exclusion is not necessarily a matter of an exercise of monopoly power. If this instruction is given, it may give the jury the impression that the mere refusal indicates, which might have the effect of excluding the plaintiff in this case, that that is an exercise of monopoly power and illustrates that power, when that is not the case as a matter of law, so this should not be given or should be qualified to point out that a mere refusal to sell does not indicate any monopoly power, even though it might exclude the plaintiff.

The Court: Any others?

Mr. Williams: That's all.

The Court: What about adding this, "The words, 'to fix prices' refers to price fixing activities which tamper with or affect price structure in interstate trade or commerce."

Mr. Dixon: I think we have a requested instruction on that a little later, your Honor, that may amplify it some. As I said, it depends, of course, entirely on how you want to give these instructions.

The Court: We will see. I will give 32 with the suggested sentence.

Mr. Williams: We object to the additional sentence as making it even more vague.

The Court: Objection overruled. I may or may not give this additional sentence, depending on whether it is defined [3934] elsewhere. Unless I advise you, I will give it.

Mr. Williams: Can we have the additional sentence so we can write it down?

The Court: "The words, 'to fix prices' refer to price fixing activities which tamper with or affect price structure in interstate trade or commerce."

Mr. Dixon: Which tamper with——

The Court: Or affect.

Mr. Dixon: ——price structure?

The Court: Price structure in interstate trade or commerce.

Mr. Dixon: 34.

The Court: 34. Is plaintiff satisfied with it?

Mr. Dixon: You mean in its present form?

The Court: Yes.

Mr. Dixon: Yes, your Honor.

Mr. Williams: It is subject to the same objection we made to the preceding instruction No. 33, and we incorporate those by reference. It also involves a question under the Capper-Volstead Act which we stated with respect to plaintiffs' proposed No. 2, and we incorporate that by reference.

Further, the instruction is not related to conspiracy, which is the issue involved here. It is not monopoly power of an individual company. There should be an element of [3935] conspiracy referred to in the instruction. This indicates, in fact, this relates really to the attempt to monopolize, rather than the conspiracy, because it is individual acts of Sunkist and Exchange Orange, not acts done pursuant to conspiracy.

The Court: Well, the plaintiff is charging, apart from conspiracy to monopolize, defendants did monopolize. But, of course, it is tied in here with restraining competition, exercising their monopoly power.

Mr. Williams: My understanding of the amended complaint is not that Exchange Orange and Sunkist monopolized anything, but that Exchange Orange, TreeSweet and Silzle and Exchange Lemon monopolized.

Mr. Dixon: You are wrong in that respect, counsel. The charge is made there was control of the products oranges.

Mr. Williams: Well, you are not charging illegality in control of the products oranges, as I understand.

Mr. Dixon: No, but they exercised it to restrain competition, and they certainly violated the law. I don't care——

Mr. Williams: Just take the first sentence, "Monopoly power is the power to exclude a competitor from a market."

The only application that might possibly have to this case is relating to the market for the sale of products oranges. [3936]

Mr. Dixon: That is a general statement. It is background for what follows.

Mr. Williams: It is the same argument I just made with respect to the other one, so I won't repeat it, with respect to the preceding instruction. It is going to be misleading to the jury and prejudicial to talk about monopoly power in the abstract without pointing out there is no question of monopoly power of products, that it only relates to oranges.

The Court: Well, that isn't true.

Mr. Dixon: No.

The Court: Plaintiff is contending, No. 1, that there was a monopoly power in these defendants over product oranges. He is not complaining that is right by itself a violation or the cause of his injury.

Against that background of that situation, he says defendants may or may not use that power properly. Then he charges that they conspired to violate the Sherman Act, that they conspired to monopolize juices, and that they actually monopolized or exercised monopoly power over juices.

Mr. Williams: The essence of his charge, as I understand it, is that the defendants conspired with TreeSweet, Silzle and Exchange Lemon to misuse this monopoly power over oranges to gain some advantage in the products market.

The Court: The conspiracy——

Mr. Williams: That is the only misuse of the power is [3937] by using it in the conspiracy. Any other misuse of it apart from conspiracy would be an attempt to monopolize.

Mr. Dixon: I think counsel is probably correct in what he says, your Honor. I don't want to go over it again. [3938]

The Court: Now, wait. Are you going to concede your instruction is bad?

Mr. Dixon: No, I don't concede this instruction is bad, your Honor, not at all.

The Court: Are you standing on it?

Mr. Dixon: Yes.

The Court: Then in what respect is he correct?

Mr. Dixon: That the monopoly power that we are talking about in this instruction——

The Court: Is this backdrop monopoly power?

Mr. Dixon: That is right. It is not a monopoly power over the citrus juices that may be processed therefrom, because that is the product——

The Court: I understand your position. Now, maybe you are willing to make the instruction clearer.

Mr. Dixon: I thought it was clearer, but sometimes when we dictate these things we have things in mind that may be clear to us but may not be clear to anyone else.

Mr. Williams: We would just like to add that this, to us, is inconsistent with the statement that is now a part of the preceding Instruction No. 33—excuse me—Instruction No. 32, that no claim or contention is made herein that the defendants, or either of them, attempted to monopolize.

Mr. Fowle: In other words, your Honor, this instruction would tend to lead the jury away from the idea of a [3939] conspiracy and focus their attention on what is being done by two of the supposed members of the conspiracy alone, and without reference to the conspiracy.

Mr. Dixon: I think it is part of the conspiracy, because the conspiracy charge is that they set the price, and they had the monopoly power to do so.

If we don't show they had the monopoly power to do so, then mere fixing of the prices of product oranges wouldn't mean very much.

I think, your Honor, as I read this over again, if I insert the words "over product oranges" here in line 5, after the word "power," and on line 9, after the word "make," insert the words "product oranges," that then it would be clear what the "monopoly power" refers to that is being talked about in this instruction.

The Court: All right.

What was that on line 9?

Mr. Dixon: Strike the word "them" and insert the words "product oranges."

The Court: Now, let me read it again.

All right. Any further objections to 34?

Mr. Williams: Yes. In its present form it would ban any choice of customers, because it takes the position that you must exercise monopoly power—in other words, the right to choose customers in such a way as not to restrain [3940] competition. It seems to us that it would imply that they had no right to select their customers at all.

The Court: Restrain competition and select customers are two different things.

Any further objections?

Mr. Wililams: That is all.

The Court: I will give 34 with those two amendments. The objections are overruled.

35. You say "as a part of such plan or scheme." As a part of a conspiracy or combination. Because we haven't referred in here to any scheme or plan.

Mr. Dixon: "As part of such combination or conspiracy they refused to * * *"

The Court: Yes. I tentatively approve the first sentence.

The second sentence, however, gets into this formula field.

Mr. Dixon: That is right, your Honor, it does. I found it difficult in framing these instructions to stop in the middle.

The "market" referred to there, I think it is clear—it is to me, at least—is the interstate market. That is line 17 I am talking about, your Honor.

The Court: I am looking at the words "such market" up in line 12. Shouldn't it be over the interstate market? [3941]

Mr. Dixon: The market is the market previously referred to. The citrus juices that are processed in California and sold.

The Court: Then that is all right; "such market" refers back to that.

Mr. Dixon: It is clear to me as it is. [3942]

The Court: Now, let me look at it again.

Wouldn't it be better to strike out, "and caused the plaintiff damage, you should find for the plaintiff," and insert after the word "market" on line 17, "then you may find that the defendants violated the antitrust laws"? Because you still have the question of particular acts, causation——

Mr. Dixon: That is a good suggestion.

The Court: ——and various other things.

So it now reads, line 16: "plaintiff as a competitor of Sunkist, TreeSweet and Silzle in such market, then you may find that the defendants violated the antitrust laws."

And the second sentence, "Sunkist and Exchange Orange, or either of them, were endeavoring to extend their control, and that as a part of," if you took out "such"——

Mr. Dixon: The reason I had the words "scheme or plan" is because that is frequently used by the Supreme Court or other courts where a conspiracy is the thing that is charged, because it presupposes and assumes the existence of a scheme.

The Court: This is based upon conspiracy to exercise monopoly control?

Mr. Dixon: Right.

The Court: Then we should take out "either of them." [3943]

Mr. Dixon: No, for this reason, Judge: The contracts here were made by Exchange Orange. Sunkist sold——

The Court: This is what I am thinking about. You will see in a minute. "either of them," insert tentatively, "by a combination or conspiracy were endeavoring," and so forth, "and that as a part of such combination or conspiracy."

It was the original thought you had, because you said "such scheme." Otherwise unless you get conspiracy or combination in above, you make it look as though it was an individual act, and this is slanted towards the conspiracy.

Mr. Dixon: I see your point. I think it is well taken.

The Court: All right. With those suggestions, what are the defendants' objections?

Mr. Williams: Well, the first sentence is a repetition of the last four or five lines of instruction No. 34, where it says, "Sunkist or Exchange Orange must exercise their monopoly power over the product oranges," and so forth, and that is repeated to some extent in the first sentence.

Of course, under the Capper-Volstead Act if their position in oranges is entirely lawful, and by deciding to whom they will sell—suppose they decide to make none themselves and sell to everyone, they are not extending control over the market in any way, so this would ban action that is permitted to them under the Capper-Volstead Act and [3944] the general laws.

Mr. Fowle: The point, your Honor, is that the objection to the first sentence is that under the Capper-Volstead Act Exchange Orange and Sunkist could do exactly what is set forth in that first sentence.

Mr. Dixon: What are you talking about—35?

The Court: 35.

Mr. Fowle: 35, yes.

They could do all the processing themselves, and that would extend their control, and that would probably have the necessary effect of eliminating a competitor or eliminating competition. But that is perfectly lawful under the Capper-Volstead Act.

The Court: I know. Let me read it a minute.

I propose this: That we strike the first sentence of 35 and go directly from 34 to the second sentence of 35.

I think there is merit to Mr. Fowle's suggestion.

Mr. Dixon: There is, your Honor.

Mr. Fowle: I think the same point might well apply to the last sentence of the previous instruction. That in No. 34.

The Court: They must exercise in such a manner as not to restrain competition.

Mr. Dixon: I thought I had there, originally——

Mr. Fowle: If Sunkist decides to take over the [3945] processing 100 per cent, that is going to restrain competition; but it wouldn't be unlawful.

The Court: In 34, couldn't you do this? On about line 12, "must exercise their monopoly power over the product oranges of their grower members without engaging in a combination or a conspiracy to restrain competition?"

Mr. Fowle: With outsiders. Without engaging in a conspiracy or combination with third parties.

Mr. Williams: Exchange Lemon might be a third party. You would have to exclude it, also.

Mr. Dixon: This instruction deals with particular facets of this case.

It demonstrates, I think, very well the difficulties in trying to charge on particular things in an anti-trust case, upon which instructions should and are usually given.

Certainly 35 in its present form——

The Court: Let's go back to 34, because we have the same problem there.

"must exercise their monopoly power over product oranges of their grower members in such a manner as not to illegally restrain" putting the word "illegally" in there would do it. That is a suggestion.

Mr. Dixon: Yes.

The Court: In other words, I think you gentlemen are right, they could actually be restraining competition by, [3946] for instance, processing all their oranges, they would effectively restrain it. I think the word "illegally" might do it, tentatively, in 34. "illegally restrain competition."

Mr. Williams: Where do we define what "illegally restrain" means?

The Court: It is being defined all the way through here.

Now, let's see what that does to 35.

On line 5, you could say, "could not be illegally exercised."

Mr. Williams: You wouldn't need the first sentence of 35 in any event.

The Court: Let's take that up again. The worst that can be said about that is that it is repetitious. We will take that up later.

This is line 5. "such control could not be illegally exercised so as to extend their control over citrus juice by illegal means which had the necessary effect."

Then we come down to what the illegal means are. "if you find that by a combination and conspiracy they were endeavoring," and so forth, "and as a part of the combination they refused to make oranges," and so forth. At least in my thinking that improves it.

Mr. Dixon: I agree, your Honor.

Mr. Williams: It improves it, but—— [3947]

Mr. Dixon: Of course, I have been so close to this case I see things here that are clear to me, again, but——

The Court: Don't feel badly. The defendants didn't see that, either, in 34, with all the objections they made, until they got to looking at 35.

Mr. Williams: That's right.

The Court: Those instructions let you argue whether there was a monopoly, and if there was, whether it was legal or illegal.

You are going to argue there wasn't any conspiracy, I suppose.

Mr. Fowle: That is right.

Mr. Williams: These words begin at line 7 and continue into 8, after "illegal means," the words "which had the necessary effect of eliminating a competitor." I don't think they add anything.

Mr. Dixon: You have to show the application of it to this case. That, again, is one of the charges made in the complaint.

The Court: Let's relax a minute.

(Discussion off the record.)

The Court: Going back to 34, I am going to insert the word "illegally" in front of the word "restrain" on line 13, and apply all the objections heretofore made, and overrule them and give the instruction. [3948]

On 35, I am going to insert the word "illegally" before the word "exercised" on line 5, and the word "illegal" before the word "means" on line 7.

Have you finished your objections to 35?

Mr. Williams: No. This line 8, it says, "eliminating a competitor." I think that should be "eliminating substantially all competitors," because we are dealing here with conspiracy under Section 2.

The Court: No. The only monopoly he talks about here is this background monopoly.

Mr. Dixon: That is right. This is the exercise of this monopoly power.

The Court: Any other objections?

Mr. Williams: In line 11 we have added, "by a combination or conspiracy," but it should be, "by the combination or conspiracy charged." Then it should be limited to the first or second cause of action.

They are not talking about a combination or conspiracy in the abstract. We are talking about a particular one.

It raises the Capper-Volstead question whether Sunkist and Exchange Orange can conspire. [3949]

The Court: Well, on line 13, since we have referred to conspiracy on line 11, I think on line 13, it should be "such" again. "Is a part of such."

Mr. Williams: My point is that when it says, "a combination or conspiracy," it could be construed by the jury to mean a combination or conspiracy only between Sunkist and Exchange Orange.

The Court: That could be. The jury doesn't have to find that all of the——

Mr. Williams: That raises our Capper-Volstead objection, that these two companies can't conspire.

Mr. Fowle: Also, the charge in the complaint is that there was a five-part conspiracy.

The Court: The jury doesn't have to find it all.

Mr. Fowle: But I think in this particular instruction, however, where you are just referring to the conspiracy generally, there should be a reference to the conspiracy charged in the complaint.

The Court: You could say, "by the combination or conspiracy charged," line 11.

Mr. Dixon: I have no objection to that. That's all right. There again I thought that was what we were talking about.

The Court: All right. Any further objections?

Mr. Williams: The mere fact of making contracts with [3950] TreeSweet and Silzle referred to in lines 12 and 13 is not enough to show they were endeavoring to extend their control into the citrus juice market.

The Court: Here the refusal and the contracts are coupled together.

Mr. Williams: And there is no intent required here, and there should be at least an intent.

The Court: Well, there is going to be an intent as to conspiracy from the conspiracy instructions. This can't all be used. For instance, "each party must be"—referring to Judge James' instructions —"must be actuated by an intent to promote a common design."

Mr. Dixon: Yes, Judge, I read that over or scanned it. I haven't read it all. I think his charge relates primarily to criminal conspiracy.

The Court: On reflection, I do, too, and whether we can pull stuff out of it or whether we would do better by putting our own conspiracy provisions in there, I don't know yet.

Mr. Dixon: When we get to it, I would like to discuss that.

The Court: Any other objections to 35?

Mr. Williams: I believe it should state "such refusal" referred to in line 15 was made with the purpose and intent of eliminating the plaintiff.

Mr. Dixon: Oh, no, I don't think that is necessary here. [3951] We have a charge on that in the previous sentence.

The Court: Any other objections?

Mr. Williams: That's all.

The Court: Overruled. I will give 35.

36. Are you content with 36?

Mr. Dixon: I am, yes.

The Court: What are your objections to 36?

Mr. Williams: The first paragraph has no relation to the facts here, because there is insufficient evidence to go to the jury on the question of whether the defendants had the power to determine the price and quantity of Valencia oranges. The evidence is unequivocal that the prices were below the $40 price of Sunkist, that these lower prices were charged by others, including Morgan Ward, and TreeSweet bought at the lower prices.

The Court: This is your general objection, that the background monopoly is not in the case?

Mr. Williams: No, this is a specific objection that there is insufficient evidence to go to the jury on the power to determine the price or the quantity of Valencia oranges going to processors.

The next point is that the instruction as a whole is repetitious of the two preceding instructions, 34 and 35, that the word "otherwise" here in line 19, "otherwise controlling trade and commerce" is vague and indefinite, and [3952] "otherwise controlling" is not a violation of the antitrust laws in and of itself. There may be legal means of controlling trade and commerce. That when you add lines 21, 22 and 23, which refer to specific juice products, instead of just referring to citrus juice products, which you find in line 20, that you are again confusing the issues as to what this case is about.

The Court: Before you go any further, let's hear from the plaintiff first as to paragraph 1. As I understand the objection, it is that there aren't enough facts in this case to justify this contention of monopoly power, background power over products oranges.

Mr. Dixon: With reference to that, it is the contention of the plaintiff it is almost a fact on which a judge could instruct——

The Court: Look, I am just speaking——

Mr. Dixon: I know you don't do that.

The Court: I understand your position and I understand theirs. I have already ruled on it before. Is there anything else in there that bears on that problem?

Mr. Dixon: I didn't understand the question, your Honor. Just a moment.

The Court: I think there is sufficient evidence.

Mr. Dixon: This particularizes the application of the power to the products as to price and quantity that were [3953] available to independent processors.

The Court: You are content with 36?

Mr. Dixon: Yes.

The Court: The first paragraph. What about this "otherwise controlling"? I don't think that adds a lot.

Mr. Dixon: I don't suppose it does. That is language frequently used in the courts in connection with monopoly and restraint.

The Court: All right. Any other parts? The "otherwise controlling," I have stricken.

Mr. Dixon: Then let's add the word "or."

The Court: "Or monopolizing." Any further objections? I stopped you so we would not forget what that was.

Mr. Williams: We suggested that the last three lines come out, 21, 22 and 23.

The Court: That is upon the objection you have been making about the reference to California citrus juices and particularly—this should be "trade and commerce in California citrus juices." That is the term we have been using. Line 20, strike out "products."

Mr. Dixon: In drafting these things, again this illustrates, your Honor, you have to repeat.

The Court: Any other objection to 36?

Mr. Williams: We object there is no evidence of frozen concentrate being restrained and monopolized. [3954]

The Court: Any others?

Mr. Williams: That's all of our objections to 36.

The Court: Overruled.

Mr. Dixon: 37, your Honor, deals with the question, is intended to deal with the right of the defendants to make processing contracts and the application of that right to the evidence in this case.

The Court: Let me read it then.

At 16 you start to get into trouble, "must be true processing contracts and not devices which are resorted to, to restrain trade or to monopolize * * *."

Again you would have to have certainly illegally restrain trade or illegally monopolize.

Mr. Williams: We have a further objection to the term, "true processing contracts," as vague and indefinite and object to its use at all.

The Court: This isn't tied down to conspiracy necessarily. It is part of your contention that the contracts under Section 1 illegally restrain?

Mr. Dixon: Yes, Judge. Possibly it should be tied down. I don't know. I will take a look at it. Well, I couple it there with the refusal.

The Court: So I understand this, this from about line 20 or 19 on is—I am paraphrasing—for you to decide whether the contracts entered into were true processing [3955] contracts or whether they were contracts which had the purpose and effect of extending the monopoly control by eliminating competition between Sunkist and other processors.

In other words, this, then, speaks, apart from the conspiracy or combination, of the allegation in the complaint that the defendants, eliminating the allegation of conspiracy and combination, by contracting had the intended and necessary effect of restraining trade and commerce.

Mr. Dixon: You are right, Judge, and yet——

The Court: So it raises the issue of whether you are contending that in addition to combining or conspiring to restrain trade and commerce, you are also contending that they by contracting contracted to restrain trade and commerce.

Mr. Dixon: Contract and refusal.

The Court: Together.

Mr. Dixon: Yes, together. Now, the contracts and the refusal are two of the acts specified as being part of the combination and conspiracy charged. I think if the jury, for instance, let's assume a verdict was returned here under any theory whereby the jury might be required to make findings, just to illustrate what I am talking about, I think if the jury made these two findings or if the court were hearing it and making findings of fact, and found these two findings, I think they would probably constitute sufficient factual [3956] evidence to support any judgment or verdict.

The Court: The instructions given to the jury plus the verdict are the equivalent of findings. So the question is again, it is your contention that apart from conspiracy or combination, the contracting and the refusal constitute an offense under Section 1?

Mr. Dixon: I would say so, Judge. The question is whether or not it ought to be, just in the interest of safety, as far as the plaintiffs are concerned, tied into and made a part of the combination and conspiracy.

The Court: I would agree with you. I think the contracting, at least in logic, is equally effective in Section 1 as are the combination and conspiracy, when coupled with refusal. The contracting by itself or the refusal by itself, and certainly the two of them together, I think, would constitute a violation. But whether someone else might agree with you or not is another thing.

Mr. Dixon: It is probably safer to word this instruction so that it would be part of the combination, because a verdict for the plaintiff would then be clearly based upon that fact, if there was a combination and conspiracy, and it wouldn't be necessary to search the whole record through to determine the basis of it any further than that. So there would be no law or novel question which would be presented in that sense by such an instruction. [3957]

I think perhaps in the interest of avoiding the presenting of this precise factual situation to any reviewing court, it ought to be tied in to the combination charged in the complaint.

In other words, your Honor, again to get back to the purpose of this instruction, it is to charge on the processing contract part of the case covering the right of the defendants to make processing contracts, but, however, indicating to the jury that that right to make a processing contract, so-called, is not an absolute right which is without limitation. The processing contracts as such are nowhere defined, to my knowledge, in any of the marketing acts.

In this case, it seems to me that if I were on the other side, I would take the position, "Well, these are proper processing contracts." The plaintiff, however, of course, contends that they were part of a scheme and device charged in the complaint. It would therefore seem to be one of the questions of fact for the jury to determine as to whether they were in fact such contracts as are legally permitted, shall we say, within the right given to the defendants under the Capper-Volstead Act, to make processing contracts.

It is my judgment and contention, of course, that they are not, particularly where they are made in this atmosphere and have the effect of appropriating to the use of TreeSweet and Silzle substantially all of the product oranges that [3958] the defendants had available for processing purposes to independent processors.

That is what this instruction is intended to apply to and to present that phase of the contention of the plaintiff to the jury in its proper perspective.

It might be solved in this way, ~~your~~ Honor. I am just thinking out loud now. Starting 19, something like this:

"One of the questions of fact that you are called upon to decide in this case is whether these processing contracts"——

The Court: See if this does it. On line 22, after the word "which," insert "were made pursuant to the"——

Mr. Dixon: This is line 22, Judge?

The Court: Yes, after the word "which."

Mr. Dixon: All right, your Honor.

The Court: "Were contracts which were made pursuant to the combination or conspiracy charged," and then drop down to 27, put a comma in after "contracts," strike "such latter effect," and proceed on down to "ments" on line 30.

Now, let me read it the way I would have it, about line 15. I am also inserting the word "illegally" before "restrain trade" and "illegally" before the word "monopolize," both on line 17. So that it would read like this:

"However, such contracts must be true processing contracts and not devices which are resorted [3959] to, to illegally restrain trade or illegally monopolize that part of the citrus juice market which is represented by such citrus juices as are processed in California and thereafter sold in interstate commerce. It is for you to decide whether the contracts which EOP entered into in 1951 with TreeSweet and Silsle were true processing contracts or whether they were contracts which were made pursuant to the combination or conspiracy charged and had the purpose and effect of extending the monopoly control of Sunkist and EOP over citrus juices that are processed in California and sold in interstate commerce by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts, when coupled with any refusal of the defendants Sunkist and EOP products to make oranges available for the plaintiff under comparable arrangements."

Does that do violence to what you are talking about?

Mr. Dixon: No. I think it tends to clear it up, Judge. This is one that was very difficult, frankly, for me to frame, because I got into the problem of going the whole length or not, I mean making it a formula instruction to cover all possibilities. [3960]

Mr. Fowle: Your Honor, before we make any objections, if we make any to this instruction, I wonder if we might have a couple of minutes to look it over.

I might say that I personally found this instruction very confusing.

I had a little trouble trying to figure out what was behind it.

With these changes, some of the things that we would have objected to have been obviated.

The Court: A lot of it is a defendants' instruction.

Mr. Dixon: That is right. I intended to anticipate by this——

The Court: I will look it over again. I will sip my coffee here, and we might relax a minute.

(Discussion off the record.)

Mr. Dixon: Shall we strike the word "the" in line 23 and put the word "any"?

The Court: I think the word, line 25, "by" there should be inserted "or by eliminating."

Apparently this would refer both to the conspiracy to monopolize, and it would refer, also, to the conspiracy to eliminate competition.

How does it read if you put the word "or" in front of the word "by" on line 25?

Mr. Dixon: I think instead of "any" we should use the [3961] word "such." That is on line 23.

Mr. Williams: Where does "such" go?

Mr. Dixon: On line 23. Strike the word "the" and put the word "such."

Doesn't that show definitely what is being referred to?

Mr. Fowle: What does it refer back to?

The Court: It starts out with this legal monopoly at the very beginning.

Mr. Dixon: That is what I had in mind. I don't know whether I did it.

The Court: That eliminates that "or" on line 25.

Mr. Dixon: A little word sometimes makes a lot of difference.

The Court: Because the monopoly power was legal, and therefore——

Mr. Dixon: Yes.

The Court: Have you finished reading it yet?

Mr. Fowle: I am not quite through.

Mr. Dixon: I think if we are going to put a comma after "contracts," we should make it a period and then strike the last sentence. In other words, stop there, because the refusal is tied in——

The Court: You say put a period where?

Mr. Dixon: Leave the period after the word "contracts" and strike the last sentence is the way I am thinking now. [3962] I am reading it as revised——

The Court: Going back to line 19: It is for you to decide whether the contracts * * * EOP, Tree-Sweet and Silzle, were true contracts, or were contracts pursuant to a conspiracy charged.

Mr. Dixon: Which had the purpose and effect.

The Court (Continuing): Which had the purpose and effect of extending such monopoly control by eliminating competition, when coupled with any refusal.

In other words, you are coupling the contracts with a refusal. That is your theory.

Mr. Dixon: The thing that bothers me is leaving the "when coupled" up in the air.

The Court: It might have to go in earlier.

Mr. Dixon: That is what was disturbing me, Judge. Just a minute, here.

The Court: If you are going to put it in earlier, you would put it in line 21 after the word "Silzle." Contracts entered into with TreeSweet and Silzle, when coupled with any refusal of EOP to make oranges available, were true processing contracts, or whether they were contracts, and so forth.

Mr. Dixon: You are right, there, it makes it one sentence.

The Court: I will have her retype this if we agree [3963] on it.

This is just a matter of grammar now.

Mr. Dixon: The thing that bothered me was the grammar.

The Court: This language coming after the word "contracts" on line 27, put a period there, and then going along with line 27, pick up these words, which we are going to insert earlier, "when coupled with any refusal of the defendant Sunkist or Exchange Orange Products to make oranges available to plaintiff under comparable arrangements"—pick that language up, and ~~stick it~~ in on line 21 after the words "TreeSweet and Silzle." Then it will read like this——

Mr. Dixon: That makes sense.

The Court: Beginning with line 19:
"It is for you to decide whether the contracts which EOP entered into in 1951 with TreeSweet and Silzle, when coupled with any refusal of the defendant Sunkist or EOP to make oranges available to the plaintiff under comparable arrangements, were true processing contracts," and so forth and so forth.

Mr. Dixon: That is a good instruction.

Mr. Fowle: What possible connection is there, your Honor, between a refusal, on the one hand, and the question or whether or not the other contracts are true processing contracts?

I don't see any connection. I would think the defendants [3964] would have to object to this instruction on this one ground, among others, that it is so confusing that it is very difficult to understand what it means. It lumps together Sections 1 and 2 of the Sherman Act, intermingles them so that it is difficult for me, and I would think very difficult for a jury, to sort out just what propositions of law and what questions of fact are really being submitted as the result of this instruction.

The Court: I don't think so.

Here is the skeleton of the instruction: It starts out and says defendants may have a legal monopoly and they may process their own juice, or may make processing contracts. But they may not illegally restrain trade or illegally monopolize by such contracts. Then it is for you, the jury, to decide whether these contracts, coupled with any refusal, were true processing contracts, which would be legal, or whether they were contracts that were made pursuant to the combination or conspiracy and had the purpose and effect of extending the monopoly control and eliminating competition.

Mr. Fowle: Well, assuming for the moment there is something to what you say, Judge, it seems to me that whether or not the contracts were true processing contracts doesn't have anything to do with it. What the plaintiff is driving at, it seems to me, is whether or not these [3965] contracts, themselves, along with the refusal, were a part of a conspiracy. And I don't see what difference it makes whether they are true processing contracts, or not. That injects a question here that isn't necessary for the jury to decide, and it is a vague term. [3966]

The Court: What you are really talking about is this: that maybe the term should be "legal processing contracts."

Mr. Dixon: That is all right.

The Court: Supposing we said, going down here, in line 11 they use "valid processing contracts," however, down in line 15, "such contracts must be"—could you put "legal" there, "legal processing contracts and not devices," and so forth? "It is for you to determine whether these contracts, coupled with a refusal, were legal processing contracts, or whether they were made pursuant to a conspiracy," and so forth.

Mr. Fowle: That wouldn't cure the objection, because, as I understood it, we were all pretty much in agreement that the contracts standing by themselves were legal processing contracts. They were legal contracts; there was nothing wrong with them. It is a question of what the purpose was behind them and whether or not they were part of a conspiracy.

The Court: That is where the refusal and the contracts are coupled together.

Mr. Williams: Your Honor, I am not clear in my mind, from the discussion, whether this instruction is intended to be under Section 1 of the Sherman Act, which condemns illegal contracts, or whether it is under Section 1, the part which condemns conspiracies and combinations.

The Court: I will tell you what I think it is under, because of the words "pursuant to combination or conspiracy," [3967] it is therefore under Section 1——

Mr. Dixon: Or 2.

The Court: ——and 2.

Mr. Dixon: That is right.

Mr. Williams: That doesn't quite answer my question whether it relates to contracts or relates to conspiracy, or is it an amalgamation of both?

The Court: We have taken the proposition out that the contracts alone and the refusal would be a violation. We required that there be a finding of conspiracy or combination.

Mr. Williams: Then this is objectionable because there is no issue—it is objectionable because it poses the issue to the jury whether these contracts are legal or are illegal, and that is not in issue. They are really legal in themselves.

The Court: It doesn't pose the question of the contracts alone. It poses the question that if the contracts were a part of a conspiracy, and it couples them with the refusal.

Mr. Williams: It is immaterial in this case, your Honor, whether—if the contracts were part of a conspiracy, once you assume that, that they were part of the conspiracy, it is then immaterial whether they were legal or illegal, because they are one of the means used to further the conspiracy.

Mr. Dixon: I agree with that.

Mr. Williams: So the issue need not go to the jury to [3968] decide whether they were legal or illegal. If they find a conspiracy, then it is an immaterial question.

The Court: Actually this is largely your idea of a defense instruction?

Mr. Dixon: In a sense it is, Judge. This is not facetious, counsel.

The Court: If it is, you want to object to it?

Mr. Fowle: Then it isn't a very good one from our point.

Mr. Dixon: The plaintiff again concedes that all these things that are set forth in this instruction, that they can do that; but where we start to part company with the defendants is that we say, under the general principle of law that a legal contract, when used to effect an illegal purpose, becomes illegal——

The Court: I understand your position, and I am trying to understand——

Mr. Williams: Ours is that that is immaterial.

The Court: It seems to me, however, that your instruction is too narrow, if it is going to represent your view of the case. In other words, it seems to me that the contracts and the refusal could be properly considered under either the conspiracy to restrain trade and commerce, the conspiracy to monopolize, or the monopolization.

Mr. Dixon: Right, your Honor.

The Court: Therefore it seems to me there ought to be [3969] "or" again before the word "by," and there ought to be another phrase in there to really present your theory on the contracts.

I am going to show you what I think it ought to be, and then we can pass it up and you can study it over the noon hour. [3970]

* * *

Mr. Dixon: Judge, I will be glad to give you my thoughts on this.

The Court: First of all, if it is worse than we were before, then let's go back to the old one.

Mr. Dixon: No, I think my first suggestion would be to eliminate the second page, starting with the word "or" on the first line. On line 27, strike the words "or monopoly," and add the words "and monopoly," and on the next line, strike the words "affecting or," and then on line 30, I think maybe the tense is wrong. "Were." It relates back to acts previously done.

The Court: I picked that up out of yours.

Mr. Dixon: Yes. I noticed it was the same. The next line, strike the words "or of," and insert the word "by."

The Court: Well, then, we had better go back to what you have got there on this.

Mr. Dixon: This does it, Judge, with those slight changes, as far as I am concerned.

The Court: Then we go back to yours, because the only real addition, outside of dressing it up, was the changing of the word "by" to "or" and adding the phrase on the second page. Go back to 37 as it was, and let me make one suggestion and then see how that reads. [3971]

Mr. Dixon: All right.

The Court: Now, on line 21, after the word

"Silzle," you have that business about "when coupled with," going in there.

Mr. Dixon: Yes.

The Court: And on line 23, after the words "Sunkist and Exchange Orange Products," then inserting in between the lines, "from the Valencia product oranges to the," and striking "over." So that it reads, with the context and so forth, "were true processing contracts"—strike the word "true" and put in "lawful."

"were lawful processing contracts, or whether they were contracts which were made pursuant to the combination or conspiracy charged and had the purpose and effect of extending such monopoly control of Sunkist and EOP from the Valencia product oranges to the citrus juices which were processed in California and sold in interstate commerce, by eliminating * * *"

Mr. Dixon: I have no objection to that. I think that in a sense clarifies my thought.

The Court: Well, wait a minute. I can make it even clearer. That insert there between 23 and 24, it might be clearer if you said, "from the monopoly control, if any, of Valencia product oranges to the citrus juices," so that it [3972] will read, "had the purpose and effect of extending monopoly control of Sunkist and——"

Well, that won't do it either. [3973]

Mr. Dixon: We have already identified monopoly control by the word "such" in line 23, that is why I suggest that you don't need it in again.

The Court: I think we will go back to the revision. It is easier to read now.

Have you got the revision on 37?

On line 16, change the word "true" to "lawful."

And on line 17, strike out "to illegally restrain trade," and we will stick it in below. Stick it in on line 18 after the word "charged." It makes better sense that way.

Mr. Dixon: "* * * to illegally restrain trade" —yes.

The Court: Now, on line 25, change the word "true" to "lawful."

And on line 27, strike out "monopoly" and put in "conspiracy."

That was miscopying by my secretary.

Mr. Williams: And "and" instead of "or."

The Court: And on line 28, strike out "or" so it will read "effect of extending."

And leave the word "as" like I changed it, and then the insert I gave you before, "may have already had over product oranges to the citrus juices." This is modifying the word "extending," "extending such monopoly control as Sunkist and EOP may already have had over product oranges to"—no comma in there, and then a comma after "oranges," "to the citrus [3974] juices that were processed."

On line 31, change "or of" to "by."

Then we go on the second page to the words "such contract," period, and strike out the rest.

Mr. Dixon That is agreeable to the plaintiff, your Honor, as revised.

The Court: Let me read it once more.

Mr. Fowle: Do you wish to hear from us?

The Court: Not yet. I wish to read it once more. Change "valid" on line 11 to "lawful."

All right. What are the defendants' objections?

Mr. Fowle: I am sorry to say, your Honor, that we have a number of them. I hate to prolong this.

In the first place, we object to that portion of the first sentence which states, begins on line 3, "that are available to independent processors," and so on.

If it is going to be stated that the defendant Sunkist is permitted under the law to acquire a legal monopoly over Valencia oranges, I think it should stop there. That is to say, if we are entitled to have a legal monopoly over Valencia oranges, it isn't just the Valencia oranges that are available to independent processors. It should refer to Valencia oranges generally. [3975]

Mr. Dixon: Well, I think that might be a good suggestion. Let me make this suggestion. "The amount of Valencia oranges and such product oranges as are available for processing into citrus juice products by all persons."

Mr. Fowle: Well, that is products oranges.

Mr. Dixon: Well, I don't care if we start there.

The Court: Why don't you say "Valencia oranges and Valencia product oranges"?

Mr. Dixon: I was willing to start with "the amount of Valencia oranges," start there, and strike out the words "available to independent processors for processing into citrus juices," if you want to use that term again.

Mr. Fowle: Why not leave it just "product oranges"? That carries with it everything that——

The Court: He is talking about something else. He suggested it read, "legal monopoly over the amount of product Valencia oranges"——

The third line, "that are available for processing into citrus juice products."

He inquires whether you want citrus juices instead of citrus juice products. It doesn't make any difference.

Mr. Fowle: I don't think that makes much difference, but it seems to me the point here is that Sunkist is permitted under the law to acquire a legal monopoly over the amount, or over product Valencia oranges, period, and you [3976] don't need to limit it to anything else.

The Court: "over product oranges that are available for processing." I struck out the "amount."

Mr. Fowle: I don't think you need to go on to say "that are available for processing." That is the point I have.

Mr. Dixon: The reason that is important, counsel, is that that is the problem that is involved in this case.

The Court: That is all that is involved here. Your objection on that point will be overruled. You mean we shouldn't single out "and processing into juices"?

Mr. Fowle: I don't think we should single out the products available to independent producers.

Mr. Dixon: We took that out.

The Court: We took that out, so it reads now, "acquire a legal monopoly over product Valencia oranges that are available for processing into citrus juices," and so forth.

Now, what is your next one? That one is overruled.

Mr. Fowle: The next point, and this deals with the next sentence, the sentence beginning line 5, which says:

"Sunkist and Exchange Orange could in 1951 have processed all such oranges,"

and so forth,

"and not have made any of them available to independent processors, if they had cared to [3977] do so."

In the first place, under the evidence here, I think it is perfectly clear Sunkist or Exchange Orange could not have processed all such oranges.

The Court: Let me see. "Could legally." Is that what you mean? "Could have legally processed." You are not talking about the physical thing. "Could have legally processed." That's a good suggestion.

Mr. Dixon: Yes, that is acceptable.

Mr. Fowle: It still leaves the inference, this whole sentence leaves the inference that they had the capacity to do it and that if they had wished to exercise a whim to use their entire capacity, they could have done that, or they could have made up their minds for no reason at all to make some of it available.

The Court: That objection is overruled, because the next sentence takes care of that.

Mr. Fowle: Well, this sentence ends up, your Honor, with the phrase, "if they had cared to do so." The "cared to do so" has nothing to do with this. Whether or not they process the oranges that are available is an economic situation.

The Court: "If they had been able to and cared to do so." That's a good suggestion, Mr. Fowle.

Mr. Fowle: Well, we still dislike and object to the phrase "and cared to do so." I don't want to push too far. [3978]

The Court: Now it is coupled with "had been able to and cared to do so."

Now, the next objection?

Mr. Fowle: The next objection is that in the following sentence, the one beginning on line 9½, I guess it is, it doesn't make it clear that the citrus juices processed might have been sold to prospective buyers, including independent processors. I don't know whether I have made that clear.

The Court: I know what you mean. Let's see. How about adding at the end of the sentence——

Mr. Fowle: I would suggest after the word "buyers" on line 15½ on my copy, there be a comma, and the phrase "including the independent processors."

Mr. Dixon: If it comes at the end of the sentence, it reads better.

The Court: Yes, I was going to put it at the end. It reads better at the end of the sentence, Mr. Fowle.

Mr. Fowle: All right.

The Court: "including independent processors."

Mr. Fowle: Well, then, as Mr. Williams points out, the phrase "in interstate commerce," is too broad. It should be "intrastate or interstate commerce."

Mr. Williams: Leave out the phrase entirely. "including independent processors" and then period.

The Court: That's all right. Any objection to that? [3979]

Mr. Dixon: Oh, I guess not.

The Court: What's the next one?

Mr. Fowle: The next objection is that the alteration of the word "true" to the word "lawful" does not really meet the objection that we raised this morning.

The Court: You mean in your Volstead Act exemption?

Mr. Fowle: Well, it is partly that, but it is also that by using the word "lawful" or "true," either one, in front of the expression "processing contracts," the instruction tends to flag the proposition of the legality of the contracts themselves. We have taken the position that these contracts are in and of themselves lawful.

The Court: Well, that objection is overruled. If you want a better word, all right, but the sentence shows, "must be lawful processing contracts and not devices," and so forth, so the general objection that in all events these contracts were legal is overruled.

Now, what other objection do you have?

Mr. Fowle: Just a second. I am trying to figure out what changes are in this sentence.

The Court: I suggested putting the "illegally restraining trade" down in a different place to make it read a little better. [3980]

Mr. Fowle: The next objection, your Honor, is in the sentence beginning on line 21, "It is for you to decide"——

Mr. Dixon: May I go back for a moment? I don't mean to interrupt, but I think perhaps a period should be put on line 5 after the word "thereof," for this reason——

The Court: Wait a minute. "including independent processors"?

Mr. Dixon: Should be stricken, yes.

The Court: No. Why?

Mr. Dixon: An independent processor is of course a prospective buyer. TreeSweet and Silzle, in a sense, are independent processors, there is no question about that. They are included within the realm of prospective buyers——

The Court: I am just particularizing. Your objection is overruled on that.

Mr. Dixon: All right.

The Court: Now go ahead.

Mr. Fowle: The next objection is that in the sentence beginning, "It is for you to decide," on lines 21 and 22, it is not made clear that the refusal of the defendant Sunkist or Exchange Orange to make oranges available must also have been pursuant to the conspiracy charged here.

I think maybe it is made clear that Silzle and TreeSweet [3981] contracts must have been pursuant to the conspiracy, but I don't think it is made clear that the refusal of Sunkist or EOP to give comparable arrangements to the plaintiff must also have been pursuant to the conspiracy.

The Court: Well, that logically follows.

Line 24, after "EOP" insert "pursuant to"—what did you say, combination or conspiracy? Which one comes first?

Mr. Dixon: Combination or conspiracy.

The Court: All right.

Mr. Fowle: The next objection is this: There is the statement there beginning along about line 28, "had the purpose and effect of extending such monopoly control as Sunkist and Exchange Orange Products may have already had"——

The Court: "over product oranges."

Mr. Fowle: ——"over product oranges, to citrus juices that were processed in California."

We have what I think is a fundamental objection to this, because it isn't charged in the complaint that there was any scheme or plan to extend the monopoly, if there was one, of Sunkist or EOP over product oranges, to an additional field, that is, citrus juices produced from the oranges.

The Court: It is not charged in those words, but it alleges that you did have the monopoly control over product [3982] oranges, and then alleges these other things, so inferentially it is just a choice of words.

Mr. Fowle: My point is this, Judge: That the complaint charges that there was a conspiracy on the part of five people, five organizations, Sunkist, EOP, ELP, TreeSweet and Silzle to monopolize citrus fruit juices. And to say here that there is an effort to extend the monopoly of EOP and Sunkist from one field to another doesn't follow the charge in the complaint.

The Court: I don't think you read the complaint right.

Mr. Fowle: It has been amended.

The Court: I have the amended complaint here. This is what it says:

"Sunkist, EOP and ELP have a monopoly control over the production and distribution of fresh citrus fruit." [3983]

Mr. Fowle: But the charge with respect to the conspiracy, though, is that it is a conspiracy on the part of five people to get a monopoly. So that what the charge really is is this: that the monopoly control of EOP and Sunkist is pursuant to this conspiracy somehow or other being used to obtain a monopoly for five organizations instead of two.

Mr. Dixon: No. That doesn't necessarily follow.

Mr. Fowle: That is what the complaint charges.

Mr. Dixon: A judgment is sought against the defendants who, under this charge, are alleged to have had and to have exercised monopoly power over the product oranges by doing these things, into the citrus juice field.

The Court: We could maybe obviate this. It all hinges on the word "extending." We could obviate this by saying, line 26, "or whether they were contracts which were made pursuant to the combination and conspiracy charged and had the purpose and effect of monopolizing the market in citrus juices," and take out this "extension of monopoly control over product oranges into juices."

The word "extending"—you start out with three people alleged to have a monopoly in one thing, and then you talk about extending it. Strictly speaking, that isn't what the plaintiff claims. He claims that this alleged monopoly over product oranges was the backdrop, was something that existed. With that setting, they then allege a conspiracy of the [3984] five of them to monopolize.

Can you work it that way and get rid of the word "extending"?

Or you can say, "the purpose and effect of also exercising monopoly control over the citrus juices."

Mr. Williams: That is not an offense.

The Court: Monopolizing?

Mr. Williams: Exercising monopoly control.

Mr. Dixon: It may be if it is done for the purpose of eliminating competition or maintaining a monopoly.

The Court: "* * * had the purpose and effect of monopolizing the market in citrus juices"?

Mr. Dixon: Judge, here is the thought that I have on this. I think we are making headway on it.

On line 27, "combination and conspiracy charged"—that is the two of them, Sections 1 and 2, so "combination and conspiracy charged," and "had the purpose and effect of restraining interstate trade and commerce and monopolizing."

Strike all that.

"* * * had the purpose and effect of restraining and monopolizing interstate trade and commerce"——

The Court: Do you want "and" or "or"?

Mr. Dixon: In the alternative.

The Court: "* * * interstate trade or commerce"——

Mr. Dixon: ——"in citrus juices, particularly single-strength [3985] Valencia juice, processed in California and sold in interstate commerce."

That ties it right in to both Section 1 and Section 2. And it applies this processing contract to the facts.

I think that will do it, Judge.

The Court: You are leaving out the last two lines, then?

Mr. Dixon: They could go in, yes. It shows how it was done by eliminating competition, which would be a proper part of the charge.

The Court: Let me see if I have got it as you have.

Line 26:

"which were made pursuant to the combination and conspiracy charged and had the purpose and effect of restraining and/or monopolizing interstate trade and commerce in citrus juices, and particularly single-strength Valencia orange juice, processed in California and sold in interstate commerce, by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts."

Mr. Dixon: I think that is clear, and I don't think it can possibly be subject to objection. I presume it will be by defendants.

Mr. Fowle: I approve of the alteration so far as it [3986] goes.

The Court: Let's go ahead with your objection now.

Mr. Fowle: "* * * affecting or extending such monopoly control as Sunkist and Exchange Orange Products"——

Mr. Dixon: That is out.

Mr. Fowle: The last objection we had, your Honor, was to the phrase "by eliminating competion between Sunkist and such processors in the interstate market."

The evidence would indicate in our view that the Silzle and TreeSweet contracts, rather than eliminating competition, stimulated competition. [3987]

The Court: Can we eliminate the last two lines?

Mr. Dixon: What's that?

The Court: Stop right at "commerce" on 30.

My point is different from Mr. Fowle's. Reading it grammatically, you have "monopolizing by eliminating competition." I don't know whether that follows.

Mr. Dixon: It does. It follows "monopolizing by eliminating competition." I mean it applies to either "restraint of trade" or——

The Court: Objection overruled. We will go ahead with the objections.

Mr. Fowle: You monopolize by eliminating competition of the plaintiff or others who are not involved here, but you are talking about eliminating competition between Sunkist and TreeSweet and Silzle, and my point is that the contracts, the Silzle and TreeSweet contracts stimulate competition, and they didn't eliminate competition between Sunkist and Exchange Orange or TreeSweet and Silzle.

The Court: They eliminated competition if the jury decides the effect of them was to substantially fix prices.

Mr. Williams: If they didn't get any oranges, they would have been out of business, possibly. To that extent, they furthered competition.

Mr. Fowle: Your Honor, if it is the price-fixing element that lies back of this phrase, "by eliminating competition," [3988] which I suspect was lying back of it, but isn't expressed here, then we should have the general objection that price fixing was not pleaded in the amended complaint and the evidence does not support price fixing in any event.

Mr. Dixon: Well, it is tied in, Judge. I don't suppose it makes much difference whether it is taken out or it is in.

The Court: Well, it looks all right to me.

Mr. Dixon: I think it is all right as it is myself.

The Court: All right. Objection overruled.

Mr. Williams: I had an objection, your Honor, in that it is immaterial whether the contracts were lawful processing contracts or were not. Perhaps I made that point this morning.

The Court: I think you did. That is overruled.

Mr. Williams: Then we will rest on what I said this morning.

Mr. Fowle: I take it your ruling is this will be given as modified.

The Court: Yes. Let's go back to K, which the girl typed over the lunch hour. I will hand you copies of it. There should be a comma on line 29, after 1951. And on page 2, a comma after 1951.

Well, I have to go upstairs to see one of the Circuit Judges.

(Interruption.) [3989]

The Court: Is K tentatively okay?

Mr. Dixon: The only suggestion that I have, your Honor, is maybe a typographical error, where it should be "combined or conspired" on line 30.

Mr. Williams: Is there any distinction between combination or conspiracy?

The Court: I don't know.

Mr. Dixon: It is just the language of the statute.

Mr. Fowle: What line is this?

Mr. Dixon: 30. It would infer that the two things had to happen.

The Court: All right.

Mr. Fowle: We have a couple of suggestions, your Honor.

We don't want to barge into what is a statement of the plaintiff's theory here, but in several places the word "defendants" is used alone, and I think you mentioned this morning, yourself, that perhaps you would want to couple that with "and alleged co-conspirators."

If you will look at line 21, the beginning of that fourth paragraph, "We come to, then, what plaintiffs contend are violations of the antitrust laws by the defendants." That is repeated in three or four different places.

The Court: "by the defendants and co-conspirators." That is all right, isn't it?

Mr. Dixon: I didn't notice that, myself. [3990] The nature of the combination will be set forth, I assume, in the charge. In the last paragraph of page 1, "contend that the defendants and co-conspirators," the words "and co-conspirators" should be taken out, because of course no judgment or anything can be acquired against the co-conspirators.

The Court: I know, but you contend that they all conspired.

Mr. Dixon: Yes. But they don't all have to.

The Court: I know, but this is your broad contention. It seems to me it ought to be in line 22—"defendants and co-conspirators," and it ought to be in line 24, "defendants and co-conspirators."

Mr. Fowle: Would you go along with calling them "alleged co-conspirators"?

We don't care what you call TreeSweet or Silzle, but we would like to have Exchange Lemon called "alleged co-conspirator."

The Court: I don't see any objection one way or the other.

Mr. Dixon: All right, Judge, put it in as "alleged co-conspirators," if you want it in.

Mr. Fowle: That is true, also, on line 24. "Plaintiffs contend that the defendants combined"——

The Court: Yes. [3991]

Mr. Dixon: If this is coupled with the general charge, as I know it will be, any two or more combined and conspired, I have no objection to it.

The Court: Yes.

All right.

Mr. Fowle: On page 2, the first full paragraph, the word "defendants" is also used alone.

Mr. Dixon: I don't think it should necessarily be "and co-conspirators" in all places.

For instance, in line 23 it should be the way it is, "antitrust laws by the defendants," and what the plaintiffs contend, and so on. Then the plaintiffs contend that the defendants and alleged co-conspirators, if you want to put it in there I have no objection.

The Court: I don't think it hurts in or out on line 23. It is your position. If you want it out, I will take it out.

Mr. Dixon: I would rather have it out, because we are only seeking judgment against the defendants.

The Court: It is in on line 30 properly, and I don't think it belongs on line 3 of page 2. You don't claim that the co-conspirators monopolized, do you?

Mr. Dixon: No.

The Court: You claim the defendants monopolized?

Mr. Dixon: Yes. [3992]

Mr. Fowle: I wouldn't agree with that. The charge is that the defendants and co-conspirators monopolized, and they did it successfully. They all did it.

It is true the jury doesn't have to find that they all did it, but that is the charge.

The Court: But the plaintiff can contend for less than his charge.

Supposing a defendant had a certain defense in, and you come to summarizing what his defense is, and he says "I am not going to rely on that," do you think it would then be proper for the court to want to put in a defense they don't want to rely on?

Mr. Fowle: No.

The Court: The plaintiff says, We are just relying on monopoly by the defendants.

Mr. Fowle: I don't wish to labor the point. It is true, also, on line 10 on the second page. [3993]

The Court: Well, I think it should go in there. You see where that is, Mr. Dixon?

Mr. Dixon: Yes. My only objection, as I said, your Honor, on this is, as long as it is made clear to the jury by proper instructions, as it will be, so they don't get the idea we have to prove that they were all——

Mr. Fowle: There is one further point on line 25 or 26, whichever it is, of the first page. The plaintiffs contend that the defendants and alleged co-conspirators combined, conspired and contracted.

That "and contracted" is the problem that we discussed this morning. I wasn't quite sure whether that aspect had been removed.

The Court: Here it is coupled with a "and." If it was "or," under what we did this morning, it would be out. Here it is an "and" and it is properly in. What I did this morning was to eliminate it as an "or" standing by itself. We certainly didn't eliminate it any other way.

Mr. Williams: Well, I am not quite clear that I understand it. You mean one offense is conspiring and contracting, or is contracting a separate distinct offense?

The Court: It is the language of the statute.

Mr. Williams: It is "or contracting." I think contracting is a separate offense under the statute.

The Court: Here the contention is contracting is part [3994] of this conspiracy.

Mr. Dixon: That is correct.

Mr. Williams: Then it isn't a separate offense. If it is part of the conspiracy, then the words "or contracted" should come out, because they are included in the words "combined and conspired."

The Court: Objection overruled. I will give K as it is.

Now we will go back. Before we get to L, we go to plaintiff's 9, which we passed over because I was going to look over the Judge James instruction. I think it is a proper statement of the law. Any changes you want to make in it?

Mr. Dixon: No. It states the general law of conspiracy.

The Court: On line 5, the "or" should be "of," should it not?

Mr. Dixon: Oh, yes. That is a typographical error.

The Court: Any objections to 9?

Mr. Williams: It leaves out some of the material contained in the third paragraph of the Judge James form.

The Court: Well, I am going to pick up that later on. What is that?

Mr. Williams: Actually, No. 9 duplicates paragraph 3 of the James form as to what constitutes a conspiracy.

The Court: Then it leaves out what? Some of 3 or 4?

Mr. Williams: 3, I think.

The Court: There is a lot left out. Success or failure [3995] isn't important here. Well, it certainly doesn't cover all the law of conspiracy, because there are three instructions here, and then I have L proposed. So as far as it goes, and we will pick up loose ends later on, is there any objection to 9?

Mr. Williams: There is no evidence of any invitation to participate in the plan, so that statement should be omitted from the instruction. It is inapplicable to the facts of this case and tends to confuse the jury.

The Court: You can say an implied invitation.

Mr. Williams: But there isn't any evidence of any invitation. I am thinking of the factual situation.

Mr. Dixon: There is no direct evidence of any invitation, unless you want to take the invitation to Silzle as an invitation.

The Court: Then take it out.

Mr. Williams: The entire sentence comes out?

The Court: The entire sentence comes out. Any objection other than that? I will give it.

Mr. Dixon: That takes out the essence of the conspiracy which should be in the conspiracy part of the charge somewhere, Judge, as I know you are aware of.

The Court: We may have to work it over again. When we get through with them, you can look it over and see what is left out. [3996]

10? What is the objection to 10?

Mr. Williams: No objection.

The Court: All right. 11?

Mr. Williams: There should be a "common unlawful purpose."

The Court: Should be what?

Mr. Williams: An unlawful purpose in line 3, between "common" and "purpose" at the end of it. In this case there isn't any——

The Court: "Common unlawful purpose." Any objection to that?

Mr. Dixon: No.

The Court: Other than that, it is all right?

Mr. Williams: Yes. Again, this is the same subject matter covered in the James draft and we request the language of the James draft in paragraph 3.

The Court: You say you request the language?

Mr. Williams: Yes. We prefer the language in paragraph 3 of the James draft. The last two touched on parts of it.

The Court: Well, it's pretty close. I will give 11.

That brings us down to L. The first paragraphs I composed and the second paragraph I copied off of James. What do you say to L?

Mr. Williams: No objection.

Mr. Dixon: Just a second, Judge, until I get L. It is right here at the bottom. Just a moment. [3997]

* * *

19?

Mr. Dixon: This is one, Judge, that I had in mind with reference to the application of the law of conspiracy and the proof, and the type of proof required, to the evidence in this case.

The court's L, in a sense, is background and essential, I think, to any conspiracy charge, but I suggested this one and had this in mind primarily because it is an application of the principle of the leading cases.

The Court: Let me read it.

Well, the word "intra" should come out in both places, shouldn't it?

Mr. Dixon: Yes.

The Court: It appears on line 13½ and line 17½.

"* * * but may be shown by circumstantial evidence," down at the next to the last line, and the way you have it worded, it is an indication to the jury they may draw this inference.

I think it should read, "may be shown by circumstantial evidence," and strike out "from," and say, "and from all just and reasonable inferences which may be drawn."

Mr. Fowle: How does that read?

The Court: The last two lines will read, after the words "circumstantial evidence," "and from"—strike out [3999] "which"—"all just and reasonable inferences which may be drawn."

Do you see what I mean?

Mr. Williams: Yes.

Mr. Dixon: It is satisfactory to the plaintiff as modified.

The Court: What are the defendants' objections? [4000]

Mr. Williams: The first objection is that it relates to an attempt to monopolize, because it relates only to an offense by Exchange Orange or Sunkist Growers. It is not related to a conspiracy charge in any way.

Mr. Dixon: This, Judge, relates to one of the six elements, or six acts charged to be a part of the conspiracy.

The Court: But the defendants' point is that you have got it tied down to monopoly, but not to any combination or conspiracy.

Mr. Williams: It also contains the words "or monopoly control" beginning at the end of line 14 and into line 15.

Mr. Dixon: Yes.

Mr. Williams: Which should come out.

Mr. Dixon: It should be in, because the alleged refusal is a part of the conspiracy to violate both Sections 1 and 2 of the Sherman Act.

Mr. Williams: Section 2 is in here in the preceding words in line 14, where it reads "or maintain a monopoly."

Mr. Dixon: "to eliminate the competition of the plaintiff in the interstate market." That is Section 1, that is your restraint of trade. "or to create or maintain a monopoly or monopoly control," that is your Section 2.

Mr. Williams: "or monopoly control" is not the language of Section 2.

Mr. Dixon: You are right. [4001]

Mr. Williams: When you say "or maintain a monopoly," that has covered Section 2, and the rest should come out.

Mr. Dixon: I have no objection to striking the words "or monopoly control."

The Court: All right. It may go out.

Don't you think there should be a reference, at about line 11, was pursuant to the combination or conspiracy?

Mr. Dixon: Of course the refusal here was made by both Exchange Orange and Sunkist. Now your question relates, I assume, to whether it should be further amplified? I mean, that is one of the parts of the conspiracy, and possibly it should be, Judge.

The Court: Insert after "pursuant to" on line 11, "the combination or conspiracy charged and a purpose." "or" wouldn't do it.

Mr. Dixon: What was that, now?

The Court: On line 11, after the word "to" insert "the combination and conspiracy charged and." [4002]

Mr. Dixon: I might suggest "the combination or conspiracy," not the "and."

The Court: "or conspiracy"?

Mr. Dixon: And then what is it?

The Court: Then go right ahead.

Mr. Dixon: If the word "or" is used between combination and conspiracy, the jury should be instructed as to the difference between the two, because the "or" implies there is a difference.

The Court: Well, it doesn't make any difference. I said I was going to give an instruction that combination and conspiracy meant substantially the same thing.

Mr. Fowle: Your Honor, there is really a more basic objection, I think, to this entire instruction. We would have no objection, of course, to an instruction in which you tell the jury that direct evidence isn't always necessary, that sometimes circumstantial evidence is sufficient, but to couple that kind of an instruction with an instruction which deals with a lot of other things and which, as a matter of fact, as you yourself pointed out a moment ago, again deals with only one of the six acts, seems to me to put this whole proposition of direct and circumstantial evidence to the jury in a light in which it should not be put. This deals with only one of the six acts. Now, you have an instruction, I believe, in your mimeograph material which, as I recall it, [4003] deals with the subject of direct evidence and circumstantial evidence, and we have no objection to that. But I think to couple it with one of the six acts charged in the amended complaint, and limit it to that would be misleading to the jury and prejudicial. We would, I think, most certainly have an objection to this instruction on that ground.

The Court: Well, it presents a question of policy and it presents a question of what, for want of a better name, I term trying to even up the instructions. You get cases where you are trying to formulate your instructions and you get something that is lopsided, and sometimes an instruction which would otherwise be proper, you pull out. I will make a note of your suggestion on it, and you properly state the problem. That is this problem of direct and indirect evidence applies to all the evidence in a case.

Mr. Dixon: I agree to that, Judge, it does.

The Court: So I will know more about it when I look at these as a whole.

Mr. Fowle: May we mark this "held in abeyance"?

The Court: So that we will have a record that there won't be any question about, I am going to indicate a further change or two, and then I will indicate I will give it unless the matter comes up later on.

Down on line 18, I think there should appear "such a combination or conspiracy or [4004] purpose."

Mr. Dixon: "such a combination or conspiracy or purpose," is that correct?

The Court: Yes. Then I made a note "This applies to direct or indirect evidence in all respects. Should I use?"

I will pass on it later. Are there any other objections other than the objections noted?

Mr. Williams: This one has the limitation in it with respect to juice processed in California, and I recall that this morning they did not mention that limitation, that you can't monopolize the juice processed in California if it is the same type of juice, comparatively speaking, as that from Florida.

The Court: You may have that objection to all of these instructions. That is a general objection.

Mr. Williams: A general objection.

The Court: On your theory of what the instructions should be that runs to all of these.

Mr. Williams: Yes. If we may have just that general objection and it goes back to those where we did not state it, your Honor.

The Court: All right. 20. Can we get rid of 20?

Mr. Dixon: Yes, I think so, Judge. Take it out.

The Court: You are very agreeable today.

Now, before we go to 2, which is the remaining one there, I have looked over another instruction which we passed, [4005] instruction 5, which was this question we talked about in court yesterday, whether there was a question of fact. I don't think this is offensive now that I read it carefully. I think it actually leaves to the jury as a question of fact that problem. It now reads: I have inserted,

"The complaint defines citrus fruit juices as natural and frozen concentrate juices processed from by-product fruit. I charge you that the single-strength orange juice and other citrus juice products produced in California and sold in interstate commerce constitute part of the total trade in commerce,"

There can't be any objection to that, because they do constitute a total part of these products.
"and may be the subject of restraint and monopoly under the Sherman Act."

Therefore, it is left to the jury under that instruction whether they have monopolized that part.

Mr. Williams: Our objection is that it does not clearly do that and it could be construed to mean that the court had already decided that it was an identifiable segment of commerce subject to monopoly. We feel there ought to be a specific instruction submitting that to the jury, and we have prepared one and served it today.

The Court: We *will that* up later. Let that ride for [4006] the time being. Of course, Mr. Dixon contends that almost as a matter of law I could say this is a segment.

Mr. Dixon: I think you could and it would be perfectly proper.

Mr. Fowle: Without any evidence at all?

Mr. Dixon: You have evidence here of a substantial volume of dollar commerce involving citrus juices processed in California and sold in commerce.

The Court: Let's go to 2. On line 8, after the words "conspire together and/or with others"——

Mr. Dixon: May I make this suggestion, your Honor, that we add the words "combine or conspire" since we have used that in the other charges?

The Court: "combine or conspire together"?

Mr. Dixon: "or with others."

The Court: I don't like that "and/or" either. It doesn't add anything.

Then I propose to add, "subject to other instructions concerning Capper-Volstead Act and Section 6 of the Clayton Act and exemptions therein contained."

Mr. Fisher: Just by an addition?

The Court: Yes, an addition to the instruction.

Mr. Fowle: May we have that language again, your Honor?

The Court: I thought you wrote it down. I will give it to you again. We were discussing these. I had another [4007] alternative which I discarded.

"Subject to other instructions concerning the Capper-Volstead Act and Section 6 of the Clayton Act and the exemptions contained therein."

In other words, your objection to this instruction is another one of your general objections where you disagree with my theory of the case. Your contention is that those exemptions are so broad that in no event could these defendants conspire among themselves, although you do concede, probably, that they could conspire with others?

Mr. Fowle: That is correct. We concede they could conspire with others, but it is our position that they could not conspire together.

The Court: Of course, the word conspire connotes either an illegal means or an illegal purpose. So when you say conspire among yourselves, that certainly sets it off aside from, let us say, the act of Sunkist and EOP of sitting down and saying, "Now, let's make all the orange juice, make all the orange products into juice in Southern California. We want to do it because we want to make some money for our growers."

There they are acting together in concert but they are not conspiring. They are carrying out the purpose for which they are set up.

As soon as you say they conspire together, the cases [4008] and all the instructions will tell you that the word conspire is a dirty word and carries a connotation of unlawful means or an unlawful purpose.

I think you could find other analogies where people might do a certain act for one purpose and not violate the law, but when they do the act for another purpose, then they violate the law. It runs all through the criminal law on such matters where specific intent is required. In other words, a man does a certain act, and if you don't find the specific intent, it is a lawful act. If he does it with the specific intent, feloniously, unlawfully, and the terms that they use, then it is a felony.

We may be in disagreement, but I think fundamentally that is the distinction that I see in these sections.

Mr. Williams: I am not sure that we have had it pointed out, your Honor, that Sunkist and Exchange Orange should be treated as though they were a single company, and Exchange Orange is just one part of it.

The Court: I understand that point, too, but your objection on that ground is overruled. Do you have any further objection?

Mr. Williams: I think we stated all our objections to that when it first came up.

The Court: I will give it with that [4009] modification.

* * *

Now, let's start in on some of these defendants' instructions.

Let me say again, I had one general objection to your instructions, and I will tell you, in theory, what it was. This will come up time and time again.

You proceeded in your instructions to chop this case into little pieces, and then you took little piece A and said, "This act is lawful, therefore if you find that they did this, you will exclude this from your consideration." And you took B and said, "This is perfectly lawful," and excluded it.

That is one way to do it, but I disagree with you. It omits entirely the possibility that these acts together may be unlawful, and we have already discussed that as to my views on the interplay of the forces of the contracts and refusal. Do you follow me on that?

Mr. Fowle: Yes, we follow you.

The Court: Therefore—I may be wrong, but the view I take is that the contracts and the refusal, and some of these [4013] other things, too, are part of the forces or the background that was operating at the time the refusal was made, and therefore you can't chop it to pieces and say, This is legal, and this is legal, and then wash them all out as legal.

We may be able to do something with these.

That, I assume, was your purpose in the way these instructions were drawn.

Mr. Fowle: I might express the purpose a little differently than that, but I think that is generally correct. They were taking the six specific acts that we all know about. It was our view that those acts are charged as specific overt acts performed pursuant to a conspiracy, and that if the jury should find that any one of those acts was not done pursuant to this conspiracy, or with the purpose and effect of restraining trade, that it should not be considered by the jury, and that it was proper to approach the thing on this basis.

The Court: You get into metaphysics on this thing, then.

Let's take the TreeSweet contracts. This is one example. Suppose at the moment the TreeSweet contracts were entered into there was no intent or conspiracy, but they were entered into. They now exist. Suppose a minute after they are signed there comes into existence an intent, having in mind that these contracts are now in existence, what do you do about that? [4014]

Mr. Fowle: But that isn't the way the thing is charged in the complaint.

Mr. Dixon: I think, Judge, if I may inject my views into the matter for whatever they are worth, there is a basic principle of law that certainly applies—and I have the same objection noted in reference to some of these charges—that acts which may otherwise be lawful become unlawful when part of an illegal scheme or plan, such as a combination or conspiracy to restrain or monopolize trade and commerce.

I think that is the only type of instruction of that kind that would be proper.

* * *

No. 2. Is defendant satisfied with 2?

Mr. Fowle: Yes, sir.

The Court: What is the plaintiffs' view?

Mr. Dixon: The second part of the sentence seems to me [4015] to be subject to question.

This instruction is a part of an entire instruction, I think, that was given in the case referred to in the citation, and in context it may be perfectly proper.

For example, if you are discussing motive and intent, that is one thing. But you can't pick it out——

The Court: I am interested in BAJI on this. This is a typical criminal instruction, but whether they ever give this civilly, or not——

Mr. Fowle: This came out of a civil case, your Honor.

The Court: You are in California now. This is California law. Where is the Cape Cod case?

Mr. Fowle: That is in Boston. It is a long way off.

The Court: We have moved 3,000 miles.

Did you find anything in BAJI on it? [4016]

Mr. Fowle: I didn't find one that I thought was as good as this.

The Court: What startles me is that we try these jury cases day after day, we have a set of form instructions here, and you go through these cases and the thing never comes up, no lawyer ever raises it, and then here come a couple of Michigan boys out here, and you look at it and you just wonder.

Here is their evidence. It starts with 21.

If it was the law out here, you can rest assured that these defendant lawyers, who largely drew this book, would have it in here. And I suppose some of the big-shot plaintiff lawyers also helped.

Here is a standard instruction. No. 21:

"In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the burden of proof as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of the evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from [4017] which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue."

Mr. Fowle: That is the law in other places, too.

Mr. Dixon: In addition to that, may I refer to the Standard Sanitary Manufacturing Company case, 226 U.S. 20, which is an early case, 1912, where the Supreme Court, in dealing at that time with the general question of purposes, and so on, said, even if additional purposes were involved, it would not justify the combination, since the Sherman Act can't be evaded by good motives.

This instruction puts it up to the jury, in a sense, whether they had a good motive, assuming that "good" and "lawful" are the same, or whether they had a bad motive.

Now, it isn't a question of motive in the Sherman Act in a civil case; it is a question of intent, perhaps, in a criminal case, but the motive with which you perform an act is wholly immaterial where you are dealing, in my judgment, with a statute such as the Sherman Act, which is malum prohibitum, not malum per se.

The Court: I have your point. [4018]

Now, over here we have not even used 21. We have used—by "we" I mean most of us around here —we have used what we call Civil 3. We have tried to boil down these instructions, and Civil 3 says:

"If the plaintiff fails to prove any essential element of his case by a preponderance of the evidence, you must find for the defendant."

Now, let me look at one other thing. [4019]

I am trying to think of the Supreme Court case that Clark decided. It was a criminal case where they had a similar instruction, and he disapproved it and said it was confusing. You don't know the case that I am thinking about, do you?

Mr. Dixon: Offhand I don't. It wasn't an antitrust case, I am sure.

The Court: It was a criminal case.

I will tell you what it was in. It was in the income tax cases, when the Supreme Court handed down the four decisions by Clark on income taxes.

That wasn't very long ago, was it?

Mr. Dixon: I think it was about a year or so ago.

Mr. Fisher: Was it the Helvering case?

The Court: No. These were criminal prosecutions on income tax.

Here they are. Holland was one of them.

Listen to this. This is a criminal case. In a criminal case a man's liberty is at stake, and if you are going to have a rule that applies in a criminal case, it ought to apply in a civil case. This is from Holland versus United States, 348 U.S. 140.

No, here it is.

Holland versus United States, 348 U.S. 139:

"Petitioners press upon us, finally, the [4020] contention that the instructions of the trial court were so erroneous and misleading as to constitute grounds for reversal. We have carefully reviewed the instructions and cannot agree. But some require comment. The petitioners assail the refusal of the trial judge to instruct that where the government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, (citing cases), but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. (Citing cases and citing Wigmore.)

"Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities."

So that standard which has been used around here, [4021] that you can't find the defendant guilty unless every reasonable hypothesis of innocence is rejected, has been disapproved.

This isn't exactly like it, but it certainly squints at it.

Mr. Fowle: I would say that it is quite a long way from it.

The Court: "Equally susceptible of being interpreted."

Mr. Fowle: This instruction——

The Court: "Equally consistent with motive" and so forth. [4022]

Mr. Fowle: Correct. It seems to the defendants that motive in this case, in the minds of the jury, at least, is going to be a very important factor. The conduct in which the defendants engaged, the

6

conduct that is complained of here, might have been engaged in for perfectly valid business reasons, or it might have been engaged in with the motive that is suggested by the plaintiff. It seemed to us that it was very likely that the jury might—and I speak quite frankly, it seemed to us that it was quite likely that this jury might wind up not being able to tell whether the conduct was engaged in here for perfectly valid reasons or whether it was engaged in for some illegal purpose. It seemed to us that the jury ought to be instructed that if they can't tell what the motive was here, if they are left in doubt as to whether the defendants engaged in these transactions for perfectly valid reasons, or whether they engaged in them for some unlawful purpose, that they ought to be told to bring in a verdict for the defendants.

This instruction is really not taken out of context in the Cranberry case from which it comes. It is a proposition of law which Judge Wiscynski included in his instructions to the jury in that case, and he told the jury in that case that the question of motive was really the most important question in that case. We are going to get here very shortly to the whole problem of specific intent, and this [4023] is really related to that in a way.

The Court: The word motive—Judge Wiscynski, was it?

Mr. Fowle: Yes.

The Court: He has a very good reputation.

Mr. Dixon: He wrote the opinion in the Shoe Machinery case.

The Court: But motive and intent are generally in the law two different things.

Mr. Dixon: They certainly are, in my judgment, in the antitrust law.

The Court: I am going to reject No. 2 on the basis of what I said and on the Holland case, and on the ground it is covered by 3 and on the ground it is not a customary civil instruction given in California.

It seems to me the reason you fellows never read the Holland case is it follows Mead's Bakery, and when you got through reading Mead's Bakery you just quit reading and didn't read the Holland case.

Mr. Dixon: I have added for the record the Standard Sanitary case, your Honor.

Mr. Fowle: I take it that for the record we have an objection to any instruction that is refused?

The Court: No. I don't want you to be misled. As I understand these rules, and when you understand the rule and the purpose of it, you see what you have to do, the [4024] reason for your objections, not here, but this incorporation by reference, is to assist the court in correcting errors and, therefore, you have to tell the court why it was wrong. On this Las Vegas case, which you read, over there when I read the trial record, this defense attorney kept objecting on the ground the instruction was prejudicial to the defendant. That doesn't help the court at all. You are supposed to point out just what, as you have been doing, as you have pointed out here, just why I should give 2, but I don't think you can merely sit upon your request without pointing out why it should be given.

Mr. Fowle: All I meant was that following the discussion in which we do point out why we think an instruction should be given, if your Honor refuses the instruction, I take it that is sufficient.

The Court: That's right. That is my understanding. Your objections to my refusal are overruled. [4025]

* * *

The Court: All right. No. 4. Well, are the defendants content with the form of it?

Mr. Fowle: As it is now?

The Court: Yes.

Mr. Fowle: Yes, your Honor.

The Court: It is inconsistent with other instructions that I have given, that they can conspire. I propose to reject it. Is there objection?

Mr. Dixon: I have an objection to it, your Honor, but since it has been rejected——

The Court: The point is this. I can't give this and [4032] let some of the others stand.

Mr. Dixon: It is entirely inconsistent with some of the others and does not correctly state the law.

The Court: I propose to reject it. Make your record.

Mr. Fowle: We object to the rejection of this instruction. I think we have discussed this at some length. Your Honor knows our views.

The Court: You may incorporate all your other objections at the time we were discussing this question of whether EOP and Sunkist could conspire together, and so forth.

Mr. Fowle: Yes. I might say that as an alternative to this, we would accept the——

The Court: Do you want to work tonight or tomorrow?

Mr. Dixon: I would rather work tomorrow.

Mr. Fowle: I would, too.

(Interruption.)

Mr. Fowle: We would propose as an alternative the instruction which was contained in some draft of instructions which you submitted to all of us January 31st. Your proposed instruction contained the paragraph that is now in No. 4, with this addition, "but either or both Sunkist and its subsidiary EOP is capable of conspiring with other persons or corporations and the other alleged co-conspirators in this case are TreeSweet and Silzle." We would propose this instruction No. 4 with that addition. [4033]

The Court: I was hopeful I was going to convince Mr. Dixon to eliminate his contention—you remember we talked about that and he contended they could conspire among themselves. I really think they can, but I thought it would be one of the things we could take out of the case. I didn't succeed in convincing him, so my instruction was written at the time when I thought I was going to convince him of that fact.

Mr. Fowle: I simply want the record to show that we propose that as an alternative.

VOLUME VIII

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record

In 9 Volumes

Volume VIII

(Pages 3255 to 3614)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

The Court: All right. 4 is rejected.

5? This is similar to 4. There will be the same objections. I am proposing to reject it and the same objections would apply.

Mr. Fowle: That's right.

The Court: Reject 5. 6? Are the defendants satisfied with it?

Mr. Fowle: We have, I think, a couple of modifications. In line 13, insert the word "actual" before the word "movement," and in line 18, insert the word "actual" before the word "marketing."

The Court: Well, in going over it, I have done this. Maybe this will satisfy you. Line 12, it says, "in some appreciable fashion restrained or affected interstate commerce in citrus fruit juices," and I have struck out "movement." [4034]

Mr. Fowle: I think that is satisfactory.

Mr. Dixon: What is that, Judge?

The Court: After the word "restrained," make it "or affected interstate commerce in interstate fruit juices." Strike out "in interstate commerce," again.

Mr. Williams: What is the difference between "appreciable effect" and "appreciable restraint"?

This gets into the question raised in the Las Vegas case of intrastate affecting interstate.

The Court: I don't think that point is raised.

Mr. Williams: I can see appreciable effect. Is there any distinction between appreciable effect and the appreciable restraint? The language of the cases is "appreciable restraint." So it seems to me the words "appreciable effect" should be omitted. It should be solely appreciable restraint.

The Court: What is your view, Mr. Dixon?

Mr. Dixon: I disagree, your Honor, with everything in this instruction after the first sentence. It implies that if the jury would find that the plaintiff was injured as the result of the alleged acts, even though it put him out of business, that the plaintiff would not have a case, which is not the law, in my judgment. If that doesn't make a case, if I am stopped there, then we have been wasting a terrific amount of time.

The next part of it attempts to deal with harm to the [4035] general public in the form of an undue restriction upon trade and commerce. The harm to the public can come, as I have suggested, from a fixing of prices or interference with the price structure here, which is illegal per se. The harm to the public can come from the contracts with Hyland Stanford, which were entered into admittedly in this case, and which tied up the processing facilities of those companies to the exclusive use of the defendants insofar as the first call on their facilities was concerned.

In other words, after the first sentence here, the defendants are asking the court to instruct the jury on something that is restricted and limited in its scope.

I assume the purpose of this is to inject the public interest or injury requirement of the case into the charge somewhere. If that is the purpose of it, then I think it is entirely improper, because the public injury does not have to be the one that causes the plaintiff damage. That is my objection to this instruction.

In other words, the public injury here can come from the elimination of the plaintiff as a competitor in interstate commerce, and where you have got the volume of commerce here, and it isn't in dispute, that the plaintiff sold over a million and a half dollars' worth of products, a substantial part of which was in commerce, if the elimination of that amount of competition doesn't constitute a public injury, assuming [4036] nothing else, then we have been wasting our time in this case.

But let's assume the jury felt that was not a public injury, certainly the others, the fixing of prices, the tying up of facilities, under Section 2 would constitute sufficient public injury, certainly, to make a clear valid case for the Government, for example, if it was presenting it solely on the ground that all that was required to be shown here was the establishment of public injury.

So this instruction, in my judgment, which says, "If you find from the evidence that the plaintiff alone was injured from whatever cause, including of course, the combination and conspiracy charged in this complaint, that you cannot find for the plaintiff,"—well, now, if that is the law, we have been wasting our time.

Mr. Fowle: Well, we think we have been wasting our time, Mr. Dixon.

Mr. Dixon: I know you do, but I don't think I have.

The Court: Is this your public injury instruction?

Mr. Fowle: Yes, sir, this is the public injury instruction. That is certainly what it is. [4037]

The Court: Well, I think you are going to have to revise it.

You can work tonight on it and submit another one.

Let me say two or three things.

First, your last sentence is argumentative.

Mr. Fowle: I don't see just wherein it is argumentative.

The Court: It is argumentative, and it also uses this language about "verdict for the defendants."

I am trying to get away, in both sets of instructions, from saying "verdict for the plaintiffs" or "verdict for the defendants."

Secondly, I agree with Mr. Dixon that this language about injury to the plaintiff alone is not correct. [4038]

* * *

Do I understand, number one, that you think it is the law that the question of public injury is a question of law for the court, and the court can remove that question from the jury?

Mr. Dixon: That is my view, your Honor.

The Court: Number two, do you think, also, that an instruction that says, If you find that the plaintiff has been injured by reason of the things charged in the complaint, that there automatically follows that there was a public injury?

Mr. Dixon: There would have to be.

The Court: You would go along with either one of those?

Mr. Dixon: Yes. [4043]

The Court: It is pretty hard for me to see how you leave to the jury the question of public injury.

That definitely is a legal question.

How do you leave to the jury a question, under antitrust law, as to whether there was a public injury? It is a question of law.

Mr. Fowle: If the court please——

The Court: Whether you should go as far as to say, "I instruct you that there was a public injury here"——

Mr. Dixon: No.

The Court: ——as contrasted with saying, "I instruct you that if you find that the plaintiff has been damaged as alleged in the complaint, then it follows that there is automatically a public injury"—I would prefer the latter of the two.

Mr. Fowle: The evidence in this case, as distinguished from the charge in the complaint, indicates at the very most some sort—taking it in the light most favorable to the plaintiff—indicates some sort of a plot to get rid of the Winckler-Smith Company.

There is no evidence here that any other commerce or any other competition was in any way affected by the supposed misconduct of the defendants.

Now, even after the disappearance from the scene of Mr. Winckler, of the Winckler-Smith Company, as a competitor [4044] here, if everything moved on the same, if the market for citrus juice products was exactly the same as it would have been whether he was here or not, if exactly the same amount of citrus fruit juice flowed into the market, if the prices weren't tampered with, if really nothing happened to the flow in interstate commerce of citrus juice products, we say that there wasn't any public injury. [4045]

Now, that isn't to say that Mr. Winckler, or Winckler-Smith, might not have a cause of action on some other ground, on some other basis, against the defendants for putting him out of business. He might have. But it wouldn't be a violation of the antitrust laws, because the public interest would not have been affected.

That is our position.

The Court: No. 1, I take it that it is the purpose of the antitrust laws, generally, that there be competition, on the theory that competition is good; and it is all these things that flow from the lessening of competition that the antitrust laws are directed at.

If you followed your view, then a defendant might proceed to eliminate one competitor at a time, and not thereafter make any change in the price structure, then he might even wait until any questions on the statute of limitations had run; he had run all his competitors out of business, and then he would say, Bingo, here we go, boys. And then where are you?

Mr. Fowle: That doesn't follow from the proposition that I have urged, because I am saying if the competitive situation and commerce in citrus fruit juices continues to be the same. You are assuming that it is chopped off little by little.

The Court: I am just assuming that a competitor is [4046] chopped off. Then I assume that he chops off another one. But he doesn't tamper with the prices thereafter. I am giving you an extreme situation. So he gets rid of all of them. Then to be doubly sure, he waits a three-year period, so there are not going to be any complaints against him. He has meanwhile run his competitors out of business, and then he goes to town. Do you think that is contemplated under the antitrust laws?

Mr. Fowle: No, I do not.

The Court: Let me hear Mr. Dixon's views on it. He can probably more accurately express his views.

Mr. Dixon: I was looking—I can't find it offhand—for a statement frequently quoted in these cases, that it is the purpose of the Sherman Act to foster and promote competition, as well as to preserve it. Therefore, any action which prevents even the coming into a business of competition, the elimination of it after it is there, or the creation of a monopoly which prevents any further competition after it has been eliminated, constitutes a violation of the Sherman Act without more. I mean a showing to that effect violates the antitrust laws.

And that is the purpose and function of them; to preserve and maintain our free enterprise or our competitive system.

Therefore, anything which tends to eliminate it, as expressed in the Clayton Act, which gets at them in the [4047] incipiency, before they can throttle competition and create a monopoly, is made illegal, the Sherman Act reaches acts, also, in their incipient stage where they relate to the formation of a conspiracy to restrain commerce, even before it has become effective, and the actual performance of acts under and pursuant to conspiracy after it has been organized.

In other words, every phase of our business operations at which competition can be throttled, prevented, eliminated, and monopolies created, is dealt with in the Sherman Act. And any act or any elimination of a competitor, therefore, such as the plaintiff in the instant case, by any acts which can be said to stem from the defendants, which are part of a combination or conspiracy to restrain trade or commerce in citrus juices, or to monopolize citrus juices—I am referring to those that are processed here in California and sold in interstate commerce—constitutes a violation of the Sherman Act.

So that this Instruction 6, which the defendants are contending for, which is based on the Shotkin case, has absolutely no application either to the Second Amended Complaint now before the court, and under which this case is to go to the jury, or the evidence which has been presented to the jury pursuant to that Complaint.

For that reason, I stated at the outset that I objected to anything in Instruction 6 after the first [4048] sentence.

The Court: I will tell you what we will do. I am tired, and I suppose you all are. And I know, speaking for Mr. Fisher and myself, and Mr. Walker, this antitrust business is pretty difficult to follow. These three fellows over here——

Mr. Fowle: Speak for me, too.

The Court: ——they can glibly give you an argument and cite you authorities and quote from cases.

Are you an antitrust expert?

Mr. Fowle: I wouldn't say so.

The Court: You have been doing pretty well, I will say that for you.

If you were not one before you started this case, you will be before you get through with this case.

Why don't the defendants do this? Look over your instruction, if this is the one you offer on public injury, and see if you are satisfied that this is the one that you want to offer. And I would like to have one along the line that you suggest, and we will jump into public injury the first thing tomorrow morning.

Mr. Dixon: I attempted to answer this by saying that I don't think this is any matter on which the court should instruct or be required to instruct.

The Court: I think we should go at least as far as to [4049] say that if you find that the plaintiff has been damaged as charged in the complaint——

Mr. Dixon: But that is the general charge of causation.

The Court: I want something suggested on that general charge, then.

If you don't have a stenographer, write it out and my stenographer can type it the first thing tomorrow morning.

Mr. Fowle: One of the difficulties here is that I take it Mr. Dixon is really contending that there is no such rule as we find in the Shotkin case and some other cases, that injury to the plaintiff alone is not enough, that there must be public injury.

The Court: There must be facts from which it can be determined that there was a public injury.

My law clerk, I think, put his finger right on it.

Mr. Fowle: That is, of course, talking about the pleading. But after the evidence is in there must be facts, too, from which it can be determined.

The Court: You and I are just in disagreement, because I think there are such facts, if the jury wants to find them.

Mr. Fowle: Other than the injury to the plaintiff?

The Court: I think the elimination of the plaintiff as a competitor in citrus juice is the public injury. And I distinguish it from these dealer cases where the man eliminated wasn't competing with the person he sued. And [4050] the case Sugarman tried—was it Sugarman? In the Interborough News case—Sugarman, yes, there the thing turned —I don't know whether it was said in so many words, but it turned on the fact that these people who were really sued were not the people that were competing with the fellow.

Mr. Dixon: That is why there was no elimination of competition. There was no elimination of competition in the Shotkin case, and the other cases. And if there was no elimination of competition, then I would agree there could be no public injury.

The Court: What time do you want to come down in the morning?

The Clerk: Judge, could we get on the record the admission of this final exhibit here? Mr. Fisher thinks we ought to get it admitted before Tuesday morning.

The Court: What have you got? [4051]

Mr. Fisher: You will remember that as to Plaintiffs' Exhibit 84, I believe it was, we elected to have the petition for leave to present the third modified arrangement in the Chapter XI proceeding and the order confirming that arrangement substituted——

The Clerk: Added, I believe.

The Court: Well, one or the other. What do you want to do? Substitute?

Mr. Fisher: Substitute.

The Court: Do you have any objection?

Mr. Dixon: No.

The Court: Do you have it sorted out?

Mr. Fisher: Yes.

The Court: It can be substituted in place of 84.

The Clerk: 84 is stricken from the evidence, then?

The Court: 84 is the same as this except that the defendants——

Mr. Fisher: One is the order and one is the petition.

The Court: They will be together.

The Clerk: Then is 84 to be withdrawn?

Mr. Fisher: Yes.

Mr. Dixon: And this substituted.

The Clerk: Then I am to substitute this and give the original 84 back to Mr. Dixon and take it clear out of the record. [4052]

Mr. Fisher: That is true.

The Court: No. Let the present 84 be called 84-A and marked for identification.

The Clerk: You told the jury this would be 84.

Mr. Fisher: It was to be substituted.

The Clerk: You said the form hadn't been decided.

The Court: Then call this one 84-A and use 84 for identification only and withdraw it from evidence, and then the record will be clear. [4053]

* * *

Saturday, February 4, 1956—9:00 A.M.

The Court: Did you submit anything on your idea of public injury, Mr. Dixon?

Mr. Dixon: Your Honor, I checked the law and the cases last night, and my position is as it was before we discussed the matter. There is nothing in the statute which relates in any way, or makes it a requirement to show any public injury. Section 7 of the statute is clear in that respect.

The only time this question of public injury has been raised, to my knowledge, has been when the defendants in an action for treble damages seek to test the complaint or the sufficiency of the complaint by claiming that the facts alleged therein do not constitute or show any public injury. That is the ruling of all the cases, and that is the only manner in which this problem has been presented on the basis of the cases which I have, which I will be glad to let your Honor see on this question, if you are interested.

The Court: Well, I am in accord with what you say from the check I made.

Mr. Dixon: Furthermore, I have checked some charges to the jury on this question, and no one of them that I have checked has shown any reference to any requirement or a showing to the satisfaction of the jury that there be any public injury [4055] shown.

For example, in the cranberry case, which is quoted on one point by the defendants, and which I think represents generally a pretty good charge on the question, if you will search it, read it, as I did, you will find no reference anywhere in the charge to any public injury being required to be shown by the plaintiff as part of his cause of action. There is nothing in the statute requiring it. The statute merely provides that the plaintiff in a treble damage action under Section 7 must show that injury resulted from a violation of the antitrust laws, and that has always been my understanding of the law from the charges that I have checked in private suits on that matter.

So it is certainly not in my opinion any question to be submitted to the jury. It would indeed be an anomalous situation if the jury were to have to determine what constituted public injury.

So that, to answer your question, I have prepared no instruction on that question, because I don't believe it is a matter upon which any instruction should be given by the court. In other words, if this court is satisfied on the basis of the pleadings and on the basis of the evidence that there has been sufficient evidence and allegations contained in the complaint to establish the existence of public injury, if proved and if believed, that is the end of the public injury question. [4056]

I said that all the cases that I have checked, the Shotkin case and all the rest of them, never got beyond a motion to dismiss the complaint. That was the circumstance under which all of those motions were made and the claim made that the complaint was insufficient because it didn't allege public injury, and then the cases go on to indicate, of course, that is a matter of law certainly upon which the court can determine whether the allegations of the complaint are sufficient, if proved, to establish the existence of public injury.

The Court: I was trying to recall whether or not the jury have been told anything about public injury.

Mr. Dixon: I don't think so, your Honor, from my memory.

The Court: How about the opening statement of Hurd?

Mr. Williams: Well, I don't recall it was mentioned.

Mr. Dixon: I don't believe he said a word about it. I don't think he should have. I don't think it is a proper matter for comment in the sense that it is a requirement, your Honor. [4057]

The Court: And then you wouldn't even suggest an instruction that if the case of the plaintiffs is proved to the satisfaction of the jury, that the court instructs them that there is public injury?

Mr. Dixon: No.

The Court: It doesn't add anything?

Mr. Dixon: No, it doesn't add anything. The basis of a private lawsuit is the damage resulting from the violation of the law, of the antitrust laws, and if this complaint, if proved, does not state a violation, then we should have been dismissed at the start of this case; there should never have been any evidence taken on it.

The Court: I hadn't thought about that angle of it, about no instruction at all. But my own view was that it was one of law, and that is in accord with your view. It is just a matter of procedure how to handle it.

Mr. Dixon: In other words, your Honor must, of course, charge on the necessary elements of a cause of action for the plaintiff in a treble damage action, show that the defendants have violated the antitrust laws, and that the plaintiff has suffered injury or damage as a result of some of the acts done pursuant to such violation. That was Judge Wyzanski's charge in the cranberry case, and I think the charge is very good.

The Court: I propose, then, to give no instruction on [4058] public injury, and to reject defendant's 6, you may make your record on that.

Mr. Williams: I would like to state our objection to your Honor's proposal: That this case has charged an injury to the plaintiff, and we have maintained all along that it failed to state a cause of action because it did not charge any injury to the public, in addition to injury to the plaintiff. We feel that the cases, Shotkin, Fedderson, and so forth, cannot be distinguished on the basis that was discussed last night, that is, that the plaintiff was not a competitor of the defendants, because in those cases you still had a suppression of competition by the plaintiff going out of business, between the plaintiff and the plaintiff's competitors; and the Sherman Act has never distinguished between a suppression of competition at one level and at another level. They are both equally unlawful.

If the cases are correct that there is a requirement for a public injury, in addition to injury to the plaintiff, then they become meaningless if the mere proof of injury to the plaintiff constitutes also proof of injury to the public. Because every injury to a plaintiff's business necessarily hampers his ability to compete in one way or another, and there would be no necessity for the rule of public injury.

So our position is that the question should be submitted to the jury as one of fact. [4059]

The Court: I don't think it is one of fact. I think it is one of law.

Mr. Fowle: I take it, also, your Honor, that you would refuse any instruction on the subject of public injury?

The Court: Any instruction as a matter of fact, and probably as a matter of law. As a matter of law, however, I would instruct, if you would waive that question, I would instruct that if the plaintiff proved the things charged in the complaint, and if there was damage to the plaintiff, that public injury necessarily followed.

But I don't think it is necessary to instruct if it is a matter of law.

Mr. Fowle: I just wanted to be sure——

The Court: I am not objecting to the particular form or language of your instruction.

Mr. Fowle: That is what I meant. We have a number of alternatives, but I see no purpose to be served in dealing with alternatives if each one of those raises the problem as a question of fact.

The Court: Nor do I.

I reject No. 6. That is, defendants' 6.

Defendants' 7.

The defendants, first, are satisfied with the form of it?

Mr. Fowle: There is one slight change that I think I [4060] would suggest. In line 21 after the words "specific things," I would put in a comma and a phrase, "or one or more of them comma."

The Court: I noticed that, too.

Mr. Fowle: Also, your Honor, as an alternative to this, in view of your Honor's rulings up to date, with respect to the capability of the three co-operatives to combine and conspire among themselves, I think as an alternative, although we would like to submit this as it is, as an alternative we would be willing to submit one which in that portion of the instruction from line 18 down simply stated that Sunkist, Exchange Orange, Exchange Lemon, Tree-Sweet, or Silzle, rather than separate the five into two categories.

The Court: I noticed that, too. In other words, this is not consistent with the other instructions that I have given. You already have your point on that.

Mr. Fowle: Correct.

The Court: You will not be waiving that point if we modify this particular paragraph.

One other thing. I don't like this language on what is actually charged, and I would suggest that you put a comma after "plaintiff" on line 11, that is, drop down to say 13, "that the defendants and the alleged co-conspirators conspired," and so forth.

It is just a matter of form. [4061]

Mr. Fowle: I am not quite sure I follow that. How much did you propose omitting?

The Court: I would suggest after the word "plaintiff" on line 11, you put a comma, and then strike out "what is actually charged * * * in view of the evidence in this case is that" and then put in, "i.e.," so that it will read, beginning with 11, "with resultant injury and damage to the plaintiff, i.e., that the defendants and alleged coconspirators combined and conspired to eliminate," and so forth. It is just a matter of form.

Mr. Fowle: All right.

The Court: Now, before we butcher it up too much, let's find out what the plaintiff's objections are. Some of this, I think, would be proper.

Mr. Dixon: Well, our general objection, of course, is that certain things should be added apart from the other one we previously discussed, so I will take those up first. On line 6, after the word "other," the words "at a date unknown to plaintiff" should be inserted.

The Court: Wait a minute. What is that?

Mr. Dixon: "At a time or date unknown to plaintiff." In other words, this conspiracy isn't particularly one that was necessarily formed in 1951. It had been going on here for three years insofar as TreeSweet was concerned, or five years. [4062]

Mr. Fowle: We would have no objection to that insertion.

The Court: All right.

Mr. Dixon: The word "for" in line 8 should be stricken, and the word "with" put in.

The Court: "With" in place of "for"?

Mr. Dixon: Yes.

The Court: Does that make any difference?

Mr. Dixon: I think it is more in line with the general allegations, your Honor. I agree it is a small change.

Mr. Fowle: I think I took this language right out of the amended complaint, but I don't think it makes much difference.

The Court: I don't think it makes any difference.

Mr. Dixon: I won't argue.

The Court: Put "with" in, and what else?

Mr. Dixon: After the word "juice" in line 9, I think should be inserted "particularly single-strength Valencia orange juice."

Mr. Fowle: I don't think that phrase is in the allegations of the first cause of action.

Mr. Dixon: It should be changed to "juices," too.

The Court: They don't have it in the first cause.

Mr. Dixon: I thought it was in all of them, your Honor, and it certainly relates to all of them. I think it should [4063] be. I am certain it is in the first cause of action somewhere. I will have to read the complaint here.

The Court: Are you looking for the complaint?

Mr. Dixon: Yes.

Mr. Fowle: I take it, your Honor, apart from whether this is in the complaint or not, it is not necessary for us to urge the point that we believe the charge here should deal with one thing or the other, that is to say, it should deal with citrus fruit juices, or single-strength Valencia orange juice, but not with one and particularly with the other. That is a point that we made yesterday, and I don't believe we would want to go ahead and urge it every time it might arise, if it is understood that we are urging it.

The Court: No. I think we can have an understanding where these points have been made that are general and go to various instructions, they can be incorporated by reference without being specifically mentioned as to each instruction. There has got to be some consistency here.

Mr. Dixon: Paragraph VI(b) of the complaint, and the citrus industry in Paragraph V(b) and V(d).

The Court: It isn't in those other places, but it is in V(d). Well, here is my view of that. We won't waste any more time on that point. The gist of this instruction is that you want an instruction throwing the plaintiff out unless he has proved certain things and, therefore, I think you [4064] have to take the broadest scope of the plaintiff's claims, or you can't ask me to throw the plaintiff out. In fact, you might have error in the instruction if you had an instruction that plaintiff be thrown out unless he proves particular things. In other words, it would have to be broad enough to cover plaintiff's contentions, and although actually in the particular paragraph of Section 1, it doesn't appear, it does appear inferentially throughout.

Mr. Fowle: I thought, your Honor, by using the term canned citrus fruit juice—I am willing to put that in the plural, "juices"—I had made it as broad as you could make it.

The Court: I am going to insert, and you can object to that part, "particularly single-strength orange juice" on line 9.

Mr. Walker: Make it Valencia orange juice?

The Court: Yes. What else?

Mr. Dixon: On line 13, the word "defendants," I think, should be inserted "Sunkist and EOP."

The Court: That doesn't make a lot of difference. What is your thought on that?

Mr. Fowle: Well, I would——

The Court: I am asking Mr. Dixon's thought. It doesn't make a lot of difference.

Mr. Dixon: It isn't too important, I presume, your Honor, [4065] except that, and this is only personal opinion, it would follow the general practice I have of drawing instructions, that I name the defendants in a conspiracy instruction, because they have to be pointed out, particularly if they are referring to co-conspirators later, to distinguish them. But that isn't too important.

Mr. Fowle: We would be perfectly willing to have the defendants identified at that point if the alleged coconspirators are also identified at that point.

The Court: I think we are wasting time on this.

Mr. Fowle: I think it should be both or none.

Mr. Dixon: I don't care, Judge.

The Court: I am going to change "defendants" to "Sunkist and Exchange Orange Products."

Mr. Dixon: Then down on 16, it should be "juices" instead of "juice" and then the following language, "particularly single-strength Valencia orange juice," and then "and performs certain acts pursuant to such combination or conspiracy which proximately resulted in damage to the plaintiff."

In other words, this is apparently a formula instruction where they want everything covered, so all the elements of the cause of action should be put in.

Mr. Fowle: Well, they are in the important part of this instruction. It is in the next sentence.

Mr. Dixon: I know, but it is broken up part by part. [4066] That is what I am pointing out, counsel.

The Court: All right. Insert on line 16 after the word "juice"—make that "juices," and insert "particularly single-strength Valencia orange juice," and it would be "in the year 1951." Now, after that, what was your suggestion?

Mr. Dixon: Well, I have suggested striking of the words on 18 "or Exchange Lemon."

The Court: I haven't got that far yet.

Mr. Dixon: I'm sorry.

The Court: I didn't get the insertion you suggested on line 16 after 1951.

Mr. Dixon: "And performs certain acts pursuant to such combination or conspiracy which proximately resulted or which caused damage to the plaintiff."

The Court: "And performs certain acts pursuant to such combination or conspiracy which proximately caused damage to the plaintiff."

Mr. Dixon: That is correct. [4067]

The Court: All right. Tentatively we will put it in.

Now we come to the other one.

Mr. Dixon: Line 18, I have suggested striking out "or Exchange Lemon," since it is not a defendant, and, therefore, no judgment can be taken against it in this case.

Mr. Fowle: May I make this suggestion with respect to lines 18, 19 and 20?

The Court: Yes.

Mr. Fowle: As I think I mentioned before, we started out, that as an alternative, in view of your ruling about who can and who cannot conspire, we might make this change: "Unless you find, therefore, from a preponderance of the evidence, that Sunkist, Exchange Orange, Exchange Lemon, TreeSweet or Silzle, or two or more of them, combined and conspired."

The Court: I would prefer to say, on line 18, that Sunkist or Exchange Orange combined and conspired together, or with——

Mr. Fowle: That wouldn't be quite right, your Honor, because there is only one conspiracy charged here, and that is a conspiracy among these five concerns.

The Court: The jury could find a multitude of conspiracies. I don't mean a multitude at the same time, but they could find any one or more of various conspiracies. They could find that EOP had conspired with TreeSweet, for [4068] instance; they could find that EOP had combined with TreeSweet and Silzle; in other words, they could leave out any one unit.

Mr. Fowle: If you put it that way, if you say the jury can find—they can only find one conspiracy, but they can find less than all of the conspirators in that conspiracy as participants.

The Court: We are all agreed on the principle; now the question is how to word it.

Mr. Dixon: May I ~~give you~~ my thoughts for a moment for what they are worth?

I have suggested striking "or Exchange Lemon" on ~~line~~ 18, and striking the word "and" on line 19, and inserting the language of the statute "or" and on line 20 striking the word "1951."

The Court: Why take "1951" out?

Mr. Dixon: Because relating to the conspiracy we don't know that they——

The Court: But the 1951 there refers to the six specific allegations. And in 1951 did the specific things, or one or more of them.

Mr. Dixon: Yes, I see.

The Court: It belongs in there.

Mr. Dixon: You are right, your Honor.

"and did one or more of the specific acts"—I think [4069] you already suggested that.

Mr. Fowle: "did the specific things, or one or more of them."

The Court: That means the same thing. "did one or more of the specific acts"——

Mr. Dixon: "charged in the first cause of action"—"and that such act or acts had the purpose or effect of damaging and."

The Court: "damaging and"?

Mr. Dixon: Yes. ——"and eliminating competition of plaintiff in the interstate market."

"for California" should be added—"canned citrus fruit juices."

Mr. Fowle: I am lost.

The Court: I am lost.

Mr. Dixon: This brings it in line with the complaint, in my judgment.

The Court: Now, let me see.

On line 22 "charged in the first cause of action"—what were you going to insert there?

Mr. Dixon: "and that such act or acts had the purpose"—striking the word "specific"—"or effect the damaging and eliminating."

The Court: You don't want "and eliminating"? You would have to prove to both. "Damaging or"? [4070]

Mr. Dixon: If counsel is satisfied with it, then I am.

Mr. Fowle: We are not satisfied with this at all, as a matter of fact.

Mr. Dixon: I am restating here the elements of the cause of action, since it is a formula instruction.

The Court: Let's stick to this.

"effect of damaging or eliminating" or "and eliminating"?

Mr. Dixon: "and" it would have to be.

The Court: Why? This is the other way around. This is a formula instruction where——

Mr. Dixon: Yes.

The Court: "or eliminating."

Mr. Dixon: "competition of the plaintiff in the interstate market"—"for California" should be inserted—"for fruit juices, particularly single-strength Valencia juice."

Those are the suggested additions of the plaintiff.

The Court: Let me read what I have got. Start at about "Unless" on line 16. "Unless you find, therefore, from a preponderance of the evidence, that Sunkist or Exchange Orange, or one or more of them"—it should be "or either of them," shouldn't it?

"or either of them, combined or conspired with either TreeSweet Products Company or E. A. Silzle Corporation, and in 1951 did one or more of the specific acts charged in the [4071] first cause of action, and that such act or acts had the purpose or effect of damaging or eliminating the competition of plaintiff in the interstate market for California citrus fruit juices, particularly single-strength Valencia orange juice, your verdict must be for the defendants on the first cause of action."

I think you limit yourself in that score where you insert "particularly."

Mr. Dixon: I am sorry, Judge, I didn't hear you.

The Court: I think where you insert that last "particularly" in a formula instruction you unduly limit your position.

"if you find that defendants and one of the co-conspirators combined and conspired"—then you haven't enough in there even then. Combined or conspired to do what?

Mr. Dixon: As charged.

The Court: As charged, or violated the anti-trust laws, and in '51 did one or more of the specific acts charged in the first cause, and that such act or acts had the purpose and effect of damaging or eliminating competition of the plaintiff—then leave out the "particularly" there.

The verdict must be for the defendants.

I don't know.

Mr. Dixon: I think that is correct, your Honor. I get these things in mind—— [4072]

The Court: Since it is a formula instruction, a formula instruction should be "or." "fruit juices or single-strength Valencia orange juice."

I don't like these formula instructions, but I don't know any other way to present your position on these things.

In other words, this is a formula instruction and it has to be the broadest position of the plaintiff. So it would be fruit juices or single-strength Valencia orange juice, on line 24.

Those suggestions, outside the matter of form in this matter, don't do any violence to the principle of your instruction.

Mr. Fowle: They omit the word "specific."

The Court: The "specific" is in there in one place, "one or more of the specific acts."

Mr. Fowle: It omits the word "specific" before "purpose."

The Court: "and that such act or acts"—it refers back to the word "specific" used in the previous line——

Mr. Fowle: Two specific things, that was merely a reference——

The Court: Here is the way it reads——

Mr. Fowle: I am talking about specific intent.

The Court: I don't think specific intent is required in the conspiracy end of it. I ruled on that already.

Mr. Fowle: I understood there was some talk about that [4073] the other day, when there was a motion for a directed verdict. But if I might, I would like to point out briefly to your Honor the reason for the inclusion of that element in the instruction.

There has been a lot of talk about this Griffith case, United States vs. Griffith. This won't take very long. It will just take me a moment. In United States against Griffith, 334 U. S. 100, at page 105, the court states:

"It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated."

Stopping there just for a moment. It seems to me that that suggests very plainly that sometimes it is necessary to find specific intent. That implication is in the sentence.

Now, skipping down a little further in this paragraph:

"Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act. The classical statement is that of Mr. Justice Holmes speaking for the court in Swift & Co. vs. United States, 196 U. S. 375, at 396:

"'Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly — but require [4074] further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.' "

Now, I suggest to your Honor in this case, entirely apart from the charge in the complaint, or whether there has been proof of the six specific acts, it is claimed by the plaintiffs that those six specific acts were performed pursuant to a conspiracy to eliminate the competition of the plaintiff. I say that it does not necessarily follow from the performance of those acts that the competition of the plaintiff was eliminated. Those six acts do not lead directly and necessarily to the elimination of the competition of the plaintiff. And that being the case, I submit that proof of specific intent to accomplish what the plaintiff says was the unfortunate result here, following from the alleged wrongdoing of the defendants, must have been done with the specific intent that that result occurred. [4075]

The Court: I have your point.

Mr. Fowle: I think it is generally true in the tort field generally that where an act doesn't necessarily and directly lead to the result complained of, that a specific intent is necessary.

The Court: I have your point, but I suggest that this instruction and the problem we are now considering is based entirely on combination or conspiracy, and the instruction that we have already approved has language in it of the intent, and the conspiracy itself, if found, supplies that specific intent which you are talking about. You therefore distinguish between, we will say, the situation in an attempting to monopolize where one person, one corporation might attempt to monopolize, and where there is a requirement for a specific intent from, for instance, conspiracy to monopolize, where the conspiracy itself necessarily requires the intent, or specific intent, and where the instructions on conspiracy cover that.

Here we have the conspiracy under Section 1, and therefore you don't build intent on intent. If the jury finds conspiracy, there is no chance of their having found an innocent act. That is the gist of it right there.

Mr. Fowle: Well, if that is the case, I see no harm, and it seems to me it is appropriate to state, then, that each of the acts charged to have been done pursuant to the [4076] conspiracy were done with the general intent that lies back of conspiracy, or with the specific intent that lies back of the conspiracy.

The Court: There might not be any harm.

Mr. Fowle: Perhaps I should put it a little differently. Instead of saying there wouldn't be any harm in doing it, it seems to me we are entitled to have the jury instructed that the objective, the specific objective of the conspiracy itself, is also the specific objective of each of the acts performed pursuant to the conspiracy.

The Court: You see, the words used are "purpose or effect." When I went over this instruction beforehand, one thing I noted was changing your and/or there. As far as purpose is concerned, that impliedly talks again about your intent. "such acts had the purpose." Now, "effect" gets you into another field. As I read these cases, time and time again they talk about the purpose or effect, and this is "or" coupled with conspiracy.

Mr. Fowle: Has that word "and" between purpose and effect been changed to "or"?

The Court: Yes.

Mr. Fowle: The last time I heard your Honor read the change——

The Court: "purpose or effect."

Mr. Fowle: I had "and effect" because our proposed instruction [4077] would have read "purpose and effect." I mean if you change it to "purpose or effect," that is tantamount to saying you don't need the purpose at all, if these things were done with the effect of eliminating the competition of plaintiff, that is enough.

The Court: That's right. If you find the conspiracy as charged and that these things done pursuant to the conspiracy had the effect.

Mr. Fowle: But in this case, your Honor, you have got to work it the other way, it seems to me. You have got to look at the acts that were done, because those are the only things from which you can infer the existence of conspiracy. There is no existence of a conspiracy here other than these acts. I would submit there is no such evidence. It seems to me you have got to look at those six acts and determine whether those acts themselves were done with this specific purpose, because those acts do not lead necessarily and directly to the elimination of the plaintiff.

The Court: That is not the way to analyze a conspiracy case. In your general experience on criminal conspiracies, there isn't one in a thousand where you have any people sitting down and agreeing. You have acts, things done. There are acts done in pursuance of it. It is from those things that are done that a jury can infer there was a conspiracy and there was unlawful intent. It is the old principle that [4078] an individual intends the natural and probable consequences of the act that he does.

Mr. Fowle: Correct, but——

The Court: Therefore, if he conspired, and there is the intent part of it, in fact, in the conspiracy law, it is presumed that if he conspires for a certain purpose, and X, a co-conspirator, who may not even know all of the plans, but has joined the conspiracy, then does an act which carries out the purpose of the conspiracy, every other conspirator is bound, because the intent has been supplied at the time the conspiracy was formed.

Mr. Fowle: Well, in any case, your Honor, you understand our position.

The Court: I understand your position.

Mr. Williams: May I add one thing? It seems to me your reasoning may be circular there. If you start out in this case, there is no evidence of intent apart from the acts, if that is accepted, then you use the acts to supply the intent for the conspiracy. Then you say now you have got the conspiracy for the intent, so you don't have the intent, and you come down to the acts. So you never get the intent in the case.

The Court: Mr. Williams, that analytical argument could be made in every conspiracy case. It would apply to the typical criminal conspiracy, that analytical argument could [4079] be made. I have never heard it made.

Mr. Williams: I think this is different, because each of the acts here is lawful per se. I don't think that is necessarily true in all cases.

Mr. Dixon: Well, I thought we had disposed of this matter before, and I hope we can dispose of it now, if this question is going to be raised in any of the further instructions.

The Court: I have disposed of it. The contentions are overruled. Let's read this over once more and I will have my girl retype it for us, because it is in a mess. Let's see what else we find in there.

Why should we each time talk about the full name of these companies? Why don't we just say TreeSweet or Silzle? You don't care about that, do you?

Mr. Fowle: No.

The Court: It would be easier for me to read.

Mr. Fowle: That was a typographical error.

The Court: Line 9, change "canned" to "California citrus fruit juices."

Mr. Fowle: The next line, I think, straightens that out, "canned citrus fruit juices processed in California and marketed throughout the United States."

The Court: Then just strike out "canned."

Mr. Fowle: I think the word "canned" ought to be there. It is in the complaint. That is the charge against us. [4080]

Mr. Dixon: I won't argue with you about it.

The Court: Of course, the word "canned" is used, I take it, in a broad sense where it is used. If it is put in a glass container and sealed up, I suppose it would be canned. I don't know that there is any proof—I heard some proof about drums. I got the impression some of this juice was put in bottles, some of the concentrate.

Mr. Dixon: No, just the fresh fruit, Judge.

Mr. Walker: Distributed through the dairies. Some of that is in paper cartons.

Mr. Williams: I think ordinarily the hot pasteurized concentrate beverage bases is not canned. It is put in barrels and drums.

Mr. Walker: 50-gallon drums.

The Court: I think that canned juice adds confusion. Is anybody going to argue about that? Are you going to spend some of your time in arguing about whether it goes in a drum or whether a drum is a can?

Mr. Fowle: You mean to the jury?

The Court: Yes.

Mr. Fowle: I would doubt it very much. I think, however, for the record, the charge here would involve canned citrus fruit juices. That has a more limiting effect than the phrase without the word "canned." The amended complaint is the frame of reference in this case, and I don't think [4081] we should get outside the pleadings.

Mr. Fisher: Throughout, we answered the interrogatories on the basis of the complaint.

The Court: I don't think it makes any difference so long as it is not going to be argued, so we don't have to define it to the jury.

Mr. Fowle: I don't wish to make a commitment that it won't be argued.

The Court: Well, if it is going to be argued, then I would tell the jury that putting juice in drums or in tin cans was the same thing, that the manufacturer is the canner, whichever way he puts it out. This case isn't going to turn on some little thing like that.

Then make this TreeSweet or Silzle.

Mr. Fisher: You are just changing that to TreeSweet and Silzle?

The Court: Yes. Well, I think we better type it up and see what we have. It's pretty hard to follow.

To complete the record now, so it will be here when we come back to it, I propose to give 7 in the form we have got it now and overrule the contentions and objections of the defendants. But we will look it over again when it is revised. This will be revision No. 1 of 7.

Defendants' 8. I have got same or similar as to 7, and I have got "intent or effect" written down here in ink on [4082] it. Are defendants satisfied with it?

Mr. Fowle: We have two or three minor alterations.

The Court: All right.

Mr. Fowle: In the first line, after the words "specific acts," "or one or more of them."

In the third line, after the word "intent," "and with the effect."

The Court: Third line?

Mr. Fowle: Yes. I beg your pardon. Line 5.

The Court: "specific intent or effect"?

Mr. Fowle: So that line 5 reads, "specific intent and with the effect of eliminating plaintiff."

The Court: "And"?

Mr. Fowle: Right.

The Court: All right.

Mr. Fowle: In line 8, after the words "specific acts or any one of them." Otherwise, we submit the instruction.

The Court: Let me look it over. I propose to reject the instruction for various reasons. First of all, it runs into the same problems that we discussed in the previous instructions about intent and effect, intent or effect, and it is a repetition of what is contained in the previous instruction.

Furthermore, it is unintelligible. I get lost in reading it. Beginning particularly with the comma after the [4083] juice on line 6.

On the ground that the statement appears, "the disappearance of plaintiff as a competitor was not the necessary and direct result of these specific acts," which is an instruction to the jury that they should find a certain fact, and for other reasons.

What showing do you want to make on it?

Mr. Fowle: Well, so far as line 6 is concerned, if there is any confusion about the interstate market for canned citrus fruit juice we are perfectly willing to change that to comply with the language that has been used in other instructions, that is, for canned citrus fruit juices processed in California and sold in interstate commerce.

The Court: What do you add here that you haven't covered in 7? I am not talking now about how your views and mine differ on some of it, but even assuming it was dressed up so that it followed the same line of 7, what do you add that isn't in 7?

Mr. Fowle: Well, if 7 had been given as proposed, that is, if it had contained and still contained the theory which the defendants wish incorporated in it, proposed instruction No. 8 would simply point out to the jury, and properly so, it seems to me, why it is that they are being told that specific intent is necessary.

The Court: Going back to 7 a minute, you see, the only [4084] major dispute we had outside of some matters of some dressing it up, was this intent or effect and, secondly, correlated to that, the question of specific intent. That is our major parting of the ways on 7.

Mr. Fowle: I think that is correct.

The Court: Well, I will reject 8.

Mr. Fowle: I take it that we have——

The Court: You have made a record and what you said as to 7 may apply here, varied somewhat.

Mr. Fowle I might also say this, your Honor. As I believe I said the other day, in view of your rulings with respect to the question of intent, that is to say specific intent, as I have used the term, we believe that the jury should be instructed to find whether or not the results complained of in this case did as a matter of fact follow necessarily and directly from the acts complained of, and that if they should find that there was not that necessary connection, that is to say, that the results did not follow directly and necessarily from the acts complained of, that then they must find whether or not those acts were performed with the specific intent of accomplishing the results complained of.

The Court: That is just what they have been told in 7. You have got a formula instruction, if you find, and so on—if you find one or more of these acts was done for the purpose of or with the necessary effect or with the effect. [4085]

Mr. Fowle: The word "necessary" isn't in that instruction.

The Court: No.

Mr. Fowle: If the word "necessary" were there, that might change our view on this a little bit.

The Court: We will talk about it when it comes up. Anyhow, the alternative is there, one or the other, and under your formula instruction they can't find for the plaintiff unless they find one or the other.

Mr. Fowle: If the word "necessary" is there, that changes it, but I don't believe the word "necessary" is there. [4086]

The Court: We will look at 7 again when it comes back.

Now, No. 9.

Mr. Dixon: I make this comment at this time, your Honor, with reference to instructions 9 through 14.

Plaintiff objects to them on the ground that they are picking out particular acts and saying there is nothing wrong with them in and of themselves, and then going on to further elaborate concerning them.

Of course, I am willing to stay here and will stay here as long as it is necessary to discuss or go through these instructions but it seems to me that 9 through 14 all come within that general statement and objection.

It is certainly not in order to pick out each particular thing and say it is lawful, and then say it only becomes unlawful when it is done under certain circumstances. Because one general instruction on that point, that acts lawful in and of themselves can become unlawful——

The Court: Let me say this: When I went through these, 9 through 14, I marked the same thing on them. And I also had the note "Will plaintiff eliminate ELP." That was the suggestion that I made that you didn't want to follow. Then, further along, I think I have some comments which I mentioned yesterday, that you can't cut this up piecemeal and say each thing was lawful and then ignore the fact that collectively they could be unlawful; and I propose to reject [4087] 9 through 14 as they now stand, and permit you to submit some other instruction in lieu thereof.

Mr. Fowle: If the court please, it is our view that these six specific acts are the most important part of the plaintiff's case, and if any one or more of them was not a part of the conspiracy, wasn't done with the objective that lies back of the conspiracy, that that should be smoked out, and that particular act put aside and not considered as being a part of the case at all.

We feel that we have a right, here, to have the jury take a look at each one of these acts and see whether or not it should be considered as a part of this case.

The Court: You have that right, but here you have repeated, from line 8 to 17, in each one of these, the same language. There is no necessity for that.

Secondly, I think as a matter of law you are wrong in your statement that "you will disregard one of these as being of no consequence in the case."

That is a very broad statement, and it is probably erroneous as a matter of law. Because even if one of these acts is not the cause of specific damage to the plaintiff, I don't think it follows that you can tell the jury "You may disregard it as having no significance in the case."

Mr. Fowle: I believe——

The Court: Let me finish in one or two sentences, and [4088] you will see what I mean.

Acts one to six, supposing they find that acts one and two caused no damage, the acts one and two are still in evidence as part, then, of the general background of the case, and the jury may from those facts proved draw other inferences, or they might be able to use it in various ways, and you would have read each of these out of the case completely.

You are in substance telling the jury: Just treat this case now as if there was nothing ever said about those things.

And I think that is wrong as a matter of law.

What you really mean is: if you find that this was a legal contract and was not part of the conspiracy, then it cannot be considered by you as being any cause of damage to plaintiff.

Mr. Fowle: Our position is a little more than that, Judge——

The Court: Not as you have it written out here.

Mr. Fowle: We say if any one or more of these acts was not part of the conspiracy—that is the first and the important point.

The Court: Not part of the conspiracy, that means part of the intended purpose of the conspiracy.

Mr. Fowle: If it wasn't done pursuant to the conspiracy, we think the jury should disregard it. [4089]

The Court: But you can't tell the jury it is of no consequence in this case.

You can't read it completely out of the case.

Are those your views in the case, Mr. Dixon?

Mr. Dixon: I think you have stated them, your Honor. Namely, there may be certain acts which may be part of the conspiracy, which do not necessarily have to damage the plaintiff. But if you read them out of the case merely by saying that you can pick this one out, and if you find this was done, so and so, you may disregard it, and then follow that to its logical conclusion, you then have completely dismembered all of the acts charged to be part of the conspiracy and wind up with nothing.

Mr. Fowle: That is exactly right.

Mr. Dixon: That is not correct, in my judgment. The decisions of the Supreme Court and the courts of appeal on this question have repeatedly held that you cannot dismember these acts and pick them out one by one and say there was no conspiracy because this act was lawful.

The Court: I am satisfied on that. Now, make your record on 9 to 14, which I am going to reject and permit you to submit one alternate.

Mr. Fowle: I think we have made our record, your Honor. We object to the refusal to give these instructions, and I think we have made our position sufficiently clear. [4090]

The Court: The objection is overruled. I will reject 9 to 14, with permission to supply something in the alternative.

9-A is submitted here.

Mr. Fowle: Proposed instruction 9-A may not be very artistically done. I did it rather hurriedly last night. But it is an effort to combine in one instruction——

The Court: What we talked about yesterday?

Mr. Fowle: That's right.

Mr. Dixon: I see we are back in the old problem again.

The Court: 9-A falls afoul of the same thing which I mentioned in 9 to 14. "of no consequence in this case."

In other words, you are reading them completely out of the case.

What you are entitled to say is this: If they find that a particular one of the specific acts did not cause the plaintiff any damage, or was not part of the conspiracy, then they may not consider that act in connection with any damage to the plaintiff.

Mr. Fowle: Perhaps as an alternative we can modify this. We can submit it in the alternative form.

The Court: Maybe you can.

Let me look at this a minute.

I notice in the Second Amended Complaint under Specifications, that you lead off with certain allegations about [4091] Silzle and not about TreeSweet. What is the reason for that?

Mr. Dixon: What page is that?

The Court: Page 10.

You may have been following the language of the complaint at the time TreeSweet was a defendant.

Mr. Williams: What page is this?

Mr. Dixon: Page 10.

Mr. Williams: What paragraph?

Mr. Dixon: 3.

Mr. Fowle: Frankly, I have not had an opportunity to read the Second Amended Complaint. I have been working from the First Amended Complaint with the amendment.

Mr. Dixon: I am sure this conforms to the amendment.

The Court: You see, you start out with TreeSweet as a defendant, and then you wound up with TreeSweet as a co-conspirator. And I think in your First Amended Complaint——

Mr. Dixon: Certainly the first paragraph shouldn't start out with Silzle.

The Court: Should not what?

Mr. Dixon: Should not start out with Silzle, I am certain.

Mr. Williams: Here is your First Amended Complaint. It starts out with Silzle.

The Court: What happened now, to trace it back, the original complaint said, under Specifications, that was 3, [4092] that the defendants contracted, combined and conspired, and so forth. At that time TreeSweet was a defendant, and the original complaint didn't have Silzle named. Then you come along with the First Amended Complaint, and I guess that was before TreeSweet was out, too, wasn't it?

Mr. Dixon: Yes, it was, Judge. That is, they were still named as a defendant.

The Court: They were still a defendant.

Mr. Dixon: Yes.

The Court: So you come along then——

Mr. Dixon: What was apparently done here——

The Court: Then when you came down to 3, of course you had TreeSweet as a defendant, and you were putting Silzle in——

Mr. Dixon: And leaving out TreeSweet.

The Court: Yes.

Mr. Dixon: That was done——

The Court: I am not talking about your Second Amended Complaint. In your First Amended Complaint TreeSweet was still a defendant. Then when you filed your Second Amended Complaint, meanwhile TreeSweet was dropped as a defendant, but not as a co-conspirator. So you have only Silzle in here in your Second Amended Complaint and not TreeSweet.

Mr. Dixon: Frankly, your Honor, I did not have a chance to read this, Mr. Irwin prepared it, because I have been so [4093] tied up with other things that I just didn't have a chance to read it until your Honor directed my attention to it.

I would like to ask leave at this time to amend by interlineation——

The Court: Let's not do it now. Let's look it over. I think probably all you have to do is add "TreeSweet" after "Silzle" or before "Silzle."

Mr. Dixon: "co-conspirators TreeSweet and." That is what I would like to add.

The Court: Throughout the two previous paragraphs of the specifications.

But look it over and see. Because apparently when you prepared your motion and gave it to Mr. Irwin, as your amanuensis, he typed it up as you had it, but you still hadn't taken into account that TreeSweet was no longer a defendant.

Mr. Dixon: You are right, your Honor.

The Court: I was just looking over those six acts.

With reference to revising 9-A, or drawing another one, I don't know how you are going to say it, but—before I forget it, on this amended complaint, you have on page 3 of the Second Amended Complaint said "defendants" on line 11, then you have Sunkist, EOP, then you have got Lemon. Well.

technically Lemon is not a defendant. I suppose line 11 should be "defendants and co-conspirators."

On page 4 you have "TreeSweet and Silzle" who are not [4094] defendants but are co-conspirators.

Mr. Dixon: I think it is on page 6, also, your Honor. We have defendant ELP, for instance, on page 6, which has been dismissed.

I think your Honor will appreciate the circumstances under which I have been working here the last three or four weeks. The intention is clear, of course, to have the amended complaint conform to the record as it now stands, and Exchange Lemon, of course, is not a defendant. It is still a co-conspirator. TreeSweet is not a defendant, but it is still a co-conspirator. And to the extent necessary to——

The Court: Look it over and we will talk about it later.

If I were going to draw this instruction, or was going to try to instruct the jury on it, I would start out by saying: Now, I want to talk about the six items which we referred to as the acts complained of. Then I would say: As to each of these acts standing by themselves, and unconnected with any combination or conspiracy, there is nothing illegal or claimed to be illegal about them. Then I would say—I may be repeating—as heretofore explained to you, or as you have been instructed, plaintiffs' recovery, if any, must be based on proof of violation of the antitrust laws, and proof of one or more of these acts and damage proximately resulting from these acts.

And then I would wind up with some conclusion: performed [4095] pursuant to conspiracy.

We have, again, purpose and effect, which we have to be consistent on. And then you have to change this latter language about being of no consequence in the case: You will disregard such act, therefore, if not proved, as being any cause of damage to plaintiff. [4096]

Now, I would try to dictate one, but from what I have seen, I think you fellows are better able to dictate it than I am. Ross Fisher and I were commiserating last night on hearing the three of you glibly talk about antitrust law. I drew one and shoved it at you and I am ashamed of it. I have some that I haven't talked about yet. Some of them have elements that ought to be covered, but I am way off the beam on some of them.

Mr. Fowle: Well, we will take a whirl on this.

The Court: All right. 9 rejected with permission to submit something else.

Mr. Fowle: 9-A, you mean.

The Court: 9-A, and the matters heretofore discussed under 9 to 14 and under 7, I think it is, are incorporated as defendants' showing in the matter. Overruled.

Do you want to go gack now, before it gets too far behind us, and look at 7? We will just proofread this hurriedy first off the record.

(No. 7 proofread off the record.)

Mr. Dixon: I think line 27, the word "and" should be "or," the language of the statute again.

The Court: Line 29?

Mr. Dixon: Yes, "were made pursuant to the combination or conspiracy."

The Court: On 24 to 29, where that phrase is in there, [4097] wouldn't it read better if—well, no. I don't like the phrase in there where it is. Don't you think maybe it should go at the end?

Mr. ~~Dixon~~: I think it reads better.

The Court: I think it reads better to put it at the end.

Mr. Dixon: Yes, it should go at the end, Judge. I think it reads better that way.

The Court: Would it be "and" or "or" there?

Mr. Dixon: In line 26, it should be "or."

The Court: All right. Here is 7, which she has typed over again. This is another one I will read hurriedly to see if she has done her typing job.

Mr. Fowle: What are we doing with No. 37?

The Court: 37 was already passed. But the thing was so chopped up on your sheets and mine, I was going to give you another sheet to work on. That's the only reason I retyped it. The record has been made on that.

Mr. Fisher: Just for consistency, I think elsewhere you refer to them as Exchange Orange. You can strike the word "Products."

Mr. Dixon: What's this?

The Court: Strike out the word "Products" after Exchange Orange, to cut these names down.

Mr. Dixon: Yes. [4098]

The Court: I will do some of that sort of thing when I go over these finally.

Now, 7. I handed you that and we have just been over it.

Mr. Dixon: 37 is given subject to these changes?

The Court: The same objections would apply to what few changes we made this time to 37, and the objections will be again overruled.

Now we will proofread this one.

(No. 7 proofread off the record.)

The Court: Now, the question is, has she typed it properly?

Mr. Fowle: There are one or two little things. On line 8, you read the word "processed" where there is the word "produced" here. I don't know that that makes any difference, your Honor.

The Court: I read "processed"?

Mr. Fowle: I think you did.

The Court: It is "produced." We were just proofreading now.

Mr. Fowle: And she has put "plaintiff" all the way through in the singular.

The Court: "Plaintiff"?

Mr. Fowle: That is a question we are going to come to sooner or later. It seems to me there really are not two [4099] plaintiffs here. I don't want to be technical, but Mr. Walker is an intervenor and not a plaintiff. There is only one plaintiff here.

Mr. Williams: When you speak about injury to plaintiffs, the injury didn't occur to Walker, but to Winckler & Smith.

The Court: I think to be consistent all the way through, we will make it just plaintiff.

Mr. Dixon: That is agreeable.

The Court: I will try to make this change in the proofreading of it all the way through. Any other place where she is badly off?

Mr. Fowle: That's all.

The Court: Now you can read it a little better than you could before. I notice in line 19 you have got only TreeSweet and Silzle. Do you want ELP in there?

Mr. Dixon: I suppose they ought to be in. What is the defendants' position on this instruction now?

The Court: I already indicated I was going to give it, but I told you I would type it up for you so you could read it more easily and we could look at it again. Now, what further objection do you have?

Mr. Fowle: Well, I believe we have made all the objections to a refusal to grant our original No. 7, but subsequent to that we did discuss the possibility of inserting the word "necessary" in front of the word "effect," in line [4100] 22. I think your Honor will notice that in the amended complaint, the second amended complaint itself, if you look at the very first paragraph of the second cause of action, which is really the umbrella paragraph under which everything else falls, the words purpose and effect are stated, with the word "and" in between them. It is "purpose and effect."

The Court: Well, that wouldn't necessarily mean that you couldn't prove purpose or effect. It is just conjunctive pleading. So it is a question of what the law is and not how it is stated. That doesn't convince me at all.

Mr. Fowle: That is what we are charged with.

The Court: Well, take a simple tort case. You allege that the defendant negligently drove his vehicle at a high speed, cut a corner, and was dead drunk, and injured the plaintiff. So you come into court and what do you do? You tell the jury, if you find the defendant negligently drove at high speed or cut a corner or was dead drunk, you find for the plaintiff.

We are talking about a pleading question, and the question we really should talk about is as a matter of law, and that is what we have talked about heretofore.

Mr. Fowle: Well, in any event, we would request that "necessary" be inserted before the word "effect" in line 22.

The Court: Any objection? [4101]

Mr. Dixon: I have no objection, Judge.

The Court: It is one of the things, if a jury is listening carefully, all right, but I don't think they get these. I will add "necessary effect."

Mr. Dixon: I am inquiring now, specifically what objections, if any, does the defendant have to this instruction now?

The Court: Let's see if I can state it. I think it boils down, the real issue boils down to the word "or" between purpose and effect, purpose and necessary effect. The defendants claim it should be "purpose and necessary effect," and their second point was that there should be something about a specific intent. Those are the only two objections that I can recall, other than matters of form and dressing it up. Is that right?

Mr. Fowle: I believe that is correct.

The Court: I think that is the only place we parted company. There were minor changes on language used, and so forth.

Those objections are overruled. I will give 7.

Mr. Fowle: May I ask, was ELP referred to?

The Court: Yes, added on line 19, and strike out "or" and make it TreeSweet, Silzle or ELP.

Now we go to 15. Let me look at it. Are the defendants content with it? [4102]

Mr. Fowle: I would suggest the insertion of the words "or control" after the word "acquire" in line 11.

Mr. Fisher: Don't you need the word "of"?

Mr. Fowle: I guess "control of."

Mr. Dixon: "control of." Where do you want it?

Mr. Fowle: No, we don't need the "of."

Mr. Dixon: Strike out the word "acquire"?

Mr. Fowle: No. "to acquire or control," that is the way we suggest it read.

The Court: Then you don't need "of"?

Mr. Fisher: No.

The Court: Just insert "or control." Well, now are you satisfied with it?

Mr. Fowle: Yes, sir.

The Court: My reaction when I first read it over, and I made these notations, was that to start with from line 14 on, I have gotten written out.

"You are setting up a straw man which hasn't anything to do with the case and instructing on it." Is that your objection?

Mr. Dixon: Judge, you must be a mind reader. I have the first part marked okay. I think it is repetitious, because I think it has already been given in substance in some of the other instructions, but I am not objecting to it.

The Court: Of course, the law is this, so we get ourselves square on these things. When you submit an instruction [4103] and there is anything wrong with that instruction and I throw it out, as long as there is anything wrong with it, your instruction is out. The instruction submitted must be correct and proper in all respects. However, we do try on both sides to see if we can obviate little things that might otherwise throw an instruction out.

Now, as to the first part, let me see that. That has been covered in another instruction and so I would propose to reject 15 in toto unless you show me there is some element in there we haven't covered in some other instruction.

Mr. Fowle: Well, the second cause of action starts out by alleging that the defendants Sunkist and Exchange Orange and the alleged co-conspirator Exchange Lemon have a monopoly control over the fruit grown and available for processing in California and Arizona.

The Court: All right. In that connection, let me stop there. I don't want to break your chain of thought, but let me just stop there. I have tried somewhere in here, and will again point out that this—that is why I think this is repetitious—this is background. It is not contended by the plaintiff to be anything but background. In other words, their violations of the antitrust law do not count particularly on that alleged monopoly over product oranges. That is the background against which the allegations of violation [4104] of antitrust laws are alleged to have occurred, and the monopoly in the second count actually, as far as the working end of the cause of action is concerned, is on the monopoly over juices. [4105]

Now, that is what we did when I summarized plaintiffs' contentions. I have got that very thing covered.

So, again, I say if you want something on this as to your second cause on monopoly, you are going to have to bear in mind the distinction of the two monopolies talked about.

Mr. Fowle: I think we have borne that in mind. I simply believe that we are entitled to an instruction that, in effect, explains away the allegation with which the second cause of action starts, that we have this monopoly control, and some explanation as to why that is. That there is nothing wrong about that.

That is what this instruction proposes to do; to make it a little clearer to the jury.

The Court: All right. Let me look at it again. I noticed, also, when I was telling you about my original comments, I had taken your first part and gotten down to the words "Capper-Volstead Act" and added, "and did not illegally use that monopoly."

Mr. Fowle: Where would that phrase go?

The Court: Right after the "Capper-Volstead Act."

In other words, it is not illegal for them to acquire large control of fruit if they do so solely through co-operative action authorized by the Capper-Volstead Act—"and do not illegally use that monopoly."

Mr. Fowle: We would object to any such addition as [4106] that, Judge, because we don't concede that they had a monopoly. This instruction is very carefully phrased so as not to make that concession.

We don't concede that there was a monopoly. Even as to this background aspect of the case, to use the term that has been used here, we do not concede that there was a monopoly.

Mr. Dixon: Plaintiff in the trial of this case, and in the argument to the jury, so the record may show our position again, is going to concede that if you had a monopoly, that you had a legal monopoly over the oranges that were available for processing.

The next instruction raises the question of whether you did or you didn't. You probably claim you didn't have.

Mr. Fowle: Right.

Mr. Dixon: But we are not questioning the fact that you could have, put it that way, a legal monopoly.

Mr. Fowle: I understand that you are not questioning that a monopoly, if it existed, would be a lawful monopoly.

Mr. Dixon: That is right.

Mr. Fowle: We understand that. But we are also contending, even though you make that concession, that there was no monopoly.

Mr. Dixon: I understand.

That raises a question, then, of either fact for the [4107] jury to decide whether you had that, or if the court feels that it wants to instruct on that question, that they in fact do have one, or leave it to the jury.

The Court: Let me get this straight.

As far as your first cause of action, do you make this contention of the monopoly on product oranges?

Mr. Dixon: Yes, your Honor.

The Court: Both causes?

Mr. Dixon: Yes. It is in both causes of action. In other words, they do have monopoly control over the product oranges available for processing; that there is nothing illegal about that monopoly control insofar as the manner and method in which it may have been acquired is concerned; that the Capper-Volstead Act, and so on, permits the defendants to acquire a legal monopoly, if they want to do it.

The Court: You allege it specifically in the second cause. Do you allege it in the first?

Mr. Fowle: I don't believe that that was the court's question. I think the court's question was whether or not this supposed existence of the monopoly is essential background to both causes of action.

We would say——

Mr. Dixon: It is, yes.

Mr. Fowle: ——in any event it is not relevant background to the first cause of action. Because the first cause of [4108] action doesn't involve Section 2.

Mr. Dixon: Here on page 5, Section (b), talking about the industry, says they are the largest single source, and so on, and have two-thirds, and that they determine the selling price, and so on.

Those are factual allegations.

The Court: I am satisfied on that.

Mr. Dixon: So that it is part of the first cause of action.

Mr. Williams: Is it the plaintiff's position, then, that if he fails to prove that we had a monopoly power in the first cause of action, that his first cause must fail? If it is, then we are entitled to the instruction to that effect.

The Court: I think he considers it essential to the second cause, but—what is your view on that? Do you have to have that in on your first cause, restraining trade and commerce in juices?

Mr. Dixon: On page 6, starting with line 2, the complaint reads: Because of the monopoly control by Sunkist and EOP over the quantity and price at which Valencia oranges, and so on.

Mr. Fowle: Is that from the first cause of action?

Mr. Dixon: This is in the complaint as part of the first cause of action. [4109]

The Court: Now, Mr. Williams is trying to pin you down, and the question is, do you contend that that is a necessary part of your first cause of action?

And if you do contend it is, then he suggests that he wants an instruction on that.

I personally don't think it is a necessary part of your first cause, although I think it is a necessary part of your second cause.

On the other hand, I think you are entitled to use it as part of your first cause from the pleadings that I have seen.

Mr. Dixon: Paragraph (e) of III of the specifications I think answers that question as effectively as I can answer it.

That is one of the six specifications of the alleged conspiracy charged in the first cause of action.

The Court: One of the six acts complained of?

Mr. Dixon: Yes.

The Court: All right. Let's go ahead on this. And, therefore, since it is one of the six, you claim you have a right to avail yourself of it——

Mr. Dixon: Yes.

The Court: ——but you don't necessarily——

Mr. Dixon: Have to prove it. But which I think we will.

The Court: I will dictate something here to my secretary: [4110]

"The plaintiff has set forth allegations concerning two monopolies: one, allegations that the defendants Sunkist, EOP, and co-conspirator ELP, have a monopoly control over the production and distribution of fresh citrus fruit, that is, product fruit, available in California, Arizona, for processing in California into citrus fruit juices. And, two——"

Mr. Dixon: Do you want me to interrupt you there?

Our contention is, as part of the case, that they have and account for two-thirds of all of the oranges, and so forth, and 89 or 88 per cent of all the lemons that are available, fresh fruit, and so on. Now, the balance of the oranges that remain, or the oranges that remain after the fresh fruit has been disposed of, constitute the primary source of fruit for independent processors.

Now there is, as you have suggested, and there would have to be to start with, a sufficient amount of control over the entire production for it to follow that they would have a control over what was left, but the case stems and is based on the fact that they control the amount of product and have a monopoly and thus control the amount of product oranges and lemons that are available to independent processors for processing into citrus juice products. [4111]

The Court: This is very rough. Let me finish what I am thinking about. We certainly can't take all that time to tell the jury what I have in mind here.

"And, two, have alleged that the defendants Sunkist, EOP, and the co-conspirators, ELP, Tree-Sweet, and Silzle, have conspired to and have in fact monopolized that part of the interstate trade and commerce in citrus fruit juices produced in California and sold in interstate commerce, and particularly single-strength Valencia orange juice.

"There is a basic difference and distinction between the two monopolies referred to in the allegations of the plaintiff, and the court desires to explain the matter and call it to your attention in connection with considering the issues and evidence in this case.

"As to the first monopoly referred to, which we will speak of as the monopoly over product oranges and product lemons——"

Mr. Dixon: Grapefruit was also included, but there wasn't much evidence of it.

The Court: ——"that is, product oranges, lemons and grapefruit, the plaintiff concedes, as it must, that this was a legal monopoly under the provisions of the statutes relating to marketing associations. [4112]

"Plaintiffs' allegations as to the second alleged monopoly, which we will refer to as to the alleged monopoly over citrus juices, is urged by plaintiff as the basis of its claim of violation of the antitrust laws in connection with its allegations of conspiring to monopolize, and having in effect monopolized.

"Now, returning to the first alleged monopoly referred to, you are instructed that it is not a violation of the Sherman Act, or of any other antitrust act, for co-operatives such as defendants Sunkist, Exchange Orange, and alleged co-conspirator ELP, to acquire or control a large or even 100 per cent of the citrus fruit or citrus fruit products grown in California and Arizona, if they do so solely through their co-operative or collective action authorized by the statutes relating to marketing associations."

Now, nobody will be happy with that, but that is what I would try to tell the jury, to try to get them to understand what the case is about.

Is it even worth while writing up?

Mr. Walker: It stops too soon.

Mr. Dixon: Judge, here is my thought, for what it is worth: Reference, perhaps, to some of the allegations in [4113] the complaint almost verbatim, if you care to use them, I think would point it up, point the monopoly contention, or that question up——

The Court: Now, look. The trouble with the allegations in the complaint and all that, the same as with instructions offered by the defendant, are that you get these involved things which a jury can't understand.

I haven't finally decided, but I may try to explain to this jury something about what this case is about. If I do so, I am going to come to a part of my instructions and then say:

"I have been giving you instructions. Now I am going to give you what might be called my comments. I am not going to comment as to what I think you should find or not find, but I am going to try to tell you in laymen's language what the case is about and what some of the issues are. These comments you can disregard."

And then when I get through I will say:

"Now, I am going back to my instructions as to the law."

And when I did so, I would try to tell them in ordinary language something about this case. And I don't think it would be error—I know it wouldn't be error, first because I have a right to comment, and, secondly, because I would [4114] try to tell them and would tell them in laymen's language that there are two monopolies referred to in this complaint. One is a monopoly referred to by the plaintiff referring to monopoly of the citrus fruits and by-product fruits, which plaintiff claims that the defendants Sunkist, EOP, and ELP possessed; the second is that plaintiff's charge that there was conspiracy to monopolize, and in fact monopolization, of the fruit juices produced here in California and sold in interstate commerce.

Mr. Dixon: Judge, that is your second. Your combination and conspiracy to monopolize and the monopolization of the citrus juices.

The Court: I know but it is another monopoly talked about, conspiracy to monopolize and monopoly.

Mr. Dixon: The difference being in the first instance, we concede——

The Court: Let me finish.

Mr. Dixon: I am sorry.

The Court: I would say: As to this first monopoly, which I am going to talk about, a monopoly in fresh fruit or product fruit, and so forth, the plaintiff concedes that that was not an unlawful monopoly. The plaintiff has alleged it as part of the background of this case.

The defendants do not admit that they have that monopoly, but they contend, and rightfully so, that even if they [4115] do have it, it is a legal monopoly.

When you get to the second monopoly, however, then you have a hotly contested issue. Plaintiffs' allegations are that certain of the defendants and co-conspirators conspired to monopolize, not the product fruit, but the juices made from the product fruit, and that the plaintiffs allege, and the defendants deny, that the defendants and the co-conspirators did, in fact, monopolize these fruit juices.

Now, I want you, as the jury, in considering this problem to bear in mind that two monopolies have been talked about, and two different rules apply to them, and so forth.

I think they can understand that kind of talk. If you pick up the language of the complaint and start to read the stuff, they won't know what it is all about.

You are as interested as Mr. Dixon is to have them understand that—you may not agree that there are two monopolies or two issues as to monopolies, but you certainly are as interested as Mr. Dixon is for them to know that there is nothing illegal in a monopoly in product fruit.

Mr. Dixon: That if there is one, it is a legal one.

Mr. Fisher: Or in juices.

Mr. Dixon: Juice is something else. That is where we part company.

Mr. Walker: Even on fruit, isn't there a cut-off point where that monopoly legality ceases? [4116]

The Court: Technically you can put in all sorts of distinctions.

You have a jury of 12 people out there that are laymen. Here are two guys, and one other that I am going to add to the list, that know something about antitrust law, and here you are, and Fisher, and myself, that know a little about the antitrust laws, but we don't claim to be experts on it.

Mr. Walker: Next week one or the other of us will be.

The Court: So you have a jury that you are trying to tell something to about antitrust laws. The least you can do, in common decency, even if you make a few little errors in leaving out this or that, or some of the fringe stuff, is give them some idea of what this case is about.

Mr. Dixon: I think Judge Wyzanski's charge in the cranberry case, Judge, if you haven't looked at it, is a very good example of doing precisely what you have in mind. It is an excellent charge.

There are only two or three things that I disagree with, and it does deal with a lot of these problems that we are discussing, and on which we are endeavoring to arrive at instructions that will help the jury decide the issues in this case.

It is not an easy one. No one knows that any better than I. Yet, it is relatively simple if placed in focus, as you have indicated there shouldn't be any—— [4117]

The Court: Do I understand your theory?

Mr. Dixon: I think you certainly do, your Honor.

The Court: All right. I think I understand the defendants' theory. You say, first, there is no monopoly over product oranges, fruit, but if there is, it is perfectly legal and, of course, they deny there is any conspiracy, to monopolize or actual monopolization of fruit juices.

Mr. Dixon: That's right. They go back a step beyond my argument. I start with the premise that they have a monopoly control over the products fruit that is necessary for the plaintiff to continue in business. They say there isn't, they don't have such a monopoly. Therefore, that makes a question for the jury to decide, whether they did or didn't.

Now, starting from that point, the plaintiff says, "by reason of the monopoly control and the other things done here, they stabilized and control the prices at which oranges were available to independent processors at $40," and so on. The price is so high that the plaintiff couldn't purchase them, and so on and so forth.

But one of the reasons that they were able to do that, of course, was because, as the complaint alleges, they had this monopoly power, control over the oranges, so that the plaintiff couldn't get them from any other source, as well as from the defendant, on the basis that would have enabled them to have processed products oranges into citrus [4118] juices and compete with the defendants and the juice that was processed under these contracts.

Now, the second cause of action—in other words, that is where the restraint operates, the unreasonable restraint imposed upon commerce by reason of the exercise of this power to do the other things which are complained of, so the plaintiff was unable to process any juice, and therefore it was eliminated as a competitor and the restraint complained of with the damage resulted.

Now, as to the second, Section 2 act, the plaintiff incorporates all of these claims again as part of its second cause of action, and says further that exercising this monopoly control over the production and distribution of fresh fruit available in California and Arizona for processing into canned citrus juices, and by doing these things complained of, and by, furthermore, entering into these processing contracts with Hyland Stanford, and so forth, they tied up the facilities available even to other independent co-ops, like the Independent Fruit Growers Association, so that as part of that combination and conspiracy to monopolize citrus juices processed in California and sold in interstate commerce, the plaintiff was eliminated as a competitor, and the monopoly achieved.

The Court: Well, now, I am not going to argue the case for you. That's a good argument to the jury. [4119]

Mr. Dixon: That is the contention.

The Court: I know, but I am not going to argue your case for you.

Mr. Dixon: Of course not.

Mr. Walker: Stated much more briefly, but perhaps not as artfully, the impression which would be left by what you dictated a few minutes ago is the monopoly is legal. As I understand our contention, it is legal only to a point, so that the perimeter of legality should be in some way described.

The Court: That's right, and we are going to do that by these instructions, and that is in this instruction 15. You are way afield here. I had proposed to insert after the word "Volstead Act," "and do not illegally use that monopoly."

Mr. Walker: Then is there a cut-off point anywhere in the legality?

The Court: What's wrong with that insert?

Mr. Fowle: Because that assumes there is a monopoly, and that is one of the issues.

The Court: Monopoly power, if any, if you find it to exist.

Mr. Walker: Doesn't that leave the jury in doubt as to what is an illegal use of the monopoly?

The Court: In the one instruction, yes, but you can't put it all in one instruction. [4120]

Mr. Walker: I realize that.

The Court: We have had other instructions here about this, that, and the other thing, but it is very simple to me as to what the contentions are as to the first monopoly. The plaintiff says it existed and it is legal, but it is being used, coupled with a lot of these other things, so they contend it is part of the illegality.

The defendants say it doesn't exist in fact and, secondly, if it exists, it is legal and, thirdly, their contention is it continued to be legal at all times thereafter.

You deny the whole works. There is no dispute about this thing. It is how we are going to word it.

Mr. Dixon: It is the monopoly power, Judge, assuming they have it, which enabled them to do these things, that makes their acts illegal.

The Court: I understand that.

Mr. Dixon: You can have a legal thing and use it for an illegal purpose.

The Court: I understand all about that. It isn't the monopoly itself. Let's look at the first paragraph of 15 again. On line 5, it seems to me you ought to put products fruit there. Of course, you contend this monopoly is over fresh fruit and products fruit.

Mr. Dixon: Fresh fruit is only material because if they didn't have the fresh fruit, they couldn't have the [4121] products fruit.

The Court: Is there any harm in putting the words in there, "over products fruit"?

Mr. Dixon: No. I think it would be easier to strike the word "grown" in line 6, and have "have monopoly control over the fruit available."

The Court: Why not say products fruit?

Mr. Dixon: That's all right.

The Court: Any objection to saying that?

Mr. Fowle: Well, I don't believe so, your Honor.

The Court: Nobody is going to talk about any monopoly over fresh fruit.

Mr. Fowle: I don't believe so. How are you going to do this? The only reason for this language being the way it is is I looked at the complaint, that's all.

The Court: "products fruit." I don't know whether grown adds anything. "products fruit available for processing in California and Arizona. You are instructed, in this connection, that it is not a violation of the Sherman Act, or any other antitrust act——"

Well, strike out "Capper-Volstead," and then it will be "co-operatives, such as defendants."

Do you object to that, Mr. Dixon?

Mr. Dixon: No. That's all right.

The Court: "co-operatives, such as defendants Sunkist [4122] and Exchange Orange." You say "such as." That's all right. "to acquire or control a large or even 100 per cent of the citrus fruit * * *"

Mr. Dixon: Then you have got citrus products fruit.

The Court: "citrus product fruit grown in California and Arizona," and then I would prefer to say the statutes relating to marketing associations.

Then I would propose to add, "and providing they do not illegally use——"

Mr. Dixon: May I make a suggestion there, your Honor?

The Court: Yes.

Mr. Dixon: End the sentence there, and then talk about—because we are going to another subject, the power, if that is what you would have in mind, and I am just giving you my thoughts in an outline here——

The Court: Well, let me finish this first.

Mr. Dixon: All right.

The Court: "Providing they do not illegally use the power arising from such a monopoly, if you find it to exist."

"Power, if any, arising from such monopoly, if you find it to exist."

Mr. Williams: Your Honor, we would object to that addition upon the ground that that implies that the acquisition and control of a monopoly is illegal if the monopoly is misused. [4123] We believe under the law acquisition and control remains legal regardless of misuse. The misuse may be an offense, but it does not reach back and make the control illegal.

Mr. Dixon: Well, that's right.

The Court: I say "providing they do not illegally use." I don't say that the monopoly then became illegal, but I say if it is misused.

Mr. Williams: That is the way I construe the provision. When you say provided, it means to me that the acquisition and control became unlawful.

The Court: Instead of putting it provided, suppose I make another sentence and say——

Mr. Dixon: "such power, if you find such to exist, may not, however, be exercised by the defendants to accomplish or effect an illegal purpose."

Mr. Williams: Didn't we say that in an instruction yesterday?

The Court: We may have said it.

Mr. Wiliams: I think it is included in one of the plaintiff's instructions.

Mr. Dixon: I think it is already there in substance.

The Court: Say it again then, "such power, if you find——" we haven't even mentioned power yet.

Mr. Dixon: "such monopoly or control over product [4124] fruit, if you find such to exist, cannot be used by the defendants Sunkist or Exchange Orange to effect illegal restraints of trade or commerce."

The Court: No. You are lost, because we have got monopolization to go in there.

Mr. Fowle: And, furthermore, there is no charge that these defendants did by themselves make such use of any monopoly power, if it existed.

Mr. Dixon: If you believe.

Mr. Fowle: The charge is that they and some others conspired to do it.

Mr. Dixon: The point is, they can't use it themselves or in combination.

Mr. Williams: That has been abandoned.

Mr. Dixon: No, it isn't. The difficulty is, as I see it, this instruction merely states the law, and that is why it ought to stop there, in my judgment.

The Court: Let's stop there, because we have got other instructions.

Mr. Fowle: The second portion of this was intended to go a little further and take out, so far as the jury was concerned, some of what we regard as the sting in this charge and the arguments that will be made from the evidence, that somehow or other we did something or other to exercise control over the balance of the market for product oranges or [4125] the balance of the supply of product oranges.

Mr. Dixon: It is charged in the second cause of action, counsel, what you did there.

Mr. Fowle: And we didn't do it, but I just thought we ought to make it clear by an instruction to the jury that we didn't do it by attempting to expand our membership or increase our acreage or exclude anybody else from getting into the products fruit business, and so on, and I think the jury is entitled to be told that.

The Court: We will go into that in a minute. We stopped at "the statutes relating to marketing associations." Then in sorting these instructions, suppose I put in next 13, which we have already passed on. It is this one about the use of monopoly power, however lawfully acquired, and then I add at the end, "whether monopoly power existed in the defendant or defendants, and whether such power was misused is a question of fact for the jury."

I think I will solve this one by doing this. We have gone over the thing down to line 13—this is instruction 15—"do so solely through co-operative or collective action authorized by the statutes relating to marketing associations."

I propose to reject the straw man in the last part of your instruction. Now, make your record on 15 as it stands. [4126]

Mr. Fowle: If the court please, I believe we do not object to the modifications that have been made in the proposed instruction down to the period in line 14. But we do not regard what is contained in the latter portion of this instruction as a straw man. There has been an implication, and there is going to be an argument, that in some fashion or other, because the defendants consist of a membership which grow some 65 per cent of product oranges, that somehow or other we also have a control or exercise a control or can exercise a control over the other 35 per cent, and the burden of this instruction is intended to tell the jury that even if that is so, there are certain ways in which we haven't done it.

We haven't tried to increase our membership or increase the acreage that is under the Sunkist system, or done anything of that character which in any way violates the provisions of the Capper-Volstead Act or, as you put it, the statutes relating to marketing associations.

The Court: As long as the plaintiff doesn't accuse you of those things, why inject them into the case? You are talking about what we call straw men. In other words, you have got plenty of things to talk about on the things the plaintiff is accusing you of doing without setting up here that we didn't do that, we didn't do that, and we didn't do the other thing.

You could multiply the list forever. I don't agree with [4127] you.

Any further point on that?

Mr. Fowle: No, sir.

The Court: All right. I will give 15 as indicated, namely, the first half and not the second.

16. Let me look at it a minute. I propose to reject 16 on the ground it is an instruction on a question of fact.

Mr. Fowle: May I make this proposed modification to 16? On line—I would suggest line 10 read as follows: "from selling products oranges or power to determine prices at which others——"

The Court: Are you looking at the same instruction I am?

Mr. Fowle: Yes, sir.

The Court: 16?

Mr. Fowle: I beg your pardon. Let's go back to line 9, so that the sentence would read, as modified, in this way: "There has been no showing of power to exclude others from selling products oranges or power to determine prices at which others sell products oranges."

The Court: Or power to what?

Mr. Fowle: To determine prices at which others sell products oranges.

In other words, we would alter that sentence beginning on line 9 to read in that fashion, and submit the instruction [4128] with that modification.

The Court: All right. Now, just a minute. Strike out the word "growing," then, on 10?

Mr. Fowle: That is correct.

The Court: Then it becomes an instruction which you present to raise a question of law, and I take it the plaintiff objects to it?

Mr. Dixon: Definitely, your Honor.

The Court: It is rejected.

Mr. Fowle: Now, then, your Honor, we have an alternate, No. 16-A, which was submitted along with some other instructions yesterday.

The Court: All right. Just a minute. I have something I had crossed out of your instruction, something written below here. I want to see what it is.

What I would do would be say something like this.

"In considering the second cause of action concerning monopoly and conspiracy to monopolize, you will determine whether the defendants or either of them had monopoly control, power and ability to exercise monopoly control over product Valencia oranges available," and so forth, "processed in California," and so forth, "if you so find, you will next consider whether the defendants acted within the so-called statutory exemptions from the antitrust laws, or whether they illegally used the monopoly power." [4129]

Well, let's pass that.

Mr. Fowle: We have instruction No. 16-A.

The Court: Where is that?

Mr. Fowle: It is an alternative instruction. It is in the group which was served and filed yesterday morning.

The Court: I have it here.

Mr. Dixon: I must have that here somewhere.

Mr. Fowle: We gave it to you.

Mr. Dixon: Oh, yes. It's in these other papers. I have it now.

The Court: The defendants submit it and are satisfied with it?

Mr. Fowle: I believe we are.

The Court: Let me read it. What is the plaintiff's objection?

Mr. Dixon: First, it ties in the production of oranges.

The Court: It is all production, but supposing you took production out. Distributing or selling.

Mr. Dixon: It is not the power to exclude, necessarily, that is the monopoly power. That is one of the tests, the power to determine the prices at which others sell. In other words, there is testimony in the record already concerning that question, but it doesn't come within the ambit of this instruction. It certainly is competent evidence. [4130]

Mr. Fowle: Let me just say this, aside from the question of production and distribution and the form of that expression—that expression, incidentally, coming from the amended complaint—this instruction is based, basically, upon one of the instructions you submitted, which says the two most important indicia of monopoly power are the power to exclude and the power to fix prices.

Mr. Dixon: Not fix prices.

The question is determine prices.

There is such a thing—I won't say price leadership, but it comes close to that, where there are two sources of supply, and they are both in the same category, independent co-operatives, and the price is established by the one who has two-thirds of the production, and the other source of supply says, We can't sell at any lesser amount and satisfy our members, so we had to take the same price.

In a sense that is determining the price by the exercise of monopoly power.

Mr. Williams: That is competition.

Mr. Fowle: I don't believe price leadership is the power to determine prices. I believe monopoly is the power to determine prices at which others must sell.

I would just like to call attention to plaintiffs' jury instruction No. 33, which the court indicated it would give as modified slightly, which says: In considering the matter [4131] of monopoly power two ingredients are of outstanding significance, the power to fix prices and the power to exclude competition.

We have simply incorporated those two outstanding ingredients in this proposed instruction 16-A, as we think we would be entitled to do.

The Court: He says those are the two outstanding ingredients. What are the other ingredients? There could be, probably, many other things.

Mr. Fowle: If those are the two outstanding ingredients, and the jury doesn't find they exist, it seems to me we don't need to worry about the other ingredients.

This instruction is cast in such a way that before they can find the existence of the monopoly they must find the power to exclude competition and the power to fix prices. That is, to fix prices or determine prices at which others sell.

Mr. Dixon: I generally object to this, your Honor, on the grounds it is an instruction on the evidence, instead of leaving the question up to the jury.

Mr. Fowle: That leaves the question up to the jury.

The Court: Can it be revised?

As it stands I don't think it is proper.

Mr. Dixon: If they want to suggest other ingredients that constitute monopoly power, that they feel are applicable [4132] in any way, let's consider them.

Mr. Fowle: We don't think it is necessary to consider them. If they don't find the two important ingredients, which you have suggested are the important ingredients, we say they may not find the existence of monopoly.

Mr. Walker: Well, it doesn't fit the pattern of the evidence at all.

Mr. Fowle: If your proposed instruction fits the pattern of the evidence, I would say this certainly fits the pattern.

Mr. Dixon: To fix prices?

Mr. Fowle: Look at your proposed instruction No. 33.

Mr. Dixon: It is true the power to fix prices, and that is applied to your price fixing deal as one of the elements of monopoly power, which we contend flows from your contracts.

Mr. Fowle: I am at a loss to see how the plaintiff could complain about this instruction, that is, the essence of it.

Mr. Williams: Could you have a monopoly if you didn't have the power to exclude others and had no power to—what is it, fix prices?—to determine the prices?

If you lack those two things, you can't have a monopoly power.

Mr. Dixon: I have a notation here in connection with [4133] 33, that the power to fix prices refers to the price fixing activities which tamper with or affect price structures in interstate commerce.

Mr. Fowle: That is right. That simply defines what fixing prices means, or particularizes a little bit. But it doesn't change the essence.

Mr. Dixon: Yes, it does, counsel. There is a difference.

You may fix prices by agreement with others, but determining prices is something else. You don't have to fix prices to determine what your competitors will have to charge for Valencia oranges, if they are going to compete with you, even, or stay in business. There is a difference. Price fixing is in a category, that is one of the essential elements, but you don't always have, and frequently do not have monopoly, when you have price fixing agreements that are in effect and, in fact, fix prices.

Mr. Fowle: But if you have monopoly, the whole concept of monopoly—and this is one of the reasons why it is regarded as an objectionable thing—is that the people who have the monopoly have the power to determine prices at which not only they sell, but at which others sell.

Mr. Dixon: Determine.

Mr. Fowle: I have the word "determine" in here.

The Court: I am going to change my filing system here. [4134]

Mr. Dixon: I think this is a good time to have a recess, your Honor. I don't know about you.

The Court: I will tell you what I think about this. I have been listening to you fellows argue.

Beginning with instruction 13 of plaintiff, we have some instructions about monopoly power. 13, and 32 is about monopoly, and 33 is about monopoly, 34 talks about monopoly, 35.

First let me say that I am satisfied with those instructions on monopoly, or I wouldn't have passed them. I will group those together, and then follow with a defendants' instruction, that you are instructed unless you find EOP or Exchange Orange had monopoly control or power as defined to you in the instructions, that you may not find defendants had monopoly control, unless you find that they had it as defined in these instructions. And not, then, try to restate all the parts and exceptions, and the things that are important indicia in another instruction.

And it fits in, and you get the instructions on monopoly, what they are, the law on it, and then you get the defendants' instruction.

Mr. Fowle: I would say that the defendants are definitely entitled to have an instruction as to the effect of the law on the facts of this case. If the jury is unable——

The Court: You are wrong on that. Let's get straightened out on that right now. You are not entitled, as far as [4135] that goes, to any factual instruction. The court could give the jury just some instructions on the law. I tried to even things up, where factual instructions are asked for. Like plaintiff has one stuck in now where he calls attention to certain facts. I have a flag on it as to whether I am going to give it.

All you are entitled to is to have the law stated to the jury.

Mr. Fowle: Perhaps I misstated myself.

It seemed to me, in the light of the numerous instructions proposed by the plaintiff, and accepted by the court, with respect to the subject of monopoly, that it is fair for us to request the type of instruction that we have proposed in defendants' jury instruction No. 16-A.

The Court: If you go through those instructions that I listed, and see how they read—I am going to group those together, when I get through I will have the instructions on damages together, on monopoly, conspiracy, and then I shuffle them around so they read intelligently, and I try to even them up so they read as a group—sometimes you have little problems—I think if you go through and see those instructions, and then find this one coming at the end of it, I think you have everything you asked for, unless I misstated the law as to monopoly in those instructions.

Mr. Fowle: Frankly, I have not been able, as yet, to [4136] take all the instructions that have been accepted, either as proposed, or as modified, and try to figure out exactly what the implications of all those instructions are.

The Court: I haven't, either. We are in the same boat in that respect.

Mr. Fowle: This instruction, No. 16-A, was supposed to deal specifically with the question of what we have been referring to here as the first monopoly that is claimed. That is to say, the monopoly over products oranges themselves. Because if there is a flaw in the plaintiff's case with respect to that—I don't say there is—but if the jury should find that there is, then all the rest of their claim with respect to Section 2 tumbles down.

Mr. Dixon: Would your contention be true as to Section 1, too?

Mr. Fowle: I think so.

The Court: You can think it over. We will go and have some lunch. But I think if you read those instructions over, which sufficiently describe the monopoly power, and then read this instruction, without repeating all the points again, they will follow it along.

There might be a preference of some order.

Ordinarily it is not counsel's business to know what order I will give them in, but I think you will see that they fit in there pretty well. [4137]

That is all you would be doing if you were restating it.

Mr. Fowle: There has been a pattern to some extent in the instructions of setting forth propositions of law, principles of law, and then attempting to apply those to this case.

Our instruction No. 16-A——

The Court: I say if you look at those, I think I named you five, two or three of them are just law, one of them is an application of facts, one of them I listed may not even be on that point, it is on something else, but then you come along with your law, and you give the plaintiff's application, and then you come along with "if they don't have the power and control as defined," that is the defendants' point.

I don't see any sense for us to try to enumerate all the things. You would be writing a text here on the monopoly power.

Mr. Fowle: Except this one is really the essence of it. [4138]

* * *

The Court: Now, that brings us back to the instructions. As to 16-A, we have discussed it at length and we have got to come to an end sometime. I am going to reject 16-A as is and I am going to give it—my tentative decision is to give it in the following form. On line 4, strike out "production and."

On line 6, after the word "Sunkist," change the "or" [4147] to "and." That is on line 5.

On line 6, after "Exchange Orange," insert "or either of them."

Leave in the word "had" and strike out the rest of the sentence.

Add these words, "such monopoly control or power as described under the instructions I give you."

Now, make your objections. [4148]

Mr. Fowle: We object to the refusal to give defendants' jury instruction No. 16-A for the reasons and upon the grounds which were made clear during our discussion this morning.

I don't believe there is any necessity to repeat them.

The Court: No, I think we have covered them.

Mr. Fowle: We would also object to instruction No. 16-A as modified, because of its failure to include the more specific language which was included in our proposed instruction No. 16-A.

The Court: All right. The objection is overruled and I will give defendants' instruction 16-A.

Mr. Fowle: Your Honor, excuse me.

I have here a revision of 9-A, which is a little rough, perhaps, but it was the one we were talking about earlier today.

The Court: All right. Let's take a look at it.

Mr. Fowle: We have tried to redraft it in accordance with the court's suggestions.

The Court: Offhand, I would say generally it complies with my suggestion, except you have left out the actual monopolization.

You have conspiracy to restrain or monopolize interstate commerce.

Don't change anything yet. That is part of plaintiff's case. And then down below you have "were performed pursuant [4149] to the conspiracy."

You don't have monopolization there.

Maybe I am wrong, but it would seem to me that plaintiff would have a right to rely on these—well, certainly these are the same acts that he relies upon for monopolization——

Mr. Fowle: You are correct, something more is needed to cover that.

The Court: Can we do it at the beginning, after "monopolize"—"or as a part of actual monopolization of interstate commerce."

I would suggest on line 4, after the word "monopolize"—everything so far is pursuant—to insert "or as part of actual monopolization of."

Mr. Williams: Isn't that, simply, the conspiracy hasn't been successful, in essence, so isn't it included here?

The Court: Try this for size. You are contrasting pursuant to a combination——

Mr. Fowle: Might we not say this? After "commerce" on the third line——

The Court: "or as part of actual monopolization thereof."

This starts out "The plaintiff claims."

"or as a part of actual monopolization thereof."

Mr. Fowle: I was going to suggest, or that the six acts complained of resulted in an actual monopolization of [4150] interstate commerce.

The Court: They don't say those six acts alone resulted in it, but they were part of it.

Try this for size: "or as a part of actual monopolization thereof."

"were performed pursuant to a combination or conspiracy to restrain or monopolize interstate commerce, or as a part of actual monopolization thereof."

Then down on six and seven, "Each of these acts standing by itself and apart from any combination or conspiracy"—"or actual monopolization"—"was lawful."

Does this purpose and necessary effect also apply to monopolization?

Off the record.

(Discussion off the record.)

The Court: Does it follow that this purpose or necessary effect goes along with monopolization? Mr. Dixon, this is directed to you, largely.

Mr. Dixon: I am sorry, Judge. I was trying to compare this with the original No. 9. We have got something wholly different now. What was your question? [4151]

The Court: Well, you will have to go back then and see what we have done to date. On line 4, we insert "or as a part of actual monopolization thereof," and after the word "commerce" "or as a part of actual monopolization thereof."

On line 7, after "combination or conspiracy," insert "or actual monopolization."

Now we come down to the next part of it, and it says, "except as you may find," and so forth, "these acts or any one or more of them were performed pursuant to the conspiracy charged in this case."

Right there I am inquiring, can we say "or the monopolization charged"? Then does it logically follow that the next part, "and with the purpose and necessary effect," does the purpose and necessary effect apply to monopolization as well as to the conspiracy? If we can, then it is simple.

Well, I have got a better idea. Go down to line 12, after "plaintiff," the purpose and effect of eliminating competition of plaintiff, that all follows from the conspiracy. "or were performed pursuant to the monopolization of the market for citrus fruit juices." I think that will do it.

"performed as part of the charged monopolization of," and it actually would be inserted after the word "in" on line 12, instead of after "plaintiff," the way it would read. [4152]

"The plaintiff claims that the six acts complained of were performed pursuant to a conspiracy or combination to restrain or monopolize interstate commerce or as a part of actual monopolization thereof, and that it was injured by reason of the performance of one or more of these acts. Each of these acts standing by itself apart from any combination or conspiracy or actual monopolization was lawful. Except as you may find therefore from the preponderance of the evidence that these acts or any one or more of them were performed pursuant to conspiracy charged in the complaint and with the purpose and necessary effect of eliminating competition of the plaintiff in or were performed as part of the charged monopolization of the market for citrus fruit juices processed in California," and so forth.

Mr. Walker: On line 12, shouldn't that be "combination or conspiracy"?

The Court: Line 10.

Mr. Dixon: Is this now the defendants' instruction?

Mr. Fowle: Actually, it isn't any longer.

The Court: You conceded you had covered everything except that. I don't know how we are going to cover it except I have suggested this.

Mr. Williams: I have a complaint on that, your Honor, and that is that you can't have a crime of monopolization by more than one person, one party, without the element of [4153] agreement between them. If you have the element of agreement between them, then you have conspiracy. The reason you can't have it without an element of agreement is because you would have nothing but conscious parallel action, which has been condemned by the Supreme Court. Suppose you have four persons going along parallel lines. You can't say they monopolize the field. You have to have an agreement.

The Court: I have got your point. What do you say to that?

Mr. Dixon: Your Honor, my general objection, I was prepared to argue with reference to monopolization itself being accomplished. Insofar as this case is concerned, the monopolization which we claim was accomplished in 1951 as a result of these acts was the control, I mean the accounting for a certain percentage of the total production of single-strength citrus juices.

Now, to answer your question, it is true monopolization generally, you can combine or conspire to monopolize, which means you can do it with two or more people, or you may monopolize as an individual through the normal and natural consequences of your act.

The Court: Well, wait.

Mr. Dixon: I have an objection to this whole instruction.

The Court: Williams' point is not good on this instruction, [4154] anyhow, because this instruction doesn't touch the question of whether one or more of the defendants may monopolize. This instruction says you may ignore these six acts, so it doesn't touch this monopolization. If there is to be an instruction, it should be a separate instruction.

Mr. Fowle: Your Honor, I really believe the instruction as it was proposed originally before the modification takes care of the matter because it is true it deals only with the conspiracies, the conspiracy to restrain trade and the conspiracy to monopolize, but there couldn't have been any monopolization here by the people who are supposed to have conspired to monopolize unless there had been a conspiracy to monopolize. To deal with it as an actual monopolization merely means it was a successful monopolization.

The Court: As I understand, monopolization could come about in two ways, either by the accomplishment of the conspiracy or by the act of one individual. In other words, the actual monopolization would either be the result of conspiracy to monopolize, or it would be the act of one. If it was the act of more than one, it would have to be the result of conspiracy.

Mr. Fowle: Right.

The Court: Then with that in mind, we could leave the instruction as it is with one or two exceptions, and say [4155] "disregard such acts as being the cause or causes of plaintiff's damage based under any combination or conspiracy charge," and limit this then to combination or conspiracy.

Mr. Fowle: I understand your Honor's point, but I don't think stating it the way we had stated it originally eliminates that element you are speaking of, because if these acts were performed as part of a conspiracy to monopolize, I don't think it is going to be of any significance at all as to whether or not there was a so-called actual monopolization. If there was a conspiracy to monopolize, that is the end of the ball game.

The Court: What were you going to say, Mr. Dixon?

Mr. Dixon: I only have this to say, your Honor. I have the original 9 and I have this 9-A which we are talking about, and I have compared them. They are completely different and on different subjects. I object to this revised 9-A for a good many reasons, but at the moment I am interested so that we can go along. I understand how we are proceeding, how you want us to proceed in this matter. I would like to make this comment.

I would like to know first whether these instructions when they are revised or changes made, are acceptable and become the instruction of the defendants, or whether they are the instructions of the court? I naturally want to aid in every respect that I can the court in framing any and all [4156] instructions here. To that extent, I will, of course, direct my objection primarily to what we are considering, which I understand are your instructions, the defendants' instructions.

If the court has in mind giving certain instructions on certain things, it seems to me that is something a little bit different than what we are talking about here, because in this instance, we have a copy of this instruction in 9-A, and I don't know, frankly, what the purpose of it is, except I can see what the effect of it would be.

The Court: Mr. Dixon, I get your point, but we all want to save time.

Mr. Dixon: Right.

The Court: They propose these instructions, picking out isolated act by isolated act, and winding up with a long paragraph that you will take this out of the case. I told them I would consider one if they limited it to taking it out of consideration as part of the conspiracy, but not out of the case. It seems to me something like that is proper. Whether it is done right is another thing.

We got off onto the monopolization question, and let's terminate this by saying if there should be an instruction on the accomplished monopoly, or monopoly conspiracy, there should be a separate instruction.

The question is, ignoring the insertions I put in [4157] there, what are your objections to 9-A?

Mr. Dixon: The second sentence, clearly each of these acts standing by itself and apart from any combination or conspiracy was lawful. That is tantamount to an instruction by the court on the evidence concerning these facts or acts, to which I would not necessarily agree. I don't think it is the kind of thing that could be anything except prejudicial to the plaintiff in considering this evidence, because the natural effect of this instruction is to convey to the jury that each and every one of these acts standing alone is a lawful act and, therefore, the net result of it is that considering them in that light, there couldn't possibly be any illegal action, because you wind up with nothing more than the entire conspiracy.

I frankly do not know of any instruction of this kind that was ever given in a conspiracy case for the very reason I have mentioned. I don't know how to further elaborate on the point, except that here in one instruction the plaintiff has got, if it is given, what they tried to get in the other five, because the court is now telling the jury that every one of these six acts, if you want to separate them and pick out the act separately, was a perfectly lawful act, which is certainly commenting on the evidence, which the court has a right to do, if you want to do it.

That is my objection to the second [4158] sentence.

Now, the rest of it merely deals with causation and a general charge, in other words, on causation would cover this point because the law is, of course, clear that the plaintiff must show that he had been damaged by some of the acts of the defendants, but it may be one or more. But the jury must find that it was one or more and that the acts damaged.

Now, it seems to me that is the way to instruct on the acts, not to pick out all of the acts, as the defendants have done in this instruction, and then have the court tell them that every one of them standing alone is perfectly legal, that the only time they become illegal is when they are done pursuant to a combination or conspiracy, and then you must decide which one of those acts, if any, damaged the plaintiff.

I don't object to a general charge, of course, on causation, and the proper connection of these acts to damages, and that any act that damaged the plaintiff must have been done pursuant to conspiracy.

The Court: All right. I have your point.

Mr. Dixon: I feel it is highly prejudicial in this form.

The Court: I have your point. The matter comes down to this. The court has to make a determination some time as to what is a proper instruction and what is not, and I might [4159] as well make it

I am going to see how this reads by striking out this business about these acts there. If you want it with that in there, all right. If not, we will reject it again.

Leave the first sentence in. You are entitled to some instruction about these acts.

Strike out of the second sentence "lawful in itself."

I read the acts over a while back and I was going to comment then there are two or three of those acts it would be error for me to instruct were lawful. That couldn't be said about the ELP contract, but some of the others, I think it would be error to say were lawful. I am not commenting now.

Now, then, on line 7, strike out "Except as you may," and insert "you are to determine."

Strike out "find" on line 8.

"You are to determine, therefore, from the preponderance of the evidence that—whether these acts or any one or more of them were performed pursuant to the combination or conspiracy charged in this case, and with the purpose or the necessary effect of eliminating the competition of the plaintiff."

Strike out my insert, "in the market for citrus fruit juices produced in California and sold in interstate [4160] commerce."

Mr. Dixon: That I can't find any objection to.

The Court: I will reject 9-A in the form it is. I propose to give, if you want it, 9-A in the shape that I read it. You can make your record on it. In fact, I will go further than that. No. Leave it as it is. [4161]

Mr. Fowle: If the court please, we do have objections to the alteration of this first revision of instruction No. 9-A, because as it stands now it gives the jury no indication as to which way they are to go, if they find that these acts, or one or more of them, were not performed pursuant to the conspiracy.

We simply want the record to show that.

If your Honor proposes to give this instruction as modified, as long as we have our record on this instruction on the form in which we proposed it, I think we would have no further comment at all.

The Court: As I understand, you are objecting to my refusal to give 9 to 14, inclusive, and you object to my refusal to give 9-A as you submitted it?

Mr. Fowle: That is right.

The Court: But since I have overruled you on those things, you do not have any objection to 9-A as it stands?

Mr. Fowle: Except as we have——

The Court: Except insofar as that by giving 9-A as it now stands I am rejecting your previous request?

Mr. Fowle: Correct.

The Court: I am going to give the first revision of 9-A as modified.

Mr. Williams: Your Honor, we submitted a proposed instruction with respect to each of the six acts, like 9-A [4162] was before modifications—I mean like 9-A in its first revision was before modifications. In other words, there were some acts that you couldn't hold were lawful apart from any combination or conspiracy, but there were some that are. So we now request an instruction as to those that can be so held, that the jury be instructed that they are lawful.

The Court: I am not going to decide that in a vacuum. If you want to present something like that, present it, and I will look at it.

You concede some are proper and some are not?

Mr. Williams: We are not conceding it. We are just trying to conform to your ruling.

Mr. Fowle: I take it that if we had supplied an instruction in the form of this first revision of 9-A dealing with each one of the six separate acts, that you would reject all of those, as you rejected the one that deals with them collectively?

The Court: I am not playing cat and mouse with you; I might consider, after I saw it written up, something on the ELP contract, and the oral contract, and the reverse of it, EOP for ELP. But those probably would be the only two. I would have to see them in writing to look at them.

Now, 17, while we are getting ready, this corresponds to a similar one we had on the first cause, and I have done some—— [4163]

Mr. Fowle: I might say this, your Honor. We will withdraw No. 17, because No. 17 was drawn originally to deal with the attempt to monopolize, and we have a substitute, which is numbered 17-A.

The Court: I will get 17-A out. I am sorry I worked on the wrong one. 17 withdrawn.

17-A. Let me look at it.

Mr. Dixon: Are the defendants satisfied with this instruction? I mean, you don't intend to change it?

Mr. Fowle: I think in view of the court's rulings, there would have to be a change or two in who the conspirators were.

Mr. Dixon: That is the only change?

I have several objections to it, your Honor, and it will take me some time.

The Court: Wait a minute.

Mr. Fowle: We would also suggest the insertion in line 16, after the words "specific acts"—"or one or more of them."

The Court: I don't know still how to do this.

I am willing to give you this kind of a formula instruction, but it has to be worked out like the other one.

First of all, if it is worked out similar to the way the other one was worked out in the first cause, do you have any objection? [4164]

Mr. Dixon: I don't think so, your Honor. I have said I have several objections, if this is the defendants' instruction.

The Court: I reject the instruction as it is.

Mr. Dixon: If the purpose is to help the court frame an instruction on this point, I am perfectly willing to give the court my views for whatever they may be worth.

The Court: Let's do it all at one time, because you may not be content as it is.

I propose to do something to it in a moment, and then you can make your objections to the modification and the proposals.

I am talking about defendants' 17-A. On line 6, after the words "cause of action," insert "which were incorporated by reference into the second cause."

I want to get rid of all this talk about going back to the first cause. It is true they were in the first cause, but they were incorporated by reference, and it is confusing, as I read it.

Line 10. Insert "and particularly single-strength Valencia orange juice" after the words "fruit juices."

On line 13 we are going to have to change that in there on this conspiracy. Maybe we will go back to the other one and find what language we have got. I couldn't figure that out right at the [4165] moment.

Line 16. After the words "and conspiracy did" insert "one or more of the."

Strike out "the same specific"—so it will read "did one or more of the acts charged and complained of." Strike out "in the first cause of action."

Down on line 19 strike out "specific intent" and say "purpose and necessary effect of excluding"—strike out "substantially all"—so it will read "excluding competition."

Strike out "including that of the plaintiff."

Mr. Fowle: Your Honor, did you say "excluding the competition of the plaintiff"—is that the way it reads?

The Court: So it will read "excluding the competition of the plaintiff."

Now, maybe I can pick up from the other one the language we used.

That doesn't help me.

Mr. Fowle: May I make this suggestion? It is the five concerns that are charged.

The Court: Yes?

Mr. Fowle: And your Honor has indicated we must treat them all alike.

The Court: Yes.

Mr. Fowle: Therefore, would it not be proper to say that defendants Sunkist—just leave out "defendants," and say "Sunkist, Exchange Orange Exchange Lemon, TreeSweet, or [4166] Silzle combined and conspired, and pursuant to such combination and conspiracy."

The Court: Actually you would have to have Sunkist or EOP in this conspiracy, they would have to be in, anyhow. So we will say on line 12, "defendants Sunkist and Exchange Orange, or either of them, and one or more of the co-conspirators"—"combined and conspired"—strike out "with TreeSweet and Silzle"—"and pursuant to such combination or conspiracy," did one or more, and so forth.

Have you got about what I have got, or do you want me to read it over?

Mr. Dixon: I think I have got it.

Mr. Walker: Lines 14 and 15, how does it read?

The Court: Going back to 13, it reads, "Exchange Orange, or either of them, and one or more of the co-conspirators." Line 14, "combined"——

Mr. Dixon: Leave the word "alleged" in?

The Court: Yes, "alleged co-conspirators."

Line 14, "combined and conspired."

Line 15, "and pursuant to such combination and conspiracy did one or more of the acts charged and complained of."

Mr. Dixon: Strike out "with either TreeSweet or Silzle"?

The Court: Yes.

Charged or complained of in order to acquire effective [4167] control of the interstate market for California citrus fruit juices with the specific—and so forth.

Do you object to that in that form?

Mr. Dixon: No, I don't Judge. I think it correctly states the law.

The Court: Now make your record as to why I should give 17-A as submitted, and your objections, if any, to 17-A as modified.

Mr. Dixon: I suggest the word, instead of "excluding"—"eliminating."

Mr. Fowle: Isn't "excluding" the word of art that is used in connection with monopolies?

Mr. Dixon: This is combination.

Mr. Fowle: To monopolize.

Mr. Dixon: Yes. You are eliminating the competition.

The Court: I will change "excluding" to "eliminating."

Mr. Fowle: We object to the alterations insofar as they eliminate the reference to specific intent, and insofar as to the language "excluding substantially all competition." Because in our view a monopoly or an attempted monopoly — and, of course, a conspiracy to monopolize is really nothing but a joint attempt to monopolize—intent is necessary where the acts fall short of the results complained of, and the very essence of monopoly is to engross either all or substantially all of an entire market. [4168]

Putting it a little differently, the essence of a conspiracy is to exclude all or substantially all competition from a market.

The Court: Then you may have, also, your objections heretofore made to the use of the words "purpose or necessary effect," as you have heretofore made them on another instruction. You may have that incorporated here.

You wanted "and" and we changed it in the alternative.

What about their point as to eliminating the one plaintiff? Are you satisfied with that?

Mr. Dixon: Eliminating competition — I don't think I got their point.

The Court: Their point was this: This was a conspiracy to monopolize, this is under the second cause, and therefore the instruction is wrong where we talk about eliminating only the competition of the plaintiff.

Mr. Dixon: As I understand the instruction, the purpose and necessary effect of eliminating competition, including that of the plaintiff—that is part of the instruction, isn't it?

The Court: No. Eliminating competition — all right. If that answers their objection, leave the words "including that of the plaintiff."

Mr. Williams: We still have objection to "substantially all" being left out. [4169]

The Court: Any other objections?

Mr. Fowle: I believe not.

The Court: I will give 17-A and overrule the objections.

Are you satisfied with 18? I propose to reject it. I just want to know whether you want to do anything before I reject it.

Mr. Fowle: I would believe, in view of the discussions that have taken place heretofore, and in view of your Honor's views with respect to a similar instruction earlier in the series——

The Court: That you will let it stand as is?

Mr. Fowle: Yes.

The Court: You may incorporate all your objections heretofore made to a similar instruction——

Mr. Fowle: As a matter of fact, I do have this suggestion, come to think of it. We did have some modifications of this proposed instruction for this reason: It was prepared in the beginning to deal with an attempt to monopolize, and we had, therefore, made some alterations on the face of it, which directed it at the conspiracy to monopolize, rather than the attempt to monopolize, so that it would have read this way:

"You are instructed that the specific acts charged in the second cause of action to have been done pursuant to the alleged conspiracy to [4170] monopolize must have been done for the purpose of monopolizing and with the specific intent of excluding the plaintiff as a competitor,"

and so on.

The only other change was down in line 11. After the phrase "but that" we would suggest inserting the words "monopolization and." And then changing the last word in that line from "was" to [4171] "were."

Mr. Dixon: What are you talking about? 25-1?

The Court: 25-A. Have you got one to submit on this?

Mr. Fowle: No. This is 18.

The Court: You haven't given us anything? You are just reading?

Mr. Fowle: I was simply reading certain revisions in our proposed Jury Instruction 18 as you have it before you to bring it into conformity with the amended complaint which now calls it conspiracy to monopolize rather than an attempt to monopolize. This instruction having been prepared before the complaint was amended, I do this to eliminate the allegations with respect to the attempt to monopolize.

The Court: Well, I don't know how it will read. Better go slowly over it again before I reject it. What do you insert?

Mr. Fowle: After the words "second cause of action" in line 4, insert the phrase "to have been done pursuant to the alleged conspiracy to monopolize."

The Court: Then what is next? Did you strike something?

Mr. Fowle: After the word "done" in line 4, "for the purpose of monopolizing."

The Court: Well, what you want in here is specific intent, isn't it? You want to make the record on specific intent?

Mr. Fowle: Yes, that's right. [4172]

The Court: Well, I am going to reject it, so I suggest, to save time, you type up whatever you want as 18-A and we will look at it then. There is no use spending the time copying this, because I have already ruled on this question of specific intent. You can submit another one, if you want, that will take care of this provision and still raise the point which you want to preserve.

Mr. Fowle: All right, sir.

The Court: 19?

Mr. Fowle: That is withdrawn.

The Court: All right. 20?

By the way, these others that you submitted, do you have alternate numbers?

Mr. Fowle: Yes.

The Court: If you have alternates, call my attention to them.

Now we come to another one of these series in the second complaint like you had in the first. I think they are 20, 21, 22, 23, 24 and 25. They are the same kind of series, apparently, as 9 to 14 was.

Mr. Fowle: Even as they stand now, your Honor, they need slight modification to bring them in line with the second amended complaint, which eliminates the attempt to monopolze.

The Court: Do you withdraw them at this time? If they [4173] need modification, you better withdraw them.

Mr. Fowle: The modification is really quite slight. It is almost exactly the same phrase at the same point in each one.

The Court: I reject 20 to 25. You can make your record on them, and again you have the same problem we ran into with 9 to 14. We have some kind of pattern of what I would propose to give, if you want something on the second cause, like we had on the first. If you do, I would like to have it submitted. Make your record on 20 to 25.

Mr. Fowle: Well, I don't believe it is necessary to say anything more than was said this morning.

The Court: You incorporate here the matters of discussion, particularly under 9 to 14, and 9-A, along in there?

Mr. Fowle: That is correct.

The Court: And, as a matter of fact, any other discussion we had which bears on the problem here?

Mr. Fowle: And we may wish to submit a single instruction incorporating the essence of these.

The Court: Yes. I think I am right, that 20 to 25 are all the same kind, aren't they?

Mr. Fowle: Yes, sir.

The Court: All right. Now, 25-A?

Mr. Dixon: That should be withdrawn.

The Court: It is out? [4174]

Mr. Fowle: Yes. That is the Robinson-Patman Act. 25-A is withdrawn. 25-B, I believe, is still submitted. That does not deal with the Robinson-Patman Act.

The Court: 25-B. We have got 25-1 over here somewhere.

Mr. Fowle: That deals with a slightly different subject. Actually, that deals with the Hyland Stanford contract. We can come to that later and handle it separately.

The Court: All right. 25-B. Let's read it over. Well, in the form it is in, I propose to reject it. Whether it could be dressed up or not is another question. I would reject it for the reason that in the paragraph where there is reference to the eliminating and suppressing interstate commerce, it should be the purpose or necessary effect. That appears a time or two. And for the reason that at the very bottom line it says "TreeSweet and Silzle," and this is in the way of a formal instruction. It would have to be "TreeSweet or Silzle," and so forth.

What is the plaintiff's position?

Mr. Dixon: This instruction, your Honor, certainly we object to it on the ground that, first of all, it does not state the law, and, if it did, there would be no limit to the right or the extent to which any co-op, so-called, could control the prices and use to which products purchased from it could be made after they were acquired. Just based on the fundamental law in that respect, once you sell something, you [4175] can't determine how it shall be used, unless you have got a patent, and even then, under the recent decisions of the Supreme Court on efforts to control resale of patented articles, that has been frowned upon, and in practically all instances it was held to be illegal.

In this instruction the defendants are seeking to get the court to instruct the jury in this case that, regardless of what they did, it was all right because they could have sold oranges to TreeSweet for processing purposes at any price they chose as long as they were used for processing purposes, I mean for processing to single-strength juice. They could have sold to Hyland Stanford at a different price on condition only that Hyland Stanford process them into pasteurized concentrate. And to another purchaser at a different price yet provided they were used only for processing into frozen concentrate.

I think to state the situation is to indicate the utter unreasonableness, shall we say, of such practices, which I am certain never had any specific authorization in any of the marketing acts of Congress, and certainly, in my judgment at least, would not be approved by any court.

Mr. Williams: Your Honor, counsel's objection goes to the validity of an agreement between the seller and the purchaser that would limit the purchaser in his use of the oranges. This instruction does not in any way pass upon the [4176] validity of such an agreement. This merely says it is lawful for them to sell it at two different prices, and doesn't take the next step and say it would be lawful for them to agree with the purchaser that the purchaser must abide by a restriction on use. This was exactly the situation in the Maryland-Virginia Milk Association against United States. They argued there that the two-price system was unlawful, and the court held that it was not.

The Court: I don't know whether you can dress anything up on this or not. I have doubt about it. But 25-B is rejected as it is. Make your record on it.

You can try over the week end to see what you can do with it. I have already told the jury that, bear in mind that I have already told the jury that these defendants could process until the cows come home. I have already told them they could make contracts with independents if there weren't this, that, and the other thing. I take it that what you are shooting at there is the so-called two-price system.

Mr. Fowle: True. This was a difficult instruction to draft.

The Court: Are you going to argue the two-price system at all? If you are not, there isn't much urgency in the case.

Mr. Dixon: I don't know what you mean, Judge. The two-price system, I am going to argue certainly—of course, this isn't in the case, they didn't do this in the first place, as [4177] such. There is absolutely no evidence whatever to my knowledge in the record in this case upon which this kind of an instruction could possibly bear or have any place. It relates to the right, as I read it, of a co-op to do certain things in selling its product, namely, to sell it at two or three different prices, apparently, as it pleases.

There is no evidence in this case that that is what they did as such. The price was $40 for fruit. That was it, the one price. They did sell some for $22 under the Silzle contract, about 500 tons.

Mr. Williams: We don't concede that.

Mr. Fowle: It is going to be the position of the plaintiffs here that oranges were being offered and sold at one level and that contracts were being entered into with certain processors which permitted them in effect, this will be the claim, to get either oranges or the equivalent at a figure which brought back to Exchange Orange the lesser price than the price at which Sunkist was offering oranges for, say, in the market.

That, we say, is very similar to the two-price system which was before the court in this Maryland milk case. It was charged that the two-price system there, where they sold one kind of milk at one price for one purpose, and another kind of milk, skim milk——

Mr. Fisher: No, it was the same milk. [4178]

Mr. Fowle: ——the same milk for different purposes at a different price, it was charged there that that was a price-fixing scheme and was done with the purpose of restraining trade.

The Court: It is not charged here there is any violation as part of a price-fixing scheme. It is charged that the TreeSweet and Silzle contracts were, but it isn't charged that the others were. The only thing that Bireley——

Mr. Dixon: They bought at the regular price, Judge, in the first place, and there is no evidence in this case at all, to my knowledge, that the defendants ever offered publicly to make oranges available to processors of single-strength juice at $22 a ton.

In the milk case, anybody could get it if they wanted to.

The Court: Nor did they publicly make available the processing contracts.

Mr. Dixon: No.

Mr. Fowle: But there is evidence in the record that the $40 price was fixed with the view in mind that oranges could be bought by certain processors at that price if they were to process those oranges into a certain type product, whereas, if oranges were to be bought by purchasers for single-strength orange juice, they would have to be sold at a lower price. That was not only true of Sunkist, but Morgan Ward, and he solved the problem in the same way. [4179]

Mr. Dixon: There is no evidence in the record to that effect, counsel, that Sunkist or EOP, to my knowledge at least, ever offered to make these contracts pursuant to which a processor like the plaintiff could get access to oranges on a basis where they would pan out to be available at, say, ten or twelve dollars a ton, as they were to TreeSweet and Silzle, or fifteen, whatever it was.

The Court: Anything further you want to add in behalf of 25-B? I will still consider, if you want to look it over during the week end and see what you want to do about it, but I have serious doubts about it. You can take another stab at it. I am not going to take the time now, because it is t[illegible]emote.

Mr. Fowle: All right.

The Court: Anything further you want to add? Rejected.

* * *

The Court: All right. Are you content with 34, or do you have a revision of it?

Mr. Fowle: I think we are content with 34.

The Court: Let me read it again.

I propose to reject 34 in the form it is in. I might, [4180] with certain changes, give that part of it down to the period on line 12.

I also would give some summary form of its contentions. However, it must be in summary form, your theory and contentions, and not specific things. You know what I mean. Like the plaintiff did. You have got more to put in yours than the plaintiff, it would be longer, because, like the old tort case about the pot, you say you didn't steal it, and if you did steal it, it was broken, and finally there wasn't any pot at all.

In other words, you have got whatever you want in that respect, but I am not going to discuss evidence in connection with either the plaintiff's contention or the defendants'.

When I first went over it, what I had was to strike out the latter part of it; the first part down to about 12, with some changes of wording, largely might be proper.

Mr. Dixon: The word "substantial" isn't proper, certainly, in line 11. That isn't the language of the cases.

The Court: No. The question isn't substantial cause. In fact, I scribbled on it at the time I was going over it, "This isn't good."

"The burden is on them to prove that the plaintiffs' loss or damage was caused at least in part by the action of the defendants. The plaintiffs need not prove defendants' acts were the sole cause if other changes and happenings may also [4181] proximately have contributed."

Incidentally, I have laid aside these instructions on proximate cause. We still have to get one on that.

"If, however, no wrongful act or conduct of defendants contributed proximately in any way * * * then the defendants are not liable to the plaintiff."

This is in the way of proximate cause. Also, it involves the question of sole cause or other contributing causes.

Mr. Fowle: We wouldn't argue about the word "substantial," your Honor. This instruction is based to a considerable extent on Judge Wyzanski's instruction to the jury in the cranberry case, where he explained to the jury the various causes that might have resulted in the plaintiff's injury in that case, just as we have attempted to do in this instruction.

The Court: Let me see what I can do on the first part. [4182]

Mr. Fowle: We wish to change the word "substantial" to "the proximate cause of any injury."

The Court: "a proximate cause."

On line 7, after the word "extent," maybe Judge Wyzanski liked the words "circumstances which befell," but I would strike that out and say, "to what extent"—insert "plaintiffs'"—strike out "are" and say "plaintiffs' alleged injury is attributable to the wrongdoing of the defendants."

And then on line 11, strike out "substantial" and say "proximate cause."

Offhand I think that part of it is all right.

Does plaintiff have any objection to that part of it?

Mr. Dixon: How does that read now?

The Court: "to what extent plaintiffs' alleged injury or damage is attributable to the wrongdoing, if any * * *" That is the way it reads now.

Mr. Dixon: Does the words "if any" come in there again?

The Court: This doesn't go all the way.

Mr. Dixon: I see.

The Court: This is proximate cause, really. If you find there is proximate cause, then you have to still find whether there was injury and damage, and so forth.

Mr. Fowle: If the court please, I believe you indicated a moment ago that the defendants would be liable to the plaintiff in damages even though the defendants alleged [4183] wrongdoing was not the sole proximate cause of the injury.

The Court: Right.

Mr. Fowle: I don't believe that is so. I believe if the injury was caused in part by the alleged wrongdoing of the defendants, and in part by some other cause, that the defendants would not be liable for all the damages that resulted from the different causes.

The Court: Well, I don't know. You are in the tort field. If you have got causation, tort feasors cannot talk about how they are going to apportion damage.

Mr. Dixon: Judge, here is the way it is usually done. Up to the first part it is correct. You determine whether they violated the antitrust law, then if you decide that they have, then you should next consider whether such acts of the defendants constituting the violation were the proximate cause of any damage suffered by the plaintiff.

In other words, the act complained of must cause the damage.

Then the instruction would follow on what constitutes proximate cause. And then, of course, having determined that the acts were committed, and that there was a proximate cause of some injury, then you will determine the extent of the damages, if any.

I mean in that logical order.

The Court: Technically I hope we don't have to get into [4184] this, but technically you have exactly the same problem I wrestled with in that Marshall case, and we had an old Idaho case saying there can be only one proximate cause.

Actually, you have the foreseeable test as to other forces and happenings. If they were foreseeable, then the defendant is liable for the whole business. If they weren't foreseeable, then the defendant is not liable. If the unforeseeable cause came in, it broke the chain of causation.

That is what you really have got if we have to go into it.

Mr. Fowle: I know this gets the whole thing pretty complicated, but in Judge Wyzanski's charge to the jury in the cranberry case he went into this very question. He said, "You may decide that the wrongdoing of the defendant in that case, or defendants, was only a part of the cause of the damage here, some of the damage may have resulted from other things, in which case you ladies and gentlemen of the jury will have to make up your minds to what extent the defendant is liable for what happened here."

Mr. Walker: I happen to be looking at that case right now. Does the court want it?

The Court: His instruction, with all respect to Judge Wyzanski, wasn't technically correct, if you want to get down to it.

In certain instances, it is true, some other cause, an [4185] unforeseeable cause, wouldn't be chargeable to the defendant, but a foreseeable cause would be. If we get into all that, we have a heck of a thing. For instance, suppose it was foreseeable that the plaintiff was a little hard up for money, and because it was hard up for money, it lost contracts and eventually went broke. Now, unless this being hard up for money was the thing you assume was the cause of the injury, if a proximate cause here is attributable to the defendant, and if it was foreseeable while the defendants were doing the acts that they were doing, that the plaintiff might become hard up, then the fact that it became hard up and it went broke was a foreseeable cause and doesn't relieve defendant of liability.

Mr. Williams: Here we have the problem whether it was foreseeable that Morgan Ward would refuse oranges.

The Court: If we say a proximate cause here, maybe we solve it.

There isn't a lot of difference between what you state down to line 12 and what Dixon suggests. I like it better.

If you first find it violated the antitrust law; secondly, you then see whether or not the acts complained of, or any one or more of them, caused the the plaintiff damage; and then whether or not that act was a proximate cause.

Mr. Fowle: Well, the portion of this instruction that is incorporated in that part of it down to line 12, I agree [4186] can be stated in many different ways. That was simply an introduction to the balance of the instruction. I agree that the first part of it can be stated in many ways, and if all the rest of it is going to be rejected, I have forgotten what Mr. Dixon's instruction says at the moment, but it may be adequate. Perhaps not.

The Court: I will dictate something to my secretary.

This is a revision of 34. Copy what is marked as "A," which goes down to the word "consider" on line 7, and then I will dictate:

"Whether or not one or more of the acts complained of by the plaintiff resulted in injury or damage to the plaintiff, you will next determine whether or not the violation of the antitrust laws, if such you find, and the commission of the act or acts complained of, if such you find, was a proximate cause of any injury which the plaintiff may have suffered."

Does that do it?

We will lay 34 aside.

Do you want to make any record on 34 as is?

I am rejecting it as is.

Anything more than what we have said?

Mr. Fowle: I might make just this one statement, that we believe that we are entitled to an instruction in either that [4187] form or a somewhat similar form for this reason: that instructions are going to be given, I gather, in this case, that deal with principles of law, and which, in addition, apply those principles of law to the facts of the case, not in great detail, but in some detail, and since a fairly substantial part of this case was taken up with evidence which we believe shows or tends to show that the misfortune of Winckler-Smith company in 1951 was due to causes other than the alleged wrongdoing of the defendants, we think that it would be proper to instruct the jury that if they find that the fact that the plaintiff went out of business in 1951 was due to some of these other causes, naming them, then the defendants would not be liable.

The Court: All right. The objection is overruled.

Where do we go now, to 14-A?

That is the next one that I have that hasn't been acted upon.

Mr. Fowle: Yes.

The Court: Are you offering it?

Mr. Fowle: Yes, sir.

The Court: A lot of this has been covered by instructions pointing out that the plaintiff must prove this conspiracy and must prove that things were done for the necessary effect, and so forth.

The instruction is wrong as a matter of law, in line 16, [4188] where it is charged with being of no consequence in the case, where you take out of the case a bit of evidence which may be considered for other purposes.

I propose to reject it.

What is the gist of what you want to say by 14-A?

Mr. Fowle: The gist of this, your Honor, is by the second amended complaint the plaintiff added to its charge a charge of price fixing. That was new in the case as far as we are concerned.

You say we are competent counsel and we should have been able to figure this out. I think there is a little bit more to it than that.

It was the first time that price fixing was pleaded in the case. It is, therefore, the first time that we knew that it was going to be in the case as far as the pleadings are concerned.

Now, this instruction deals with the matter of price fixing, and it says, in effect, that unless you find that price fixing was done here pursuant to the conspiracy, and with the purpose and effect of eliminating the competition of the plaintiff, the whole matter of price fixing doesn't belong in the case.

And that is our view.

The Court: Does plaintiff object to this instruction?

Mr. Dixon: Yes, definitely. [4189]

Mr. Fowle: We go on to say, in addition to that, that in any event the charge of price fixing should play no part in this case, unless the jury finds from a preponderance of the evidence that Sunkist or Exchange Orange entered into an agreement with TreeSweet or Silzle to fix the prices at which those two companies resold the products.

The Court: There, you see, you are wrong, because if they conspired to eliminate the plaintiff, and if the purpose or the necessary effect of what they did was to eliminate the plaintiff, it is proper to be considered.

Mr. Fowle: But plaintiff doesn't claim it was the purpose or necessary effect—that that was the purpose or the necessary effect, at all. They don't claim that. I am sure of that. They don't claim that price fixing had anything to do with the elimination of the plaintiff. As a matter of fact, price fixing would have helped the plaintiff.

The Court: What was the plaintiff's instruction that you were looking at when you drew this?

Mr. Fowle: I wasn't looking at one of his instructions; I was looking at the Second Amended Complaint.

Mr. Dixon: This instruction I think should be read in connection with plaintiffs' 27, your Honor. In a sense it is an attempt to deal with the same subject matter.

The Court: The instruction has three parts in it, plaintiffs' 27. First you are to determine. That just presents [4190] the question. The second sentence is a statement as to the law.

Mr. Fowle: Are we talking about plaintiffs' 27 now?

The Court: Yes. The third sentence is, If you find, and so forth.

Now, I will give the reverse of that third sentence and run it right in behind here.

That is the way instructions ought to go, anyhow.

The first paragraph of 27 presents the question; the second sentence states the law; and the third sentence says, If, therefore, you find the 1951 Tree-Sweet or Silzle contracts had the necessary or intended effect of fixing or tampering with price structures, you may consider such fact in determining whether there was a conspiracy, and so forth.

I could say: If, on the other hand, you find that neither of the '51 TreeSweet or Silzle contracts had the necessary or intended effect as indicated above, or whatever it is, then you may not consider——

Mr. Dixon: You should not consider it in determining whether or not there was the conspiracy charged by the plaintiff.

I have no objection to the addition, Judge. [4191]

The Court: Do you see what I am thinking about?

Mr. Fowle: I see what you are thinking about, yes, Judge, but we still take the position that the whole charge of price fixing is something brand new in this case as of the date of the amended complaint, so far as the pleadings are concerned, and we contend if it is going to be in the amended complaint, that there ought to be an instruction to the jury that they must find it was done pursuant to the conspiracy charged in the first cause of action, and with the purpose and effect of eliminating the competition of the plaintiff. Otherwise, we feel it has no place in the case at all.

The Court: Well, you have got a lot of stuff in here to start with about what is charged.

Mr. Fowle: Yes.

The Court: You have another instruction which this would follow.

Mr. Fowle: That simply summarizes what we are charged with in the complaint. I believe it is an accurate summary of the charge. We are saying in effect here in this instruction that if the jury doesn't find that the alleged price control and elimination of competition charged in the complaint was accomplished pursuant to the conspiracy charged in the first cause of action, that the jury should disregard the charge, and I think they should, and we are saying next [4192] that if they do find it was part of the conspiracy and was done with the purpose and effect of eliminating competition of the plaintiff, then they should not find that there was any price fixing or elimination of competition unless there was an agreement to that effect in this case.

I take it that the suggestion that there is price fixing here is double-barreled. I mean there has been some talk of price fixing between Exchange Orange on the one hand or TreeSweet and Silzle on the other hand with respect to the prices at which those two concerns resold to the public.

There is also a suggestion that the TreeSweet and Silzle contracts themselves are price fixing just in their very nature.

Now, you will notice that in the last portion of this instruction we deal with both those problems. We say that the jury shall not find there was any price fixing as far as the resale by TreeSweet and Silzle of their products is concerned unless there was an agreement to that effect between those two concerns and Sunkist.

We also say that as far as the contracts are concerned, that you shall not find that they had the effect of price fixing unless you find that the discount at which oranges were sold to those two concerns was so narrow as to forbid price competition between the buyer and the seller.

The Court: Is this the only instruction you have on [4193] price fixing, 27?

Mr. Dixon: I think so, your Honor.

Mr. Fowle: On the contrary, the plaintiff has several proposed instructions on price fixing. In fact, so many that we objected to the overemphasis on the subject a couple of days ago.

The Court: 29 and 30.

Mr. Fowle: Perhaps it would simplify this problem if we redrafted 14-A to put it into three separate instructions. I don't really think it is necessary to do it, but it might flush the three problems we are dealing with, perhaps, a little more clearly.

The Court: Well, redraft it. Have you followed the language of the complaint in your first sentence?

Mr. Fowle: I certainly intended to, and I believe I have. That is the second amended complaint.

The Court: All right. That could be put in. I might use it as lead instruction to the whole price fixing subject.

Mr. Dixon: I think there, if it is used, Judge, so it just wouldn't be confusing—of course, with the other instructions, I don't see why that should be. It is charged, of course, it is true it is one of the allegations of the complaint in that sense, but it is not one of the charges relied upon in this case as being the cause of the damage. [4194]

Mr. Fowle: Well, it is nonetheless in the case. We are charged with it. We can't figure out the reason why you are charging us with it.

Mr. Dixon: I think the instruction shows why.

The Court: All right. If you want to split it up, try again.

Take the first sentence, but also either you add or I am going to add the point Mr. Dixon just made. Although this is the charge, it is not one of the six acts complained of.

Then if you revise the second part—I will not approve this business about it being of no consequence in the case. That would have to be changed.

The last part, where you disregard the charge, that should be worked out as a corollary to 27 and 28 in there where you have if you find one way and if you find the other.

I will reject 14-A as it now stands and overrule the objection.

14-B? This is a question of law.

Mr. Fowle: Correct.

Mr. Williams: A question of fact for the jury, is our position.

Mr. Dixon: That is what they have tried to make it. It is our contention this instruction should be denied and we [4195] would object to it on the grounds that were previously urged and set forth in our previous discussion on this same matter.

The Court: I am going to take the position that is a matter of law and not a matter of fact, and reject it.

Mr. Fowle: I take it we need to do nothing further than say we object to the refusal to give this instruction on the grounds we think the evidence warrants it.

The Court: Yes.

Mr. Williams: We can embody the argument on the motion for directed verdict which discussed this point, can we?

The Court: Yes, that is a good point. You may. 16-B is the next one I have.

Mr. Fowle: Well, we got a little bit out of order in discussing things. This was one which perhaps should have been discussed a little earlier when we were dealing more specifically with the second cause of action.

The Court: I think it is a correct statement of law. Any objection to it? It is a general statement of the law.

Mr. Dixon: I am not sure that is quite correct, your Honor, even as a statement of law. Is this a quotation from this case?

Mr. Fowle: Well, it is substantially a quotation.

Mr. Dixon: I don't recognize it, if it is, counsel. That is why I am asking the question. I don't think it is. [4196] I think what you have done is take out of this decision some things and worked them into a statement which in my judgment is not a complete statement, put it that way.

Mr. Fowle: Well, some professors write 30 and 40 page law review articles on this subject.

Mr. Dixon: That's right. You have "with the purpose of monopolizing" in here. That is why I asked if this was a quotation and, if so, what part of this decision is it from. This could only have application to this case to the conspiracy to monopolize or combination or conspiracy to monopolize, as indicating what such a conspiracy or combination would be. It is not a definition, certainly, on the law of monopolization, effective monopolization, in other words, a fait accompli.

That is why I say I don't think standing alone it is a correct statement.

Mr. Fowle: Well, I believe it is a correct statement of the law. I think any objection from the plaintiff should point out more than just that it is not a *correct of* the law. I think the objection should be more specific than that.

Mr. Dixon: For example, your Honor, we have heard a lot in this discussion about Judge Wyzanski in the cranberry case. I have a lot of respect for him.

Mr. Fowle: He says much the same thing.

Mr. Dixon: Here is his exact language in the opinion on [4197] to monopolize.

"To monopolize"—that is the conspiracy to monopolize, the combination we are talking about—"means to take steps toward acquiring a dominant position in the market and to take such steps when they are not encouraged by the law."

For a simple statement of to monopolize, I think that standing alone is perhaps as good a statement as you can get. If you want to elaborate on what is meant by to monopolize——

The Court: Do you find that in the Griffith case?

Mr. Fowle: I am not able to find it right now.

The Court: Is this slanted toward the conspiracy to monopolize or the actual monopolization?

Mr. Fowle: It is slanted toward both, your Honor.

The Court: Well, monopolize means only a conspiracy.

Mr. Dixon: Monopolization is quite different from to monopolize.

Mr. Fowle: I have got the term "monopolize." I have simply said here is what the word means as it is used in the statute.

The Court: It is only used in this case in connection with the conspiracy to monopolize.

Mr. Fowle: But a conspiracy to monopolize is a conspiracy to do the very thing that is forbidden in the statute, and the statute uses the word monopolize. This was an [4198] effort merely to give the jury what we think is the proper meaning of that word "to monopolize."

The Court: Let's see the book you have. Haven't the courts attempted to define monopolize and monopolization?

Mr. Fowle: They have, and they frequently do it rather differently. I can't remember whether it came from this page or not. But it came out of there somewhere (handing volume to the court).

Mr. Dixon: This is a very restricted definition.

Mr. Fowle: What's wrong with it?

Mr. Dixon: I tried to tell you, counsel, some of the things I think are wrong with it. The term "to" is left out. I don't want to be pedantic or anything, but it is important.

Mr. Fowle: Let's put the word in. I don't object to that.

Mr. Dixon: Then I still wouldn't agree to the definition. You asked me what I thought was wrong and I am starting out to tell you.

Mr. Fowle: I haven't heard anything else you think is wrong with it.

Mr. Dixon: "follow such a course of action with the purpose" you have got in here. Purpose, intent, is injected into the thing again. You just do not charge intent under the Sherman Act.

Mr. Fowle: This is the specific intent now. This is [4199] the purpose of monopolizing.

Mr. Dixon: You don't elaborate. That is another objection I have to your definition. I think Judge

Wyzanski's definition of to monopolize is as good a statement as you want.

Mr. Fowle: As you know, there is a lot more to what Judge Wyzanski has to say about monopolization than that.

Mr. Dixon: No, there isn't. He defines it and then he goes on and says there is nothing unlawful about getting 100 per cent as applied to the case, yes, but that is his definition, as I remember the case, at least.

The Court: The language in here, of course, is no particular definition. For instance, if Section 2 of the Act is aimed inter alia at the acquisition and intention of effecting market control, among other things—that is one thing.

Then it says, hence the existence of power to exclude competition when it is desired to do so is a violation, provided it is coupled with for the purpose and intent of exercising power.

Unreasonable per se to foreclose competitors from any substantial market.

Antitrust laws are as much violated by prevention as by destruction.

Then the classic statement, use of monopoloy power to foreclose competition, to gain a competitive advantage or [4200] to destroy a competitor is unlawful.

I would like to have a definition of to monopolize as used in the conspiracy part, and monopolization as used in the other part of the plaintiff's case.

Mr. Dixon: Monopolization, Judge, as such, of course, covers a lot of things, but it means, as the

Supreme Court has indicated, I think in the Griffith case and others, domination and control over a market. In other words, you start with that generally. I mean it is hard to make an abstract simple definition, but certainly those two elements are always present.

Then you start from there and you say those constitute monopoly power. Then you decide or have to decide, was that power or monopolization lawfully acquired, because it still might have been lawfully acquired. You get it in public utilities, and so on.

The Court: Then where do you go from there?

Mr. Dixon: Then you determine the question: Was the power used to exclude, I mean to restrain trade under Section 1, which would constitute a violation, not necessarily of Section 2, but of Section 1, and under 2, to monopolize by excluding all competitors from that market. In other words, somebody wants to come into that market after you have got your monopoly position, and you say, "Oh, no. I have got the monopoly here over the product, for example in this case, [4201] that you need to continue to process or to come into this market to sell juice in competition with me, and I will exercise it by depriving you of it."

That is where an exercise of the monopoly power which may be perfectly legal becomes illegal.

Mr. Fowle: As a matter of fact, I wouldn't quarrel very much with what Mr. Dixon has just said. The emphasis should be upon the purpose and the effort to foreclose all or substantially all of the market.

The Court: Dixon's remarks are going to be available for you. It sounded kind of logical to me. I think you have got to go further. It seems to me you have got three problems here. If somebody can come up with proper instructions, I would like to give them.

You have got, one, to monopolize as used ~~in~~ the conspiracy charge. You have got monopolization as used under the other theory of the plaintiff, and as set forth in the second amended complaint. They are two different things in a way.

Thirdly, you have got the point you gentlemen raise which, if you want it, and it is good law, ought to be given, that is that monopolization results either from the act or several defendants as the result of a conspiracy or combination, or results from the act of one defendant alone by what he himself does. [4202]

That is your contention, is it?

Mr. Dixon: I think it is very well stated in brief form, your Honor.

The Court: So I reject at this 16-B. Have another crack at it. I think that you could well consider all three problems. [4203]

* * *

25-1. Is this submitted by the defendants?

Mr. Fowle: Yes, it is. In order to expedite consideration of it, I might simply say that this instruction has to do with the problem that is raised by the second amended complaint and the allegations therein concerning the Hyland Stanford contract. I might point out, incidentally, that there is a reference here to Hyland Stanford alone and not to Hyland Stanford and General Foods, or the Bireley Division of General Foods, because in the case of Bireley's, there was no agreement with Sunkist or EOP which could in any way be said to foreclose the market to anybody. Sunkist or EOP did not have the so-called first call on the Bireley's facilities. There is no contract to that effect in evidence.

The Court: Let me read it over.

Are you looking at the complaint?

Mr. Dixon: Yes.

The Court: Did you allege that Hyland Stanford had first call?

Mr. Dixon: The complaint alleged that Hyland Stanford and General Foods—those contracts are right outside. I think I have copies of them. There is one of them that was, I think, different.

(Discussion had off the record.)

Mr. Dixon: Judge, I must apologize. Mission Dry should be inserted here, instead of General Foods. That is on page 14, line 17, of the Second Amended Complaint.

This was drafted on a Sunday, and I did not have——

The Court: Page what?

Mr. Dixon: Page 14, line 17, the words "General Foods" should be stricken, and in place thereof should be substituted the words "Mission Dry."

The Court: Then Hyland Stanford remains in?

Mr. Dixon: Yes.

And if ~~it is~~ in order, I would like to ask leave to amend the Second Amended Complaint to conform to the changes requested.

Mr. Fisher: Your Honor, we would object to that, and we object to it on the same grounds that we objected to it [4205] when the motion of the plaintiff to file the amendment was first presented to the court, and we would ask that the same objections which we raised at that time be incorporated by reference at this time.

The Court: They may be incorporated.

Objection will be overruled. It will be permitted. But may the same limitation that was made on it at that time also apply?

Mr. Dixon: Yes.

The Court: Namely, that this can't be argued as any act of causing damage, but is purely part of the background material developed during the case?

Mr. Dixon: We so stipulate, your Honor.

The Court: And whatever limitations I placed on it at that time will also be incorporated.

Mr. Fisher: I make the further suggestion that here we have had a number of suggestions today, so it seems to me we should get a Third Amended Complaint that incorporates all these changes.

The Court: Well, these are mostly insertions of words. There is no change of any allegations. Striking out "defendants" and putting "co-conspirators" here is merely the naming of one company that was named by mistake.

Your request will be overruled.

That still leaves us with Hyland-Stanford [4206] here.

Mr. Fowle: Mission Dry will have to be incorporated in this proposed instruction.

The Court: Let's see if we can do something here.

After the words "Hyland-Stanford," on line 7, insert "and Mission Dry."

On line 7, "these companies."

Do they both pack hot concentrate?

Mr. Fowle: Yes.

Is that right?

Mr. Walker: Yes.

The Court: The next line, "processed and sold by them instead of "it."

And on line 10, it should be "companies."

Line 15 "Hyland-Stanford and Mission Dry."

Mr. Dixon: May I make a suggestion, then, your Honor, if this is the court's instruction?

The Court: No, we haven't gotten that far yet. You changed your complaint, and I granted the motion. Now we have got an instruction, and for fair presentation it should conform to the amendment. Is that it?

Mr. Fowle: Yes, correct.

The Court: Now, it takes care of both Hyland-Stanford and Mission Dry?

Mr. Fowle: I think that is right.

I know that your Honor does not approve of this phrase [4207] "disregard such contracts as being of no consequence in this case," however it makes it difficult for the defendants to frame their objections, because in this particular case the amended complaint does allege that these contracts between Orange or Sunkist, on the one hand, and Hyland-Stanford and Mission Dry on the other hand, were entered into as part of the conspiracy, which didn't involve those two companies, but a conspiracy between Sunkist, Orange, Lemon, TreeSweet and Silzle. Then they are saying they are not relying on this as a cause for damage.

We say that this has no business in the case. It is a little bit like what your Honor has referred to in the past as the bad boy statute. This is an effort to drag something in which wasn't alleged to be part of the conspiracy, in the first place, and which isn't claimed to cause any damage; which is simply here to prejudice these defendants in the minds of the jury. It has nothing whatsoever to do with the claims in this case.

It seems to us that the only way we can present this is to say that if these things——

The Court: All right, I see your problem. Let me suggest this: It seems to me that you could first say, start down along about line 14: You are instructed that these contracts are not part of the six acts complained of, and therefore may not be considered by you as any cause of [4208] plaintiffs' damage, if any.

Mr. Fowle: Well, your Honor, we don't need to do that, because your Honor is going to tell the jury that anyway, that it has been stipulated that these are not the basis of any claim for damage.

The Court: If I am going to tell the jury in these instructions somewhere, you had better get something written out for me, because I won't be able to keep it in my mind.

It is true I propose to tell the jury in an instruction here about what these six acts are, and that the damage has to come from those acts and a violation of the antitrust laws.

If you want to, you could say that in here. Then I think you could say: Unless you find from the preponderance of the evidence that they were entered into as a part of the conspiracy charged, combination or conspiracy charged, you may not consider them as any violation or any part of a violation of the antitrust laws.

Mr. Fowle: That is of some use to us. But if they are a violation of the antitrust laws, that is an additional charge against these defendants, a charge of violating the antitrust laws that was not part of the original complaint.

Again, I say, if they are not going to claim that that damaged them, that that simply is the bad boy statute again.

I would also say if they claim this is an additional [4209] provision of the antitrust laws, it is too late to incorporate it in the complaint.

The Court: My point in putting it that way is this: Every bit of evidence in the case may have some bearing on some issue somewhere, and when 1 you use this broad language "excluded from the case," I think it is error.

We can possibly take it out of particular parts.

You can say you cannot consider it as any part of damage. No. 2, if it is not part of the conspiracy, then it cannot be considered as part of the antitrust laws.

There is not much that plaintiff can do with it after that.

Mr. Fowle: Except argue to the jury, Look what these people did, they went so far as to foreclose the processing capacity around the State of California from these poor little fellows like Independent Food Processors.

Mr. Dixon: That is the purpose for which it is offered.

The Court: It might have a bearing on the intent involved in this conspiracy. Because everything a man does involves his intent.

Mr. Fowle: Except the conspiracy charged here is a conspiracy to get rid of the plaintiff. How can this have any bearing on getting rid of the plaintiff?

As a matter of fact, as I suggested in the last line of this instruction—and I am perfectly willing to take tne [4210] last four lines out of there, I think perhaps they shouldn't have been there, I did this late at night, but the fact of the matter is that if, as is suggested here, Morgan Ward wasn't able to peddle his oranges around as successfully as usual, he probably had more oranges available than before, and he was the plaintiff's principal source of supply.

I just don't see how this has anything to do with the conspiracy to get rid of the plaintiff.

The Court: I am not going to give all the things in the instructions that you might argue.

You understand, to start with, your right to argue this case is a lot broader than the instructions I give.

Unless you get clear out of line I don't ordinarily stop lawyers from arguing their case and presenting the matter. If you get clear out of line, I might stop somebody. But it seems to me that as to 25-1 as it now stands, I would reject it. That you may take one and add to it, that you can take it out of the case as far as it concerns damaging the plaintiff; you can take it out of the case insofar as a part of the antitrust laws, violation of the antitrust laws is concerned. Even then I think you are going pretty far for plaintiff there.

Mr. Dixon: May I interrupt, your Honor?

This instruction deals with, in many respects, the same type of thing that is covered in the instruction I think your [4211] Honor has already given with reference to any finding or consideration of——

Mr. Fowle: Price fixing. Correct. It is the same type.

Mr. Dixon: And I think it should be, and I have no objection to, and can see no valid objection to patterning this subject matter after the same kind of an instruction, which tells the jury in a few words what they may consider it for, if anything.

Mr. Fowle: We, of course, would like to do that, if that is all we can do. But it seems to us that to let these claimed violations of the antitrust laws, which were not included in the original complaint, stay in here, and be argued to the jury, while we are told, that, yes, you can have instructions that the plaintiff can't claim damages for these things, simply tends to prejudice the jury against the defendants.

The Court: There is a lot of material in this case put in by both sides which may be argued or may not, which may have some evidentiary value in the case, but certainly is remote. The complaint alleges that these were entered into as a part of the conspiracy, and I think we could hold plaintiff's nose to that, that unless they found that they were part of the conspiracy, then they cannot be considered as a violation of the antitrust laws, as a particular part [4212] of the antitrust laws.

But whenever you take any piece of evidence and say you can read it out of the case, you run afoul of what you always tell a jury, that they must decide the case on all the evidence, not only plaintiff's or defendant's, but all the evidence.

I am going to reject 25-1, and see what you can do with it.

If you think these contracts are that important that you want an instruction on them, all right.

Mr. Williams: I think we have another objection, your Honor, and that is that there is no showing that these contracts had any relation or effect upon interstate commerce.

Morgan Ward was not in the business of processing and selling in interstate commerce. It is only intrastate transactions.

The Court: I would say if you want to raise that point, the way to raise is, you are also to determine whether or not these contracts had any effect on interstate commerce.

Mr. Fowle: I think your Honor sees our position; even if we eliminate the thing for all those purposes, they are still there to be argued for some purposes.

The Court: I think they can properly be argued for some purpose. I think you have asked too much. You say throw them out completely. [4213]

I think you can whittle it down.

We are going to knock off here pretty quick.

25d. Do defendants submit this as it is?

Mr. Fowle: Yes, your Honor.

Mr. Dixon: Is this in the form that you want it?

Mr. Fowle: I think so.

The Court: All right.

Mr. Dixon: I have numerous objections to it, if it is to be considered.

The Court: What are you trying to point up? You are trying to point up something on the refusal?

Mr. Fowle: Yes. That really is the heart of the matter, on both causes of action. That is the focal point of the whole case, it seems to us.

The Court: No, 1, it is not the refusal alone, it is the refusal against the backdrop of the Tree-Sweet and Silzle contracts. [4214]

Mr. Fowle: Well, that is implicit in this instruction.

The Court: No. 2, a lot of it is argumentative. Some of it would make a pretty good argument to the jury, as you argue on it. The arguments aren't as precise as instructions. But is not an instruction under what circumstances the jury may disregard this refusal business.

Mr. Fowle: Correct, because it seems to us that the whole case really boils down to the propriety of this refusal to give the plaintiff contracts on arrangements comparable to those that were given to TreeSweet and Silzle.

The Court: Well, of course, you have got, for instance, a "but" down in line 25. "Unless you find it was made without valid business reasons, but was made"——

Now, it might have been made pursuant to one of the conspiracies and might also have been made for a valid reason, and it might have been also an independent decision of Exchange Orange in which other conspirators concurred.

Mr. Williams: If it is an independent decision, it can't be by conspiracy.

The Court: Suppose the decision was made and then concurred in by the other conspirators.

Mr. Williams: Then it wouldn't be independent.

The Court: At the time it was made, it was independent.

Mr. Williams: No. It would be by agreement.

Mr. Fowle: The last part of the instruction takes care [4215] of that, "but was made pursuant to one of the conspiracies."

The Court: Will you briefly state your objection to it?

Mr. Dixon: Well, your Honor, briefly, the first part of it, of course, seems to me to be clearly improper for obvious reasons. That is the first sentence.

The second sentence purports to state a legal view of the obligation of Exchange Orange which is not in context or in accord with the evidence before the jury in this case, and singles out a particular transaction or contract or contracts, and in effect says that those contracts are legal.

Of course, the next sentence goes on to discuss—those contracts, incidentally, are in dispute as to what they are, whether they are processing contracts or just what they are.

Now, the next sentence goes on and says that they may enter into processing contracts, which I don't agree with.

The Court: We have got an instruction on that.

Mr. Dixon: We have covered all that.

The Court: They can make lawful processing contracts, but they can't make them as a device. We have got that already covered in instructions.

Mr. Dixon: Then it takes up the question of one of the six things that are charged to be part of the conspiracy and purports to give a specific clearance, in a sense a qualified clearance, to that act in language which will certainly require [4216] amplification and clarification, if proper. I don't think it is proper.

In other words, this instruction as a whole seems to me certainly does not fit in with the previous instructions already discussed on the general charge of the six acts.

The Court: All right. That's enough. It seems to me if I was wanting to offer an instruction on this refusal, which is an important part of this case, because it together with what I call the background of TreeSweet and Silzle contracts, comes pretty near being the main thing plaintiff is complaining about, I would start out and merely call attention that one of the six overt acts, the sixth act complained of, was the refusal. Something to call their attention to it.

The trouble with your instructions—you don't mind my being critical? I like you, even if I am critical, and I may be wrong.

Mr. Fowle: I have a thick skin.

The Court: The trouble with your instructions is you are so prolix. You use a whole paragraph to call attention to this refusal. You can do it in a sentence. It is one of the six acts complained of. Then you follow up, No. 1, unless you find this act by itself or in conjunction with some of the other six acts caused damage to the plaintiff, then you may not consider it for that purpose. I think I would have to give that instruction. In other words, it may not be [4217] artfully worded, but it is in there.

It is alleged to be for a certain purpose and unless you find that it is there by a preponderance of the evidence, you can't consider it.

Secondly, if you find it was not a part of the conspiracy or combination or monopolization—I am just thinking out loud—a part doesn't tell the story. I was thinking of some way to make a statement that could not be considered as a violation of the antitrust laws.

Mr. Dixon: It is very difficult, Judge, to pick it out of context when they are obviously trying to focus attention on one particular act which they regard as more important in the defense of their case.

Mr. Fowle: We are not really focusing attention on one act. The focus is upon three. It is upon the TreeSweet and Silzle contracts and the refusal to give a comparable one to the plaintiff. It seems to me that is quite implicit in this. We say the case really turns upon the propriety of the refusal to give a contract to the plaintiff comparable to these other two contracts. That necessarily involves three of the six acts.

Mr. Dixon: The plaintiff could have gotten oranges from other sources. You are certainly going to argue that. That is just as important in a sense from your point of view, and they are entitled to an instruction on that. [4218]

Mr. Fowle: I think you would argue we are not entitled to an instruction on that.

Mr. Dixon: I might. You are not entitled to this kind of an instruction that you have requested. You get into the question here of pointing up that they might have a perfectly valid business reason for refusing. You might argue that to the jury, but I don't think you can put it in any instruction to highlight it. Motive is no defense in an antitrust case.

Mr. Williams: It is on a refusal to sell. That's the Lorain Journal.

The Court: I think a thing like this, you ought to go back, and I am going to fit these instructions together, you ought to go back to 12, which is a plaintiff's instruction, if you want another sentence in there, and say conversely what you want.

12 says if you find that the effect of the act of Exchange Orange Products in entering into the 1951 contracts with TreeSweet and Silzle and refusing to enter into comparable contracts with the plaintiff whereby it could have secured oranges, and so forth, was to exclude plaintiff as a competitor from a substantial market for single-strength juices sold in interstate commerce, such exclusion would be unreasonable and in and of itself illegal.

Then conversely, if you find by a preponderance of the evidence that such was not the effect of the matters referred [4219] to, and that there was no effect to exclude plaintiff—or put it this way: Conversely, you may find that such was not the effect was not to exclude plaintiff from a substantial market, and in such event such exclusion——

Well, of course, you have got two things there.

And if there was no such exclusion, then such matters were not illegal.

I am not going to be critical, but I will say this, I think by and large Mr. Dixon's instructions came a lot closer to what instructions should be than what you have presented to me, and when you go over these you will find I have accepted a number of his instructions, many of which are likewise instructions which call attention to your situations, like the one on the lawful processing contract, when it is lawful and when it is unlawful.

As a result, I have had less trouble in going over the form of his instructions than I have had with yours.

Having gone over and been satisfied with a number of plaintiff's instructions, it seems to me that the time to stick yours in on those, if you think there isn't enought conversely on the thing, is right at that time, because when I sort these things out, that is where they are going to go in.

As a matter of fact, you can raise your point a lot easier by looking at what I have given for the plaintiff here, [4220] and you are in a better position then. You know what I am going to say on the plaintiff's instructions, and then your instruction will logically follow.

I don't guarantee to get them in the right order, but I will try to do it.

Mr. Fowle: That would be fine, your Honor, if we agreed with the content of the plaintiff's instructions. I get your point, though.

The Court: That's easy enough now, because I have told you certain ones of the plaintiff I am going to give, so this is a fait accompli, you know, the old Chinese proverb.

In other words, so you won't misunderstand me, I am not trying to knock down every instruction you give, but you give me this one, for instance, 25-B. I have got the middle two sentences marked that have to go out. They involve some other instructions that I have already given and they are not complete in themselves, unless I want to go back and repeat what I said in the others. At least part, I don't think, is a correct statement of the law.

I am going to reject 25-B. Now you have got the week end to see what you can come up with.

Defendants' 36.

Mr. Dixon: Do you stand on 36?

Mr. Fowle: Yes. 36 is one which is tacked on to the end of one of yours and which comes out of the same case. [4221]

Mr. Dixon: I have no objection, your Honor. I have been waiting to say that for a long time.

The Court: 36-A?

Mr. Dixon: That is a horse of another color.

The Court: Now, what general subject does this cover?

Mr. Dixon: This has to do with the subject of damages.

The Court: Is this one you approve?

Mr. Dixon: No, indeed, your Honor, I do not.

The Court: Do you just object if they are long and agree if they are short?

Mr. Dixon: The trouble is, if they are short and to the point, I can't find anything to object to, but when they are long, I can find plenty.

The Court: All right. Let me read it. I would reject 36-A without hearing from the plaintiff on it on the ground that again this might be a jury argument. There has been evidence given on speculation and conjecture, and if you want to spend time and it is important, you can take the jury along that road. It is an argumentative instruction.

It has in line 7: Since any and all damage to plaintiff is claimed to have resulted from its alleged inability to secure Valencia oranges——

Mr. Fowle: Isn't that true?

Mr. Dixon: That may be one of the proximate causes of the damage. [4222]

The Court: I think it is a very limiting statement.

Mr. Dixon: It covers the whole case.

The Court: It resulted from the evidence the plaintiff put on in this case.

Mr. Dixon: Could we make a case if that is all we alleged?

The Court: It is not a correct statement of the law. Then you say: You have to determine at the outset—you are telling the jury the first thing you have to determine is this. I am not going to tell the jury that.

You might say to the jury, well, first determine whether there are some violations of the antitrust laws, next find whether there was damage and causation, some general principles, but I am not going to pick out one of the particular things and tell the jury they have got to look at this thing first before they look at anything else. I don't propose to give any instruction about speculating on oranges. You can argue it. I am not going to keep you from arguing on things like that.

Mr. Fowle: We would expect to make the argument, also, but it seems to us this is one of the real basic questions in this entire controversy. If, as the plaintiffs say, there was a duty on the part of Exchange Orange or Sunkist to furnish oranges to Winckler-Smith Company when they asked for them in 1951, how can anyone in the world tell what amount of oranges [4223] should have been made available.

The Court: Let me give you an example of how wrong you are. Supposing you had a personal injury case where a plaintiff has got a bad back. So the defendant comes in and gives an instruction, "At the outset you are going to have to determine and fix the amount of damage that this person suffered from this back. You may not speculate or conjecture on how much this injury is. You must base your decision on some reasonable yardstick about measuring bad backs. If you are unable without conjecturing or speculating on what is a reasonable estimate of how bad his back is, to determine that, then you may not bring in a verdict for the plaintiff and your verdict must be for the defendant."

Do you think a trial judge would give that?

Mr. Fowle: I don't believe the situations are comparable.

The Court: I think it is comparable because if you ever had anything that has that as a matter of common sense is speculative, it is trying to fix the amount a plaintiff is awarded. Of course, what do courts do? They give instructions like I have got in my general instructions. Damages must be reasonable. You may not speculate. You may not give damages for prospective injury which is not within the realm of possibility.

They content themselves with those general statements [4224] of law and don't come out and start to pick up—if a defendant in a personal injury case pulled out an instruction like this on damage, the yardstick in speculating, there would be an awful howl from the plaintiff. With that kind of an instruction given, pinpointing, tearing apart this matter of damages, you would never get a verdict for the plaintiff.

What happens in the argument? The defense lawyer gets up and says, "He has got a bad back. There is nothing in the X-rays. The back is perfectly good. It is all in his mind. It is all subjective. There is no injury here."

Then the plaintiff gets up and says, "Sure, it isn't in the X-rays, but you have had pains, ladies and gentlemen, and you have been to doctors and they have told you there is nothing wrong with you, and yet you know how you have felt."

That is the only way you can handle problems like this. You can't take an instruction like 36-A and proceed to do what you have done.

Do I make a little impression on you?

Mr. Fowle: Yes. I better not go on any further.

The Court: I have already in my form instructions got some very fair instructions to defendants. Damages can't be speculative. You can't use a pooling plan. Damages must be reasonable, not conjectural.

Sometimes when I read those I feel kind of ashamed of myself for sticking them in. [4225]

Mr. Dixon: There are some that I would prefer not to have in, Judge, but it is all right.

The Court: I will reject 36a.

Mr. Williams: This question of how many oranges should be given the plaintiff——

The Court: I am not going to restrict you on arguing that. This would make a pretty good argument.

Mr. Williams: It also goes to liability, because supposing you were Exchange Orange, and plaintiff comes around to ask for oranges, how do you determine how many you give him?

The Court: That is a good argument. [4226]

* * *

The Court: I can't remember what I have in there.

39. Do you offer it?

Mr. Fowle: Yes, sir.

The Court: The plaintiff?

Mr. Dixon: There are some things in there that I would like to discuss, your Honor.

I assume by "earnings" they mean profits from operations.

It sounds like this was taken from an instruction where somebody was killed or maimed and was claiming loss of earnings. [4227]

No. 2——

Mr. Fowle: There is a claim of loss of earnings in the complaint. That is part of the language.

Mr. Dixon: Don't hold me responsible for the complaint in the first instance, or it would have been different.

The Court: Of course as a matter of fact, earnings is broader than profits. "Profits" narrows the plaintiff.

Why do you pick July 31st?

Mr. Fowle: Because that is the date of a certified financial statement of the plaintiff company showing that it had already up until that time lost $148,000 out of the $184,000, which was lost during the entire year, and because the Valencia season begins at or about that time, and it wasn't until at or about this time, or thereafter, that the defendants would have made any oranges available to the plaintiff in any case.

Mr. Dixon: That isn't quite the evidence for this plaintiff. It starts its operations usually around about the latter part of June or early part of July. Sunkist doesn't. But then there is nothing in this instruction concerning the fact that the claimed loss of earnings here, as far as plaintiff is concerned, that the yardstick is the two-year period following its termination of Chapter XI proceedings. However, of course, you will argue that the whole period was in, I presume. [4228]

The Court: What about this? Can't we say, You may consider the evidence in respect to plaintiff's earnings since the time of its incorporation and whether or not the plaintiff has operated at a loss during the period of its incorporation until 1951?

Do you object to that?

Mr. Walker: Doesn't that put undue emphasis on loss?

The Court: Loss or profit.

Mr. Dixon: In that connection, since we are dealing with this precise point, we had in mind requesting your Honor's comments with reference to the status of the record as it now stands.

One of the big contentions of the defendant is that the loss they claim resulted here of some two hundred some odd thousand dollars occurred in the fiscal year ending January 30, 1950, that that testimony upon which Mr. Lynch based his statement with reference to that loss, which he attributed to the sale of the plant as having occurred after the reorganization, or the termination of Chapter XI proceedings should be in my judgment removed from the case. Insofar as any evidence that he gave that bore upon his opinion as to that loss, which was based upon that fact, the jury should be instructed to disregard it, because the record in this case now shows clearly, at least in my judgment, that the basis of his whole plan of computing this loss for the period [4229] ending January 30, 1950, was based upon something which was not legally and could not be legally correct.

Therefore, the assumption upon which his figures are based must be taken out of the case and the jury instructed to disregard them in determining whether there was any loss.

The Court: I have got a note of that.

Mr. Fisher: We certainly object to that position.

The Court: I understand you object, and you claim it is a voluntary sale.

Mr. Fisher: Yes.

Mr. Dixon: But it is important to the plaintiff, certainly, because that is the basis under which you get all your figures that they had this terrific loss.

In other words, this instruction—this is the place to put it in on that, since it deals with earnings and contentions made by the plaintiff, as well as the defendants, it might properly be discussed under this kind of instruction by the court.

The Court: I intend to interpret what happened by the Chapter XI. My present intention is to state that the sale of the real property was, as a matter of law, a part of the reorganization.

You don't like that, that may be true, but I am going to do that.

I will have to get something over the week end, or [4230] Monday, and have it for you Monday afternoon. I said "week end"; over Sunday, I guess.

Apart from that, can't we give this instruction like I indicated?

Mr. Dixon: In this form I certainly object to it vehemently, telling the jury that they can't consider anything after July 31, 1951.

The Court: All right. This far: Upon the question of claimed loss of earnings, you may consider the evidence in respect of plaintiff's earnings since the time of its incorporation, and whether the plaintiff operated at a profit or loss during the period of its incorporation until 1951.

I reject 39 in the form that it is in. I don't care how you argue it.

Mr. Fisher: Wouldn't it be better to say "until the close of its 1951 fiscal year"?

The Court: It probably would.

Mr. Dixon: You don't want me to be bound to January 30, 1952, do you? You want it to end—I am sorry, I am getting groggy. Your idea is to make the date January 30, 1951? I have no objection to that.

Mr. Fisher: No.

The Court: '52 he means.

Mr. Dixon: No. '51, your Honor, because that is the fiscal year. In other words, we claim profits of $140,000 [4231] were earned——

The Court: Why don't we just do this? "Profit or loss during the period from its incorporation."

Mr. Dixon: All right.

The Court: Your argument is going to be——

Mr. Dixon: That is okay. I would just as soon not have a date.

The Court: I am going to reject 39 as it now stands.

Mr. Fisher: How would it read?

The Court: "Upon the question of claimed earnings, you may consider the evidence in respect to plaintiff's earnings since the time of its incorporation, and whether the plaintiff operated at a profit or loss during the period from its incorporation."

Mr. Fowle: You propose to give it in that form?

The Court: Yes.

Any objection to 40?

Mr. Dixon: Mr. Walker's rights are as trustee.

The Court: Those are the only rights he has got.

I think it is a proper instruction.

Mr. Dixon: That is all right. I have no objection to it.

The Court: Maybe we are getting tired.

41.

By the way, I will try to go through and make everything [4232] "plaintiff" instead of "plaintiffs."

Mr. Dixon: This is certainly objected to, your Honor, even though it is short.

The Court: That is to raise a question of law.

Mr. Fowle: Our position on that instruction is that there was no effort made to show what would have happened to the plaintiff if plaintiff had had a Silzle contract, and that there is no evidence in the record from which the Silzle contract could be considered for the purposes of damages that wouldn't allow the jury to engage in the wildest kind of speculation and conjecture.

The Court: Couldn't the jury go out and take the Silzle contract and proceed to make some computations?

Mr. Fowle: I don't see how they possibly could, without engaging in the wildest kind of speculation.

The Court: Isn't there enough material in the record?

Mr. Fowle: I don't think there is.

Mr. Williams: They don't have the overhead, and all that.

Mr. Dixon: The jury has all the overhead.

Mr. Williams: Only on a 12,000 ton basis.

Mr. Fowle: You have our point.

The Court: I reject it, and I have your point. Here is 34 revised for what it is worth. This is 34 we are talking about. The first part of it I dictated something [4233] to the girl, and we wanted to see what it looked like. It is much like what you have got, except breaking it down further. Remember your 34, the first part? It is called "revision of 34."

Mr. Fisher: That is plaintiffs' 34?

The Court: No. It is defendants' 34. I will put "defendants" on there.

It is not much different from what you have got. Maybe you don't like it as well.

Mr. Dixon?

Mr. Dixon: I have no objection to it, if you are waiting for me, your Honor.

The Court: Defendant? Without waiving your objections to my refusal to give your 34 as requested?

Mr. Fowle: I think it is all right. I would prefer "the proximate cause," instead of "a proximate cause."

The Court: I hope we can avoid getting into all of that business. [4234]

* * *

Monday, February 6, 1956—2:00 P. M.

(The following proceedings were had in the chambers of the court:)

The Court: If you will first turn to the plaintiff's group of instructions that we have passed over. I went over these instructions Sunday, and I want to call your attention to certain things.

On plaintiffs' 6, and you won't have to look at this, to be consistent with my rulings on public injury, I will strike out of 6 the insert on line 8, "and that public injury has been proven"; and all your record made on public injury, and all your record made in the objection to 6, may be incorporated herewith, and is overruled.

On No. 7, I have redrawn it, and if you are looking at 7, I can tell you what I did, and you can take my word that the redraft does it.

On 7, as it stands corrected, I struck out matters on lines 6, 7, and 8, which didn't add anything to it, in my opinion, and made it more cumbersome. On line 6, after the words "causes of action," the rest of line 6, line 7, and all of line 8, down to the second cause of action, and struck out, also, the reference to public injury.

I did some other things too. On line 11, I changed that around so that it reads, beginning at 10, middle [4239] of 10, "were committed by any one of the defendants or co-conspirators, that you find were a party to such combination or conspiracy," and so forth.

And down on line 13, "combination or conspiracy, period," and struck out the rest of it.

Mr. Dixon: A period at the end of "conspiracy"?

The Court: Yes.

What I struck out there was "and would bind and make liable such defendants," and so forth, to the end.

It doesn't add a thing, and I think I have said it all when I get to the end of "conspiracy" on line 13.

I have now called it Revision No. 1 of Plaintiffs' Instruction No. 7.

Do you object to that change, Mr. Dixon?

Mr. Dixon: I do not, your Honor. It is all right.

The Court: All your record made on public injury in connection with these instructions may be incorporated to Revision No. 1, and your objections heretofore made to Plaintiffs' 7, and the objection is overruled. [4240]

The Court: Then to make it easier for me to shift around here with these instructions, here is what I call now Court's N. This is an instruction which I said I would give when we were discussing Plaintiffs' 13. I have merely put it on another sheet of paper so I can do some shifting.

I think it said "was misused," and I have inserted "was illegally used or misused."

I don't know if there were any objections at the time I said I would give that, but if there were, they may be incorporated to N and be overruled. Likewise, what I call the Court's instruction O was another squib that I said I was going to give at the time we discussed Plaintiffs' 32. I merely put it on a separate sheet of paper as the court's instruction, and I will give it.

On Plaintiffs' 19, which I have redrafted, it is largely a matter of getting rid of a lot of the material in it that we had——

Mr. Fowle: I thought that was withdrawn, your Honor.

The Court: 19?

Mr. Williams: My note is 19 is to be given.

The Court: I have at the bottom it is a reference to direct and indirect evidence and should I use, and I told you I was going to give it unless I advised you otherwise. The only thing outside of cleaning up the typing job was I added the last paragraph: [4241]

"However, the plaintiff has the burden of proving such matters by a preponderance of the evidence."

We were talking about evening up instructions, and I got tired of waiting for some of your suggestions, and here is the way I even this one up.

Mr. Fowle: You are speaking of 19?

The Court: 19. I take it you have no objection to the addition of the last paragraph.

Mr. Fowle: No.

The Court: I still have the question of "shall I give it." Unless I advise you otherwise, I am going to give it.

Plaintiffs' 23, here is a copy of revision No. 1 before you. I can tell you quicker than you can look at the note about what I have done, but you will have to make one addition even in revision No. 1 of 23.

On the first line here, it says, "based on all the instructions," so insert after "the" "evidence and instructions."

You will note that all I have done is cut out the language "by activities in restraint of trade," and just the preliminary statement to lead into the question of damages.

Likewise, the last part of the quote in 23, "that principle is an ancient one and is not restricted to proof of damage in antitrust cases," and so forth, I don't think that adds a thing and I have cut it out. That is what I did [4242] with 23.

Mr. Fowle: We would still have the same objection we had before, your Honor, to the use of the word "wrongdoer" in this instruction. Also, we would object to the arrangement of the first sentence. It seems to me the cart is before the horse. If you as jurors determine that the plaintiff's business was injured, and then, secondly, that the defendants or either of them is liable, the question will arise as to plaintiff's damages.

The first thing that has to be determined is whether there is liability.

The Court: It says there, "and that the defendants or either of them is liable." If you get that far, then the question arises as to damage. Objection overruled.

Any objection you had to 23 before the revision will be incorporated.

Mr. Dixon: The only suggestion I have to meet the objection is to add the word "therefor" after the word "liable." That is just a suggestion.

The Court: All right. "Liable therefor."

Mr. Fowle: I would simply state for the record that that doesn't meet our objection.

The Court: Objection overruled.

Now, on instruction 24, I haven't retyped it. Instruction 24, line 11, there is this statement, "These are governing [4243] principles applying to compensatory damages if unliquidated." I don't think it adds a thing, and I am cutting it out.

Mr. Fowle: The entire sentence?

The Court: The entire sentence. Any objection heretofore made to 24 may be incorporated as the objections to 24 as it now stands, and I will give it.

Now, as to 30, I propose to change 30 to make two sentences out of it with the result I will strike the word "while" in the first line, and I will end with a period after "contract" on line 6. Strike out the word "that," and start a new sentence with the words "However such."

This again is a matter of two reverse sides of the coin. I don't think it changes the principle involved, but instead of making it look as if it is all a plaintiff's instruction, it is a defendants' instruction and a plaintiff's instruction.

You may incorporate all the objections to 30 as heretofore made, and they will be overruled. I will give 30. It doesn't do any violence to your— [4244]

Mr. Dixon: No, we have no objection to that, your Honor.

The Court: All right.

31. 31 is another of these that I said that I would give unless I advised you later. I still have a lot of doubt as to 31, since it is one of these recitation instructions, and I may not give it. But unless I advise you otherwise, it will be given as it stands.

There is one other instruction that I did something to. I think it is 34.

34 is again an instruction in which I am merely changing the form of the words so that in the two halves of it it has both sides of it.

In line 8, after the words "if they cared to do so," period. Strike out "but when," and start a new sentence with "However, if and when."

And on line 12, "must exercise their monopoly power"—insert "if such they possessed."

And on line 14, insert the word "fruit" between "citrus" and "juices."

And the objections you heretofore had to 34 will be incorporated, and they will be overruled and I will give it with those changes. [4245]

* * *

Mr. Fowle: The next one is Defendants' Jury Instruction No. 34-A. and it is a proposed revision of original 34.

The Court: On 34, what did we do—reject it or give part of it?

Mr. Fowle: Actually what happened was you rejected our proposal, it was the instruction that dealt with causation, [4247] and after rejecting our proposed instruction you drafted another one which you said you would give.

The Court: Which was based in part upon your first two or three sentences?

Mr. Fowle: Correct: We weren't altogether satisfied with that.

The Court: This would be in lieu, now of 34——

Mr. Fowle: 34 or any revision of it that has been made up until now, although we do wish to keep our record, of course, on our original proposal.

The Court: It is in lieu of your first 34 as submitted——

Mr. Fowle: Right.

The Court: And you can have all the objections you had to my proposed ruling on your first 34 incorporated herein for what they are worth. But by submitting the revision, are you, in substance, withdrawing your request for 34 as first submitted?

Mr. Fowle: No, sir.

The Court: You want that to stand?

Mr. Fowle: We think we are entitled to it. [4248]

The Court: All right. It may stand. This is also in lieu of what wound up as 34.

Mr. Fowle: It is in lieu of an instruction that is headed revision of No. 34.

The Court: Revision No. 1, wasn't it? [4249]

* * *

Mr. Williams: Didn't we decide at the last session since monopolization was just the result of combination or conspiracy in this type of charge, that we included monopolization by referring to the acts pursuant to the combination or conspiracy?

The Court: Well, not necessarily. Technically, on the record of the case, I think the plaintiff could contend apart from the conspiracy, one or the other of the two defendants monopolized. It would have to be EOP monopolized. But I commented somebody might propose an instruction, if there was monopolization, I think we are agreed on the law, it could only result from the acts of several people in a conspiracy or the act of a single person apart from the conspiracy.

Mr. Fowle: Our understanding was there was no charge any individual single defendant had monopolized.

The Court: Well, I don't know. Is there?

Mr. Dixon: Well, the language of the complaint is, combination and/or conspiracy to monopolize and monopolization of the citrus fruit juices.

Now, your question is whether plaintiff contends that any single individual monopolized, I mean any single individual defendant, is that the question?

Mr. Fowle: Yes.

The Court: That is the question. I don't think, leaving [4252] out your alleged monopoly of product fruit, that you could possibly charge—the only thing you could possibly charge would be that EOP monopolized the fruit juice market.

Mr. Dixon: That's right.

The Court: Now, the question is, do you want that left in the case?

Mr. Dixon: Well, our contention, of course, is in the sense Mr. Williams has suggested, that the effect of their acts has been to give them monopoly over the citrus juices, particularly single-strength Valencia juice.

Mr. Fowle: As I have understood the charge under Section 2 of the Sherman Act, it is a charge that there was a conspiracy to monopolize, with the additional charge that not only was there a conspiracy to monopolize, but the conspiracy was successful.

Mr. Dixon: Well, that it was effective, yes. That is the substance of it. Now, of course, the question goes to whether or not when you—certainly standing alone I would unhesitatingly say in the broad sense of the term that EOP did not have monopoly of the single-strength juice, because it doesn't add up in percentages.

The Court: Well, all right then.

Mr. Dixon: But collectively it does, in my judgment. [4253]

* * *

The Court: I will give it, but, query as to the instruction on causation.

What is the next one?

Now, by giving it, you now want 34 withdrawn?

Mr. Fowle: No, we don't want it withdrawn. You mean the one you drafted with your secretary?

The Court: Yes. This supplants that, doesn't it?

Mr. Fowle: Yes, but this doesn't supplant our original 34.

The Court: No, it doesn't supplant any of your original objections, but I would now pull 34 out.

Mr. Fowle: Correct.

The Court: All right.

Now, what is your next one?

Mr. Fowle: This one.

The Court: This is just to raise a legal point?

Mr. Fowle: This, it is proposed, would follow plaintiffs' Instruction No. 33, which deals with the subject of monopoly, monopoly power, and so on. We propose that at that point the jury be instructed that the mere fact that Sunkist has 65 per cent of the products oranges is not enough all by itself on which they could base a finding of monopoly power over products oranges.

The Court: You are talking now about monopoly power [4270] over products oranges?

Mr. Fowle: Right.

The Court: Does the plaintiff object?

Mr. Dixon: Definitely it does, your Honor. This certainly is not the law in my judgment. This is tantamount to an instruction that the jury must find that on 65 per cent of the products Valencia oranges, that that is not enough for them to exercise power over price .and other factors.

The Court: That is the matter as it stands.

Mr. Dixon: That certainly is not the law.

Mr. Williams: Your Honor, we rely on the decision of Judge Learned Hand in the Aluminum

Company case in the Second Circuit, which says 90 per cent may be enough to establish monopoly.

Mr. Dixon: 33 per cent may be enough.

Mr. Williams: He said 60 to 64 per cent is doubtful, which indicates you have to have something more than 65 per cent.

The Court: You make your record, if you want to. I will reject 43. That largely speaks for itself.

Mr. Fowle: It does speak for itself. I don't think there is any need to say more.

The Court: All right. What is the next one you have?

Mr. Fowle: The next one is 44, which is intended to deal with the question of refusal which your Honor mentioned. [4271] It follows Plaintiffs' No. 12 and to a considerable extent uses the language of that instruction.

The Court: I am cutting out "companies" here again.

Mr. Dixon: There is nothing like this in Plaintiffs' 12, counsel, that I can see.

Mr. Fowle: It is not a duplicate of your 12. When I said language of this proposed 44 was taken from Plaintiffs' 12, what I meant is the phrase, "the action of Exchange Orange in entering into the 1951 contracts with TreeSweet and Silzle and refusing to enter into comparable contracts with the plaintiff" is the exact language that you find in the first sentence of Plaintiffs' Jury Instruction No. 12. That is why I used it. It seemed to me it was adequate for the preparation of the proposed defendants' instruction, and I find it in Plaintiffs' Jury Instruction 12.

Your Honor suggested the other day that we might take Plaintiffs' Jury Instruction 12 and add to it, "conversely, if you find so and so."

The Court: Well, I had the same problem you did. When I read it over again on Sunday, I figured it was a hard thing to do.

Mr. Fowle: It is impossible for us to do that, because we find Plaintiffs' Jury Instruction 12 to be about the most objectionable of all the instructions that were submitted by them from our point of view, because it says the effect [4272] of this act I have referred to here, if it was an effect, if the exclusion of the plaintiff was the effect of this action, then the exclusion is unreasonable per se.

We take the point that is not a proper instruction in our case. I think we have made our record on it. It doesn't make any difference whether it was the effect or not. It has to be either the necessary and direct effect or it must be the effect that was specifically intended.

The Court: Do you have other proposed instructions on this refusal, or is this the one?

Mr. Fowle: This is the one.

The Court: What is plaintiff's objection to 44?

Mr. Dixon: Well, the last sentence is the primary objection to start with. I have no objection to anything which will tie this in with part of the conspiracy, but this is an instruction on the law, the last sentence. It takes away the matter from the jury completely.

The Court: I have thought this over a long time. Whether I can use this or not, I don't know. But after all, unless this refusal which, of course, has to be considered with other facts in the case, was two things, and they have got them both here, was not the result of independent business judgment, and was not part of the conspiracy or done pursuant to the conspiracy, then I think you are out. I think you have got to sustain that burden. [4273]

I was going to propose something maybe not after 12, but somewhere in here where you talk about refusal, without a lot of this preliminary discussion: If, on the other hand, the refusal of Exchange Orange to enter into comparable contracts with the plaintiff, if such you find, was the result of independent business judgment and was not a part of or done pursuant to the conspiracy charged, then——

I wasn't going to go as far as you have gone here.

Then you may not consider it as any basis of plaintiff's case.

Mr. Fowle: Well, that comes pretty close to some of the things I suggested in some of our other instructions, which didn't meet with approval here. It does seem to me, however, that what you said a moment ago is correct, that if the jury should find that the refusal to give comparable contracts was done as the independent act of Exchange Orange and was not done as part of or pursuant to the conspiracy charged in this case, that that is the end of the lawsuit, you can forget about the rest of the acts involved here.

Mr. Dixon: I don't agree with that at all, your Honor.

Mr. Fowle: Just forget about them.

Mr. Dixon: If there is going to be any question about it, I would prefer to withdraw this instruction.

The Court: Withdrawing 12 doesn't still answer the question, because in view of the instructions we have got in here [4274] on your side on the refusal, they are entitled to some comparable instruction. Very frankly, they have asked for a bunch of instructions which I think were properly rejected because they weren't the law.

One thing I noticed in going over these instructions and the changes I made, many of Mr. Dixon's instructions had the converse situation in them. To dress them up a little bit I made two sentences out of what plaintiff put in those instructions.

A lot of these instructions you have offered to me in fairness, in trying to show the problem, didn't do it. Looking through what I have rejected, it looks like I have thrown out all of defendants' instructions and have taken the plaintiff's. But I will say frankly, I think the plaintiff's instructions were a lot better.

But I read this over and there were converse instructions in here. You can destroy oranges. You can have 100 per cent monopoly. But you cannot do this.

But there is no converse instruction on refusal. Refusal is a very essential part of the case.

Mr. Dixon: Well, it is, but it isn't enough to throw the case out, Judge, because it is the control of the defendants over the orange supply, No. 1, which enables them to establish a price, No. 2, pursuant to which the plaintiff was unable to get any oranges from any source, including the [4275] defendant. The refusal was part of the conspiracy.

The purpose of this instruction is solely on the law, as to what constitutes an unreasonable restraint per se. That is the sole and only purpose of it.

Maybe the reference here in this should be limited without application to the facts of this case and let the jury decide whether it is applicable. But certainly exclusion from the market here, your Honor, is one of the elements in this case, because if this plaintiff wasn't excluded from the market through the inability to acquire oranges for processing into single-strength juice on a basis that would have enabled him to compete, then there is no violation of the law here.

I would be agreeable, in view of your Honor's comment, to limit such an instruction to a mere statement of what I regard as being the law set forth in these cases, without necessarily applying it to any refusal or anything else. Maybe that is what should be done in view of your Honor's comments. [4276]

Mr. Fowle: We——

Mr. Dixon: You will notice that this instruction stops my merely telling the jury that that would be unreasonable per se, and that they have to find that there was such an exclusion. It doesn't tell them that if they find that these things were done, and it was illegal per se, that they must proceed to find for the plaintiff, or anything else.

Now, that was the purpose of instruction 12.

So I would be content, in view of your Honor's view on the subject, to either withdraw it entirely, or to just couple it with a statement that the exclusion of a competitor from a substantial market of products sold in interstate commerce is unreasonable per se, and let it go at that.

Mr. Fowle: If I may say this. We don't really care much what the plaintiff does with its own instruction No. 12. We propose this No. 44, in any event. We simply suggested that it follow Plaintiff's 12, because that looked like a pretty good place to insert it. However, the plaintiff has suggested not one, but I would say three or four, maybe five instructions, all of which deal with this question of the giving of contracts to TreeSweet and Silzle, and the withholding of a comparable contract from the plaintiff.

In our view, that is really the nub of the matter anyway.

We think if that happened as a result of a decision on [4277] the part of Exchange Orange alone, and was not part of the conspiracy charged in this case, that that is the end of the ball game.

We can't help it if things turn out that way.

This is a conspiracy case, and we have a right, it seems to me, to have the jury decide whether some of the things that are charged to be part of the conspiracy are or are not part of the conspiracy.

Mr. Dixon: That I certainly agree with, counsel, but what you are asking in your second line of the requested instruction is to limit this case entirely to what you have put in one sentence and say to the jury, if you find that this was not done, you must find for the defendants.

If there ever was an instruction in my judgment that was not applicable to evidence and to the issues of this case, this is one of them.

Mr. Fowle: I think that last sentence——

Mr. Dixon: It would be highly prejudicial, because you are telling the jury that they must return a verdict for the defendants——

The Court: Let me ask this. Again this is limited to conspiracy. Did we cross that bridge as to whether you would or could contend that there was monopolization entirely by the activities of EOP?

Mr. Dixon: No, I don't think we did, your Honor. But, [4278] as I indicated some time ago, we don't contend here that EOP in and of itself monopolized the single strength Valencia market. Because that would mean that they would have to have produced a sufficient amount and controlled a sufficient amount of the single strength Valencia juice to constitute a monopoly, if we charge that they were successful in accomplishing it. And that would constitute an attempt to monopolize, rather than the actual monopolization of it.

In a sense it is immaterial under the Section 2 charge whether the defendant or defendants achieved monopoly control over the single-strength Valencia juice market.

That doesn't mean that they are being charged with an attempt to do it. The charge is that they combined and conspired to do it. And the complaint further states "and monopolized."

Now, that is an integral part of the combination and conspiracy charged, on the theory that they did effect what they set out to effect, therefore they conspired to do it, because of the acts which preceded it.

But this instruction, or anything comparable to it, amounts to a dismemberment of the claims made in the complaint by isolating them, and is tantamount to saying that you can disregard the other five allegations.

The Court: There ought to be some way to do it. Let me see what I have got here. [4279]

Mr. Dixon: The first sentence I have no—I think it is surplusage. I don't think it is a proper subject for a charge, but when you take the first and second together——

The Court: Try this for size. It will come along in here somewhere. Since defendants say that 12 is one that causes them great concern, I may convert it into just merely a statement of law, instead of "If you find." I don't know. That will take a little work. But try this for size, here:

"However, Exchange Orange would have had a legal right to refuse a contract to plaintiff comparable to the TreeSweet and Silzle contracts, if such refusal was no part of the violation of the antitrust laws as charged by plaintiff."

Mr. Fowle: To our way of thinking, your Honor, that really doesn't tell the jury what we are trying to tell them, and what we think they should be told.

The Court: It doesn't tell them, true, but again it is this business of picking out a thing in isolation, and although you contend that this is the case, I am not so sure. Certainly it is a major part of it. But this again tells them that they had a legal right to refuse a contract, if such refusal was no part of the violation of the antitrust laws as charged by plaintiff. It puts it generally.

Mr. Fowle: It seems to me that that really doesn't say anything at all, because it seems to me—— [4280]

The Court: It says a good bit.

Mr. Fowle: ——you can say that anything that the defendants did here, they had a perfect legal right to do, if it wasn't a violation of the law.

The Court: The difference between the matters is this business of chopping it up and taking this little piece and saying this couldn't be, and this couldn't be, and then arguing collectively that none of it could be since each piece couldn't be.

Mr. Fowle: A number of the plaintiffs' instructions do just this, they take the element, refusal to give a contract to the plaintiff, and the giving of the contracts to TreeSweet and Silzle, and single those three out and, as a matter of fact, I wouldn't say that is improper, because that is the heart of the matter.

The Court: What do you say to what I read? You are not going to like anything on refusal, but what do you say to this?

Mr. Dixon: I think I have expressed my views, Judge.

The Court: Well, express it on this one. Do you want me to read it again?

Mr. Dixon: I took notes here. Are you leaving the second sentence in?

The Court: I am proposing to reject 44 and give this instead. "However, Exchange Orange would have had a legal [4281] right to refuse a contract to plaintiff comparable to the TreeSweet and Silzle contracts, if such refusal was no part of the violation of the antitrust laws as charged by plaintiff."

Mr. Dixon: You would add that to——

The Court: I wouldn't add it to anything. I would run it in somewhere, where there was some reference to refusal.

Mr. Fisher: Would that, then, take the place of 12 and 44?

The Court: No. 12 is on a different point. But if I reject 44, it is what I would give in lieu of it.

That puts it in the perspective that I think it ought to be in the whole case.

Mr. Fowle: If you don't mind my saying so, it seems to me that that really doesn't say anything at all, because the jury has got the job of determining whether this refusal was a part of the violations of the antitrust laws charged by the plaintiff.

The Court: That is right.

Mr. Fowle: And to tell the jury that EOP would have had a legal right to refuse the contract to plaintiff comparable to the TreeSweet and Silzle contracts, if it was no part of the antitrust law violation, it seems to me is not to tell them anything.

The Court: It is in general terms, but by the same [4282] token if it is a part of the antitrust law violation, then there was no right to refuse. It is in very general terms.

Mr. Fowle: The violation of the antitrust laws as charged here is the conspiracy.

The Court: And monopolization.

Mr. Fowle: I think Mr. Dixon agrees that Exchange Orange could not under the charges set forth in this complaint be found guilty of anything.

The Court: This proposal that I am talking about, I am going to call the court's P.

What do you say to this proposal, Mr. Dixon?

Mr. Dixon: I was just mulling it over. It is a hard question to answer, Judge, offhand. The thing that bothers me is——

The Court: It answers the objection that you have made to keep from cutting each of these up and looking at them in isolation. It makes you look at it in respect to the whole case.

Mr. Dixon: It tells them indirectly or inferentially, as I read it, that this refusal to make a contract is perfectly proper, that is the inference, unless it is made pursuant to or made part of the combination or conspiracy to restrain and monopolize.

The Court: I think that would be better that way.

Mr. Dixon: I am not sure that it would be.

The Court: Logically it follows.

Mr. Dixon: It has got to be placed in perspective with the TreeSweet contract, which the plaintiff, of course, contends throughout this case is discriminatory.

The Court: That puts it in perspective. I will modify the wording of it. I will say "as charged by the plaintiff," and that is the issue. You are past the period of charge.

Mr. Dixon: It infers that the TreeSweet contract is all right.

What I am thinking about, your Honor, is this: Mr. Finley said in no uncertain terms, "I wouldn't give this contract to anybody except TreeSweet."

The Court: Here is the way I propose to word it. I put the word "however" in parentheses, depending on how I fit it in. The text might require it and might not.

"Exchange Orange would have had a legal right to refuse a contract to plaintiff comparable to TreeSweet and Silzle contracts, unless such refusal was a part of a violation of the antitrust laws."

Now, that puts it in perspective against the whole case.

Mr. Fowle: May I make one suggestion before you reject our proposal completely?

Supposing that we changed the last sentence to read this way: "If you find that such action of Exchange Orange [4284] was the independent decision of Exchange Orange and was not engaged in pursuant to such conspiracy, you may not consider such action as a basis for"—I was thinking of "awarding damages"—"you may not find that such action was a violation of the antitrust laws."

The Court: What do you say to that?

Mr. Dixon: I was off on 12 comparing this with 12, your Honor, again. I apologize. What is the suggestion? Are we back now on Defendants' 44?

Mr. Fowle: Correct.

Mr. Dixon: Not your Honor's suggestion?

The Court: No. They are talking about 44.

Mr. Dixon: What was your suggestion?

The Court: To strike out "your verdict should be for the defendants," and to place, instead——

Mr. Fowle: "You may not find that such action was a violation of the antitrust laws."

Mr. Dixon: I don't agree with that.

It emphasizes again——

The Court: We have got to pass on.

I am going to reject 44, and overrule the defendants' objections, and give the court's P and overrule the objections of both the defendants and plaintiff.

Mr. Fowle: May the record show that we have proposed 44 as originally proposed and with the alternative which I [4285] mentioned a moment ago, so that I have proposed it both ways?

The Court: Yes. And your offer of it is denied and your objection is overruled.

Do you object to the court's P, too?

Mr. Fowle: Yes, sir, for reasons which I expressed, I believe.

The Court: All right. I will give the court's P. What is your next one? [4286]

Mr. Fowle: Well, that is really all that we have put together in the form of proposed instructions, but we had discussed the other day the question of getting from the cases proper definitions of the term monopoly.

The Court: Yes.

Mr. Fowle: Mr. Williams has produced what we regard as satisfactory definitions or qualifications of the instruction that have already been considered. It is not in the form of a proposed instruction, but the language as set forth on defendants' 45 is quite readily susceptible of being put in the form of an instruction.

I might say, also, your Honor, that particularly the first portion of this quote from the Interborough News Company case points up the matter which we discussed Saturday.

The Court: Yes. I read it at the time I studied the case. I don't know whether Sugarman has support in other cases or not for that. He cites some cases.

Mr. Dixon: Do you want my comment, your Honor?

The Court: Yes, sir.

Mr. Dixon: The first sentence is certainly out, it seems to me. The second sentence on page 298 is a fair general statement.

The quotation on 299 is certainly not a statement of my judgment of the law as it might be applied, because it doesn't deal with what we have here, the conspiracy to [4287] monopolize, and it is objectionable because of its narrowness and because of what it does not include, rather than what it states in part.

The Court: I was impressed with a couple that I read out of Words and Phrases. Did you look those over, Mr. Williams?

Mr. Williams: No, I did not.

The Court: Did any of you look at Glass Company vs. Twin Cities Pipe?

"Monopolization that is condemned is the condition produced by agreements or by acts of individuals so that power may exist to control prices or exclude competition."

Mr. Fowle: Well, your Honor, that is the heart of the instruction we proposed the other day. In order to find that Exchange Orange or Sunkist have a monopoly of product oranges, or anything else for that matter, it is necessary to find that there is the power to exclude competition by others and to determine the price at which others sell. That really is just about what is in that case you just read. The matter we are submitting in Defendants' 45 points up the requirement that there be an exclusion of competition generally rather than exclusion of the competition of a single competitor. As a matter of fact, Plaintiffs' instruction 33 says, I think it says, that the two most important ingredients [4288] of monopoly are power to exclude competition and power to fix or determine price.

Whereupon we turned around and submitted an instruction which said in effect, unless the jury finds we did have that power or those two powers, there should be no finding we have a monopoly on products oranges, and that instruction was not acceptable.

The Court: Well, you object to 45?

Mr. Dixon: Yes, your Honor, I do definitely. There is no number on it.

The Court: It is 45. 45 is rejected. [4289]

* * *

The Court: I also had some humble thoughts here which [4291] I suppose both sides will object to. All you have to say is you do.

First, the court's B. By the way, I never submitted any A to you. You may have wondered where A was, but I never submitted any.

Do you have B before you?

Mr. Dixon: Yes.

The Court: I have made a number of changes on it. I don't know how many you have got in there. Are your copies chopped up?

Mr. Williams: No.

The Court: Let me read you what I have got. Then if you want it worded differently, we can talk about it.

"In a civil damage suit under the antitrust laws, the plaintiff must go farther than to merely rely on proof of violation of antitrust laws. The plaintiff must allege and prove that the particular acts or conduct or happenings which it is claimed caused the damage.

"Here the plaintiff particularly complains of six matters which will be referred to in these instructions as the acts alleged by the plaintiff. They are:

"1. The alleged oral contract between Exchange Orange and Exchange Lemon under which it is alleged [4292] that Exchange Lemon processed oranges for Exchange Orange during the 1951 processing season."

I have just brought that in line so they will be the same.

"2. The alleged oral contract between Exchange Orange and Exchange Lemon in which it is alleged Exchange Orange processed lemons for Exchange Lemon during the 1951 processing season.

"3. The allegation that Sunkist and Exchange Orange Products agreed to establish and maintain the price to independent processors like the plaintiff for product oranges.

"4. The contract between Exchange Orange and TreeSweet in 1951.

"5. The contract between Exchange Orange and Silzle in 1951.

"6. The allegation that Exchange Orange refused to give plaintiff upon request a similar contract." Then I would insert:

"It is also alleged by plaintiff ~~that the~~ contracts referred to above were performed and carried out.

"The other contracts entered into evidence between Exchange Orange, Hyland-Stanford, Mission Dry, and General Foods, also referred to as Birdley's, [4293] were offered and received for the purpose of showing the operations of Exchange Orange.

and such bearing as they may have in general, but are not claimed or alleged by the plaintiff to be the cause of their claimed damage."

Mr. Dixon: We put in there, Judge, the other contracts, too.

The Court: What were they now? Just the three of them.

Mr. Dixon: There were two or three others that were mentioned.

Mr. Williams: Harts, is that the one you are thinking of?

Mr. Dixon: Harts. And there was one with——

Mr. Williams: There was the frozen in 1950. I think that's all. Isn't it?

Mr. Fowle: I don't know.

Mr. Williams: There was the frozen ELP ran for EOP.

Mr. Dixon: Well, that is in here, isn't it?

Mr. Williams: Possibly.

The Court: Will you take too much offense at this?

Mr. Fowle: I would say this, your Honor, that the way you propose to state it is almost satisfactory to us. I think in the first paragraph there ought to be some sort of link-up between the acts which are said to have caused the damage and the violation of the antitrust laws. [4294]

Also, we would object, I think, to any reference to these other contracts in an instruction. It seems to us that that is simply calling attention to evidence. If your Honor is to call attention to evi-

✓

dence, there is probably other evidence in the case that we would wish to have attention called to.

The Court: Well, this is calling attention to a limitation of evidence. That is all it is doing.

Mr. Fowle: The principal purpose of this instruction, I take it, is to tell the jury what the six acts are.

The Court: That's right.

Mr. Fowle: And that these are the acts upon which the plaintiffs rely. It doesn't seem to me it helps any to refer to these other acts. [4295]

The Court: Well, it could be in a separate instruction. I coupled it in because these are not on ones on which they rely, and they were not admitted for that purpose.

What is the plaintiff's view on this?

Mr. Dixon: My own thought offhand is, on 3, it isn't quite complete. It takes off part of it. "Maintain the price to independent processors of product oranges"——

The Court: You can say "in summary." I tried to boil them down.

Mr. Dixon: In other words, the maintenance of a price alone would not necessarily damage the plaintiff.

"C" of the allegation, which is your 3, of course you read it and know what it is, but that charges the establishing and maintenance of a price at the level which made it impossible for independent processors, such as the plaintiff, to purchase or acquire by-product oranges from EOP or any other source.

You see, "any other source" there is equally as important in 3 as just to establish the price, which standing alone they have the right to do.

The Court: What would you add to it?

Mr. Dixon: The only suggestion that I can make, your Honor, is to include the language of C there of the complaint, to such extent as you care to do so. Because C is an important allegation, much more so than 1 and 2. [4296]

The Court: What page is that on in the complaint?

Mr. Dixon: Page 11 of the second amended complaint.

My only comment, your Honor, is the brevity of it, rather than the content.

I know it is lengthy, but I don't think I could state it any better than it is in the complaint.

I know your Honor doesn't want to read the allegations of the complaint to the jury. I assume there would be no objection in the argument to probably use them, which would amplify what you have here.

The Court: "To establish and maintain the price to independent processors like the plaintiff of product oranges, which made it impossible for independent processors, such as plaintiff, to acquire product oranges from Exchange Orange, or any other source, at a price or under arrangements enabling plaintiff, or other independent processors, to compete with defendants and TreeSweet and Silzle."

Mr. Williams: It seems to me the "which" in there leads to a conclusion. Couldn't it be changed in there so it wouldn't do that?

Mr. Dixon: Also competitive to Sunkist, your Honor.

The Court: I say, "to compete with defendants and TreeSweet and Silzle."

Mr. Dixon: I am sorry.

The Court: I don't know what I am going to do without [4297] a secretary.

Your "which" is over here?

Mr. Williams: It starts——

The Court: I took it from the allegation.

Mr. Williams: "And to maintain the price."

Would that fit it? If the "which" is in there now, it implies it did have this result, and it is just the allegation.

The Court: That is right, this is merely an allegation.

Mr. Williams: The "which" seems to take it out of the allegation class.

If you said, "and to maintain," instead of "which."

The Court: I want to make it clear this is an allegation. That the price made it impossible, and so forth.

Mr. Williams: That does it.

Mr. Fowle: If this is introduced by a statement that these are the allegations in the complaint with respect to these six acts, it will——

The Court: I am going to say that. And I am going to say that when I get through.

Mr. Dixon: You see, your Honor, there are so many of these—the substance of these allegations, if some part of it is taken out, I mean the factual part——

The Court: Haven't I got enough to satisfy you now?

Mr. Dixon: On "C" I think it is true. [4298]

Mr. Fowle: There is one place where there is a mistake, Judge. I think you talk about obtaining oranges from Exchange Orange. I think it should be Sunkist.

The Court: That is what the complaint says, from EOP or any other source.

Mr. Fowle: I don't think that is what is meant.

Mr. Dixon: It is important, Judge, from the point of view of the plaintiff, because here you have Sunkist, which only sold oranges.

The Court: What is important?

Mr. Dixon: You have got all the allegations of "C," I think, in your statement there. If any part of it is left out, in a sense it doesn't state the contention of the plaintiff with reference to it.

The Court: You can read, at least once, your allegation as to these acts.

Mr. Dixon: That is all I want to do.

The Court: But I am not going to give them all. Of course I could read this long section of the complaint with these acts.

Mr. Dixon: The only ones that I am particularly interested in, your Honor, are, of course, C, D and E, and, of course, F. I will be glad to do it, and I intend to say something about it anyhow in my opening argument.

The Court: You do it. Because this in summa would [4299] tell—you have got to pinpoint th so they have some idea what the 6 are. They a the contracts, this maintenance of price; and th refusal. I am telling them it is only in summa form.

Mr. Fowle: It seems to me that the argume will pretty well tell the jury what these six a are. If you just refer to them with almost just reference, it will be known what you are talki about.

The Court: I will give Court's B. I take it the is no objection to it?

Mr. Fisher: Your Honor, would that be pr posed to be given with reference to the Hyla Stanford contract, and so forth?

The Court: Yes, I am going to put that in, t

Mr. Fisher: It occurs to me that you have me tioned the two——

The Court: I have got Hyland Stanford, Hart Case-Swayne, Mission Dry and General Foods.

Mr. Fisher: It would be preferable to just s "any other contracts," without naming them.

The Court: What harm does it do, Mr. Fishe You are as interested in this as the plaintiffs. Y certainly don't want the jury to go out and figu that these contracts are causes of damage. So juror might get the idea that damage is shown rig over here, but nowhere else. I am just going [430 to tell them the facts of life, that these are n pleaded as acts causing damage.

I will overrule your objection on that. [4301]

* * *

D. I don't know whether you have it in there, but after the word "Winckler" insert "concerning complaints."

On line 6, after the words "falsity of the"—then insert the word "alleged."

Mr. Fowle: On court's D, we, of course, would have the same objections that were urged with respect to the admissibility of these letters during the trial. That is to say, we contend that these letters could be——

The Court: You may incorporate here the record made at the time of trial when the letters were offered, and the purposes you then stated that you offered them for, and my rulings on your offers.

Mr. Fowle: Especially the ruling that these letters would violate the hearsay rule, if considered for purposes other than impeachment.

The Court: All right.

Mr. Fowle: Also, we object to the giving of this instruction, because we feel that it places undue emphasis on the matter. Your Honor instructed the jury quite fully on this at the time.

We have this further objection: that in this instruction no distinction is made between complaint letters, on the [4302] one hand, and correspondence back and forth between brokers and the plaintiff, which may have contained admissions, on the other hand.

The Court: If I give the instruction, I should, in fairness, add to it, "letters offered in evidence which were written by the plaintiff or its agents were received in evidence on the theory of admissions against interest," and so forth.

Mr. Fowle: That might even include letters from brokers.

I have forgotten whether there were instances of this, letters from brokers which were answered by the plaintiff, might make up a series of correspondence which contained an admission.

The Court: I concede we can think of a situation like that, but I don't think it is in this record. For instance, a broker makes a complaint and the answer comes in, "Referring to your letter of so-and-so, we admit your complaint was justified," then you would have to require both letters. But I don't think there are any letters like that.

I think in each instance if there is an admission he repeated the substance of what was said in the letter.

What is the plaintiff's suggestion to this? Maybe plaintiff doesn't want it, either.

Mr. Dixon: Your Honor has already instructed them on [4303] part of this.

The Court: Now, wait.

Mr. Dixon: Are you talking about D now?

The Court: Yes. Do you want it or don't you? If you don't want it, we are talking about idle matters here.

Mr. Dixon: Yes, I think we would want this.

The Court: Do you want it with this addition, "letters written by the plaintiff or its agents and so-called anagrams were admitted for the purpose of showing admissions against interest, if any"?

If it goes in, they both ought to go in.

If you want to think about it, all right.

Mr. Fowle: I didn't get all that.

The Court: "Letters written by the plaintiff or its agents and so-called anagrams were admitted for the purpose of showing admissions against interest, if any."

Do you want to leave it up in the air?

Mr. Dixon: No. I think it is all right as far as the plaintiff is concerned.

The Court: All right. I will give it.

E.

Mr. Dixon: E is all right as far as plaintiff is concerned. [4304]

The Court: I have added something you probably don't have on there. Did you have an insert after the first paragraph?

Mr. Fowle: No, sir.

The Court: "And may consider it also on the question of causation, that is, did the defendants cause plaintiff damage."

Mr. Dixon: After the word——

The Court: "And may consider it also on the question of causation, that is, did the defendants cause plaintiff damage."

Mr. Dixon: That's all right with the plaintiff, if you are waiting for the plaintiff.

Mr. Fowle: We have a number of objections to this, your Honor. It may take a moment to state them all. In the first place, we object to this as being an instruction which, to use a colloquial phrase, is too pinpointed. It focuses the attention of the jury on one relatively small part of the entire case.

The Court: All right. What is your next objection?

Mr. Fowle: Well, looking at the very first sentence, "Testimony has been introduced by the defendants purporting to show a recovery of oil."

The Court: Strike that out.

Mr. Fowle: We didn't introduce the testimony in the first instance. [4305]

The Court: Strike it out.

Mr. Dixon: Where is that?

The Court: The very first line.

Mr. Fowle: Also, the very phrase, "purporting to show," seems to me to be objectionable. The evidence introduced by the plaintiff itself shows that beyond any shadow of a doubt. It is not even in dispute.

Mr. Dixon: We don't think it is a particularly material issue in the case, your Honor, in any way, but we have no objection to the instruction. If counsel don't want it, leave it out.

The Court: I don't want to stick my neck out on these things. If plaintiff says they don't want it, all you have to do is whisper. I have instructed the jury on how they could consider some of these matters. I think it has been covered in my instructions as we went along, and if one of you get out of line on argument on this matter, I may stop you. You will have considerable latitude in argument, but I am not going to let you argue after-discovered facts. Of course, as a matter of fact, you do have in the record contentions about the Citromat and the oil content in juice, which goes to efficient operation, and you may have other things along that line. Maybe we can save time by knocking it out.

Mr. Fowle: As far as we are concerned we can save a [4306] great deal of time, because, as I say, we have a number of objections to the way this is phrased, the wording of it, the purpose for which the evidence may be used.

Mr. Dixon: Let's leave it in as far as the plaintiff is concerned.

The Court: Then suppose I cut it down and just give the last paragraph.

Mr. Dixon: We will object as to the third paragraph, your Honor, as pinpointing something we think has already been covered in a sense by your instructions. I may be wrong.

The Court: It is covered by instructions given during the trial, not covered by anything else in my instructions now. If you have any doubt about it, I will take it out, because the defendants indicate they have a lot of objections.

Mr. Dixon: What about the third paragraph, your Honor? Did I understand you to say you would give the third paragraph?

The Court: I would cut out a lot of argument if we just cut it down to the third paragraph.

Mr. Dixon: That is agreeable.

Mr. Fowle: Even the third paragraph, we would have an objection there, I think.

The Court: On what ground? [4307]

Mr. Fowle: Well, certainly the refusal of EOP to give a contract would have to be based, it seems to me, upon the general economic conditions in the industry. There is no reference to that element here.

The Court: "Must be judged at least in part."

Mr. Dixon: Isn't that a correct statement of what you have on the basis of knowledge and information which they had at the time?

The Court: That would cover the knowledge and information.

Mr. Dixon: Surely.

The Court: By cutting out 1 and 2, I am not, as you say, pinpointing anything.

I will give the last paragraph. Objection overruled.

Mr. Fowle: I might just add this one more factor, your Honor. It has got to be judged also on the basis of whether it was part of the conspiracy in this case. This singles out the refusal to give a comparable contract to the plaintiff.

The Court: "Must be judged on the evidence and instructions in this case and on the basis."

Mr. Fowle: "Must be judged"——

The Court: "Must be judged on the basis of the evidence and instructions in this case and upon"—and so forth.

Any further suggestions?

Mr. Fowle: We still have the objection it is unrelated [4308] to the conspiracy charged in the case.

The Court: All right. Overruled.

F. Let's save time and ask the plaintiff first.

Mr. Fowle: I would like to add one further objection, your Honor, so that we may make our record.

The Court: To E?

Mr. Fowle: To E, yes.

The Court: All right.

Mr. Fowle: That is, in view of the court's rulings with respect to evidence which in the court's view related to so-called after-acquired information, it seems to us that this instruction is not necessary and that it is prejudicial to the defendants.

The Court: Do you still want it, Mr. Dixon? You can read these overnight.

Mr. Dixon: You mean to stop there?

The Court: No. I am talking about the whole last paragraph of the insert I put in.

Mr. Dixon: The objection is that the court has already——

The Court: Because I excluded some evidence, that this makes it unfair. Do you want to think about it overnight?

Mr. Dixon: Let's think about it.

The Court: F.

Mr. Dixon: To this one, your Honor, we would like to have added the specific instruction on the law concerning the [4309] testimony of Mr. Lynch on the loss figures which he used.

The Court: I have that in mind. I haven't worked it out yet. I will have to do it tonight.

Mr. Dixon: That is our only suggestion at the moment.

The Court: That should be modified in the opening paragraph, that the plaintiffs have offered opinion testimony.

Mr. Dixon: They offered their financial statements.

The Court: "Financial statements and opinion testimony."

Mr. Dixon: For the purpose of showing their earnings.

The Court: "On the question of damages"?

Mr. Dixon: Yes.

The Court: "And the defendants have introduced opinion testimony concerning readjustment and reconstruction of financial statements of the plaintiff, also on the question of damage."

Mr. Williams: It also goes to causation.

The Court: "Damage and causation."

Now, in view of the duplication of the last paragraph and the fact that I couple these together, I could omit the last paragraph.

Mr. Fowle: Well, if the instruction is to be given at all, and again we think this is an instruction that is pinpointing certain aspects of the evidence, which is not being done generally in the instructions, we would object to it on [4310] that ground, and I would object to the final paragraph——

The Court: I will knock out the final paragraph. I said the same thing in E. Do you object to it?

Mr. Dixon: No objection.

The Court: Any objection on the defendants' part?

Mr. Fowle: Just a moment, please. Is this insert at the beginning?

The Court: "You are instructed that the plaintiffs have offered financial statements and opinion testimony on the question of damages, and the defendants have introduced opinion testimony concerning their readjustments and reconstruction of financial statements of the plaintiff also on the question of damage and on causation."

Then the next line is changed: "This testimony was admitted and may be considered."

Mr. Fowle: I think we would object to the inclusion of the phrase beginning in line 4, "their readjustments and reconstruction."

We suggest that that phrase be omitted, so that the instruction would read, "and the defendants have introduced opinion testimony concerning the financial statements of the plaintiff."

The Court: I don't care, except I want those exhibits changed before tomorrow. You know what I am talking about. Those exhibits that start out at the top, TreeSweet. I want [4311] some indication on them that they are not TreeSweet records. In some of them you have something indicated as to what it is, but you have got financial statements of TreeSweet kicking all over this case. Now, you have got some exhibits in there and they start right out at the top, Winckler & Smith—what am I talking about? I am getting punch drunk. I am saying TreeSweet.

You have got all sorts of financial records in here taken from the records of Winckler & Smith. Then you have got your reconstruction headed at the top, Winckler & Smith Products Company, which makes it look as if they were also taken from the books of Winckler & Smith.

On one or two of them, which were merely in columns, a comparison of figures taken from Winckler & Smith's books, I am not objecting to that. You just took something there and something here. But on those that are your reconstructions, I want something on the exhibits so a juror won't get up and say, "Well, here is a Winckler & Smith exhibit right here and it shows so and so."

I will mark down here, "Exhibits headed Winckler & Smith."

Mr. Fowle: Mr. Fisher suggests they may already have been corrected. I don't know.

The Court: I don't either. But check up on that.

Mr. Fowle: Do you know, Mr. Dixon?

Mr. Dixon: I don't know. [4312]

The Court: Any further objection to Court's F?

Mr. Fowle: No, sir. [4313]

* * *

Mr. Fowle: I know what it is. I have it right here.

The Court: I know it was handed in by the plaintiffs and had no number on it, and we marked it as 38 and we laid it aside. It is on monopoly.

You proposed 38.

Mr. Dixon: I don't seem to have it.

The Court: I will lend you my copy to look at.

You have got it here somewhere. You tossed it in and you had no number on it, and we gave it the next number in order, 38.

Mr. Dixon: Yes. I know now which one it is.

Did I understand your Honor to say that you would give [4321] that?

The Court: I haven't said yet.

What are the defendants' objections to it?

Mr. Fowle: We have two objections to it. In the first place, we proposed an instruction which dealt with the same subject. It was our No. 16-A, which we believe incorporated what should be in an instruction of this sort, and that is that in order to have monopoly power there must be the power to exclude competition and the power to determine the prices at which others sell. This instruction doesn't deal at all with the power to exclude competition, that is, competition generally. It deals with the power to determine prices, and it says in it at lines 7 to 9, "that if the defendants have the power to determine their own prices, or the prices of any other actual or potential supplier, then there may be a monopoly."

It seems objectionable to insert in there any reference to the right of defendants to fix their own prices.

Of course they have the right to fix their own prices. The question that should be considered when you are dealing with the problem of whether there is a monopoly is whether or not the supposed monopolists have the power by virtue of their control to determine the prices at which others sell; not the prices at which they, themselves, sell.

Mr. Dixon: This is all right. [4322]

The Court: Did you hear the objection, or were you shuffling your papers?

Mr. Dixon: I heard part of it.

The Court: The objection is that it talks about the power to fix prices, but doesn't refer to competition. Also, it refers to the fact of fixing their own prices.

In view of the other instructions we have got on monopoly, why don't I just stop at the period on line 5? [4323]

Mr. Dixon: That instruction, your Honor, was an application of the power to the facts and the contentions——

The Court: What do you say to their objections?

Mr. Dixon: Monopoly power only applies to the power to fix prices. Price fixing isn't involved in that sense in this case. It is the power to determine the prices and terms and conditions at which they would be made available to independent processors or any other actual or potential supplier. In other words, if the jury finds that they were able to do that, then they would decide that they had monopoly power control over the amount of products oranges. Do you have a copy of the instruction, Judge?

The Court: No. I want that one back. Did you find yours yet? I have to have this back because I have to give it to the clerk.

Mr. Dixon: No.

Mr. Fowle: One of the objections to this instruction is that it says in effect it is for you, the jury, to decide whether the defendants have such power over product oranges that they can fix the prices at which they, that is the defendants themselves, sell products oranges.

Mr. Dixon: No, that isn't an isolation. That isn't the whole instruction.

The Court: You have got an "or" there. It should be an "and." [4324]

Mr. Williams: There shouldn't be any reference like that there.

Mr. Fowle: There shouldn't be a reference to the right of the defendants to fix the price.

The Court: You are talking about the phrase, "which may be made available to the independent processors by the defendants." Then you say "or." Certainly, in any event, it should be "and."

Mr. Dixon: To determine the price or terms and conditions at which they would be made available.

The Court: To independents by defendants or— you have or there. That puts it in the alternative. Certainly, as far as the defendants themselves, there would have to be a "and" in any event.

Mr. Dixon: Well, I have no objection to inserting the word "and." I think it may be all right as it is, but let's insert the word "and" then.

Mr. Fowle: We object to this unless the phrase "by the defendants or" is removed entirely.

Mr. Dixon: Well, counsel, the contention is under monopoly power that you have the power yourself to determine prices at which things will be made available. If you have 100 per cent of the products, you determine the price and that shows you have monopoly power. That doesn't mean you can't do so.

Mr. Williams: What about price [4325] leadership?

Mr. Dixon: That doesn't mean you can't do so.

The Court: I will give 38, but I want Mr. Dixon to look at it again tonight. He hasn't got anything else to do.

Mr. Dixon: Oh, no.

Mr. Fowle: Also, your Honor, you understand our objection is there is no reference to the exclusion of competition.

The Court: Yes, and I want Mr. Dixon to get that point. They say this instruction talks about prices, but it doesn't talk about exclusion of competition.

Mr. Williams: And it could be price leadership.

Mr. Dixon: The question for the jury to decide under this instruction is whether the defendants had the power to fix their own price, which they have, of course. Anybody has that, but if it comes to a point where they fix the price and determine apart from price the conditions under which these oranges will be made available, not only on a sale price, but under any other arrangement, then you have control of the market and have exercised the power. Now, you would not have to exercise it illegally unless it is coupled with doing so——

The Court: All right. I want you to look it over again. I will ask you in the morning.

Have you any further objections?

Mr. Fowle: Yes, there are some.

Mr. Dixon: Do you have an extra copy? I don't seem to have this. [4326]

The Court: I took it back from you.

Mr. Fowle: In the light of what Mr. Dixon just said, we would have the further objection that this instruction really deals with only one portion of what a monopoly is in any case, and that there should be an instruction such as we proposed in No. 16-A, and similar to the one Mr. Dixon himself proposed as his own No. 33, which deals with the subject of monopoly as a whole, rather than breaking it down into its component parts. I believe Mr. Williams has one or two objections.

The Court: Do you have another copy of it, either of you, you can give Mr. Dixon?

Mr. Williams: He can have this one. It is marked up.

The Court: All right. Give it to him.

Mr. Williams: It speaks of the amount of oranges to independent processors. Independent processors might include—it is hard to tell who it does include. Does it include only someone other than the coconspirators here? Does it include American Fruit Growers, for example, or M.O.D. or someone who raises oranges and has a plant of their own?

Mr. Dixon: "It is for the jury to decide on all the evidence in this case," if they want that inserted. [4327]

* * *

Mr. Williams: Your Honor, we have one objection that goes to 3, which I can state briefly.

The Court: Plaintiffs' 3?

Mr. Williams: Plaintiffs' No. 8, and the same objection relates to Plaintiffs' 8, Plaintiffs' 35, and to Defendants' 37 as revised.

The Court: What is the point?

Mr. Williams: Plaintiffs' 8 reads, "It is sufficient if you find any acts charged by the plaintiff to have been done pursuant to the combination alleged actually and necessarily resulted in the elimination of the competition of the plaintiff."

Our point is that elimination of competition of the plaintiff is not equivalent to unreasonable restraint of trade as required by the statute as interpreted by the courts. That same equating of those two things appears in Plaintiffs' 8, Plaintiffs' 35 and Defendants' 37, as revised.

The Court: What do you say to that?

Mr. Dixon: It is a question of law. If the elimination of the competition of the plaintiff does not constitute unreasonable restraint of trade, why——

The Court: You can content, are you?

Mr. Dixon: Yes.

The Court: I will look it over. The objections are now overruled unless I changed my [4329] mind.

The clerk has prepared two forms of verdict. See what you think of these. You will have to look at them together, because there are no copies.

Mr. Dixon: Satisfactory to the plaintiff, your Honor.

The Court: Both satisfied?

Mr. Fowle: Yes, sir.

The Court: Now, you have got a request for special interrogatories here.

Mr. Dixon: Plaintiff objects, your Honor, to the defendants' special interrogatories in this case.

The Court: What is the purpose of your interrogatories?

Mr. Fowle: Well, as your Honor knows, we have taken the position that Sunkist and Exchange Orange may not conspire between themselves. You have disagreed with us on that. You may be right. We may be right. If a verdict is brought in for the plaintiff and it is necessary for us to appeal, we will be unable to raise that point or preserve it unless we know whether or not some outsider was in this conspiracy. We won't know who the conspirators were at all. That is the reason for these interrogatories.

While it takes a couple of pages to state them, really all they do is ask the jury to tell us, if they bring in a verdict for the plaintiff, who the conspirators were.

The Court: If I give them one, I would cut this down so that where you have listed under 1 some material, it would [4330] read something like this:

If you find a judgment for the plaintiff, did you base it on:

One, conspiracy to restrain trade;

Two, conspiracy to monopolize;

Three, actual monopolization.

Mr. Dixon: Or both, your Honor, instead of the three.

The Court: Right.

Mr. Dixon: Conspiracy to restrain trade, conspiracy to monopolize, or both.

The Court: Then I would say, if I give them:

2. If you found a judgment for the plaintiff and have based it on conspiracy to restrain trade, was so and so a member of the conspiracy?

However, I wouldn't put them in this order. I would put them, Sunkist, Exchange, TreeSweet, Silzle—some other order than this.

Then I would say:

If you have found for the plaintiff and have found only a conspiracy to monopolize, did you find so and so as a conspirator?

Then probably a note on it:

If you have based your verdict for the plaintiff on both grounds, who did you find——

And so forth. [4331]

In other words, I would tie this in one with the other.

Mr. Fowle: Well, we would have no objection to that.

The Court: And I might even give it to them in a sealed envelope and say, "You don't even look at this until you have found your general verdict. Your first task is to find a general verdict." Not to gum this thing up any further.

Mr. Fowle: We would have no objection to that procedure here.

The Court: What do you say?

Mr. Dixon: We object to any special interrogatories in this case, your Honor. I think the jury is going to have enough of a job here going through a hundred and fifty exhibits, if they do, without having to answer a lot of special interrogatories.

The Court: It wouldn't be a lot. I could even do this. I could not even give them the envelope, which might indicate I have figured a verdict one way or the other, but wait until they have brought in a verdict, and then by agreement send them back up with the interrogatory.

Mr. Fowle: If the plaintiff will agree. All we want to know is if they find a conspiracy, who were the conspirators?

Mr. Dixon: Why are you entitled to know that, counsel? You get your answer through the verdict. I have never heard of such a thing. There may be some cases where they have done that, but I don't think it is customary except, of course, [4332] in a criminal case the jury find whether or not they were a member of the conspiracy by those who are indicated.

The Court: It cuts both ways. I am not saying whether I will do it or not. I may look it over. It cuts both ways. If you get a verdict, you are generally able to sustain it, with the sole exception here if they only found Lemon was the other conspirator, and I don't know how they could find that. If there is a verdict for the plaintiff, you can rest assured TreeSweet and Silzle will be listed as the coconspirators and not Lemon. [4333]

* * *

The Court: Now, I haven't got these typed up. I will have to read you a couple.

Court's T is something I was going to work over coming from my form 12-C, and here is what I have got on it. I think it ought to be acceptable.

"A corporation can act only through its officers, agents or employees. Any act of an officer, agent or employee of a corporation in the performance of his duties is held in law to be the act of the employer. It is for you to determine whether the 16-man executive committee and the joint management committee of 4 and the members thereof were acting in the performance of their duties and whether they acted for Sunkist or EOP or ELP, or all or some of such entities." [4347]

Mr. Dixon: I didn't think that was a question.

Mr. Fowle: We would certainly object to anything about a four-man committee. The evidence was there wasn't any such committee.

The Court: There was evidence that they met, and it was described as a management committee; and I am leaving it entirely to them.

Here is the problem: You say to a jury, A corporation acts through its officers, agents, servants or employees. Now, you have committees which were composed of people from different legal entities. It is purely a question of fact for the jury.

As to the form of this, we can talk about that later, but I am going to advise you that I am going to give an instruction such as that.

Do you want to hear the last paragraph again?

Mr. Fowle: Yes.

The Court: "It is for you to determine whether the 16-man executive committee, and the joint management committee of four"—I am using the word "management" there, which was in the evidence—"and members thereof, were acting in the performance of their duties."

If they weren't acting in the performance of their duties, then, of course, the acts don't bind anybody. "And whether they acted for Sunkist, or EOP, or ELP, or all or [4348] some of such entities."

In other words, here is a committee made up of officials from two different corporations. Who did they act for? That is a question of fact for the jury.

Mr. Fisher: I don't believe they were referred to as a joint management committee. It was a committee of managers.

The Court: "Committee of managers."

Mr. Fisher: It was also described as an informal committee.

The Court: I will give T, and if there is anything about the form of it that you want to talk about, we can discuss it later. But you are entitled to know what I am going to give.

Mr. Fowle: We would like the right to make further objections to this, if the court please, when we see the actual draft.

The Court: All I have to do under the rules is tell you what I am going to instruct.

Mr. Fowle: We don't have any objection to the first portion of it, which refers to corporations and their officers, and so on, but I do think we may have objections to the phraseology of the second portion, if not the content of it.

The Court: And I am going to give Court's R, which I only have it written out in longhand, and it is long. It is an instruction as a matter of law as to what the reorganization [4349] situation is. All I can do is read it to you. I don't have it typed up. [4350]

The court believes it is its duty to inform you of the legal effect of Exhibit 84, which concerns the reorganization proceedings in 1948 and '49. Exhibit 84 consists of a petition by Winckler & Smith to present a third modified arrangement, and the third modified arrangement itself, and an order approving it.

The purpose of Chapter XI proceedings is to permit a debtor to propose a plan of arrangement. If the plan of arrangement is approved, the debtor's business and property then passes from the possession of the receiver back to the corporation itself.

Winckler & Smith was the debtor, and Mr. Lynch was the receiver from the time the proceedings under Chapter XI was filed until the approval of the Third Modified Arrangement. During this time the bankruptcy court controlled the title and possession of Winckler & Smith's business and property through its powers and through its receiver. So on February 14, 1949, Exhibit 84, this Third Plan of Arrangement, and the order of the bankruptcy court approving it, were followed. Both the plan and the order referred to in escrow were in the real property and the plant of Winckler & Smith, and were being sold to Rubin, and $40,000 was to go from the escrow to the receiver Lynch to be paid to creditors, and referred to a second escrow, whereby other moneys were on deposit to be paid to Lynch, the receiver, to reimburse him for certain expenses [4351] from December, 1948, to the date of the approval.

To get everything accomplished, that is, to get the $40,000 from one escrow to the receiver, and to get the money from the other escrow to the receiver, and to get a clear title subject to the RFC loan to Rubin, and to get the hold of the bankruptcy court under Chapter XI released from the real property, so that the $40,000 escrow could be closed—to get all these things done the court made its approval of the third plan conditional. That is, the order could be set aside unless the things above were all done within a fixed time.

These things were actually done, so the order of approval was never set aside.

The court, therefore, instructs you, as a matter of law, that the sale of the real property and factory to Rubin, and the receipt of $40,000 from the escrow by the receiver, was a part of the Chapter XI proceedings. And, further, regardless of when the deed to Rubin was delivered, its effect related back to February 14, 1949, the date of the approval of the plan, and the date of the release of Winckler & Smith from the bankruptcy proceedings.

It follows, also, as a matter of law, and the court instructs you, that for accounting purposes, the sale of the real property and factory by Winckler & Smith should be considered as occurring during the Chapter XI proceedings, [4352] and not during that portion of the Winckler & Smith fiscal year which occurred after the reorganization proceedings under Chapter XI. The loss of $169,000 and $175,000 resulting from the sale of the real estate and factory should not have been taken into account during Winckler & Smith's fiscal year ending January 31, 1950. Mr. Lynch was in error in so considering it, and the court was in error in permitting him to do so in his computations. [4353]

Mr. Walker: There is a Lynch referred to twice, there. It is a coincidence of names. Could the second Lynch be identified as the defendants' witness Lynch in some way?

The Court: Yes. All right.

Now, I know you object to this, but I think I am right. If I am wrong, the benefit is all on your side. [4354]

Mr. Fisher: Well, your Honor, we do object and ask that the objections heretofore made be incorporated by reference, and we will in part restate the objections.

It is our conception that the order providing for the approval of a plan simply required the deposit of the $40,000 by a certain length of time, and that the sale was entirely voluntary on the part of Winckler-Smith Citrus Products Company, not a requirement of the order; that the terms of the order could have been complied with by the deposit of $40,000 within the time limited in the order.

without any closing of the escrow; that the transaction there was a voluntary transaction, and even though it occurred during the time of the reorganization, could properly be considered in considering the earnings and profit of that particular fiscal year, and was properly taken account of by Lynch in his computations in the computation of profit and loss for that fiscal year.

Furthermore, I believe the debtor went in as a debtor in possession, and there was some period of time from the inception of the proceedings until Lynch was appointed a receiver.

The Court: I will modify that. I was not sure whether Lynch had gone in originally or came in later. That doesn't have anything to do with the principle involved.

Mr. Fisher: No. [4355]

The Court: It is a minor matter.

Mr. Fowle: We also object, your Honor, to the reference of error on the part of our witness Lynch as being prejudicial to all of his testimony and as being unnecessary as a part of this instruction in any event.

The Court: I could change "error" to "improper."

Mr. Dixon: You can instruct the jury to disregard it.

The Court: Those are matters of form. We can have this typed up and see about matters of form later on. The objection is overruled except as to possible matters of form. [4356]

* * *

OPENING ARGUMENT ON BEHALF OF PLAINTIFF

Mr. Dixon: May it please the court, and ladies and gentlemen of the jury:

We are now approaching the end of the case. As his Honor has stated to you, it is my privilege at this time to summarize the contentions and evidence that you have been listening to during the period of this trial, and to endeavor to tell you why we think you should, after considering all the evidence in this case, return a verdict in favor of the plaintiff.

Before I begin a discussion of the evidence, may I on behalf of the plaintiff; and I am sure on behalf of counsel for the defendants, express our sincere appreciation to all the members of the jury for the careful consideration that you have given this case. We know as lawyers that it is not always easy to understand the issues as they develop during the trial of a case. If you will bear with me for a few moments, I would like to refresh your recollection on the contentions of the plaintiff in this case and what we believe, now that the evidence is all in, that the evidence has proved to your satisfaction.

As you know, this is an action by the plaintiff against the defendants which is brought under the Sherman Antitrust Law, and the plaintiff charges a violation of Sections 1 and 2 of the Sherman law. You naturally are not going to take [4373] the law from me, but I find it necessary in this closing argument perhaps to briefly tell you something about the Sherman law with the thought that you may better understand and comprehend the contentions of the plaintiff and the evidence that you have so carefully listened to during the long period of this trial.

The Sherman Act, briefly, provides that all combinations or conspiracies in restraint of trade, under Section 1 of that Act, and all combinations or conspiracies to monopolize any part of the trade or commerce of the United States, violates that law, and it gives to any private person or corporation who has been injured as the result of any such violation a right to bring an action for damages against the one who he claims caused the injury or damage.

Now, the one claiming the damage and injury in this case is, of course, Winckler & Smith, a private corporation, so-called, in which the stock is owned by private individuals and represents the private investment by those individuals into that enterprise. The plaintiff corporation was formed back in 1945, you may recall, for the purpose of entering the business of processing citrus fruit juices.

The evidence here indicates that its principal product was single-strength Valencia orange juice. It did process some other products, blended juices, some grapefruit juice, and some lemon juice, and other products, but about 75 per [4374] cent of all its business during the period of time it has been in operation related to the processing and selling of single-strength Valencia orange juice.

Now, the defendants in this case are Sunkist and

Exchange Orange. Sunkist is what is known as a marketing organization for the producers of the products of its members. It is entirely a marketing organization and is given certain exemptions under the antitrust laws which his Honor will describe to you, which give them, these growers of oranges, lemons and grapefruit, the right to organize together into an organization for the purpose of marketing their products.

Now, the defendant Exchange Orange is a wholly-owned subsidiary of the defendant Sunkist, that marketing organization. It performs, you may recall, as Mr. Armstrong, I believe, said, its function since around the 20's, the early 20's, when there was this by-product fruit problem, how to dispose of it, when a lot of it just was lost for there was no way to make use of it. So eventually there was organized this Exchange Orange for the purpose of processing by-product fruit that remained after the fresh fruit was sold, into these various products you have heard of manufactured or processed from by-product fruit.

Now, the evidence here clearly shows that at all times that we are concerned with Exchange Orange did not process itself the quantity of fruit that was left over after the [4375] fresh fruit had been marketed, so that there was always available for sale to independent processors like the plaintiff oranges, for example, that could be purchased for processing into citrus juice products. [4376]

Now, those products, such as Valencia orange juice, that was processed by this plaintiff was purchased—I mean was processed and sold in competition—and that is the point that I want to suggest to you—in competition with the Valencia juice that was processed by Exchange Orange and marketed through Sunkist, as well as in competition with other citrus juices, particularly single-strength Valencia orange juice, that was processed by other independent processors, such as TreeSweet, Silzle, and some of the other companies that have been mentioned.

In other words, ladies and gentlemen of the jury, the plaintiff represented private venture capital, which went into this business of acquiring and processing the oranges into citrus juice products, and then selling them into interstate commerce, and selling them, of course, in competition with the products that were not only processed by Exchange Orange for the members of Sunkist, but also were sold in competition with products that were also processed from oranges by other independent processors, such as TreeSweet, Silzle, and some of the others that are mentioned.

So you have two kinds of companies that are involved in this case. You have the plaintiff, a private corporation, organized for the purposes I have mentioned. You have other companies, which we will call independent processors, that were organized by private capital to perform the same purpose, [4377] in other words, to engage in the business of buying the by-product fruit and processing it into these various products and selling it in interstate commerce.

But the point that I want you to keep in mind if you will, ladies and gentlemen, is that the products processed by the plaintiff and the other independent processors that you have heard mentione in this case, were sold in competition, not only with each other, such as the plaintiff selling its produc in competition with TreeSweet, but also, and at th same time, those products were being sold in th interstate market in competition with product processed by Exchange Orange, and sold for th growers through Sunkist, this great marketing organization that you have heard about.

Now, the commerce involved in this case is substantial. You heard the testimony of Mr. Armstrong, I believe it was, as to the year with which we are primarily concerned, that Sunkist sold a amount of approximately $150,000,000 worth o products, the greater part of which, about 80 per cent or more, was this fresh fruit. The balance o the 20 per cent represented the products, such a single-strength orange juice, frozen orange juice and these various other products.

The plaintiff, of course, comparatively speaking was a very small factor in this industry, but during the period of its development it had built up and was building up a business in juice products, and selling those products in [4378] commerce in competition not only with the other independent processors, but also with Sunkist. And the volume o sales of those products average over a million and a half dollars a year in the years 1949 and 1950.

But that business, ladies and gentlemen, was built up by the private capital of the persons and individuals who put their money into this plaintiff corporation for the purpose, of course, of making profit, and under the rules applicable to our economy and our free enterprise system, it was the purpose of the Sherman Antitrust Law to maintain the competition between companies that were engaged in the same or comparable types of business, at least to the extent that there would be no combinations or conspiracies brought together on the part of any person whose conduct or action would have the purpose or effect of eliminating competition of another competitor, or of creating or maintaining a monopoly in any particular industry in which that competition was eliminated.

Now, that is the background in this case in which we start to present our discussion and argument. But I want you to keep in mind, as his Honor will charge you, that it was the purpose of the Sherman Act to prevent these things, the alleged restraints on competition in interstate commerce under Section 1, and to prevent monopolies under Section 2, of any part of our trade and commerce of the United States. [4379]

As Mr. Justice Hughes once said, The Sherman Act is the charter of our economic freedom.

And it is, I think, precisely that, because the United States is the only country, ladies and gentlemen, that has such an Act. And the purpose of it, as I have said, is to maintain our free enterprise system, and to protect it, and protect those who are engaging in private venture capital operations, from any conduct on the part of anyone else that violates the Sherman Antitrust Law.

And where it is shown to your satisfaction as members of this jury that there was a violation, and that the plaintiff sustained any damage as a result of that violation, then you are entitled to determine not all of the questions of fact, as his Honor will instruct you, but you are entitled to determine the amount of the damage, and determine what amount should be allowed to the plaintiff if you find that there was a violation of the Sherman Antitrust Laws charged by the plaintiff in this case.

Now, as to the amount of damages claimed by the plaintiff in this case, the plaintiff claims that it has been damaged in the approximate amount of $800,000, by reason of the alleged violations charged here of the antitrust laws by the defendants Exchange Orange and Sunkist. Those damages are computed and estimated as follows:

The plaintiff contends that it was unable to process any [4380] single-strength Valencia orange juice in 1951, because of the acts complained of by the defendant which constituted this combination or conspiracy in restraint of trade, and that as a result of the violation, claimed violation of Section 2, the combination to monopolize the citrus juice industry by these defendants, and TreeSweet and Silzle, that the plaintiff, whose business it had been from the time of its incorporation to process and market this product, that in 1951 it was unable to process and market any single-strength Valencia juice, so that it first sustained damage in the amount of what it would have made had it been able to secure a normal amount of oranges during the year 1951 for processing into single-strength Valencia juice, which amount will be determined on the basis of its productive capacity, as judged in previous years, the amount of oranges that were available generally in 1951 for such purpose, and the profit on that operation which the plaintiff was unable to perfect in 1951, which you have heard extensive testimony on, namely, that the claimed loss of profits was approximately $210,000 to $220,000, by reason of that. [4381]

I don't mean loss of profits. I will discuss that a little later. But I mean that $210,000 to $220,000 comprises a recoupment of the loss of 1951 of some $180,000 and the estimated profit if that additional product had been made available to the plaintiff and sales made.

In addition to that amount, you will recall the testimony here clearly shows, and it is not in dispute, that during the year 1949-50, the plaintiff put an additional amount of $100,000 in this business in new equipment, in approximate amount, in round figures. That, of course, was added to the business.

In addition thereto, the testimony is during the year 1949-50, an amount of approximately $50,000, I believe, around about $48,000, was spent in promoting and developing the sales methods for the new products which the plaintiff was about to offer to the public in the frozen concentrate field. That is advertising costs which, of course, if the plaintiff prevails in this case, was lost.

Then in addition is the loss of plant and property which, under the appraisals before you and which you will have, indicated that in 1950 there was an appraisal of the plant equipment and everything connected with this business by way of physical equipment, of in excess of $600,000, which the appraiser called the sound value of the plant of the plaintiff. Of course, values differ. We will discuss that [4382] when we get to the question of damages.

But getting back to the contention of the plaintiff here, which is set forth in the charge which is on file in this case, the plaintiff contends, ladies and gentlemen, that the defendants Sunkist and Exchange Orange first had what we call a monopoly control over the amount of product oranges that were available to independent processors for processing into citrus fruit products in 1951. We contend that that power was abused by reason of the combination and conspiracy charged here in which TreeSweet in particular was one of the beneficiaries and a party, by so establishing through this monopoly power the price, and this is the thing I want you to recall, to remember in your discussions, the price at which independent processors had access to product oranges in 1951 for processing into single-strength Valencia juice.

The evidence, you will recall, was that 120-pound solids was $40 a ton. That was the Sunkist offered price to processors such as the plaintiff here that were independent processors. They depended upon the growers of fruit and the various organizations that had them available for their very existence in that there was always this surplus of fruit that was available even in short years for processing into the products of these independent processors.

But that by reason of the monopoly control over the [4383] product oranges by Sunkist and Exchange Orange in 1951, this price in that year was stabilized, fixed at $40, and it was impossible as a practical matter, for the plaintiff, an independent processor, to go out and acquire oranges at that price from any source—they could be acquired if the plaintiff had wanted to pay $40 a ton for them, and process them into the products it was organized to process and sell, and still sell that product, the single strength Valencia juice, in competition with the products processed by Tree-Sweet, Silzle, other independent processors, and, of course, Sunkist itself.

In other words, by reason of the control, and the evidence here shows, and it is not in dispute, that in 1951 Exchange Orange and Sunkist had about 65 to 66 per cent of all of the Valencia oranges that were available for processing into juice products in 1951. Now, where else could they be acquired from?

They could have been acquired, the evidence shows, from practically only one other source, and that a limited source, another independent organization, not affiliated with Sunkist, but also an organization of growers which, you will recall, had Mr. Ward as their representative to sell and market their products for them.

Mr. Ward testified that the organization that he represented had about 15 per cent, I think it was, of the [4384] total amount of product oranges available during 1951 for sale or use. The balance was limited to M.O.D., that is another co-operative, and it offered practically none for sale because it processed all of them itself and sold them itself through its own organization. There were perhaps a few other isolated sources.

But we come down to practically two sources here in this case for any independent processor of product oranges in 1951. It was either Sunkist or it was the Independent Fruit Growers Association through Mr. Ward.

So that is the problem then, and Mr. Ward testified, and you will remember that, representing his growers, of course, he tried to get the same price, the Sunkist selling price if he could get it, in other words, the price for the industry and the amount that was available which was stabilized at the Sunkist price. Mr. Ward could hardly very well report to his growers that with the Sunkist price at $40, he was selling to processors for $30 or $20 on the same basis.

So the price in the industry was approximately the same from the two sources in 1951.

Now, what happens from that point, ladies and gentlemen? That is where the story starts and that is where we begin to have to discuss names and places and contracts to show you what actually happened.

Before we get into that discussion of the evidence [4385] itself, I should perhaps again state to you, so that you can understand our contentions, because his Honor will charge you with reference to them. There are six of them which we claim constituted a part of the combination and conspiracy. Three of them I am going to briefly mention because I think they relate more directly to the injury than perhaps the others.

First is this one whereby it is contended by the plaintiff that Exchange Orange and Sunkist established the price of by-product oranges to independent processors like the plaintiff in 1951 so that the plaintiff could not purchase or acquire oranges from any other source at a lesser price that would enable it to have processed them and sold the juice product in competition with the products of other independent processors than the plaintiff. That is the first.

The second is that by reason of these contracts that you have heard about between TreeSweet, in particular, and Silzle, that oranges were made available by Sunkist and Exchange Orange to those independent processors, TreeSweet and Silzle, on a basis whereby they didn't have to pay this $40 price at all, but whereby oranges were turned over to them by Exchange Orange, not Sunkist—I want you to keep that in mind—were turned over to them by Exchange Orange under these contracts so that they had oranges made available [4386] to them, that is TreeSweet and Silzle, on a basis in fact whereby they didn't have to pay this $40 price at all. I am going to discuss those contracts a little later, but that is the second contention. And that by reason of that advantage, that competitive advantage which was given to these two companies, and the monopoly control over the product oranges available to independent processors, which came from Sunkist, control of the product oranges that were available, that Silzle and TreeSweet were able to and in fact did process and sell a substantial amount of single-strength Valencia orange juice in 1951, whereas if they had had to purchase them, as the plaintiff was required to do, they couldn't have done so, they couldn't have processed any juice any more than the plaintiff could have done so and sold it in the interstate market.

The third contention is that the plaintiff, seeing this situation develop and unfold, early in July, 1951, when the price of oranges was maintained by Sunkist at this $40 level, and seeing at the same time, you will recall, I think Silzle came into the market rather early with some products, at least they came before the best part of the crop came out, over TreeSweet, but they were already in the market with juice at the $2.20 price—and I am going to discuss these prices a little later—but they were already in the market and the plaintiff could not figure out, ladies and gentlemen, [4387] how his competitor Silzle was able to come into this market and sell single-strength orange juice, paying a price of $40, and still make money, but that is what happened. [4388]

So early in July the president of the plaintiff corporation went to some of the officials of Sunkist and Exchange Orange and asked for—well, he didn't ask for it, it will be here in evidence, because he didn't know anything about the details of that deal at that time, but he knew the plaintiff's plant was not running, because it couldn't pay this $40 price and process any fruit, so it notified the defendant Exchange Orange, and the letter is here in evidence—you will find it, it is not in dispute, it was addressed to Mr. Finley—notifying that the plaintiff offered its facilities to Exchange Orange for processing purposes.

Bear in mind that it didn't know at that time about the agreement that actually was in existence with TreeSweet, and also in operation with Silzle. It wasn't yet reduced to writing, you will recall. But at that time his competitors, the competitors of the plaintiff, were selling and processing and distributing in interstate commerce citrus juices of the same kind, that is, single-strength Valencia juice, at a price that the plaintiff knew just could not possibly be one that they were paying for oranges secured from Sunkist.

Well, that is where the basis of the complaint starts, that request was made for comparable treatment.

Now, let us briefly go on from there. But before we do so, I think we should again point out what the evidence [4389] shows here, because I think it

bears upon this conspiracy to restrain and monop
lize the citrus juice market.

Before I get into that, I don't want to overloo
it, you know how you get started in discussion c
the evidence and before you know it you are o
on another point and have forgotten something th
you want to present, so before I leave this monop
oly control point I want to direct your attentio
to the evidence on that point, because it is, I thinl
very clear, not in dispute in this case as to wha
the situation was. On January 2, 1951, this is i
Exhibit 72, Mr. Wilcox reporting to the executiv
committee of Exchange Orange on distribution c
fruit, particularly Valencia oranges, said that th
Exchange Orange Products Company has facili
ties—just a moment—the Valencia estimate fo
1951—I want to show you how good they are o
these estimates—is 485,000 tons eliminated fro
the industry, of which the Exchange will have ap
proximately 325,000 tons. In other words, in 195
they knew in January of '51 what the crop wa
going to be, and that they were going to have a
least two-thirds of the amount of Valencia orange
that were going to be available in 1951 for process
ing into citrus juice products.

Now, at that time Mr. Wilcox suggested, and thi
is in Exhibit 72 that you will have with you in you
jury room, that working agreements be made with
reliable outside processors, so that the Valencia
crop will be handled most [4390] efficiently.

Then he says, "The price of this fruit to be se
at the end of each two-weeks' period."

Then it was recommended that Sunkist be authorized to negotiate contracts with independent processors on some equitable basis.

This was way back on January 2nd, 1951, when they knew, at least by their forecast, how much crop was going to be made available.

You have heard about Exchange Lemon in this case. They are growers that grow primarily lemons, but they are also marketed through Sunkist. They also process for each other; that is, Exchange Orange will process for Exchange Lemon, and Exchange Lemon will process for Exchange Orange. We are not complaining particularly about that, as I will point out in a moment. But there were so many oranges in 1951 that Exchange Lemon was given 9371 tons to process, of which amount over 2,500 tons were rejected as unfit for juice. That is in Exhibit 13. In other words, some of them were either spoiled or just were inadequate, even when they turned them over to Exchange Lemon to process.

Going down to October 16, 1951, Exhibit 75, we find that Mr. Lindsay, the plant superintendent, is reporting to Exchange Orange that the largest tonnage received in recent years was received during the month of September. [4391]

He says, this is from the minutes, in September, 1950, there were 36,000 tons of Valencias credited to the pool. Solids averaged 131 pounds per ton, as compared with 115 pounds last September. Year to date receipts of all varieties total 254,000 plus tons at the end of September, compared with 213,000

tons for the same period last year, 203,000 in 194
and 212,000 tons in 1948.

Now, those are the defendants' figures. Thos
aren't the plaintiff's figures.

So in October when they were coming to the en
of the season for processing we find these figur
that they had the best crop, the most plentiful cro
the sweetest crop, and the most abundant crop
product oranges available for processing that the
had had in a good many years.

If that isn't enough, ladies and gentlemen, t
show the adequate supply, more than enough, i
1951, just take a look at Defendants' FD when yo
retire to the jury room. That chart shows th
difference, and in every month during 1951 the
was a greater amount of oranges available for pro
essing than in any of the previous years, and yo
will recall that the best previous year was in 194
I believe it was, when the plaintiff in this cas
processed over 12,000 tons, 12,800 tons, and had
profit of $140,000 in that year from those oper
tions.

So we start out with the fact that in 1951 we ha
the [4392] greatest amount of Valencia orang
available here in California for processing pu
poses that the industry had ever had. We start fro
that point.

Second, we find that the price—ordinarily suppl
and demand has something to do with price—bu
the price of oranges in 1951 remained stable und
the Sunkist price schedule that you will have i
your jury room with you, at $40 a ton for 1

pounds solids. No reduction in price to independent processors like the plaintiff because of this greater supply, an abundant supply. The price remained stable.

Well, what happened?

We have this very anomalous and unusual situation in this industry where you have an abundance of supply of a product, you have an independent processor like the plaintiff in this business looking forward to making money in 1951, they had spent money to get their plant in shape, they had already spent it for the season's operations, then they suddenly find that they can't get any oranges at a price which will enable it, even with this great supply, to process any and sell it in competition with the other independent processors, as well as with Exchange Orange.

Now, the figures on this situation are the monopolization control, and it is that ability to control price that I am directing your attention to, as well as ability to control the source of supply that is important to start with in this [4393] case.

Exhibit CF, for example, shows the figures that I have just indicated to you, and the Sunkist percentage.

Exhibit CG shows that whereas Sunkist—and this is an important factor, too, that I want you to keep in mind—in 1949-50, let's call it the 1950 year, Sunkist or Exchange Orange only processed 7,600 tons into single-strength Valencia juice. That was the year, you know, in which there was a lesser amount available than there was in the previous year. And if you will look at the price lists in evidence, you will find that in that year there were two price increases to independent processors; from $40 to $45 to $50 a ton during that year. No drop in '51, however. But in 1951 ,Exchange Orange processed just twice as many tons as it did in 1950.

In other words, Exhibit CG shows over 15,000 tons processed by Exchange Orange into single-strength juice in 1951, the year in which the plaintiff didn't have any. I am not complaining, as I will point out in a moment, of the fact that Sunkist or Exchange Orange processed these oranges themselves. That isn't the basis of this complaint here, as I will get to in a moment. They could have processed all of them if they had been able to do it. But I am just pointing out in passing that in 1951, because of this oversupply, if you want to call it that, or greater abundance of oranges, even Exchange Orange processed at least twice as [4394] many tons as they did in the previous year. And then these other figures on production here, all in the defendants' exhibit, will show you what happened during that year.

And it is perhaps not without significance that in 1951 with this new industry developing of frozen concentrates—and keep in mind the plaintiff was going into that business, too, it had put in new equipment, spent money for advertising these new products—that as against 11 per cent production of frozen concentrate in 1950, Sunkist or Exchange Orange jumped up to 58 per cent in 1951.

Well, there are other figures, and I am not going to take the time, you can look at these exhibits, showing the increase in the amount of frozen concentrated juice that was processed by Exchange Orange in 1951.

But there again they have a right to process themselves all of it. We are not complaining about that. We are complaining about these deals that were made with TreeSweet and Silzle, the competitors of the plaintiff, and the competitors of Sunkist, that is what we are complaining about in this case—that as a result of those the situation developed that I mentioned, and that I mentioned before. But let us for a moment see how much single-strength juice was processed in 1951 from California oranges here in California.

Here are the figures. These are Exhibits 9 and 10 and are all in evidence. The Government figures show that in [4395] 1951 approximately 5,400,000 gallons of single-strength Valencia juice was processed in California and sold. A good part of it in interstate commerce. I don't know where it was sold, but we know from the testimony here that all of these companies, Sunkist, Silzle, and Tree-Sweet, sold this product in interstate commerce.

Now, of this amount, and these are figures, ladies and gentlemen, that I want you to keep in mind, because I think they have a great significance—Exchange Orange and Exchange Lemon, that is, Exchange Lemon you recall had this reciprocating agreement with Exchange Orange, and vice versa, so Exchange Lemon processed some of these oranges into juice for Exchange Orange, and that probably was all right, we are not complaining about that either, particularly, but the total amount was 1,364,000 gallons that was processed by Exchange Orange in 1951 and Exchange Lemon. Here is the important figure. TreeSweet processed 2,381,788 gallons.

In other words, ladies and gentlemen, remember the figures on tonnage I gave you a few moments ago. Exchange Orange only processed 15,000 tons into single-strength juice in 1951, but here is TreeSweet, and the figures in this record show that they got from Exchange Orange, under this contract that I am going to talk about in a few minutes, over 24,000 tons of oranges for processing into single-strength juice in 1951. [4396]

In other words, they processed more than half again as many tons into single-strength juice as did Exchange Orange itself in 1951.

Now, Silzle didn't do so well. I am going to discuss that. They only produced 682,000 gallons. That was about 7,000 tons, I believe. But the three together, Exchange Orange, TreeSweet and Silzle, ladies and gentlemen, accounted in those figures for 4,400,000 more gallons out of a total of 5,400,000, or approximately 85 per cent of the total amount of single-strength juice processed in California by Exchange Orange, TreeSweet, Silzle and any other companies during the year 1951.

I say to you those figures are not without significance in this case, because it shows that the combination or conspiracy to monopolize this juice business was in operation and working, and that.

in fact, as a result of these contracts they did process, and, of course, sold all they processed, approximately 85 per cent of the total amount of single-strength Valencia juice processed in California in 1951. All this while the plaintiff, private venture capital, ladies and gentlemen, in this business since 1945—they had some difficulties, and I am going to discuss those with you, too, a little later—but they had been in business since 1945, they were looking forward to a good year, they knew of this abundance of supply, but they didn't process and sell a drop of Valencia single-strength juice in 1951. [4397]

While their competitors, TreeSweet and Silzle, as independent processors, had access to the oranges, processed them, and sold them, the products, in single-strength Valencia juice at a profit, and, of course, they couldn't have done this, ladies and gentlemen, unless Exchange Orange or Sunkist had made these oranges available to them for such processing, because everyone in this case that has testified, including Mr. Finley, including Mr. McMillan of TreeSweet, and I think one or two others, let's forget about the plaintiff and Mr. Winckler, the president of that company, but let's take the testimony of the others.

They all testified that no independent processor or anybody else could pay $40 for fruit in 1951 and process it into single-strength juice and sell it at any time in the market at anything except a great loss.

So instead of the big freeze in 1951, we have what

I call the big squeeze on as far as the plaintiff i concerned, because with this abundance of supply, the business to make use of it, he didn't process a drop of single-strength Valencia juice in that year.

The result was the California products and the market for California juice went to the competitors of the plaintiff, TreeSweet, Silzle, and, of course, Exchange Orange or Sunkist, the marketing agent.

Now, it is true there was a little bit more processed [4398] and sold. You are familiar with that arrangement made by Case-Swayne, and I will perhaps have time to discuss that with you a little later. You know how that happened, in any event. Mr. Ward testified he couldn't sell, and obviously he couldn't, his fruit at the $40 price or any other price even comparable or close to it, to any of the large buyers such as the plaintiff, who were the ordinary market for that product in 1951, because the price wouldn't permit it, so he was forced to make arrangements with the plaintiff either to concentrate or process the frozen concentrate, I think it was about 4,800 tons or so, total amount, into frozen concentrate, and he gave a little bit more, I think, to Case-Swayne, which was processed into single-strength juice.

But the source of those products was, of course, the Independent Producers, another co-op, represented by Mr. Ward who has testified that this year he made those arrangements because there was no alternative.

His 15 per cent, in other words, the amount that he couldn't dispose of as fresh fruit, the balance left over from his growers, went to the plaintiff for frozen concentrate, and it went to Case-Swayne to be processed into single-strength Valencia juice under the contracts and arrangements that you will find in the record.

But there again it stems from the fact, ladies and gentlemen, that the monopoly control over the product [4399] by reason of being able to stabilize or determine the price at which the products would be sold to processors, remained in Sunkist and Exchange Orange, and that price never varied during the 1951 season.

Well, that brings us to the situation of these contracts and what happened to this amount of oranges that were available. Well, let's picture this situation. Here we have Mr. Kelly of Exchange Orange. He was the salesman for all these products oranges. You will remember that he testified he was the one that set the price at which oranges would be made available to independent processors, not only in 1951, but every other year.

How did he do it? You will recall his testimony that he went around and talked with independent processors who were the primary buyers of these products, I mean of products oranges. Keep in mind they had this wonderful forecast system, Sunkist did. They knew what the market was going to be. They knew how much was available in Florida and every other place. They made trips back and forth to Florida to get that information and get it first hand. That is in the record. They knew what the market was going to be on juice in 1951. What did they do?

Well, Mr. Kelly said before he set the price in 1951, I think early in 1951, possibly, the price list came out some time, I think, around early April or May, I don't [4400] recall just which, that he went around and talked to TreeSweet, Silzle, Case-Swayne, and let's keep in mind, ladies and gentlemen, that the companies that were making single-strength juice, the big producer of single-strength juice in that market in 1951, was the plaintiff. 75 to 80 per cent of his product was single-strength juice. TreeSweet, about the same percentage of its production was single-strength juice. They made some other blended juices, as did the plaintiff. Then Silzle made some. Let's call them one of the larger producers, too. Then there was Case-Swayne. Case-Swayne, you will recall the evidence from Mr. Swayne, I believe it was, that this was a relatively small part of their business, this single-strength processing of juice, that they only produced—I think what they produced represented about between 25 and 30 per cent of their total production of all products. In other words, Case-Swayne made other products, processed tomatoes and food products generally. But single-strength was not the principal source of their products income. It was about 20 to 25 per cent.

Whereas with the plaintiff, it was at least 75 per cent, and of course Sunkist knew that. They knew what the plaintiff's production was, what its capacity was, and what its sales were from their sales department, because they were well posted on those things.

But the important thing is that we have here really [4401] Exchange Orange, they are producing for Sunkist, and they produced 15,000 tons in 1951. We have TreeSweet with 24,000 tons that they got from Sunkist. We have Silzle with about 7,000 tons that they got from Sunkist or Exchange Orange, however you want to look at it. We have Case-Swayne who got their oranges, about six or seven thousand tons, I think it was, from Mr. Ward.

Then the balance, whatever it was, came from other co-ops which processed their own juice.

In other words, there is where the juice came from. There is where the potential source of the juice was in 1951.

Let's go back to Mr. Kelly and fixing the price of oranges. He testified before they even made any decision at Sunkist of what they were going to sell their products oranges for, he went to these independent processors. He said he went to Silzle, he said he went to Case-Swayne. I think those are the two. I have the testimony and if time permits I will read to you from it.

I asked him, you remember, "Did you go to TreeSweet?"

"Oh, yes," he said, "I probably did. I forgot about that."

I don't remember the exact language. If we have time we will get into it.

But the important thing is that the plaintiff here, [4402] an independent processor, whose business, whose primary business it was, was not consulted at all by Mr. Kelly as to what the price should be, while the competitors of the plaintiff were, whether Case-Swayne, TreeSweet or Silzle. They were all consulted as to the price.

Now, you will find here, ladies and gentlemen, among your exhibits the fact that the plaintiff did purchase oranges and citrus products from the defendants. It is on their list, when they came out with this price list in the early part of 1951, May, I believe it was, again. They sent a copy of it to Winckler & Smith. It is here in the evidence in the file, in the documents, because they were a potential purchaser of oranges. They had always bought some. True, they didn't buy very many of them because there was a good reason for that, you will recall.

Prior to reorganization under Chapter XI, the plaintiff had bought over a million dollars worth of fruit from Sunkist and hadn't lost a dime on it. They had been paid every cent. That was Mr. Kelly's testimony.

But after that, for some reason, they felt they didn't want to do business with the plaintiff, and they didn't sell any except on a cash basis. They never inquired about their credit, you will recall. That is another matter which if we have time, I want to go into.

But the plaintiff did buy some oranges. It was a [4403] customer. I think it was over 1,100 tons. This is all in the record. Those were purchased from Sunkist in 1950. Maybe it was 1949. I don't recall. But, anyhow, the plaintiff was a customer. But it was not consulted. It was an independent processor. It was private venture capital. It was not consulted, like TreeSweet and Silzle were allegedly consulted, if they were, by Mr. Kelly before this price was set.

But here is the plaintiff again with this $40 fixed price, with an abundance of oranges, unable to get any at a price at which the plaintiff could process any and be competitive with his competitors. He goes to Mr. Kelly and says, "What can we do?"

Mr. Kelly says, "Well, the price is there."

On cross-examination, you know, I asked him, when I had him on the stand, I think, "Does this price depend on supply and demand, or whatever it is, or how is it determined?" And so forth.

He said he always raised the price, but he never lowered it.

The price was raised, ladies and gentlemen, twice. It is in the record here in 1950 when there was a lesser amount available the price went up. Winckler had to pay a higher price in 1950. Winckler & Smith bought some and paid for them. The price went from $40 to $45, and then it went up to $50 in 1950. [4404]

But comes 1951, when there are more oranges than were ever available before in the history, according to the chart, as far as the period is concerned, available for processing. The price does not go down with the surplus. It remains the same. The price of $40 was all during the year to anybody like Winckler-Smith, but not, ladies and gentlemen, to the independent processors competing with the plaintiff in this market, competing with Sunkist as well. During those years the price to them did not make any difference, because they didn't have to pay for the oranges. They were delivered to them under these contracts that I am going to discuss with you in just a moment.

So we have Mr. Kelly on the one hand telling Winckler-Smith, no, the price isn't going to go down. I want you to remember one of the reasons he said it wouldn't go down, ladies and gentlemen, he said he raised it, but he did not drop it, was that Sunkist had to protect these processors who had bought oranges at the price of $40, the $40 price, against a drop in inventory. That is his explanation. I hope I have time to read it to you. But that is here. You may recall it. The reason he did not drop the price is he had to protect these people who had purchased the oranges and had an inventory. I am going to come to that, because that is where Hyland-Stanford and Mission come into this case indirectly.

But to get back to Mr. Kelly, the price was there. It [4405] was not going to go down to Winckler & Smith. It was stabilized. Well, he said to Mr. Winckler to go over and see Mr. Finley and see what he can do. "I only sell oranges. What I don't sell I turn over to Mr. Finley and he processes them."

So there is the letter the plaintiff wrote to Mr. Finley in the record. There is testimony about many telephone conversations, one, perhaps, with Mr. Armstrong, but with Mr. Wilcox and Mr. Kelly and Mr. Finley by Mr. Winckler of the plaintiff here to try to get access to this market on a basis that he could compete with his competitors, but he was told, "No, you can't have any oranges."

Mr. Finley finally told him that there were no oranges available to Winckler & Smith in the middle of July. This letter was never replied to. It speaks for itself. He was told over the phone and in personal conversations that the plaintiff could not get any oranges whatever from Exchange Orange under any arrangement.

Mr. Kelly said the price is fixed. So what could the plaintiff do?

Ward, on the other hand, at that time his price was still the Sunkist price, if there were any available.

From that point on we start to see what is happening here in this industry, what has developed, what had happened in previous years. [4406]

First, let's take a look at some of these other contracts, because I want to distinguish in your mind, if I can, the fact that the plaintiff does not dispute, we are not here complaining about it, any proper processing contracts, ladies and gentlemen. In other words, the growers of oranges have a right to organize under the law. They are exempted from a combination by special statute. In other words, if it wasn't for the special statutes, they would be charged with combining and conspiring to sell the products and to fix and stabilize the market price of those products. But they are exempted from that law which applies to everybody else, and we are not complaining about that. They are given the right to do that.

They are also given the right to process, enter into processing contracts. That is where we begin to get into a little difficulty in this case insofar as the defendants are concerned. That is where they begin to get into a little difficulty, in our judgment. They can make a valid processing contract, and there are some that we regard as valid ones here in this case, ladies and gentlemen. I want you to study them, if you can, and will in considering this case, because it points up the difference between a real processing contract, concerning which we would have no complaint and could have no complaint, and the kind of a contract that they entered into with TreeSweet primarily and [4407] Silzle, not so much, but to a lesser extent.

Before we get into a discussion of these contracts, I want to direct your attention to Exhibit 3-A, which is the plan of pooling. In other words, this is the growers contract with Exchange Orange.

Paragraph 15 provides any fruit received by Exchange as juice grade fruit may be sold to processors other than Exchange Orange Products. They may be sold to other processors. I mean processors other than Exchange Orange. Exchange Orange, from this they might buy it on a fixed basis but, of course, they didn't. They were just turned over to them by Mr. Kelly.

But here is a contract which provides for sales being made to processors.

Paragraph 15 of 3-A.

Then B again emphasizes, in this same exhibit, B-1 says Exchange shall establish a schedule of prices at which fruit is to be sold which will reflect a separate price per ton for each pound of solids per ton ranging from 60 pounds to 150 pounds. According to these instructions, they did that.

That is the price list they sent out to Winckler & Smith. That is the price list you have here in evidence. You can look at it and see what it was. It didn't change in 1951. But that is the agreement that provided for sales [4408] to processors, contemplated sales to processors.

Now, here comes Mr. Winckler, as I said, of Winckler & Smith, one of the big independent processors of Valencia juice here in 1951, and asks Mr. Kelly and asks Mr. Finley and gets the turndown.

What happened? What are these contracts with these others that weren't available? Well, in 1950, there was one here you remember with Case-Swayne. It is Exhibit 71. It merely deals with turning over, I think, 493 tons of grapefruit, 479 tons oranges, that were turned over to Case-Swayne for processing into a blended juice. They were paid for that processing by Exchange Orange. Nothing wrong with it. The product in that case was turned back to Exchange Orange, and was sold by Sunkist, the marketing organization, you see. That is a processing contract.

Now, let's take a look at some of these minutes and arrangements, because there are some of them here, you remember, which authorize making processing contracts. In other words, the distinction I am going to suggest to you is this, that when you get the oranges under that kind of a contract, like Case-Swayne had in 1950, and as some of them were in 1951, the independent processor gets the oranges. He processes them into the products that Exchange Orange or Sunkist want, and turns it back to them and is paid for that operation. Nothing wrong with that, ladies and gentlemen. [4409] We are not here complaining about it. I think the law permits that kind of a contract.

In other words, that is a valid processing contract, because maybe these growers don't want to go out and put some money into processing plants, you see. The defendant here, Exchange Orange here, they put some money into that, but they don't want their money in these plants, so they always have to rely—I want you to get this, ladies and gentlemen—they always have to rely upon the independent processor like the plaintiff, like Silzle, like TreeSweet, or any other competitor of theirs, to take care of this amount that they themselves can't process. [4410]

And if they do it by a valid processing contract of the kind that I have mentioned, that they had with Case-Swayne in 1950, we wouldn't be here complaining about what happened to plaintiff in this case.

But that isn't the way they do it. They have got three or four different kinds of contracts or deals, and it is the last deal that they made with Tree-

Sweet and Silzle that we are complaining about in this case.

Well, to move along.

On July 18, 1951, the minutes of the regular board of directors meeting of Exchange Orange point out that they are going to enter into contracts with outside processors on frozen concentrates.

Fine. That is all right so far.

Then they begin to put this thing, which enters into the picture, and it enters into Section 2 of the Sherman Antitrust Act, because it shows in our judgment a purpose to monopolize and control this market, apart from the regular legitimate contract —here is what they say, and this is Exhibit ES:

"Any contracts entered into for such facilities"— talking about these frozen orange juice contracts— "would provide for the Exchange Orange Products Company having first call on the plant, which would mean that the companies could run [4411] their own product if they purchased Exchange fruit at times when the facilities were not being operated for Exchange Orange."

Well, that doesn't mean very much standing alone, but when you put it in the picture, I think you begin to see what it means.

Do you remember the Hyland Stanford contract? These minutes were July 18, 1951. That was just the time that Winckler & Smith, July 15th I think it was, had written to Finley and asked for some kind of a processing deal. Here is Hyland Stanford. I don't think I am going to have time to but briefly go over these contracts. There are so many points in them that I think show the real purpose and what they were trying to do here. But here is the first distinction, the first thing about it. This contract, Exhibit 15, which is called a processing contract, with Hyland Stanford, and it is dated June 19, 1951, is tied into the fruit purchasing contract dated June 29, 1951. I don't think in view of the testimony of Mr. Finley that we should pay too much attention to the dates on these contracts, because you will remember the Silzle contract wasn't finally drawn up, even, and signed until late in September, although they had been operating under it for three or four months. This is called a fruit purchasing contract. Section 10 of that contract—in other words, under this agreement, oranges— [4412] I see that I am going to have to read some of this. Let's take the processing contract first. I am sorry, I am getting a little confused here with these many exhibits.

"The processor is to be paid for producing the concentrate."

Well, of course there is nothing wrong with that. But the thing that is important here in that connection, in a sense, is that the overhead expenses of the processor are to be included in this payment for processing, and in addition thereto a reasonable profit on the processing operation.

We are not necessarily kicking about that, if that was a separate deal. It is important only to this extent: That if you had one of these contracts, you see, your overhead would be absorbed, because you are going to get paid for a good part of it in the processing season, and have a profit on the operation, if you got one of these contracts.

Now, the purchasing part of the contract, this is Exhibit 16, says:

"Exchange Orange is to be the only supplier of oranges to Hyland Stanford, unless mutually agreed upon, because of the inability of seller to supply requirements."

In other words, this is a tied-up kind of a deal, you see. And I think it was testified to by Mr. Finley that he made this kind of a deal because he thought they did him [4413] a favor in giving him the plant, so they should give him something in return.

There is a lot, as I said, ladies and gentlemen, in these contracts, but they are all the same. But here we begin to see a little different type of arrangement than the actual arrangement made between Exchange Orange and the other company back in 1950, Case-Swayne.

Now, here comes the Mission Dry deal. And this agreement, Plaintiff's Exhibit 17, dated August 9, 1951, provides that Mission Dry shall process the oranges turned over to it by Exchange Orange into products for Exchange Orange, of course. But the agreement provides:

"This agreement is a supplement to the fruit purchasing agreement entered into between these parties."

The fruit purchasing agreement is 17-A, and I will come to that in a moment. But here, again, the overhead expenses and a profit are guaranteed to Mission Dry on the operation.

These contracts were to continue unless cancelled.

Then, going back to the fruit purchasing agreement with Mission Dry, that is 17-A, and that agreement was dated June 1, 1949, and continued in effect, this again requires them to purchase all of their requirement of oranges from Sunkist, and it sets forth many, many provisions here that time does not permit me to discuss or to bring out. [4414]

May 1, 1951, we have this minute from the Exchange Orange Company minutes: The manager read a proposed fruit contract to be discussed with General Foods Corporation covering their fruit requirements for the Valencia season.

Then in addition to the fruit contract it is proposed to have a processing contract with General Foods, so that the Exchange can use their facilities in the event General Foods do not need their facilities for their own products.

The general form and so on has been approved, the prices and charges for custom packing are to be negotiated with General Foods.

Pursuant to that they did enter into this agreement, Plaintiff's Exhibit 18, fruit processing contract, again in 1951, containing substantially the same or similar provisions as in the other two types of contracts.

Now, there again we are not complaining particularly about that, but we are getting a little close to the edge. They are tying up facilities ~~of~~ independent processors so that Exchange Orange can have them, and at the same time they are saying, "You take all your oranges from us."

So that has an effect, as I think Mr. Ward testified, on closing this company to him as a potential buyer of oranges from the independent companies and co-ops that he represents.

Now, on June 13, 1951, Exhibit 34, we find that they [4415] are trying to get facilities to process frozen concentrate. Keep in mind the plaintiff had frozen concentrate facilities, too, that he put in in 1950, which they did use in 1951 to a limited extent under the Ward contract, but here is what the manager says:

"Cold Gold and Harts Fruit Products are not going to operate for their own account this season, and these facilities will be available to EOP. He stated he has not been in these plants for several years and will look over their facilities, but did not want to do so if it were not desirable to do business with them."

I don't know what that means, ladies and gentlemen. You may have occasion to consider that. They didn't want to do business. That was a condition, apparently. All they are trying to do is get a processing contract. They did make one with Harts, and it is a true processing contract.

We are not complaining about it, because it, again, is the same kind of a contract on frozen concentrate that they made with Case-Swayne in 1950 on blended juices.

Under this deal, as you read it, you will find that

Harts is paid for the processing operation at a stipulated price, which gives them some profit.

And keep this in mind, ladies and gentlemen of the jury: If you remember the testimony on the Harts' situation, Mr. [4416] Finley said that he knew before he made that contract that Harts was in financial difficulty, and it is in this record, you may recall, that they ultimately made an assignment for the benefit of creditors.

But they got a contract.

At least it helped carry some of the overhead for that company in 1951.

Now let's get down to the TreeSweet contract.

The Court: Let me interrupt now. We started late, and it is 12:00 o'clock and I didn't take a recess. I didn't think we were going to go this long. Do you want to stop now for lunch?

Mr. Dixon: Yes, your Honor, this is a good stopping time.

The Court: Do you think 1:30 will be a good time?

I kept you a little long this morning, an hour and 20 minutes, but I am going to give you recesses as we go along, because it is pretty hard to listen continuously.

Both of these counsel have a right to have you people listen to their arguments.

Remember the admonition of the court. The case is not yet submitted to you, so don't make up your minds, don't discuss the case.

You will be excused until 1:30. I don't want any confusion about this. 1:30 this afternoon.

(Whereupon a recess was taken until 1:30 o'clock p.m.) [4417]

February 7, 1956—1:30 o'Clock P.M.

(The following proceedings were had at the bench outside the hearing of the jury.)

The Court: We have got the reporter's draft of R, but I have had it typed up. In the second paragraph, I am going to correct this business about Lynch being the receiver from the beginning.

On the last page, there are some minor corrections. On the last page, line 4 will read, "and Mr. Lynch, the expert witness for the defendants." Strike out "was in error" and say "should not have so considered it," and so forth.

Then here is the court's T, which I read to you and which is now typed up.

Mr. Strachan: I think Mr. Fowle has made his objections once before, and I don't think this entirely cures it.

The Court: We can talk about that later. I just wanted to hand it to you now.

Also, I will hand you B—well, I guess I handed you that already. It has been retyped is all.

(Recess.)

The Court: The record will now show the jury present. I can only explain this by saying facetiously that we have been giving you a bad time since December 12th, and possibly the jury decided to give us a bad time now. [4418]

All right, Mr. Dixon, you may proceed.

Mr. Dixon: May it please the court and ladies and gentlemen: This morning before we adjourned for lunch, I referred to certain contracts that Exchange Orange had entered into with Hyland-Stanford, Mission Dry, and Bireley's, General Foods, as indicating, along with the type of arrangement that was made in 1950 by Exchange Orange with Case-Swayne, the various types of arrangement that Exchange Orange entered into with independent processors.

I endeavored to point out that the Case-Swayne type was a type of arrangement whereby the fruit was processed and turned back to Sunkist or Exchange Orange.

Under the type of arrangement with Hyland-Stanford and Mission, Hyland-Stanford and Mission acquired the fruit on a deferred payment basis and in consideration therefor and as part of the same transaction, there was this type of contract entered into whereby they furnished and made available to Exchange Orange their facilities for processing oranges into concentrates under an arrangement whereby they were paid for the processing, and the processed product was turned back to Exchange Orange. That is almost the same kind of contract, if you separate it from the deferred payment deal, as the one with Case-Swayne, but the two are tied together, you see, and under those contracts Hyland-Stanford and Mission acquired all of their requirements of oranges that they wanted for their own products through [4419] Sunkist.

Now, there is another type of contract that is important in this case, and I am coming to that now. I suggested before we adjourned that we were about to take up and consider the TreeSweet contract. Because under the TreeSweet contract, ladies and gentlemen, there was no outright purchase of fruit from Sunkist, or Exchange Orange, as there was under the Hyland Stanford, Mission contracts, which were tied into a separate and additional processing contract.

The TreeSweet, you have heard something about some of the provisions of that contract, but before we go into it, I think it is well to take you back to the year 1947, when we find out that this kind of an arrangement was first entered into between TreeSweet and Exchange Orange.

You may recall, before we start into that, though, that this price situation in 1951 remained the same. Mr. Kelly said that he set the price and it stayed that way. But I asked him on cross-examination, as part of our case, "Did you reduce the prices throughout the year?"

He said, "That is correct. Although there was no change in price in 1951."

"Was that customary?"

His answer was, "No, it was not. Most years, in fact, all of them that I can remember, we started at a minimum price, and then as it was justified, raised the price. There would not be many price changes." [4420]

You remember in 1950 there had been two increases.

I said, "Is that customary? In other words, to reduce prices?"

"Well, late in the season we did make some sales in 1951, small amounts, but we did not reduce prices once they were established, and for this reason: that I would financially cripple processors if I reduced the price. Once they had built up an inventory, these inventories were sold, some currently and some carried in stock, over a period of months, and if I reduced the price then I would cause them to suffer a loss on all the inventory they had on hand. And in some cases I understand they guaranteed the prices against their own decline in the warehouses of wholesalers."

That is from Mr. Kelly's testimony about why he kept the prices up and didn't reduce them, and particularly in 1951.

So we again direct your attention to the fact that under this deferred payment kind of contract that Hyland Stanford and Mission entered into when they also made their facilities available, they didn't have to pay for the oranges that they acquired until they sold the product, you see. In other words, they could carry it along in inventory, but they only paid for it under that contract when they sold it.

That is a little different kind of arrangement.

So we come now back to this TreeSweet arrangement, and [4421] that is the arrangement that the plaintiff complains about in this case. We think the others give a competitive advantage, but we do not contend in any way that they contributed to the injury of the plaintiff in this case, because for the most part they were processing pasteurized products and not single-strength Valencia juice.

I think Mr. Kelly said something about having made an arrangement, or at least that there was a problem in 1947 on the price situation, and at that time, this was when Mr. Finley said that this arrangement with TreeSweet actually started and got under way. Again, however. Mr. Finley said in 1951, when I was asking him about the Silzle contract—you remember that he testified that he had to contact or reach Mrs. Silzle, she was in the Valley somewhere, and he finally did. My question was:

"Did you do this at Mr. Kelly's suggestion to make these oranges available to Silzle?"

He said,

"No, because that was decided earlier in the spring that we would make oranges available to the single-strength processors."

"Q. All on the same basis, I presume?"

"A. Yes. That is what we wanted to do, was treat them all on the same basis."

That is one of the questions, ladies and gentlemen of [4422] the jury, you are going to have to decide in this case. Because that is the contention of the plaintiff here, that it did not, of course, get any equal consideration as an independent processor from Exchange Orange.

Now, this arrangement in 1947 is one that wa started at a time when there were inventory problems.

You may recall at the same time that the plaintiff in this case during the year 1946 had packe a substantial amount of citrus juice cocktail, packe for inventory. You may recall the testimony o the plaintiff that there was a sharp drop in tha inventory in 1947, which resulted in a substantia loss in excess of half a million dollars to the plaintiff.

Of course being the size company it was i couldn't take that loss. As a result of that, th proceedings under Chapter XI that you have hear testified to were instituted. [4423]

But the reason was that the inventory loss, resulting from buying oranges at a higher price an then having to sell the inventory at a lower price was what brought about the trouble with the plaintiff in 1947.

Now, this didn't happen to TreeSweet. I mean they had comparable troubles. Let me now proceed to what Mr. Finley had to say about that situation. This came out on the testimony of Mr. Finley o direct examination.

"Will you explain the circumstances under which the first TreeSweet agreement of this type was worked out in 1947 and explain your reasons for working out this arrangement."

Mr. Finley replied:

"It was in 1947. TreeSweet was buying the fruit, canning the product"—the same as the plaintiff in the case was doing. "Along about September, after he had enough pack which he figured he could sell at the then going price, usually about September we get preliminary estimates from Florida what their opening prices are going to be, in October and November, and he did not want to pack for inventory."

TreeSweet told Mr. Finley that TreeSweet did not want to pack for inventory, so in his discussions with Sam Kelly—remember Mr. Sam Kelly said there was a problem in [4424] 1947 about the product oranges—the party whom he bought the fruit from, he told him he was going to have to shut down. In other words, TreeSweet was going to have to shut down, weren't going to take any more chance on packing inventory at the prices then prevailing.

There was a lot of fruit then, so this contract was entered into in the first instance with TreeSweet in 1947 to enable TreeSweet to avoid having to pack inventory loss, taking a chance, rather, on a loss.

Now, the plaintiff was in the market at the same time and at that time had bought about a million dollars' worth of product oranges from Sunkist. They packed this product and had the difficulty mentioned which resulted in the reorganization proceedings in 1948 and '49 and their financial difficulties.

They lost about a half million dollars from that inventory loss.

Now, you will find that whole story, ladies and gentlemen, in Plaintiff's Exhibit 39, which is the one in which in 1951 the plaintiff filed its application, you remember, to get authority to sell additional stock for financing purposes, to obtain additional capital with which to carry on its extension of processing operations into the frozen concentrate part of this industry.

Now, with that background, let's proceed to analyze [4425] these contracts with TreeSweet.

The first written one, that is Plaintiff's Exhibit 21, bears the date of July 27, 1949. It is more or less in letter form, but it sets forth the general provisions under which TreeSweet in that year was able to acquire fruit from Exchange Orange to be processed into single-strength juice without having to pay for it. In other words, at the same time the plaintiff, if it wanted any fruit, it had to pay cash, if he purchased any from Sunkist, here was TreeSweet at the same time getting the advantage of this kind of a contract whereby oranges in the amount that they wanted to process were made available to them under this contract.

The provisions of paragraph 8 of this contract, and this is important, ladies and gentlemen, are as follows:

TreeSweet agrees to purchase their requirements from the Exchange—in other words, their requirements of orange juice that they themselves were processing—at the Exchange price in effect at the time of the purchase, less—then comes these various allowances, including, after label allowance—there wasn't any advertising allowance in 1949—the other allowance of 15 per cent, in addition to all the other allowances mentioned.

Paragraph 9 of this Exhibit 21 then says:

TreeSweet agrees to purchase from Exchange all of the juice packed by them and to pay for same by January 1, [4426] 1950.

In other words, they had this advantage here of packing, carrying it as inventory during the period, and in this particular contract in 1949, they were required to buy what was left at that time from Exchange Orange.

Now, there are various appendages to the contract which point out various other advantages and modifications. For instance, there was no trucking charge. TreeSweet didn't have to pay that.

If Winckler & Smith acquired some oranges at that time, they had to pay the selling price, as set forth in the price list issued by Sunkist, and in addition, of course, there was a trucking charge on bringing them to the Winckler & Smith plant.

None of those charges did TreeSweet have to pay.

There was a little difficulty or discussion, apparently, in 1949, about this 15 per cent, as to whether it was to come before or after these discounts. On August 16, 1949, after this arrangement had been under way, Mr. Finley wrote and said in paragraph 3 of his letter, which is part of this exhibit which you will have, 21:

"The EOP Company agreed that the 15 per cent cash discount as mentioned in paragraph 8 of the original agreement shall apply against the gross sales price before any deductions for label allowance." [4427]

In other words, they take the Sunkist selling price as the basis of getting the 15 per cent discount.

Now, in 1950, we find something in the minutes of Exchange Orange about these contracts for that year. July 11, 1950, Exhibit 23, Mr. Wilcox of Sunkist reports on a discussion which he had with Mr. McCracken of TreeSweet regarding processing of fruit for single-strength juice during the year 1950 and the possibility of having a working arrangement, it is called, with the Exchange, as they have had for the last three years, ladies and gentlemen. In other words, this agreement had been in effect under these minutes during the time that the plaintiff was endeavoring to rehabilitate itself and compete with this combination.

Mr. Finley stated that the arrangements with TreeSweet were for the benefit of loose fruit sales and the EOP Company would be more than willing to co-operate, as it has to be done through EOP because of pooling arrangements.

Now, August 15, 1950, Exhibit 24, we find this reference:

The manager reported that the contract had been negotiated with TreeSweet in which EOP makes fruit available to TreeSweet and they process for EOP at cost. The cost fluctuates, they say, depending on the volume of the pack.

In other words, the cost of processing, and under this contract that was paid to TreeSweet—would fluctuate [4428] according to the amount processed, according to this exhibit.

TreeSweet purchases the pack—ladies and gentlemen, I want to emphasize that—TreeSweet purchases the pack from the Products Department at the EOP price in effect at the time of purchase less specified discounts. The contract period ends—now, this year, not January 1st, but February 1, 1951, at which time TreeSweet must purchase the remaining inventory. [4429]

In other words, they have been given an additional month's time now, on any inventory carryover, to dispose of it. They didn't have to pay for it until the 1st of February under the contract in 1950.

Now, the 1949 and '50 contracts are somewhat similar, but I am going to take the time, since I know you are not familiar with it, to point out some of the provisions of these contracts.

In 1950, of course that was the year in which there wasn't so much fruit, you will remember, and Sunkist made two price increases during that year, from $40 to $45, to $50, and that is in your price lists that you will have with you in the jury room. During this year TreeSweet didn't have to worry about any increase in the price of product oranges, because they were turned over to them under the contract, and here is the way they were paid for processing it.

Paragraph 3 of 22 says:

"The EOP Company will pay to TreeSweet weekly"——

"Weekly," ladies and gentlemen——

"the processing costs."

In other words, that is the cost of manufacturing or processing these oranges into single-strength juice. And then is set forth the amounts under which they are to be paid, and the basis of it, and you will remember the testimony [4430] in that respect was that Exchange Orange took TreeSweet's estimate of costs on that. They did so because they compared them and they were satisfied that they were comparable to Exchange Orange.

But in any event, TreeSweet was paid on a weekly basis for processing this fruit. So in addition to getting the fruit, processing it into a product that they were ultimately required to buy, and which they could sell in commerce, they were paid the processing costs by Exchange Orange while that was going on.

Then they set forth,

"The EOP Company will pay trucking costs."

In other words, that is a factor that plaintiff had to pay whenever it bought fruit; not only the $40, but it had to pay the cartage cost to bring it into the plant.

That TreeSweet doesn't have to pay.

Then on the oil provision there is this provision of interest; that TreeSweet will return the oil produced, but if EOP does not request TreeSweet to recover the oil, TreeSweet will not recover it for their own account.

And the record in this case, ladies and gentlemen, shows that in the year 1949, it is either '49 or '50, that there was no money paid to TreeSweet for processing any oil. In other words, under this provision the oil was wasted. That is, from an economic point of view. [4431]

That isn't too important in this case, but it just points out and points up the fact that under this contract that was what happened.

Supplement No. 1, dated August 31, 1950, relates to this oil proposition, because it says.

"Effective August 31, 1950, Exchange Orange wishes for TreeSweet to recover orange oil from the fruit TreeSweet is processing for the Exchange Orange Products Company."

That is the arrangement in 1950.

It seems to be getting a little better each year.

Now we come down to the 1951 contract.

I think you are already familiar, ladies and gentlemen, with the background and the situation on prices, and the price situation with reference to the selling price of Valencia orange juice during that year. I am going to discuss that in a moment when we get down to the prices. And the effect of these contracts in eliminating competition, pricewise, between TreeSweet and Exchange Orange on this product. The same would be true of the Silzle contract. In 1951 the contract bears the date of July 23rd—rather, September 11, 1951. This contract, ladies and gentlemen, in 1951—and this is Exhibit 20, you will have this with you in the jury room as one of the numerous exhibits—bears the date

September 11, 1951, effective July 23, 1951. In some respects [4432] it is very much like the Silzle contract, again. But before we go into that, let me again refresh your recollection that prior to this date, Plaintiff's Exhibit 45, which you will have with you in the jury room, and after the plaintiff had endeavored without success—after talking, first, with Mr. Kelly, Mr. Wilcox, and Mr. Finley, and back to Mr. Kelly—the plaintiff finally did write a letter, and it is dated July 16, ladies and gentlemen, and obviously written after numerous conversations—Mr. Finley said he only had one conversation or two conversations, one some time in the middle of July and the other in September—well, I don't think these things just grew or came out of a void, it is for you ladies and gentlemen to decide whether there were prior conversations, but this letter was obviously written after some conversation had been had with somebody in Exchange Orange and Sunkist. But here is the TreeSweet contract. Now, the evidence will show, and I am going to discuss that in a few minutes, that TreeSweet got the cream of the crop as far as oranges were concerned that were available for processing into single-strength Valencia juice. In other words, the testimony is that they started this processing operations not in the latter part of June, as did the independent processors like the plaintiff, or as did Silzle, or as did Case-Swayne, becau you remember the fruit isn't quite ripe at that time, it is not quite sweet enough yet, [4433] but TreeSweet starts with the pick of the crop, ladies and gentlemen, under this contract; and they start late in July, and then throughout the season, as long as the Valencias are available they continue to get the cream of the crop.

Now, Mr. Finley said that there was a shortage, you will remember, of Valencias in 1951.

Well, of course there was a shortage, to the plaintiff, but not to TreeSweet. There was no shortage of oranges at any time to TreeSweet. They got them right throughout the season.

They said some time in September they had to cut them down a little bit. But there wasn't any actual shortage, that is the point that I want to definitely explode at this time.

But getting back to this contract. They say here, and this isn't too long, but the letter to Mr. McCracken, dated September 11, 1951, by Exchange Orange, on this contract, points out the following things——

Bear in mind they have been operating under this arrangement, ladies and gentlemen, all through August, and a good part of September, and we will discuss that in a moment. This is part of the letter:

"We have made one change in the contract which we feel you will be in agreement. The change is that under Section 10 we have added the [4434] sentence, "Whereby the processor will be required to purchase and make payment to the supplier for all inventory still on hand on June 1, 1952."

Ladies and gentlemen of the jury, the other contract started with purchase of inventory in January, the next one by February. In 1951 they can carry this inventory that they have processed, which they are obligated and bound to pay, and for which they don't have to pay except on the basis of the Sunkist selling price at the time of the purchase, they can carry this inventory right down to the commencing of another processing season.

Well, maybe that is fair to independent processors. That is for you to decide, ladies and gentlemen.

Now, this is what it says, further:

"Also, in connection with the contract signing we are perfectly agreeable that the inventory you had as of July 31, 1951, that was of the 1950 pack, should be considered as the first sold under this year's sales. According to your records you have the following cases on hand: July 31, 1951"—

Then they list some 2500 cases that TreeSweet still had on hand from the pack of the previous year.

In other words, this was what was left a year later from the pack of the previous year. They hadn't had to pay for it, didn't have to finance it as did the plaintiff, and [4435] under this arrangement, at the bottom of the market, they were able to sell, or buy that and sell it at the two-twenty price, ladies and gentlemen.

I am going into those prices in a minute.

Do you think Mr. Kelly was protecting somebody on inventory drop? Well, you are the ones to decide that, ladies and gentlemen of the jury.

And there is still some more:

"According to the arrangement between the two organizations the supplier is to pay you"——

That is Exchange Orange——

"for the processing of orange oil and for the cost of hauling the oranges to your plant. You as processor are to pay to us the funds from the sale of wet peel. Beyond this point you as the processor are to use money received from the sales of the products to offset the weekly processing costs that, according to Section 3, we were to pay to the processor each week. This should be watched carefully, and should the sales proceeds begin to materially exceed the processing cost then funds should be remitted to the supplier. In any event, this is to be thoroughly analyzed October 31st and a determination made as to what the future policy will be at that time." [4436]

"Also TreeSweet is to continue to send through their purchase orders to us in the regular manner as their sales are made."

Well, that was the arrangement. I mean this is the letter. The contract is explicit for carrying out the arrangement. There is a clear intention and it shows the manner and method in which this contract operated insofar as TreeSweet is concerned, and TreeSweet, ladies and gentlemen, was a competitor of this plaintiff, who was one of the larger, one of the two remaining independent processors; the greatest part of whose product was single-strength juice, and TreeSweet was also a competitor of Sunkist in selling single-strength Valencia juice.

There are some other nice provisions in this contract about processing. One is, "Should the processor's cost of cans and cartons change during the pack, processing cost will be adjusted by the actual amount of such cost changes."

Ladies and gentlemen, they had this down to such a fine point that if the price of cans went up, TreeSweet didn't have to worry about what they had to pay for them. Not like the plaintiff. No, indeed. Under this arrangement that was added to the additional cost of processing this fruit under this contract which TreeSweet was bound to buy and which they in fact thereafter bought and sold in commerce, in so-called [4437] alleged competition with Sunkist.

Well, there are some other provisions in here, but there is one in particular that I want to mention that was not in the other contract. That is that in this 1951 contract, TreeSweet was given an additional 7 cents advertising allowance—that was not in any of the other contracts—per case. That gave them an additional amount. If you figure it out, it runs into several thousands of dollars by way of additional discounts for so-called advertising purposes, an advertising allowance.

To advertise what? Sunkist products? No. The testimony in this record is that TreeSweet, from Mr. Finley's testimony, didn't have to spend a dime of this in any way they didn't want to spend it. By way of explanation, he said, "Well, Sunkist had a big advertising program in 1951."

You will recall that they had appropriated a very substantial amount. The record here shows there was approximately, as I recall it, a million dollars to advertise the Sunkist name. They had theretofore paid a million and a quarter dollars to buy the full rights to the Sunkist name.

Yet they gave them an allowance, not to advertise Sunkist products, but to spend as they wished by way of an additional part of the privileges that they got under this contract. Then follows in paragraph 10 the provision that I referred to, that TreeSweet agrees to purchase from the [4438] Exchange all the juice packed by them under their own label, and to pay for the same as sold. Processor is to purchase and to make immediate payment on all inventory still on hand June 1, 1952.

In other words, the testimony here, ladies and gentlemen, is that not a can of this juice ever went to Sunkist, ever was sold by Sunkist under the Sunkist or Exchange label, or any other label that Sunkist might have asked TreeSweet to put on this product. This whole pack, every can of it that was processed from the more than 24,000 tons that were made available to TreeSweet under this arrangement in 1951, was sold by TreeSweet under the TreeSweet label.

That is the testimony of Mr. McCracken. It was not the Sunkist or any other label but the TreeSweet label.

Now, attached to this contract is various other data on the cost. It shows how they determined the cost and how they were applied to the processing operations.

Now, I want to point out one obvious advantage of this kind of arrangement—I am sure you have perhaps already seen it—and that is that under this arrangement is an overhead, which is always there to any processing company engaged in seasonal operations, and in this one it is fully taken care of. No worry about a supply of fruit, no worry about inventory, no worry about financing or carrying the inventory. Just pay for it as it is sold. You are paid for [4439] it while you are processing.

Well, we have heard a little bit about Exchange Lemon in this deal. Exchange Lemon, all the members of it, you recall, sell their fruit through the Sunkist marketing organization. I want to point out in passing that Exhibit 31 shows that fruit, that is lemons, were made available to TreeSweet under an arrangement in a sense comparable to that. They didn't pay for the lemons. This is an attachment to Plaintiff's Exhibit 31, which is a letter from Lemon Exchange to TreeSweet.

"The following is our understanding of the terms under which Exchange Lemon is furnishing lemons effective April 1, 1951"——

Then they talk about the oil and peel, and they say, "The balance of the fruit is to be billed to TreeSweet at 57 cents per gallon for the lemon juice processed or contained."

Now, this is a memorandum attached to this deal which explains it further and shows how it is to be delivered insofar as Exchange Lemon is concerned.

"Mr. McCracken called this morning in reference to our discussion Saturday and we have agreed upon the following basis on fruit sales, retroactive to cover the approximately 1,800 tons delivered to date for which final settlement has been made. We will consider the arrangement as a price [4440] arrangement rather than a cash sale insofar as our own internal records and pool payments are concerned."

There are some omissions here.

"However, insofar as our relations with TreeSweet are concerned, the arrangement will be considered as an outright sale of fruit."

3,249 tons of lemons were made available to TreeSweet under that arrangement in 1951 by Exchange Lemon.

Now, just to apply this situation to the plaintiff again—before we get to that, the only reference in the records, I mean the ,minutes of Exchange Orange with reference to this deal in 1951, TreeSweet is only mentioned in the minutes of September 19, 1951, and that is contained in the manager's report in those minutes, in which he says:

"TreeSweet production has been cut one-half and it was felt every effort should be made to have some Sunkist and TreeSweet single-strength juice on the market over the winter, even in limited supply, so as to keep California single-strength juice labels on the market."

In other words, Exchange Orange and Sunkist wanted to be sure that their label and the TreeSweet label was on the market in interstate commerce throughout the year. What about, ladies and gentlemen, the independent processors that were trying to compete with TreeSweet, such as the plaintiff, under that kind of arrangement? [4441]

Now, I think I will proceed, while I am on these contracts, to discuss the Silzle deal. It is a little different deal than the TreeSweet deal. I am going to discuss Mr. Finley's testimony on that, the differences, and so forth, when I get through with the provisions of this contract.

But here again we have a rather extended document, Plaintiff's Exhibit 25, which is dated September 10, but relates back again to the original arrangement. I want to discuss something for a moment as to how this arrangement got under way, because you will recall that this transaction apparently started in 1951, when Mr. Kelly called Mr. Finley and asked him whether something could be done early in June about the oranges that had been delivered to Silzle.

Now, we had on the stand Mr. Kelly and asked him about Plaintiff's Exhibits 6, 7 and 8, which are the delivery sheets covering the delivery to Silzle of Valencia oranges during this period of time. There was first a price stated on there around $44, depending on the soluble content. There was a pencil drawn through that, the early part of those delivery sheets, and then after the first 500 or so tons had been accounted for, there wasn't anything on them. It was just the amount of delivery.

Mr. Kelly couldn't explain what that was. He said, "I don't know a thing about it. I don't know anything about the records. I never saw them before. I don't know why this [4442] was penciled off."

Mr. Finley said substantially the same thing, he didn't know anything about the records.

But on cross-examination, as part of the plaintiff's case, you may remember I asked Mr. Finley about this deal with Silzle, and he said, "I got a call, as I mentioned, from Mr. Kelly, asking"—and bear in mind Kelly is the one that is selling the oranges, they worked together, that is the point I want you to get on these arrangements, Kelly works with Finley, and vice versa—"whether or not they could charge Silzle for a certain amount that had been delivered on some juice basis."

Well, after an extended discussion apparently some arrangement was worked out. But the first deliveries, which added up to about 525 tons under that arrangement which, according to some of these invoices, would have been billed and if paid for by Silzle would have cost in excess of $40 a ton for fruit, they got it, you know, on a $22.50 basis for the first 525 tons. After that they, of course, got the oranges for the balance of the season.

Now, Mr. Finley said, "In working this out, I tried to get in touch with Mrs. Silzle, I thought she was the one running the business," and, you remember, had an awful time reaching her, finally found her down somewhere in the valley, called on the phone and persuaded her, so he says, to get [4443] her to accept oranges for processing under some arrangement that was apparently never too definite, not reduced to writing.

Mr. Clark, the secretary of the company, apparently didn't know what it was. He said the payment arrangement was all kept in suspense until something definite had been worked out.

But in the meantime Silzle was getting the oranges and processing them into juice and selling them in the single-strength Valencia juice market, which is the important thing to any independent producer.

The plaintiff was not doing that because they couldn't get them.

But if you examine the Silzle contract, it is called a purchasing agreement, ladies and gentlemen, under quantity, this provision appears:

"The seller is to make oranges available to purchaser for conversion into canned orange juice under the purchaser's labels."

In this kind of a deal there is nothing said about label in the TreeSweet deal. Here they come out and say, "You put your own labels on this." In other words, the testimony is, you know, that Silzle was not a label buyer. Most of their products of single-strength juice that they took, they put out under the so-called buyer's label. In other words, they packed what the trade called shiners, and when [4444] they got an order for a few hundred cases, or whatever it was, of a particular buyer or particular brand in a certain market, they put the labels on and shipped them out. Silzle wasn't competing labelwise, ladies and gentlemen, that is the fact I want you to get here, with either TreeSweet or Sunkist in the interstate market for Valencia juice.

In other words, all the juice that was put out under the Silzle contract went out under private labels, and on some occasions under the label that Silzle put on when they made the sales directly themselves. So they weren't concerned in this deal about keeping any California label, such as Tree-Sweet or Exchange Orange, on the market, as the minutes showed in the September minutes. It didn't make any difference here. They were to go out under any label that Silzle wanted.

Then on the price situation, this provision follows that I mentioned. The first 527 tons delivered under this agreement shall be priced at $22.50 a ton.

Ladies and gentlemen, if you will refer to these Exhibits 6, 7 and 8, and compare them with the price list, you can see that that was just about half, if you don't even take into consideration the carton, the price which the plaintiff or anybody else competing with Silzle would have been paying for the same fruit had they bought it at the same time from Mr. Kelly of Sunkist.

Then follows these other arrangements. "And on [4445] approximately 2,362 tons to cover the production of"—then they list, strangely enough, 57,300 cases by sizes. In other words, they could only do this if it had already been done, ladies and gentlemen. How do they know they would pack and sell 57,300 cases of a certain size?

The price f.o.b. as follows: Then get this provisions—"the fruit shall be paid for according to the sales prices of the canned juices," and then follows the prices. The sales price per case, $2.20 for the 12/46.

You have heard about that before. That is the price, the opening price, you see, not the price in September when this contract was made, but the opening price, according to the price lists that I will discuss in a moment of Sunkist, and then less these discounts, or less these allowances. [4446] 27½ cents per case for sales expense, brokerage and profit, on a 12½ per cent basis.

TreeSweet got 15 per cent. Silzle only got 12½ per cent.

Label allowance, 5 4/10ths cents.

Manufacturing costs, $1.35.

Advertising allowance—bear in mind here that Silzle did very little advertising, because it wasn't a label company. Plaintiff was. Plaintiff was selling Anagold under its label. They got an advertising allowance. They got the trucking on the fruit, $1.10 per ton.

And then we find that they paid 40 cents plus, per case, for the juice processed under here and sold to them at $2.20 a case.

And there was a "C" deal.

These are important only in that they show, ladies and gentlemen of the jury, the adjustment of this inventory and pack to the rising or falling market, so that Silzle could not sustain any loss on this arrangement, any more than TreeSweet could possibly sustain any loss under their deal.

1,047 tons will take care of 27,750 cases, and the prices on these shall be as follows: The fruit shall be paid for according to these sales prices of the canned juice:

Then the same formula, except the price is $2.50 a ton.

Well, the price had gone up in the meantime, you see, [4447] and Silzle had been able to sell and had disposed of this that they had processed on the rising market without any danger of having to get stuck with a $40 fruit price that they complained about at the time they started in processing single-strength juice in 1951.

Then the terms of payment. Price A, which covers 527 tons, has to be paid immediatcly.

Prices B and C. And then it says, "Payment due immediately upon making shipment when production does not go into storage."

In other words, they could do either one. If they sell it, they pay immediately. If it went into storage, they didn't have to pay for it until it was sold.

"The purchaser is to mail on the day following shipment a check supported by copy of bill of lading. The purchaser, if it wishes, may obliterate the name and address of its customer. Payment shall, however, be made according to whether the shipment was made under orders received under B or C sales prices."

In other words, this two-pricing system that you have heard about, where California and Arizona—where the products are processed—is the higher price, and then if it goes outside of that area the price is lower. So Silzle could buy it at $2.20, but they had to show where it was going, to get the $2.20 price. [4448]

If it went just here in California or Arizona, then they paid the $2.50 price.

Then the warehouse receipts, that is conditioned upon whether or not the purchaser's check covered a "B" or a "C" sale.

The fruit prices paid to seller—that is to Sunkist—are to be as set forth under prices B and C.

This is a sale of fruit, according to this contract. You would think they were buying oranges, but they are actually only buying juice, which they have already sold.

"Fruit prices paid to seller are under the prices B and C, whether the goods are actually sold or destroyed."

In other words, there was an absolute obligation on Silzle under this contract to pay for this fruit. This didn't go to Sunkist at all.

And, then, the provision covering the examination of the records of Silzle, and then there was a provision, that to me at least, in view of the time at which these contracts were executed—bear in mind this is September 10, 1951—"right of termination" —look what it says:

"Time is the essence of this agreement."

Then there were several supplements to this contract.

Supplement No. 1:

"It is further agreed that seller"—— [4449]

That is Sunkist or Exchange Orange——

"is to attempt to supply an additional quantity of oranges to producer approximately 15,000 running cases more of canned orange juice than is itemized in the agreement."

This is still dated September 10, 1951.

Then it tells how this fruit is to be paid for, and here follows the prices $2.35 and $2.65, because it has gone up, apparently, for the amount of the 15,000 running cases that have been processed and sold in the meantime under this arrangement.

Then on February 1, 1952, Mr. Clark, who testified here that he never did know exactly what this arrangement was, that it was all with Mrs. Silzle—incidentally, we tried, as you know it is stipulated here in the record that Mrs. Silzle was subpoenaed by the plaintiff, and we couldn't reach her, and she did not appear here for the defendants, but she apparently was the one with whom Mr. Finley made this arrangement. It says here on February 1st, signed by Mr. Clark, to Exchange Orange Products:

"Enclosed is report of inventory movement"—I emphasize the words "inventory movement," keeping in mind the TreeSweet complaint back in 1947, they weren't going to pack any more inventory, and here they had, of course, an [4450] inventory——

"for period November 29 to December 31, 1952."

Then it says:

"Confirming telephone conversation with your Mr. Jim Finley and our Mr. Wurgaft, an agreement was entered into January 7th whereby 12,000 cases could be sold at the following noted prices:"

Then we have the $2.20 price and the $2.50 price.

Then it says:

"The sale for this merchandise will be negotiated immediately and payment for this merchandise will be made pursuant to the terms of the original processing agreement."

And that is okay by Exchange Orange.

Then on February 6 is Amendment No. 1 to Supplement No. 1. It says:

"It is agreed that purchaser"——
that is, Silzle——
"may sell outside the States of California and Arizona a running total of 12,000 cases of canned orange juice at the following prices:"——
and then is set forth the prices of $2.20 and $2.50.

And, "All terms and conditions of purchasing agreement are applicable to this amendment."

There, ladies and gentlemen, are the provisions of the TreeSweet and Silzle contracts, competitors both of the [4451] plaintiff and of Sunkist, in the interstate market, for single-strength Valencia juices.

It is one of the contentions of the plaintiff in this case that this arrangement between TreeSweet and Exchange Orange, and Silzle and Exchange Orange, had the effect of eliminating all price competition between TreeSweet and Exchange Orange, or Sunkist, the selling agent, in the market for California Valencia juices.

When you keep in mind the figures that I gave you at the outset, that the total amount processed by TreeSweet and Silzle and by Exchange Orange constituted 85 per cent of the total processed in 1951, I think the significance of this becomes even more apparent.

There wasn't any trouble in Sunkist selling single-strength juice in 1951. You will recall it was a fast market. Sunkist was constantly out of single-strength juice.

Exhibit No. 28, in particular, I direct your attention to, because these are the sales announcements by the Sunkist selling department, which sells Valencia orange juice, of the price situation, and of the amount available, and so forth.

On August 20th, 1951, Mr. Thompson of Sunkist notified all his brokers to this effect—this is part of this Exhibit 28:

"* * * and because sales to date of both Sunkist and Exchange Valencia unsweetened [4452] orange juice have been well in excess of our expectations, we wired you Saturday that, effective immediately, we were withdrawing our offering."

"* * * we expect to re-enter the market shortly—perhaps in two weeks."

September 4th:

"Fresh fruit receipts increased considerably during the period * * *"

The price situation was discussed. Then it says: "With Florida juice in somewhat short supply, you should find many buyers eager to submit orders for prompt delivery."

On October 17th, it says:

"Frankly, our sales have exceeded current production"

on single-strength Valencia juice.

So there wasn't any trouble selling this product. Yet, Sunkist in 1951 gave TreeSweet 10,000 more tons for processing into juice than it itself had.

The price schedule is in evidence. 27 is the price schedule of Sunkist selling prices for Valencia orange juice. 36 and 36-A is the selling price schedule of TreeSweet. If you will take the time, ladies and gentlemen, to examine those schedules and compare dates, you will find, for example, that the opening price for California and Arizona of [4453] both TreeSweet and Sunkist, on August 3rd, was $2.50; that on the same date, for outside California and Arizona it was $2.20. And then follows the various prices. And whenever Sunkist changed, TreeSweet changed, and the price was identical. And Silzle to the same effect. To the extent that the Silzle prices entered into this arrangement. And if you analyze it, it could hardly be otherwise.

The effect was to stabilize and to eliminate, ladies and gentlemen, all of the competition, pricewise, between Sunkist, TreeSweet and Silzle, in this product; to, in effect, create a monopoly control over the product. In a fast market, when the records here clearly show there was a high demand for more than was available to Sunkist, yet we have this transaction in effect.

What was the plaintiff doing all this time?

Well, you are familiar with the problems that the plaintiff had. He couldn't get any juice. Didn't

rocess a case of single-strength Valencia juice in
s plant in 1951. It had many customers for those
roducts, and you recall the testimony of the plain-
ff that in late September and early October, I
elieve it was, that Ralph's informed the plaintiff
at if they couldn't give them some juice pretty
on, some Valencia juice, they would have to kick
e product out, as he put it, from Ralph's, a very
bstantial account for the plaintiff. [4454]

Plaintiff, then, working through Mr. O'Donnell,
les manager, called TreeSweet and finally got for
is customer a carload of orange juice.

Mr. Strachan: Mr. Dixon, wasn't that Sunkist
at sold the juice, rather than TreeSweet?

Mr. Dixon: I don't think it makes too much
ifference.

Mr. Strachan: It was Sunkist, and not Tree-
weet. And it was a carload of juice.

Mr. Dixon: Thank you, counsel.

The Court: What about a recess? Is this a good
me?

Mr. Dixon: Yes, it is, your Honor.

The Court: All right, ladies and gentlemen of
e jury. Remember the admonition of the court.
ou will be excused for a short recess. Court will
emain in session.

(Whereupon, the jury left the courtroom and the following proceedings were had in the absence of the jury.)

The Court: The record will show the jury absent.
I will return something that you loaned me here.

Here are some corrections, and I have also typed up for you the court's instruction Q, and the court's P, which we talked about.

What is your estimate on additional time, Mr. Dixon?

Mr. Dixon: I am certain not over a half hour. When did we start?

The Court: You had an hour this [4455] afternoon.

The Clerk: I figure two hours and 22 minutes.

The Court: About that, yes.

You have had about two hours and 20 or 22 minutes. The clerk says 22 minutes. I haven't figured out exactly.

Mr. Strachan: Your Honor, I looked over the notes, and there are one or two preliminary matters that I can take up this afternoon.

The Court: If Mr. Dixon doesn't run too long, and you want a few minutes, we will let you have a little time.

Mr. Strachan: Perhaps 15 or 20 minutes. We could go, perhaps, to 4:00 o'clock.

(Recess taken.) [4456]

The Court: Let the record show the jury in their proper places. Proceed, Mr. Dixon.

Mr. Dixon: Ladies and gentlemen of the jury, I inadvertently indicated that this purchase was made from TreeSweet. I intended to say it was made from Sunkist, and if there is any question about it, the exhibits are here in evidence of the 1,400 cases. Exhibit 49 shows the invoice and the amount charged Winckler & Smith for these 1,400 cases. Incidentally, it was a 10-day sale, if you will notice, but it was paid for at the time of delivery and discount taken by the plaintiff.

Now, Exhibit 50 is a statement showing what TreeSweet was paying for a case of the same size at the same time under its contract. By comparing these two exhibits, you can clearly see in operation the discrimination in effect of this arrangement, not only on competition, but on the plaintiff in this case.

Here was the plaintiff endeavoring to keep a customer. Didn't have and couldn't get and couldn't process any single-strength juice. It was told by one of its big customers, either get us some or we will throw out your product. So the purchase was made, and the actual difference in price, ladies and gentlemen, 1,400 cases, is over $400.

That demonstrates better than anything I could say [4457] one of the advantages which the competitor of the plaintiff had under this contract, and again keep in mind, ladies and gentlemen of the jury, that TreeSweet was supposed to be a competitor of Sunkist in the market for single-strength Valencia juice.

Now, you remember I asked Mr. Finley when he was on the stand about this $40 price as follows:

"You knew if anybody wanted to buy oranges from Sunkist and process them into single-strength juice, they would have to pay the $40 price if they bought them from Mr. Kelly. That is a fact, isn't it?"

Mr. Finley said, "That is a fact and I knew that."

I emphasize "and I knew that."

Then I said, "You just couldn't turn out orange juice, process it the way it is processed and pay $40 for oranges from Sunkist and sell the juice processed therefrom at, say, $2.50 a case for 12/46 cases?"

The answer is, "Yes, sir, I knew that."

Now, ladies and gentlemen, here is Mr. Finley with knowledge and, of course, he couldn't escape the knowledge, that independent processors competing with TreeSweet could not possibly buy fruit and stay in business by processing it into single-strength juice and selling it in competition with TreeSweet, Sunkist or anybody else that had this kind of a deal. [4458]

Now, rememeber I asked Mr. Finley on cross-examination, after he had been on as part of the defendants' case:

"I think you said the reason this arrangement was entered into was because TreeSweet told Exchange Orange or Sunkist that they weren't going to pack any more inventory and carry it and take the risk, shall we say, of a loss from a drop in the market by having the money tied up in a pack, is that correct?

"Yes, that is correct. You usually sell your pack in the Valencia season about 60 per cent during the packing season and 40 per cent is carried over into inventory, and they would not be willing to buy fruit for the $40 price because of their experience in 1947."

That was the same experience that the plaintiff had.

"So to permit them to avoid any risk from a drop in the market price on any inventory that might be carried by TreeSweet, assuming they processed it themselves, this arrangement was entered into with TreeSweet back in 1947, wasn't it?

"A. It was.

"Q. Did you state at that time to other independent processors that this kind of an arrangement was being made available to TreeSweet?

"A. No, I did not.

"Q. Did you state to any independent [4459] processors in 1948 that you had this kind of arrangement with TreeSweet? A. No.

"Q. 1949?

"A. No, I did not, not up until 1951."

Now, I just want to discuss that 1951 situation a moment. I think perhaps we could deal with it simply by saying that Mr. Finley claimed he made this same kind of deal available to Case-Swayne in 1951. You remember the testimony of Case-Swayne, they never got down to brass tacks, they never offered the kind of deal TreeSweet had, they never offered them a contract. They perhaps offered to make oranges available to them for processing purposes under some arrangement, but they did not make the TreeSweet deal, and Mr. Finley's testimony clearly shows that.

Now, the reasons why they made this deal are very interesting. You remember on cross-examination Mr. Finley admitted that TreeSweet right here in Sunkist's back yard, right here in Los Angeles, outsold the Sunkist single-strength Valencia juice here in its own area where it is manufactured and processed.

Then on this question of carrying the overhead, I said:

"Q. This TreeSweet arrangement that you call grower participation carried, did it not, a substantial part of the operating overhead of TreeSweet when Sunkist [4460] paid the processing cost billed to it under these contracts during the various years?"

Mr. Finley said in answer, "It carried its proper share of the overhead."

In other words, TreeSweet was also, like the plaintiff, manufacturing other products, lemon juice, and various other products, but it was primarily, like the plaintiff, a producer, a processor of single-strength Valencia orange juice.

So that is the story on this, and Mr. Finley wound up, you remember, on my cross-examination by saying—I asked:

"I believe you stated that no other independent processor had this type of contract up until 1951 except TreeSweet."

The answer is: "That is correct."

And the reason he gave, you may recall, was that they had this label, this reputation, national reputation, and that they had a sales organization.

Ladies and gentlemen, to me that was about the flattest excuse I have ever heard for giving a contract of this kind. Here is Sunkist in the same year, the year just preceding this, it paid a million and a quarter for the name, the right to use the name, and it had appropriated several hundred thousands of dollars for the advertising of the name and the Sunkist products in 1951, and that is here in [4461] the record. The figures are available. And yet Mr. Finley felt that they should have this kind of a deal because they had a good sales organization.

I ask you, ladies and gentlemen, what was the matter with the Sunkist selling organization? Couldn't it sell its own product? Couldn't it sell Sunkist Valencia juice?

Well, that's the situation with reference to these contracts.

Before I close this part of it, I want you in the jury room, if you will, to look at Defendants' FE, which sets forth the various types of arrangements that Exchange Orange had, various types of contracts, and I think it does as good a job as anybody could do in summarizing the arrangements, and you will find the Hyland-Stanford, Bireley's, Cold Gold, Hart's contracts, I have talked about here, all listed under the heading, "For EOP's account," forgetting tie-in contracts! That would be perhaps a true processing contract, ladies and gentlemen.

Then we get over into the twilight zone, the deferred payment kind of contract which Hyland-Stanford and Mission Dry had, because of the tie-in. You remember in that situation they made their plants available, but they agreed to purchase their requirements for processing purposes, but they didn't have to pay for them again until they sold. [4462]

Then in this last column we have standing alone through the various years starting 1947, 1948, 1949, 1950, TreeSweet under the heading, "Grower Participation." Ladies and gentlemen, "Grower Participation."

In 1951, they added Silzle. But here is Mr. Finley's testimony that he wouldn't give any processor in this area a contract like the TreeSweet contract. So the Silzle contract can't be properly placed in that category. In my humble judgment, it was just a situation where they had more fruit, that is the record, more fruit than they could take care of. Exchange Lemon had to get rid of approximately between 2,500 and 3,000 tons of oranges because it was not fit for processing. They had oranges coming out of their ears because there were more oranges in 1951 for processing than any previous year. But Silzle came in. Silzle got it, got, shall we call it the slop-over, to use a very poor term, what was left. But they got it, even under the arrangement which the plaintiff's Exhibit 60—that series of exhibits which I am going to discuss in just a moment—that enabled them to get the first 500 or so, they paid $22.50 for $40 fruit. The peel, forgetting about the peel and oil, was around $12-$14 a ton.

The plaintiff was supposed to compete with that kind of an arrangement.

Well, now, that brings us down, ladies and gentlemen, [4463] to the question of damages in this case. I contend at this point that the evidence, and most of it, bear in mind, ladies and gentlemen, is undisputed, facts and figures or statistical information, these contracts, the written evidence speaks louder than the vocal word, the undisputed evidence shows here what happened. The effect on the plaintiff, I would say, is obvious.

We come to this question, then, that these agreements and this arrangement with TreeSweet, giving them the preference—the plaintiff didn't know about it in 1947 when it had difficulties, didn't even know about it until we got in this lawsuit, except it knew there must be some kind of arrangement which would enable TreeSweet and Silzle to process and sell at the same time—and the selling is the important thing, to keep their markets and their customers—this juice at $2.20 and $2.50 a case, when the $40 posted price of Sunkist for oranges stayed stable and remained at that level—didn't know what the details were, but that there was some kind of an arrangement, and it could only have been made, ladies and gentlemen, as a result of a combination and agreement and understanding and pursuant to which there was a quid pro quo where each party gave something to the other in consideration of which these agreements were entered into.

In the TreeSweet situation, TreeSweet got the [4464] oranges. They got the kind of deal any businessman would have paid at least a hundred or more thousand dollars to get. The contract was worth much more than that for reasons we have already discussed.

Silale got in on the deal, perhaps through the back door, but there was an advantage to them, obviously, because they got fruit at the $14 price. If you want to consider the figures in the 60's series, it would show by computing out how it actually worked out in practice.

Now, coming down to the damages again, I am now going to discuss this angle of our case and then I am through.

I want to direct your attention, ladies and gentlemen, to Plaintiff's Exhibit 39 while you are in the jury room. That is the prospectus which was issued by Winckler & Smith in the early part of 1951 after they had secured the permission of the California Corporation Commissioner to make a public offering of stock for the purpose of acquiring the plant, exercising the option, you remember, when they had to buy it, and to secure additional working capital to expand their operations into the frozen food part of the citrus juice business. The record here is replete that that was the phase of the business that was developing rapidly. So the plaintiff in the early part of 1951 had secured permission from the State of California to make a public offering of its [4465] stock.

The story here is told very well, I think, in this prospectus, and if you will bear with me for a moment, I will read just part of it.

Mr. Strachan: I will have to object to reading that, your Honor. It is not admitted as evidence of the facts it contains. It was admitted for the purpose of showing a permit to issue the stock. The truth of the facts contained therein was not admitted.

The Court: That was not discussed, but are you now relying on that?

Mr. Dixon: It is background. It is all in evidence here through other sources, as well as through Mr. Winckler's story of what happened.

The Court: The matters you are going to refer to are covered by other evidence?

Mr. Dixon: Yes, covered by the testimony of Mr. Winckler.

The Court: All right, then.

Mr. Dixon: "In 1946 the company originated a new citrus blend, trade-marked Citrus Cocktail, and due to an unusually heavy demand for this product, it was decided to pack an inventory. The decline of the citrus price during this year, which was occasioned by overproduction and dumping of war surplus citrus juices, caused very heavy inventory losses. [4466] This affected the entire industry. These losses were definitely of a non-recurring character."

That, of course, is his statement.

"Due to the fact that the corporation since 1946 has not packed large inventories and has established the policy of packing only against firm orders, this speculative feature of the business is now eliminated. This setback caused the corporation a loss on its inventory, plus the inability to pack juices while the surplus inventory was being sold. This loss amounted to $519,155.55 and made it necessary to effect a reorganization in 1948 under the then existing law.

"Disregarding this non-recurring inventory loss"——

Mr. Strachan: I will have to object to this. This is not based on Winckler's testimony. This is just reading from the prospectus.

The Court: There is other evidence in the record. The objection is overruled.

Mr. Dixon: ——"which was absorbed by the corporation over a period of three years, the corporation auditors, Hodge & Company, reported the following profit figures from the business."

Now, that is what I was coming into, ladies and gentlemen, but before I get into it, I want you to see the difference between what happened to Winckler & Smith on inventory [4467] in 1947 and what happened to TreeSweet thereafter. They got the new deal, and the new arrangement whereby they couldn't possibly suffer any loss because of any drop in the market through inventory.

But the plaintiff, coming out of reorganization in 1949, starting anew to build up its business, to renew its activity, the record in this case insofar as the auditors of this corporation are concerned, Mr. Hodge of Hodge & Company, shows that in the year 1949, and these are in the 60 numbered exhibits, ladies and gentlemen, there was a profit, operating profit to Winckler & Smith, even in spite of this situation that they didn't know existed, this ability of TreeSweet to get this product under this arrangement and selling it all this time at the price, Sunkist buying it at that price with this discount, but in spite of that, with the true American initiative, with free enterprise, he went ahead and redeveloped and established the business anew. [4468]

In other words, they weren't down, they weren't going to be counted out, ladies and gentlemen. They came back to make a fight, get their business and their markets back, and they had a profit the first year of $120,000 in its operation.

Then came 1950. That year, you know there was a drop in the amount of fruit that was available. There was, accordingly, less produced. And in that year there was still a profit of about $20,000 on their operations.

So that after they came out of this reorganization and started anew, even with a handicap, when they bought from Sunkist, of having to pay on the line—and they bought some fruit year after year, but it got less and less, because the testimony of Mr. Kelly is that they had to pay cash, they wouldn't sell them on any other basis, but they made purchases and they continued to stay in business, and they continued, ladies and gentlemen, to develop and increase their sales. There was an increase in the sales of over a quarter of a million dollars in 1950, as against the previous year, there was an expenditure in the years 1949 and '50 of new machinery and equipment in this plant; of approximately $100,000 and there was $50,000 paid off on the RFC loan or mortgage against the plant during this period of time. So headway was being made.

We come to the period of 1951. In 1950 arrangements had been made to go into the frozen juice end of the business, [4469] and efforts had been instituted, and permission had been granted by the State of California to raise additional operating capital under the free enterprise system, ladies and gentlemen, to further develop this business, get additional working capital, so we go into the 1951 season fully expecting, because it was known, Sunkist knew, and I think everybody knew, that '51 was going to be a good year, there was going to be plenty of Valencia oranges available—so the plaintiffs expected in this year that they would be able, really, to develop and expand their business. What happened?

You know the story. Comes the drop in the price. The $40 fruit remained stable. And during the year, the processing year, the plaintiff, which in two years before, when it came out of reorganization, had processed and sold approximately in excess of 18,000 tons of all citrus juice products—I mean of all citrus products, including oranges and grapefruit—in the year 1949, as you will see, and you know from the record, the production of citrus juices exceeded 80,000 tons by the plaintiff—in 1950 there was a contraction because of the two increases in price, and the policy of the plaintiff not to pack inventory, not to get caught as they did in 1946 and '47 with a high price of fruit, prices went up twice, Sunkist prices went up forty, forty-five, to fifty dollars in 1950, so they didn't pack so much, not so much fruit. In 1951 there was no shortage.

Plenty [4470] of fruit. The biggest year. So if the free enterprise system for availability of product fruit was to operate without prejudice and against independent processors, as Mr. Finley contended, and he testified he didn't want it to be anything else in 1951, if there was any concern about the independent processors in 1951 being able to continue to process and remain in business regardless of the price, to protect him against drop in prices, as Mr. Kelly testified, and as Mr. Finley testified was the purpose of some of these contracts, that operated, ladies and gentlemen, for everybody except the plaintiff, every independent processor in the business in 1951 of any consequence, certainly those that were processing into single-strength Valencia juice, they had access to the product in such manner and in such a way that they were able to continue to process and sell and keep their market in 1951, but it was under a condition, so far as TreeSweet, Silzle and Sunkist were concerned, of price restrictions, and the operation of the price controls that are brought out and were effective, which are clearly shown from the contracts and from the testimony of Mr. McMillan, that his sales prices were substantially the same as the Sunkist, and the testimony of Mr. Clark that they were substantially the same.

Now, we come to this question of what is the damage. We submit to you that this evidence that we have referred [4471] to, these contracts, clearly show existence of a violation of the antitrust laws, the combination and conspiracy here to restrain trade in the sense that it will eliminate competition from the single-strength Valencia juice market, and to monopolize that market, to the extent that the product single-strength Valencia juice processed here in California shall be controlled here in California by Sunkist, it clearly establishes that.

We would not be here if Sunkist had processed that itself, or under proper processing contracts. That they have the right to do. But we believe as independent processors, and as competitors, not only of these independent processors Silzle and TreeSweet, and building up a label business—a label business, the Anagold label, which was built up through the years, and for which approximately $50,000 had been spent in sales promotion work in '49 and '50—that under those circumstances to give to independent processors, and to deny to the plaintiff, access to that kind of a deal, was to eliminate it as a competitor in this market. And that is exactly what happened, ladies and gentlemen.

Now, how did it happen? It happened because of these acts: The fixing of the price by Sunkist at $40, keeping it there, making it thus impossible for the plaintiff to have access to any Valencia oranges on any bases whereby it [4472] could secure them and process them into single-strength orange juice to compete in this market. That as a result of that, problems that you heard Mr. Winckler testify to in '51 occurred, in spite of the permission secured to get additional capital through stock. After some stock had been sold it was stopped because of the situation that was rapidly developing, when the plaintiff saw that it couldn't get any oranges on a basis at which it could likely produce them and sell them that year. One thing led to another, and, of course, the windup was that with no product in 1951, which comprised over 75 per cent of the total volume of its business, it could not survive that situation. And the inability to get fruit and to process it and to sell it in interstate commerce on a basis which would be competitive with its own independent competitors, TreeSweet, Silzle, and the co-operative Sunkist.

That started the wheels going and rolling, ladies and gentlemen, and what happened, of course, was that in February of 1952 an effort was made to still maintain the stability of this company. Mr. Walker at that time, I believe it was either February or March, it probably was March, was appointed trustee to take over the assets of this company, and to preserve them in the interests of the creditors and stockholders, and to endeavor to work out some arrangement to make it possible to rehabilitate and reorganize and re-establish [4473] this business. It was too late, it was too late, ladies and gentlemen. Because this is a one-purpose plant. And if you or I as business men would inquire into this situation and have presented to us the evidence which you have had presented to you as jurors in this case, I submit that no sound business man would touch a proposition of this kind, because there would always be hanging over his head the sword of Damocles which could drop and eliminate him at any time, as it was done in this case.

Now, it is our contention, ladies and gentlemen, that if the plaintiff had had, not 24,000 tons, that Sunkist got, but just enough oranges to in a sense equal its capacity and its record for production in 1949, in other words, 12,800 tons that year were processed by this company into single-strength juice, half of the TreeSweet amount, just half of it, that it would have realized an operating profit, together with its other business, on a most conservative estimate, of at least $20,000.

I want to point this out, ladies and gentlemen, because it had no product to sell, and its overhead went on—in spite of that it lost in 1951 approximately $180,000. This profit of $20,000 that I am talking about takes into consideration, as Mr. Hodge testified, that it would be recouped, that is, the loss of $180,000 would be recouped, and [4474] that in addition thereto there would have been an actual operating profit for that year. So it is our contention that that is the first element of damage, which you can consider if you reach that point, and I am certain that you will in this case on the evidence, that that is the first element of damage, the $220,000 which is set forth in these 60 exhibits. I am going to discuss those briefly in a few moments.

Then there is, in addition to that, the loss of the $50,000 spent for sales promotion work in the years '49 and '50 that you heard about on new product. There is, of course, the $100,000 on new equipment. But let us consider, and it is for you to decide, ladies and gentlemen, what the value of this plant was. There are two appraisals here. One made in

1946, another made in 1950, preparatory to the securing of this permission to sell stock to expand operations and getting additional operating capital, and to purchase the plant of the plaintiff, back, which had theretofore been available to it under the option agreement, to exercise that option and actually restore itself to its operating capacity—I mean to reacquire its plant. Now, the inventory set forth in the appraisal shows the value placed on that property at that time as in excess of $600,000. That is the reproduction cost. Now, that is an appraisal made at the time, ladies and gentlemen, and before there [4475] was any question about this lawsuit. The same as the books and records of Mr. Hodge were made and kept before there was any question about whether this company would be engaged in any litigation of this character.

I well realize that a plant which has a single operating purpose, such as this, and that is what it is, of course, may have little value, it may have no value at all, if it is thrown on the market as it was in this case, because no one is going to buy a single-purpose plant, unless they want to go into the business that that plant is capable of organizing. But the reproduction cost, the basic cost referred to in the appraisal here is the amount suggested. In other words, anyone that wants to go into the business and have this equipment, that is what it would cost them to go out and get it.

That doesn't necessarily mean, of course, that that is dispositive of the value. That is for you ladies and gentlemen of the jury to decide and to determine. But I submit to you that the chain of reaction was started here in 1951, which led to the ultimate sale by the trustee here of this property for $100, subject to the encumbrances against the plant, which at that time with taxes, and so forth, constituted an actual selling price of about $150,000 at that time.

Now, if you decide that the chain of causation here, [4476] I submit that that is what happened here when the plaintiff could not get the product to process in 1951, because of the abuse of the monopoly power by Sunkist, which it had, and it had a legal monopoly, we concede it, over the oranges available, but it abused that power by making them available to its competitors, and to the competitors of the plaintiff, in the manner in which it did in the TreeSweet contract for many years, and in the TreeSweet and Silzle contracts in 1951—that the inability to acquire the fruit is what started this situation to moving, ladies and gentlemen of the jury, to a point where it couldn't be stopped, in other words, once it was started the chain of causation continued, which ultimately resulted in the loss, complete loss of this business, with the damages that I mentioned.

Now, we have submitted to you, and it is in the record, a comparison here of our statements and the contentions of the defendants with reference to these operating profits, and balance sheets. They are all in the 60 exhibits. I am not going to take your time to go over them with you now. They will be with you in the jury room. But they show, as far as the plaintiff is concerned, clear operating profits during the years 1949 and '50.

The defendants, however, contend that instead of having any operating profits, this company, they say, never operated at a profit. And with their auditor, or auditors, I should [4477] say, they came in with their exhibits, the "BD" exhibits, and in the "B" series there is a difference between Mr. Hodge and their auditor, Mr. Lynch, of $212,000, or more, insofar as the profit and loss statement of the plaintiff is concerned, in the year 1949. In the year 1950 there is a difference of over $55,000. I think you remember how some of those differences were accounted for, ladies and gentlemen.

This big difference of $212,000—and keep this in mind, I suggest, that Mr. Lynch, the defendants' auditor, was paid to come in here by the defendants, and it is not in dispute in this record—on cross-examination he admitted that up until December 1st of this year his firm had been paid the sum of $39,000, just to make an audit, to prepare this statement, ladies and gentlemen, of which $4,000, I believe he said, was for traveling expenses to and from Chicago. Now with that in mind, looking at the things after the fact, Mr. Lynch comes up with these astounding figures as a Certified Public Accountant.

Now, it is for you to decide, ladies and gentlemen, whose figures you are going to believe, and whether there is any bias on the part of Mr. Lynch by reason of the amount that he had been paid up to that time to make this audit, his firm, and to examine these figures, or whether you are going to accept and believe the figures and the statements of [4478] Mr. Hodge, who was the auditor of this company at the time these statements were prepared and made for the years to which they relate.

I suggest to you that Mr. Lynch was clearly in error in endeavoring to inject into—he had to find some way to show that this plaintiff didn't operate at a profit at any time, and the only way he could do it was to bring in a paper loss on the plant and claim that the corporation sold it at a loss in 1949, and, therefore, that loss was part of its operating loss during that year. I think his Honor may instruct you that Mr. Lynch was in error in even endeavoring to make that kind of a computation, because the sale was made pursuant to the reorganization proceedings before this court, and subject only to the approval of the court as part of the reorganization plan. But, in addition to that, and to show the extent to which Mr. Lynch went out of his way to try to pin something on somebody to discredit them, and to discredit these books and the plaintiff corporation, you will remember he said that, I think, the president of this company had had $300, or $330 paid for rent, and a gas bill, I think, of some $28; and upon examination I asked him how and from what books of the company he got that information, and you may recall that he was finally forced to admit that as to the rental charge, which he wanted you to believe, by inference, ladies and gentlemen, was paid out [4479] of the funds of this corporation for the rent of the president of the corporation—and the facts belie it—that it wasn't paid for rent at all. We had to explain on the stand what it did go for. The $28 gas bill was paid for the corporation, gas furnished it, when this company was trying to start up again in '49, in accordance with the free enterprise system of initiative on which our American economy is based and has prospered, not to be discouraged merely because you have had an inventory loss, but to get back in and keep up the efforts, get back in the fight and build up the business. That is what the plaintiff endeavored to do.

He didn't know the cards were stacked against him, ladies and gentlemen. But that is precisely what happened, and that is precisely what the situation was.

Had the plaintiff known the situation, they could have saved themselves many, many hours of hard work and labor, and many, many dollars that went into this business, when it was inevitable, with this kind of arrangement, the TreeSweet deal always coming year after year, high prices, low prices, or whatever they were, it was impossible eventually to succeed with that kind of competition confronting them.

So in closing, ladies and gentlemen of the jury, I thank you for your consideration and careful listening to this argument. This is an important case. This is important to this plaintiff, obviously, to the creditors and stockholders [4480] of this company. It is, of course, important to the defendants. But more than that, more than either the importance to the plaintiff or the defendants, is the importance to the country and to the public, that our free enterprise system, whereby venture capital goes in to build up a business, be protected against combinations such as the evidence shows existed here, which have the power, and which have exercised the power, to eliminate a competitor, to stabilize prices, and to control the market. That is what you have in this case, ladies and gentlemen of the jury, and that is the thing that to me is more important, and is more important to you as citizens, as members of our public, that if you find that what happened here—and I submit the evidence clearly shows that it was the cause of what happened—that if such you find, that the defendants have violated the antitrust laws here by unreasonably restraining trade and commerce by their acts, by eliminating competition, particularly the competition of the plaintiff, by what they did, and by refusing to make oranges available to it under any arrangement—that is the testimony of Mr. Finley, that he wouldn't give them any oranges under any arrangement, and Mr. Kelly only at $40—that under those circumstances, even though the plaintiff may have received some oranges from Ward, it was incidental, and Ward only had a very small part, relatively speaking, of the total production [4481] available—that under those circumstances the eliminating of a competitor, in this case was the competition of the plaintiff from this market, that as a result of these acts eliminated another individual company, sponsored and promoted through private capital, from a field in which it had endeavored to develop a business in the spirit of our true American tradition, and our free enterprise system. [4482]

The cards were stacked against him, the combination prevailed, and another independent processor, and another independent businessman has suffered and been eliminated from our free economy.

So as you go to your jury room, ladies and gentlemen, after you have heard all the arguments in this case, I submit that as you consider the facts and the evidence here, you will conclude that the defendants have done the things charged here which constitute a violation of the antitrust laws, that the plaintiff has suffered damage as a proximate result of their conduct, the damage and the amount thereof being for you to determine.

I have endeavored to give you some facts and a guidepost from which you can determine that. I am confident, considering all the evidence, you will conclude that the plaintiff in this case is entitled to a verdict.

Thank you, very much. [4483]

* * *

(The following proceedings were had outside the hearing and presence of the jury.) [4485]

* * *

The Court: Whether you agree or not.

Now, do you have any instructions you want to alk about? Incidentally, I made some changes in R. If you have got the court's R in front of you, I will show you what changes I made in it. Have you got it there?

Mr. Fowle: Yes.

The Court: On the instruction on lined paper, in the first paragraph, second sentence, it should be 84-A instead of 84.

Mr. Fisher: All right.

The Court: In the second paragraph, it would have to be changed to insert after the word "debtor," "from the time of the beginning of the proceedings under Chapter XI, and then go ahead with it.

These are immaterial matters, but to be accurate, they [4491] should be made.

"and Lynch was the receiver," insert "for Winckler & Smith from"—strike out the rest of that line, "and did extend thereafter and."

The next line, strike out "Chapter XI was filed," so it will read, "thereafter until approval."

Of course, actually he still had a certain capacity as receiver as far as settling accounts, but that is immaterial.

Then on line 21, "and Smith's property and business through its powers and," inserting "and from the date of the appointment of Lynch as receiver through its receiver."

In line 26, "whereas" should be "wherein."

Line 32, "December 14, 1948"—incidentally, I had December 14. My law clerk typed this and he looked at an order or something and put in February.

Mr. Irwin: I beg your pardon. I didn't get that.

The Court: "Whereas" is changed to "wherein." "December 14, 1948," on line 42.

Mr. Irwin: Yes.

The Court: "To the date of the"—strike out "order." "Close of the escrow wherein the money was deposited."

On the next page, a portion of a word is stricken out. Line 16, I have changed "factory" to "plant."

Line 26, "factory" to "plant." [4492]

Line 32, "factory" to "plant."

Strike out "should," and say "referred to in the evidence."

Then on line 4, insert the word "expert" before the word "witness."

Strike out "was in error in so" and insert "for the defendants should not have so." Change "considering" to "considered."

Now, do you want to make any further record on your objections? All the objections you have heretofore made may be incorporated.

Mr. Fowle: I think that is satisfactory. I think Mr. Strachan made the objection to any reference to Lynch at all, that is to the witness Lynch, the expert witness.

The Court: Well, I softened it by putting the error on myself. [4493]

* * *

Mr. Fowle: Court's P, of which we have a new copy today. [4500]

The Court: It was just typed up. It is not changed. What about P?

Mr. Fowle: Perhaps we made our record on it. I simply wanted to renew the objection that that simply says, in my judgment, that Exchange Orange would have had a legal right to refuse a contract to plaintiff comparable to TreeSweet and Silzle, unless it did not have such a legal right.

The Court: That is just what the law is, I think.

Mr. Fowle: I submit to your Honor that that doesn't tell the jury what we think the jury should be told. I believe the jury should be told that they have a legal right to refuse such a contract, or they had such a right, if the action of Exchange Orange was their independent action and was not part of the conspiracy charged in this case. [4501]

The Court: As a matter of fact, this instruction is, then, more favorable to you than the one you propose, because here all the jury has to find is there was a right of refusal and it was part of a violation of the antitrust laws. Under your suggestion, the jury would have to find not only was it a part of the violation of the antitrust laws, but also it was made in the exercise of good business judgment, and then they could find it was a legal refusal. This doesn't even go as far as you propose.

I don't think it is error. It has one less element.

Mr. Fowle: You understand our position?

The Court: I understand. The objection is overruled.

Mr. Williams: We have one other objection on Q. Q is the one where they may find a violation of either Section 1 or Section 2, or both.

As long as it is the same conspiracy, they can't find a violation of Section 2 standing alone. It either has to be a violation of Section 1 or a violation of Section 1 and Section 2. And the reason for that is that a conspiracy in violation of Section 2 is necessarily a restraint of trade and also violates Section 1. So they should be instructed that they cannot find a separate violation of Section 2, if they do not find a violation of Section 1.

The Court: What do you say to that?

Mr. Dixon: Well, I don't think I agree with counsel [4502] that a Section 2 violation, conspiracy to monopolize, would necessarily be a violation of Section 1, restraint of trade.

The Court: Isn't every monopoly in restraint of trade?

Mr. Dixon: Yes; but conspiracy to monopolize—that is probably restraint of trade, too. In other words, I am thinking of the National City Lines case, where the defendants were charged with conspiring to restrain trade and to monopolize. The jury did find that they violated Section 2, and they acquitted them of violating Section 1. The court of appeals affirmed, and the Supreme Court refused to admit for review.

The evidence was the same in both cases, I mean both charges. The contention on appeal, of the defendants, was that you couldn't have such a verdict, it was inconsistent, because if it was a violation of Section 1 it was a violation of Section 2.

The Court: And they found only Section 2?

Mr. Dixon: Yes. They found only Section 2, and acquitted on Section 1.

The Court: That is an identical situation to this?

Mr. Dixon: Yes. That is why I don't necessarily agree with the defendants.

The Court: I can't see the point, either, because it seems to me that every monopoly has to be automatically a restraint of trade. Therefore, a conspiracy to monopolize [4503] is a conspiracy to restrain trade by monopolizing.

Mr. Dixon: Well, a conspiracy to restrain trade may be affected through other means than by conspiracy to monopolize, and it is a question of fact sometimes whether it is one or the other.

The Court: Section 1 is much broader.

Mr. Dixon: Section 1——

The Court: But it is the impact on trade that makes monopoly illegal.

I am content with it, unless you see——

Mr. Dixon: I am content with it.

The Court: The objection is overruled.

Mr. Dixon: That charge would certainly be in line with the National City Lines decision.

The Court: All right. [4504]

* * *

Wednesday, February 8, 1956, 9:00 A.M.

The Court: Well, I found something more. Did you fellows find anything?

Mr. Dixon: I didn't find anything directly on the point, Judge. The only Supreme Court case, antitrust case, 282 U.S. 555, doesn't deal with the question that we were discussing yesterday on proximate cause. It just leaves it proximate cause.

American Jurisprudence had some notes under Statutory Liability, and the causal application thereto. 52 A. J. 383; 50 A. J. 589.

"A person is not necessarily absolved from the consequences of his failure to perform a statutory duty because there was another efficient cause contributing to the injury."

That was about all that I could find in the search that I made.

There is another Court of Appeals case, 229 F. 77. But that, again, doesn't deal directly with the problem that you were raising.

The Court: Did the defendants find anything?

Mr. Fisher: We, of course, found this Storey Parchment [4506] Company case, that Mr. Dixon just referred to.

I checked the sections 279 and 280.

The Court: No cases?

Mr. Fisher: There was just one case I think in Kansas, a criminal case. It has been criticized by Professor Carpenter, now deceased, of the U.S.C. Law School, in 11 Southern California Law Review, page 425.

The Court: I found two or things more in the Restatement. I don't think it alters the principle that we found in 279 and 280, but in the fourth volume, which is Interference with Business Relations and Miscellaneous Torts and Defenses and Remedies, here are some general statements:

"870. Liability for Intended Consequences.

"A person who does any tortious act for the purpose of causing harm to another or to his things or to the pecuniary interests of another is liable to the other for such harm if it results, except where the harm results from an outside force, the risk of which is not increased by the defendant's act."

Then 915 on intended consequences:

"A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it was expectable, except where the [4507] harm resulted from an outside force the risk of which was not increased by the defendant's act."

That last one seems to me—they are both very similar in principle, but I will tell you what I think the law is. I don't think we would agree basically what the law is, but in the case of intentional tort, each tort feasor would be liable for the entire harm, and each tort feasor would be liable for the harm that was, as 270 said, of the type intended, and as far as other forces were concerned, he would be still liable except where the risk of this outside force was not increased by the defendant's act. I think as a matter of logic that follows.

Take a simple case of assault on a patient that has a bad heart and he dies. I am liable even though the heart condition definitely contributed to his death. In other words, except where the harm resulted from an outside force, the risk of which was not increased by my act.

We could spell out situations where some outside force brought the result about and where it would have happened, had not the actor's conduct or act been involved. Then, of course, I think that the actor is not a cause. What to do about it, I don't know.

Mr. Fowle: Your Honor, we looked over here in the County Bar Association Library at some length last night. Of course, time was not unlimited but, as your Honor knows, there are [4508] a great many cases in the antitrust field, treble damage cases, in which it is said that the injury must follow as the proximate result of the acts complained of, or vice versa, the acts complained of must be the proximate cause of the injury. I mean that language is used in opinions you have written yourself, referring to the Kar Seal case, for example. But in the time we had available, we couldn't find a single antitrust case, treble damage case, where there was the slightest hint in the opinion that proximate cause should be defined any differently than it is defined in the proposed instruction No. 12-A which is among the mimeographed instructions you submitted to us.

The Court: I started out with that, too, until I got to thinking about all those instructions, and they are in BAJI, and they are under the heading of negligent injury and they are, of course, slanted towards this question of an intervening or a superseding cause. That, of course, is the law of negligence. It is not the law of intentional injury. It is probably a point that hasn't come up very often, but when it does and they start to analyze it, I think they will have to analyze it from the standpoint of intentional injury.

Mr. Fowle: That I am not so sure about. I think that Sections 279 and 280 of the Restatement really don't deal with proximate cause. I mean they are dealing with causation and a field where you do have an intentional injury. Whether [4509] to here you have an intentional injury here or not could be a question of fact, as I think we have pointed out as we have gone along.

I saw one case in the antitrust field where they treat this whole thing as sui generis. They don't consider the precise problem your Honor is thinking about, whether this is in the field of a negligence type of tort or whether it is in the field of intentional torts. But it could be either one, I suppose, and it might well be a question of fact as to which it is.

From the opinion in the Kar Seal case the whole flavor and atmosphere of that opinion seems to me to suggest that in that case, at least, the court was not dealing with an intentional injury.

The Court: Of course, the point was never raised.

Mr. Fowle: No.

The Court: You write something and then you look at it in another light. I think all that was said there was that it must be the proximate cause.

Mr. Fowle: There was a good deal of discussion about the target area.

The Court: Yes.

Mr. Fowle: And whether or not the plaintiff happened to be within the target area and was hit.

The Court: Of course, that fits in with what I have [4510] been reading here on restatement. On these intentional injuries, you find a lot which is not material to our case, but you find a lot of comment that if the intentional injury is directed against you and it hits Williams, there is causation, because it was an intentional injury, and the fact that it hit the person that he did not intend to hit, it is still involved. That would apply to this Kar Seal situation, whether he was shot at or hit. Of course, it is the same principle. Maybe the result isn't exactly the same thing. I don't know.

What about just some simple statement with something to the effect the liability for the injury of the type intended, which the wrongful acts, if any, were a substantial factor in bringing about?

I can't see how that would be error.

Mr. Walker: Don't you go further than intended and have to tie in necessary consequence?

The Court: When you say "injuries of the type intended"——

Mr. Walker: It seems to me it puts too much stress on the intent. The necessary consequence is an equal factor.

The Court: The defendant is liable for the natural consequences of his act.

Mr. Dixon: That's right.

The Court: I think we all agree on that. The natural consequences of his act. That is an old statement of causation. [4511]

"for injury of the type intended and injury that his act was a substantial factor in bringing about."

I haven't got my neck bowed on this, if somebody comes up with something that looks all right, but I think we are in trouble if we start to take definitions of negligent causation, because I don't think anybody contends here that this is a case of negligent causation.

This talk about sui generis, if I understand what you mean, it may be that this is in a field by itself and that you can't take categories and lay one down against the other. That is what you mean, isn't it?

Mr. Fowle: That's right. As I say, I didn't have time to explore this. I would suppose someone could spend a lot of time on this point.

The Court: In view of that fact, why don't we try to pick some simple statement out that is broad enough to let either side argue the point and not try to pin ourselves down in making any law on this thing? Why not approach it that way?

Mr. Dixon: Necessary and probable result of the acts, I think certainly that is an ingredient of causation Don't you think so? That is based upon the allegations, for example, in the complaint.

Mr. Fowle: Of course, the term proximate cause is used as a standard phrase in most of these treble damage cases [4512] where it comes up at all. We don't see why the definition that is given for proximate cause in this from 12-A, which you included in your mimeographed instructions doesn't define it adequately. [4513]

The Court: Here is what is wrong with it: "unbroken by any new or intervening cause."

I have been reading the comments in various sections of the Restatement on intentional injuries.

That, definitely, is a problem that comes in from the law of negligence, and not the law of intentional injury.

You see the term proximate cause used, and you have, also, legal cause, or direct cause. In the ordinary intentional injury where A hits B, you don't have a problem, because there it is the direct cause, it is the proximate cause, and you probably never even have an instruction on it; it is clear. But where you have a situation like we have, where the matter is not that direct, then you do have a causation problem, and I don't think it can be simply answered by saying that you can use these instructions.

Mr. Dixon: What was the number of that one, Judge? I don't seem to have it. Was that 12-A?

The Court: Here are the three of them that I pulled out. You can look them over.

Mr. Dixon: 12-A and 12-B might have application to this. I don't think 12-D has any application. They don't cover the precise point we have been talking about, either.

The Court: You say 12-A and 12-B. I think 12-D is out. That is joint tort feasors, anyhow, and we have an instruction on that. But what are you going to do about this "unbroken [4514] by any new or intervening cause"?

Here is what I wrote out:

"You have been instructed that for plaintiff to recover, its injury and damage must be proximately caused by defendant or defendant's wrongful act or conduct. A person is liable for all the natural and probable consequences of an act purposely done. A defendant's act or conduct to create liability must be a substantial factor in causing the injury or damage."

Mr. Dixon: Of course, the word "purposely" there implies specific intent, to me. That is just the reaction of it.

It is correct, intent implies purpose, even under the antitrust law.

The Court: Here is what it says: The act is purposely done. It doesn't require that there be a specific intent that a certain injury result, but an act purposely done, then the person is liable for all the consequences of an act purposely done.

Mr. Dixon: I see your point.

The Court: I am not so sure, if you wanted to be technical about that, but that on intentional injury he is liable for more than the probable consequences of his act. I don't see that foreseeability enters into it. But I think for our purposes in trying to get over this hump, certainly there [4515] wouldn't be anything wrong with the first sentence.

The second sentence is: "A person is liable for all the natural and probable consequences of an act purposely done."

The next sentence: "A defendant's act or conduct to create liability must be a substantial factor in causing the injury or damage done."

Now, that is logical. If it wasn't a substantial factor——

Mr. Dixon: Then it couldn't be proximate cause.

The Court: Some minor thing, you could ignore that.

Conversely, of course, if there were other factors that entered into it, the defendant is still liable if his act was a substantial factor.

I don't think you disagree with that as a matter of law, do you? Supposing we could say there were three factors that brought about injury, if the defendant's act was a substantial factor, you still have liability. If his act was not a substantial factor, and the others were, you would have no liability.

Mr. Dixon: That makes sense to me.

It is as close as you can get, I think.

The Court: It is very general, but it skips some of the gutters here.

Mr. Fowle: Could I see that language, please?

(Paper handed to counsel by the [4516] court.)

The Court: You see, on 12-B the law does not seek and recognize only one factor—I am paraphrasing—to the contrary the acts—or "omissions" would have to come out—the acts of two or more persons—here we are not talking about persons' acts—you can say two or more forces may work concurrently as the efficient cause of an injury, and in such a case each of the acts or forces is regarded in law as a proximate cause.

Mr. Dixon: What you said is an improvement on that.

The Court: 12-B would have to be revised.

Mr. Dixon: I think the statement that you made in this other suggestion is equally as good.

Mr. Walker: I think it is better. This other would be too confusing.

Mr. Irwin: It is much better than 12-B.

Mr. Fowle: If the court please, I think the defendants would feel compelled to object to this.

I don't know just what "substantial factor" means.

In our view, defendant's act or conduct to create liability must have been the proximate cause of the injury or damage, and we think that the standard definition of "proximate cause," whether it be the one set forth in 12-A, or whether it be the one that is found in numerous other places, adequate definitions can be picked out from Corpus Juris and from American Jurisprudence, and from many places—and we think that the instruction should read that way. [4517]

Mr. Dixon: Which way, counsel?

Mr. Fowle: In the terms of the normal usual definition of proximate cause.

Mr. Dixon: What is it? What definition are you urging for the normal and usual?

Mr. Fowle: I think that form 12-A is adequate.

Mr. Dixon: Standing alone?

Mr. Fowle: Yes.

Mr. Dixon: In other words, you want a definition based on 12-A alone and nothing else, is that your position?

Mr. Fowle: What else do you propose to add to it?

Mr. Dixon: We are talking about A and B together, or the one that has been proposed by the court. You object, as I understand it, to the one that the court has proposed, and you want A alone. Is that your position? I mean 12-A alone. I just want to get the record clear as to your position as to what you want, and also what you are objecting to.

Mr. Fowle: I think I have made it clear what I am objecting to. 12-B of the court's form instructions would perhaps be all right.

Mr. Dixon: Coupled with 12-A? What I am trying to get, counsel, is what your position is with reference to either one of them or both of these plus the one proposed by the court.

Mr. Fowle: Well, I have one little difficulty with 12-B. [4518] It seems to me there is a word left out in the second line.

The Court: Well, there is the 12-B. I have cut out "omissions."

Mr. Fowle: I think the 12-A and 12-B as it has been changed by the court would be satisfactory.

The Court: Show Mr. Dixon that 12-B. The only thing in 12-A that bothers me is this "new or intervening cause."

Mr. Walker: Can that be stricken?

The Court: If you want to strike the "new or intervening cause," I will give 12-A and 12-B. Look at 12-A there with that change. I would give 12-A along with 12-B.

Mr. Irwin: I don't see anything wrong with that.

The Court: Or here is another suggestion (indicating). That makes more sense. Let me read it here so we know what we are talking about. You took 12-A and said:

"The proximate cause of injury is that cause which operating in normal and continuous sequence unbroken by some new act or force which becomes the sole cause produces the injury without which the result would not have occurred."

Mr. Fowle: Well, that become a definition, it seems to me, of something other than proximate cause.

The Court: That is actually what this new and intervening cause means, because the word intervening cause by itself, [4519] using the language of the law of restatement, doesn't mean anything. The intervening cause can break causation or the intervening cannot. If it breaks causation, it is technically called the superseding cause, a cause which supersedes, so that then logically fits in with the revision we made of 12-B.

Mr. Dixon: Yes.

The Court: Which uses acts or forces, and so forth.

Mr. Fowle: Well, I gather 12-B simply says in effect that there can be more than one efficient cause, to use the phrase that is in 12-A, and 12-B says there may be two efficient causes.

The Court: That's right. But if another cause comes along which supersedes, as it were, and becomes the sole cause, then all the other causes go out the window. That is the law of causation certainly in negligent injury, and it would probably be the law in intentional injury. If another cause comes along which supersedes and becomes the sole cause, something like that, unbroken by another cause which supersedes and becomes itself the sole cause.

Let me see that again.

12-A as I now have it reads:

"The proximate cause of an injury is that cause which operating in a natural and continuous sequence unbroken by some new and superseding [4520] cause, act or force, which in itself becomes the sole cause, produces the injury."

I don't know whether that in itself adds anything. It doesn't hurt.

"This does not mean that the law seeks and requires only one proximate cause of the injury, consisting of only one factor, one act, one element of circumstance or of the conduct of only one person. To the contrary, two or more acts or forces may work concurrently as the efficient cause of an injury, and in such case each of the participating acts or forces is regarded in law as a proximate cause."

I think I am content with 12-A and 12-B. If you don't like the other thing I suggested, the other alternative, the one I wrote out, I am content with this.

Is the plaintiff satisfied with 12-A and 12-B?

Mr. Dixon: Mr. Irwin just adds a comment here. He suggests the word "other" be substituted for the word "new."

The Court: That's all right. All right. I propose to give 12-A and 12-B and you can make your record on it. That is 12-A and 12-B as read.

Mr. Fowle: We object to the modification of 12-A for the reason that we think the insertion does not truly state the law.

The Court: All right. 12-B? [4521]

Mr. Fowle: We would have no objection to 12-B if it were used with 12-A as originally drafted, but

I think we would object to 12-B in combination with 12-A, 12-A having been changed in a way we object to.

The Court: Overruled. Actually, as far as 12-A is concerned, we haven't destroyed the effect of it. We have substituted for the words "new or intervening cause" the words, "some other and superseding cause, act or force which in itself becomes the sole cause."

I will give 12-A and 12-B in the form in which they have been read.

* * *

Mr. Dixon: You have added to the statute, Judge, have you, the language of the statute there?

The Court: No.

Mr. Dixon: The unreasonable restraint?

The Court: That would be the court's instruction on the statute. I can find it in a minute. It is I or J. Section 1?

Mr. Dixon: Section 1, Judge.

The Court: What would you add to that? [4522]

"The restraint of trade or commerce must be an unreasonable restraint."

Mr. Dixon: Yes.

The Court: I had better make this clear that this isn't the statute. "The law holds that the"——

Mr. Dixon: "Restraint referred to in the statute."

The Court: ——"must be an unreasonable restraint." Is that satisfactory?

Mr. Fowle: Would you mind reading that? I got a little mixed up. "The law holds that the restraint"——

The Court: "——the restraint referred to in the statute must be an unreasonable restraint."

I would add that to Court's I, which is Section 1 of the Sherman Act.

Is that a correct statement of the law?

Mr. Williams: I think it is a correct statement as far as it goes, your Honor, but it leaves hanging in the air any indication of what is reasonable and what is unreasonable. The cases often say every contract, many acts are restraints of trade, but it is only those that are not the normal business relationships.

Mr. Dixon: I don't think you can go into that definition in this kind of a case. [4523]

The Court: All right. I will add that to Section 1. Objection overruled. [4524]

* * *

ARGUMENT AND SUMMATION ON BEHALF OF DEFENDANTS

Mr. Strachan: May it please the court, Mr. Dixon, ladies and gentlemen of the jury. It is now my duty to deliver what is called a summation. I wouldn't call it an argument. It will be a review of what the issues are as the defendants see it, and what the proof has been according to the defendants' point of view.

I want to say, before I begin, that perhaps my voice won't register at times. If it doesn't. I would appreciate it very much, if any of you are having trouble hearing me, if you would just give me a little sign.

Can you hear me now?

A Juror: I can hear you all right.

Mr. Strachan: Good.

This is a civil action in which the plaintiff seeks to recover money damages. However, the basis of the plaintiff's claim is that the Sunkist group—and when I say "Sunkist" in this argument, I refer to all of its components—the Sunkist group was a party, perhaps with others, to two criminal conspiracies. That the Sunkist group deliberately and for the purpose of injuring the Winckler-Smith Company entered into two conspiracies. The first of which it is said was a conspiracy to restrain trade and commerce in orange products. The second, a related criminal conspiracy, they say, was to monopolize trade in citrus products, particularly [4525] single-strength juice, and for the purpose of eliminating Winckler-Smith Company from the area of competition.

Sunkist is defending this case on the theory that those charges of criminal misconduct against them are utterly false. Throughout the long history of this famous co-operative, all of its activities, from the harvesting, from the sorting, to the selling, to the processing, to the selling of products, throughout the entire history these activities have not been directed toward restraining trade or monopolizing. The fact is just the contrary.

The effort has always been made to promote the distribution, not to restrain the distribution of citrus fruit products. And that is the only object that this co-operative could have had if it was to serve the farmers, who are its members, honestly, and effectively and in their best interests.

The evidence further shows, ladies and gentlemen, that there has never been a purpose to monopolize the handling of the fruit, or its processing. Quite the contrary.

You have heard testimony that from the time that independent processors first appeared in the industry it has been the policy and the practice to share the processing of fruit with those independents. And the reason for that sharing was explained, and it should be very obvious. The fruit growers are growers; they are not manufacturers. They need to have manufacturing facilities, they need to have [4526] selling facilities available to them. But manufacturing facilities to handle the whole crop in a big year, and selling facilities, are costly, and it would not be, in the long run, to the interest of the growers to have to make the investment that manufacturing facilities and sales organizations require. So the growers, through the co-operative, have always depended on assistance from the independents, and have encouraged and fostered their growth.

Now, believing, as they do, that the plaintiff's claims cannot be established, the defendants have presented their proof in what might be called three different branches or areas.

First, is a showing by the defendants as to how they have conducted their business. That they conducted it honestly, and what is now claimed to be wrongful, had honest and reasonable motivation, and was not a dishonest act.

Second, the second branch of the case is this: We have undertaken to show with the proof why it is that the Winckler-Smith Company failed as an independent processor in the citrus industry. And, briefly stated, the proof which we have presented shows various reasons for the failure. And, of course, everybody feels sorry for a person whose business has failed, but nonetheless these were the reasons for failure:

Mr. Winckler went into this business with no prior experience in American business, and no prior experience in the [4527] citrus fruit industry.

Next, he never had enough financial backing. He never had enough investment in the business to keep it going.

And, furthermore, on the financial side, his practices were not sound.

In addition to that, there were economic forces beyond the control of Sunkist, beyond the control of anyone, that resulted in his failure.

One of those resulted from the domination of the citrus market by the crop and packing conditions in Florida.

We had a terrible impact of that economic threat to the California industry in the year of 1951, during which the Winckler-Smith Company came to its end.

Another was that there was a radical change in the citrus fruit processing industry, under way from 1948 to 1951, through the development of the frozen concentrate process of packing. That superseded and obsoleted largely the packing of single-strength orange juice.

Another difficulty was that he had trouble with the quality of his products.

Another was that he didn't enjoy the confidence and the good will of the people with whom he did business.

And another very important reason was this: That in 1951 he lost his regular supply of oranges when Morgan Ward entered into a contract with Case-Swayne for a participation [4528] arrangement for the packing of single-strength juice and declined to give Mr. Winckler's company such a participating contract.

Now, the third question in the case is damages.

As to damages, our proof shows, and I will go into it more fully, that this plant had no value, that it had been borrowed against and encumbered up to its full value. It was, as Mr. Winckler said, a hotel where you couldn't rent rooms.

Until he said that I would have compared it with a buggy whip factory. It was a factory that had no economic purpose. It had no profits, so we say that there was no damage, and there was certainly no responsibility on the part of the Sunkist group for Mr. Winckler having gone out of the citrus business.

Before I get into some of the matters that I outlined, I want to mention this: You will recall that Mr. Hodge was asked whether he had an opinion as to why in the first six months of the fiscal year, beginning February 1, 1951, the Winckler-Smith Company lost money, $152,000 they lost before the Valencia season started, before any impact could have been felt by the company from what they now claim was done against them. He was also asked if he had an opinion as to why in that final year there was a total loss of $184,000.

He said, yes, he had an opinion, it was perfectly obvious [4529] that there was a decrease of approximately $500,000 worth of sales in the California operation as compared with the year before. [4530]

Now, that sounds plausible. But, ladies and gentlemen of the jury, when you get in the jury room you will have an exhibit to show that is not and cannot be the fact. I have here the Defendants' BP. That is an exhibit which shows for each of the three years following the Chapter XI proceeding, and the three years immediately preceding the Chapter X proceeding, the purchases of fruit, and here is what it shows.

It shows that in the first year, that is the crop year of 1949, the Winckler-Smith plant processed a little over 12,000—well, quite a bit over, 12,700 tons of oranges.

The next year its production dropped to 8,000, and in the next year, the last year before the Chapter X, it made a further drop, but not so great, to 5,000.

That exhibit will also show, and you can figure it right out from the face of the exhibit, that 63 per cent of the decline in tonnage of fruit processed by the Winckler-Smith plant in the fiscal year, 63 per cent of the decline in that year was due to navel oranges, grapefruit and lemon products. The great decline, I say, was not in the Valencia oranges at all.

Coming now to Mr. Hodge's computation, you will find this Exhibit BO, which is entitled Sales of All Products, Excluding Florida Operations, and here is what it shows. It does not show, ladies and gentlemen, that the loss, the [4531] half million dollar loss of Valencia sales was responsible for what happened. It shows this, to the contrary. It shows that the biggest losses, comparing one year with the other, were these: Orange juice, navel—you will remember he packed quite a lot of navel juice, and that dropped 200,000 to 67; orange concentrate dropped from 278 to 155; grapefruit juice dropped from 225,000 to 92,000; and blended juice dropped from 176,000 to 51,000.

So the result of all this is that, excluding from consideration any decline in the Valencia orange juice, the decline in the other products alone was 743,000. Mr. Hodge simply cannot be right.

Another thing that you will see when you examine Exhibit BO is this. You will recall that in his argument Mr. Dixon said about 75 per cent of the Winckler-Smith business was in single-strength orange juice. That happens not to be borne out by the figures. The first year after the Chapter XI proceeding, the Valencia juice accounted for $832,000 in sales. You find that figure right here. In the next year, the crop year 1950, it was only 336,000.

But now we get to the other classes of products. Oh, in the first year, 58 per cent of the production was Valencia juice, but in the second year, that is the crop year of 1950, which was the base of Mr. Dixon's computation as to what happened and the base of Mr. Hodge's computation as to [4532] what happened between the 1950 and 1951 crop year, in the base year, the Valencia juice represented only 22 per cent of the total sales of Winckler-Smith. Other products, navel orange juice, orange concentrate, grapefruit juice, and the others, accounted for 67 per cent of the sales in that year.

Now, taking those figures and considering what they mean, it seems to me perfectly clear that the cause of the enormous drop that occurred between the first and the second year of operation, what Mr. Dixon called the chain reaction of causation had started in. Mr. Winckler's business was failing. It was failing seriously from the first to the second year, and in the third year the failure was completed, by causes which were quite unrelated to the supply of Valencia oranges.

There were other reasons why they had this big loss in the first six months of the year 1951. One of them you may remember was this. Mr. Winckler testified that it was not the practice of his company to pack for inventory, but he did something that was just as bad when he packed these ades. You remember he had orangeade, single strength, ready to drink, and he had lemonade ready to drink, and he had some concentrate, and he packed a lot of that material. That was in the summer of 1950. It didn't go very well.

During the fall great effort was made to move these [4533] inventories, these stocks that were consigned in warehouses throughout the country, by reducing the price. That didn't work.

In November a bulletin was sent out, "Stop offering the merchandise. Pay the storage charges on it and hold it over to next year."

Well, they tried to sell it in the summer of 1951. Mr. O'Hanlon testified that the first assignment he was given when he was re-employed was to try to move those ades, and they reduced price and reduced price and finally, according to Mr. O'Hanlon, they sold them out at 60 or 65 cents on the dollar of the original price.

And in August, 1951, you will find he was writing a letter, which is identified in this record as Exhibit W:

"We have taken a severe whipping disposing of this inventory when you consider the manufacturing cost of this merchandise, plus the shipping charges and the storage charges, plus brokerage and selling cost. You can see how we came out on the deal."

That was another thing, another business mistake that contributed to the result in the first seven months and the full year that followed.

There was another matter. That was the Florida operations. You remember that exhibit on fruit purchases, the sales of product that I mentioned, excluded his Florida operations. [4534] In October of

1950, the Florida office was opened up, and Mr. Winckler testified:

"We tried to do the same thing that our competitor TreeSweet did. They moved down to Florida and leased a plant, and we wanted to be able to supply merchandise to people who are close to Florida, so that we can compete with TreeSweet. They closed the office in July of 1951.

"Q. Was that because of the chaotic conditions of the Florida market?

"A. Well, probably I wrote that in one letter, but the real reason was it was just like speculating on the stock market. It was very hazardous business. There was no logic in it and it was wild speculation."

And that speculation, you will find by referring to Exhibit BD, that wild speculation in the year 1951, the fiscal year ended with January, 1952, cost Winckler-Smith $10,300. Another mistake of management.

Still there was another factor you must remember about that fiscal year. You will recall that when he was making year-end adjustments to the books, Mr. Hodge reclassified some selling expense and some unabsorbed factory overhead that had been charged as expense during the year, but he threw that over, he called it an asset and threw it over 7 as an asset in the next year to be written off. It was promotional [4535] expense, unabsorbed factory overhead, which means loss on inventory, and that sort of thing. But to the extent of $50,000, that is included in the loss of $184,000 for the final year, and it is also included in the loss of one hundred fifty some for the first seven months of that fiscal year.

Now, I want to talk with you a little bit about the manner in which computations of profits were made. You will recall that Mr. Hodge's testimony as to what profits he would have made had fruit been available was based on the assumption the fruit which would have been available should have been available under the TreeSweet contract, and he assumed there would be 12,000 tons processed. Nobody has explained where the Orange Products Company or Sunkist would have got that fruit. The fact is single-strength juice was unprofitable in relation to the utilization of oranges in frozen, which was in great demand. Should they have taken it away from Silzle? Should they have take it away from TreeSweet? Should they have taken it away from the more profitable frozen? Nobody has ever answered that question.

But to get on with the matter of how he computed the profits, he took the TreeSweet contract, not the Silzle contract. He told you under cross-examination why he didn't.

"When you elected to make the computation under the TreeSweet contract rather than the Silzle contract, [4536] you made that computation on the basis of the contract that had the higher Sunkist sales price, is that correct?

"A. Yes, that is correct.

"Q. And also in electing to make your computation under the TreeSweet contract, rather than the

Silzle contract, you chose the TreeSweet contract which had higher allowances than the Silzle contract? A. Yes, that is correct.

"Q. Do you know whether Winckler-Smith business is more nearly comparable to TreeSweet or Silzle with respect to volume of operations, cost of sales, character of market, and so forth?

"A. No."

A little later I will show you that there was absolutely no comparability between Winckler & Smith and TreeSweet.

Now, one glaring defect in this computation of profits seems to me to be this. You will recall that the exhibits that Hodge put in on the Silzle and on the TreeSweet contracts showed how much was the cost of fruit, how much was returned for oil and peel, two different groups. Before the exhibit was admitted, his Honor insisted that those two elements be combined, and when his Honor questioned the witness to find out whether they should or should not be [4537] combined, this is what the witness said.

"Well, they paid so much for the fruit and they also gave them the peel and oil, so you have to take the two together to see what was actually paid for the fruit itself."

Again the court said,

"With respect to the TreeSweet contract, so there should be added then for the purpose of comparison the $10.81 at the bottom of page 2 to the $14.29.

"A. Yes, sir."

Now, for the purpose of comparison that should be done but it was not done in the computation of the profits by Hodge. Hodge assumed that Winckler would have got the juice portion of the oranges without regard to the fact that TreeSweet was paying $10.81 more than that, so the computation was based on the assumption that Winckler would have had to buy and pay for only the juice and not the whole orange, which is contrary to what TreeSweet was doing, and contrary to what Silzle was doing. So on that one omission alone, the computation inflates the profits as Hodge computed them by $130,000.

Now, there are other defects and they were admitted defects in the Hodge computation. One was that he, saying that the 1949 season was the true Valencia year, used 1949 [4538] costs. They, of course, did not reflect the inflation that went with Korea.

Mr. Regan followed Mr. Hodge on the stand. He testified as to what the actual cost, according to the books, records and cost analysis of Winckler-Smith Company were in the year 1951. With respect to cans, cartons and labels alone, there had been an increase of $5.50. [4539]

So there we have another error of $66,000, an understatement of the costs by $66,000, and a consequent overstatement of the computed profit.

And I said Regan followed Hodge on the stand and gave that testimony, but, ladies and gentlemen, Hodge followed Regan again, and he did not say one word in criticism of that.

It was unrefutable evidence and Hodge didn't try to refute it.

He did make one comment that I remember on Regan. He said Regan in adjusting the Hodge estimate had included an item of $2.40 for other ingredients, and Hodge said, "Of course, there are no other ingredients in single-strength juice."

But be that as it may, Hodge did not tell you ladies and gentlemen the fact, and the fact does appear in the record, that the costs be used for 1949 also included the other ingredients. And the only difference between Mr. Hodge's figures, so far as other ingredients are concerned, and Mr. Regan's computation, is the difference between the 1949 level and the 1951 level. If it was improper to put the other ingredients in Regan's computation, he did it because Hodge had indulged in that same impropriety. And I don't think it was an impropriety.

Another defect in the Hodge computation was that he assumed that there would be no added selling or administrative [4540] expenses attendant upon handling this additional 12,000 tons.

Bear in mind this, ladies and gentlemen: If that 12,000 tons—mythical tons, as one of you called it, I believe—had been processed, the total processing of Valencia oranges in the Winckler-Smith plant would have exceeded the highest volume that had ever been processed by, I believe, some 5,000 tons, and would have been about equal to the maximum production on all types, navel, grapefruit, everything else, that he ever handled.

Well, the assumption that there would be no selling costs is one that is hard to accept. And Mr.

Regan didn't accept it. I think Mr. Regan qualified well as an accountant specializing in cost analysis. He has had government experience, and he has had private experience in that particular field. He came up with a computation of costs, including selling expense, and that computation agreed very well with Mr. Winckler's own testimony.

Hodge admitted that there would be some changes, but he had never figured it out.

Well, there was something, it seemed to me, terribly wrong about the Hodge computation.

You will remember when he first brought in his Exhibit 69, which was revised and re-revised, and you will see it in the final form, it said down at the bottom, "Profit on processing 12,000 additional tons, $25,000." [4541]

Well, that would have been what?—four or five per cent profit on a total of $750,000 of sales.

And that might not have been too far out of line, although as Regan's figures would show, built up step by step from the books, there would have been a loss on any quantity that he processed, a loss on every ton.

Well, at the end of about two days I finally realized—and I didn't realize it until the revised 69 came in—that instead of subtracting the $25,000 profit from the $184,000 loss, Hodge added the two together, and then I realized for the first time—you may have realized it before I did—that he had come to the conclusion through his mathematics that there would be a total profit of $210,000 on this one transaction.

That means something over 30 per cent, doesn't it, on a $750,000 turnover.

That is something unheard of in the citrus industry. Something the growers should have heard about if they were going to give people astonishing profits like that.

But here is how we tested the thing out. I took Mr. Hodge over, step by step, what his computation resulted in. There would be $210,000 loss that you would have to absorb. In order to do that, you would have to spend $485,000—no. $210,000, $184,000 loss, $25,000 of profit. You have got to absorb that. In order to do that, you had to have manufacturing [4542] costs, hard costs, they were called, of thirty some dollars a ton, $408,000, then you had to add to that the $170,000, which under the TreeSweet contract would have been paid for the juice alone, and not for the whole fruit, and then you add to that $22,500 for brokerage, then you also add, because Hodge added it himself, $37,296 for administrative and general expense, and when he got all through he came to about $850,000 that would have to be realized from the proceeds of the 12,000 tons.

That is, you would have had to realize something like $75 a ton. And on a per case basis, in order to get that result, Mr. Hodge admitted that you would have to sell the juice for something over $3.00. And juice, as you remember, was then selling at $2.50 and down to $2.20 a case.

I say that Mr. Hodge, had he found any error whatever in that computation which he made on the stand, could have recanted, because he was back here again.

He didn't recant, and it stands on his testimony that in order to reach the result that his over-all figures give, you would have to sell juice at over $3.00 a case on a market that was nowhere near that high.

Mr. Winckler talked about costs. He said he had $1.35 a case as his hard cost. Then he said in addition to that an unconditional expense as the expense of sales, which includes brokerage, cash discount, and the expense of our own [4543] sales department. Having given you those figures, Mr. Winckler went through a computation, assuming that he would have to pay $44 a ton for his products oranges, and when he got all through, he came out with a conclusion that it would have been impossible, because he would have had to sell at $3.53 per case, on a market that was one dollar or one dollar and a half lower than that.

Now, let me tell you what you can do when you get into the jury room with that computation. Instead of inserting there the cost of juice, $44 a ton, which he worked out as $1.90 for the juice cost a case, just use, instead, the price that was paid by TreeSweet, $25.10, and here is what you will find: You will get the cost of juice at one dollar nine, and you add that one dollar nine to the one dollar thirty-five of hard costs, and you have a cost before selling expense or profit of $2.44. If you decide to sell juice with no profit at all, and add just the 8 per cent to the $2.44, you get a cost of production, plus the cost of sales, without any profit at all, of $2.63.

That, of course, is quite a different price from the one that Hodge computed.

I say from that, that it is impossible to conclude on the basis of the evidence that is before you, that there would have been a cent profit on any quantity of oranges that might have been obtained on the terms of the TreeSweet contract. [4544]

Now, I want to talk a little about the profit and loss history of this company. Mr. Hodge talked at great length, Mr. Lynch talked at great length, about what should and should not be included in the income accounts for a given year.

Basically, the differences between these accountants were these:

First, whether the income account should be set up to reflect the transactions during the period in which they occurred. For example, the forgiveness of $38,000 of indebtedness by the corporation to Mr. Winckler, that occurred in June of 1949. Shortly after the business was resumed following the termination of the Chapter XI arrangement. What Mr. Hodge had done there was to put that back as if it had happened over six months before that. He threw it back into the prior year. Lynch and Regan didn't agree with that, but that is what Hodge did. That was one of the adjustments he made.

Another adjustment they made in that same year had to do with the loss of $169,000 on the sale of the assets, fixed assets. There is no question but what the loss was sustained, the amount of it was determined by Hodge. His report showed that the transaction was completed in April. And on that basis Lynch and Regan put the loss into the year when the records show it was sustained. [4545]

Now, Mr. Dixon told you that the court will give you an instruction, based upon his analysis of the bankruptcy proceedings, and will instruct you that it was not proper to reflect that as a corporate expense for the year. He will tell you in his instructions that the transaction originated in a plan of arrangement that was filed sometime in February of 1949, and that it was improper and it was part of the reorganization expense.

But be that as it may, it still does not justify Mr. Hodge in doing what he did, because he didn't record it as reorganization expense having occurred in the fiscal year of 1950. He put it back a year ahead of the time.

That is one of the differences between the accountants.

The other is whether it was proper to treat a prepaid bonus to Mr. Winckler—a bonus paid to Mr. Winckler in one year as being prepaid compensation for the next year in carrying it over to the next year. It was also a question of whether you could defer expense, treat it as an asset and put it over to another year.

Hodge reflected the transactions one way. Lynch had a preference for recording them in the year in which they occurred, without reclassification.

There is no question but what Mr. Hodge, by deferring expense, by setting it up as an asset in one year and carrying it over to the next, was able to make the books show a [4546] $40,000 profit, instead of a loss.

Lynch adjusted to show the loss instead of the profit.

But quite apart from the bookkeeping that is involved here, the stubborn fact remains that however you throw these losses into one year, or into another, whether you call them operating losses, or whether you call them abnormal losses, they are still losses of the business, and the stubborn fact remains, as you will remember, when you examine defendants' Exhibit BF, an analysis of the surplus account of Winckler-Smith Company is all read, except for two items of credit to the surplus account. And those two items of credit are these: A credit for the $205,000 of debt that was wiped out in the course of the Chapter XI proceedings, and the $439,000 of credit that resulted from the appraisal write-up, after the plant was bought back from Rubin and Parvin. Those are the only two items of credit in that whole surplus account for the entire period.

That, ladies and gentlemen, is the basic fact. The reason no income tax was paid is that there never was income from this business. And even though the books might be made to show an operating profit, or some other kind of a profit, the total result of the entire business was loss, loss, loss; and that was not due to anything that the defendants did or failed to do.

Now, I want to talk about the claimed loss and the [4547] fixed assets.

Mr. Dixon in addressing you yesterday, I believe, asked for something like $750,000 loss on the sale of this plant. It was a very large sum. The truth of the matter is that the evidence shows that there was no such loss, that the plant had no economic or real value over and above what had been loaned on it.

You will recall that it was in 1951 when the company was about to reacquire the plant and was about to offer stock to the public, that they paid Mr. Rubin and Mr. Parvin $17,000 in cash, and the balance to make $150,000 preferred stock. Now, the value of this same plant when it was sold to Rubin and Parvin had been carried, as I recall it, at around three hundred or four thousand, but that was an inflated value. But when they bring it back onto the books they write the plant up, and here is what Hodge said about that:

"The valuation which I wrote into the books for those fixed assets was an appraised value based upon an appraisal dated January 12, 1951. The appraisal is $732,000, the write-up was approximately $442,000, and the capital and surplus was increased by that amount."

Then he was asked, "If a corporation has by writing up an assigned value of its assets on its books, simply changing an assigned value on the books as between yesterday and today, [4548] it would change the book value, would it not, of the stock?

"A. It certainly would."

"But it would not change the actual value of the stock?

"No, it would not change the actual value."

Mr. Hodge was asked whether he had at the time he put that write-up on the books an opinion as to whether the appraisal actually reflected the real value of the assets, and he said he did not have any opinion on that subject. [4549]

Then we had Mr. Brown here. He was the man who made the appraisal. He made the appraisal in —well, he made the appraisal on which the original price of $150,000 was based. Of course, that was written off when they took the loss. He came back and made another appraisal in 1950. Then he brought that down to date in January of 1951.

He said he didn't know at the time the 1946 appraisal was made that the assets he appraised at $368,000 had cost the company only $127,000.

As to the 1950 appraisal, he said that he went about finding what was sound value. He said it represents cost of the building.

He was asked, "Do you mean that indicates that the plant and building actually cost that much?

"No, it doesn't mean that. That is what it would have cost to replace them as of the date of the appraisal."

Did he take into account whether a prudent man, a reasonable man, at the date of the appraisal would have seen fit to replace those facilities?

He said, no, he didn't. He wasn't asked to give an economic or commercial appraisal. He had no idea, he said, what the plant was worth as of the date of the appraisal in the economic sense. All he knew was an engineering determination of how much it would cost to replace that plant as it [4550] stood if you did it as of that date.

Well, that, ladies and gentlemen, has no bearing on the value of that plant. It is like a hotel without any rooms in it. Would you build a hotel like that?

No.

Would you build a single-strength orange juice ~~plant~~ in 1951?

No.

Then I asked Mr. Brown whether he was told what the purpose of the appraisal was, whether it was for the purpose of supporting the offering of stock to the public.

He said no, he did not tell him that. "As a matter of fact, he said, 'I am short of money and I don't want to pay much,' so, we, of course, didn't spend an awful lot of time and I gave him what I think he wanted at that particular time. This was rather an unusual procedure for an appraisal."

I think I would agree it was a very unusual appraisal in every respect.

Mr. Dixon said in his opening statement, and he repeated to you in his summation of yesterday that there was no market for a plant of this kind, and that is the simple straightforward fact. The record shows why there was no market.

You will recall that Mr. Winckler during July and August of 1951 was trying to finance a defaulted RFC loan. [4551] You remember he said he went to the RFC and they said, "No, you don't owe enough money. We can't refinance it because you don't owe enough money."

That was at a time when they had lost $150,000 and they had far more current liabilities than they had assets. But that wasn't the only effort he made.

He went to Hanson, the manager of the Bank of America out in Anaheim. Here is what Hanson said:

"Winckler approached us for a real estate loan to take up the RFC loan.

"Can you tell us what disposition was made of that application?

"It was rejected for two reasons. One, that it was a one-purpose building; second, that it was already in default."

There are two very good reasons why the building couldn't be refinanced. It didn't have economic value there to support the encumbrance that was already on it.

Mr. Walker as trustee, or is it receiver, in the Chapter X proceeding also tried to realize something from that plant. They tried to sell it in the citrus industry. They tried to sell it out of the citrus industry. And they could find no buyers.

Finally the plant was sold. It was sold to Rubin, the same Rubin—no, I guess the brother of the Rubin that was [4552] the lessor of the building before. It was sold to him for $100, and it was sold to him for that reason because Mr. Walker testified that it was subject to various encumbrances. The RFC loan was $50,500, and there was interest due on it.

There was a second deed to Mr. Parvin. Parvin was one of the stockholders, too, you remember, who was once the lessor under that lease-back arrangement. That is $57,000.

There were back taxes of $10,000. Withholding tax liens of 8,000.

Mr. Walker totaled them up and there was $150,000 encumbrance against the building. That is why they sold it for $100, because the building wasn't worth any more than $150,000 which had already been borrowed against it.

Now, I would like to talk about these various processing arrangements that you have heard so much about in the evidence. I want to give you a little resume of the reasons for entering into those arrangements, and what it is that justified those and how they happened to develop.

Sunkist as the co-operative marketing agency for these orange growers has three primary functions to serve. One, it sells oranges to be consumed as fresh fruit. That brings the highest return.

Next, it offers to sell product oranges to the independent producers of orange products of various kinds. That is the secondary market, we will [4553] say.

Following that, any surplus that remains is turned over to Exchange Orange Products Company for processing, and I want to show you why it is that these processing agreements are what Mr. Dixon called proper processing agreements, and that those which he says are proper are not the only proper ones, that the TreeSweet and the Silzle, that type of processing agreement, participation agreement, is just as proper and is just as well suited to serve the ends of the growers when the market conditions are such that a processing arrangement is called for.

Mr. Armstrong testified to this effect.

Sunkist has had a general policy to encourage the independent processors and to supply them with raw material or fruit for their processing requirements. Sunkist started this policy and sold fruit to the independents as soon as they existed, which I guess would be some time in the 20's. Our preference was to sell to them.

Another policy Mr. Armstrong testified to was that:

It was and is the general policy of the Sunkist organization to utilize to the fullest possible extent the facilities of outside processing groups to the extent that we have fruit available for that purpose. The reason for that is that we wanted to take advantage of their own skills in [4554] manufacturing and in the development of new products and in the broadening of markets.

Mr. Finley is the man who as the manager of Orange Products Company implements and carries out these policies which are fixed by Sunkist. He told you what he did.

It was our board policy as the crop increased and the amount going to products, to use the present facilities of outside plants. A number of them wouldn't run the whole year, so we would use their equipment. Instead of leasing their plants or making some other such arrangement, it seemed to work better to go to the custom packing or the grower participation methods, so it was the general policy at that time to hold down the Exchange Orange Products expansion and to use the existing facilities first.

Those are the policies.

Mr. Armstrong described how they were applied. He said this:

There are generally two categories of contracts, one, a participating type of contract, where the fruit was furnished by Exchange Orange, manufacturing costs furnished by the processor, and then they shared in the ultimate results of the sale on some basis which was worked out in an [4555] understanding. The other type was simply the hiring of facilities of outside processors to expand its own capacity which may be insufficient.

Mr. Finley testified before you twice. Twice he explained why it was and why it is that the processing contracts on this participating base came into being. He said as to the circumstances and reasons for working out the 1947 arrangement with Tree-Sweet, it was this:

About September, after he figured that he had packed ~~enough,~~ what he figured he could sell at the then going price, he decided that he did not want to pack anything for inventory. That is because in the fall of the year, if they are caught with inventory in California and if the Florida packers have a big crop or a surplus of competing juice, you will find that you have packed your inventory on high fruit costs and you must sell it in competition with Florida at lower fruit costs. So McCracken had decided that TreeSweet was going to close down because they couldn't speculate on carrying this inventory.

What would that mean to the growers? It would mean that there would be fruit available for single-strength juice which might find a market later, price unknown, but if it wasn't processed right then, it would have to be washed down, [4556] whatever the phrase is.

So in order to prevent that and in order to help get more fruit to market in juice form, they entered into this grower participation plan. Finley said this is the plan:

The arrangement that was worked out first in 1947 was intended to and operated as a means of salvaging a portion of the orange crop to the growers, without the growers putting in a large capital investment.

Now, this is nothing peculiar in the Sunkist organization. It is nothing new. Morgan Ward testified on the subject. He said, "We had contracts like Exchange had, and Exchange had a deal the same as we had."

You will remember, I am sure, that Mr. Winckler in the crop year 1949 had one of these participating contracts, to which Mr. Dixon now objects. He had a contract with Morgan Ward, and the Morgan Ward contract was in every essential respect one of these participating contracts that they now say are violative of the Sherman Act. Well, they are not violative of the Sherman Act. They are just good economics. They are just a way of salvaging a perishable crop.

Under the contract which Winckler-Smith had in 1949, Morgan Ward agreed that Morgan Ward would furnish Winckler & Smith with 60 per cent of all the products oranges and that those would be processed into juice and Winckler & [4557] Smith would not have to pay for the juice, they would put the goods in the warehouse, and then they would sell the goods, and when they sold them, then they would be paid for it out of the proceeds of the sale.

That is what Morgan Ward worked out with Winckler-Smith. It was a usual and customary operation.

Morgan Ward also testified he did just what Finley did in 1951 when he went to Case-Swayne. Remember now that Winckler-Smith had a single-strength participating contract with Morgan Ward in 1949, but in 1951 Morgan Ward went to Case-Swayne and he gave Case-Swayne his participating agreement and refused to give one to Winckler-Smith. Here is what Ward said about the circumstances leading up to that deal:

In 1951 we knew we would be faced with a lot of fruit, there being no home for it outside of Case-Swayne, Paramount, and a few small plants. I knew we were going to have, in order to get money from the fruit for the growers, going to have to enter into participating contracts in processing this fruit, not with one, but with several of these.

"The Court: You would have preferred to have sold your product oranges at $40 a ton?

"A. Absolutely. [4558]

"The Court: But when you couldn't do that, then you entered into the participating contracts that you have just described?

"The Witness: That is what I had to do to get rid of them."

Now, Morgan Ward had not one, he had several participating contracts in the year 1951. He had one with Paramount for frozen concentrate. He had one with Mr. Winckler for frozen concentrate. Then he had this other participating contract for the single-strength juice with Case-Swayne.

So I state to you that Morgan Ward, faced with the same problem that had faced Finley all the years, found exactly the same solution for it, a participating type of contract, and he entered into that, and that hurt Winckler-Smith, no doubt, but it is nothing that these defendants had anything to do with.

Would this be a good time for a short recess, your Honor?

The Court: I was just waiting for a good spot. We will take the recess now.

Remember the admonition of the court. The case is not yet submitted to you. Don't discuss and don't decide it.

You are excused for a short recess.

(Recess.) [4559]

VOLUME IX

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record
In 9 Volumes

Volume IX
(Pages 3615 to 3949)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

The Court: The jury is present in their proper places. You may proceed.

Mr. Strachan: One of the arguments that has been made before you is that Sunkist has a monopoly on by-products fruit. But I think the evidence clearly shows that that is not the case.

When you get into the jury room, you will have with you the exhibits, which includes these defendants' Exhibit CF. That shows the percentage of Sunkist tonnage of products Valencias to the total, and it shows that over the years there has been some variation, but roughly it has been at about 65 per cent, and only 65 per cent of the available tonnage. It was 65 per cent exactly in the year 1950-51. The total of the California and Arizona production was about 490,000 tons, and that which Sunkist controlled was 318,000. So that means that there was one hundred seventy some thousand tons of fruit that was available elsewhere.

Winckler-Smith had other sources of fruit. He said as to the period following the Chapter XI arrangement, that in each crop year from 1949 through 1951 Winckler & Smith secured more tonnage from other sources than they did from Sunkist. As he put it, they bought so little from Sunkist it was meaningless. The important supplier was the Independent Fruit Growers. That was Morgan Ward's group.

And he reported on the fruit outlook to his executive [4560] committee, that is, Winckler did, on June 30, 1949. You will have the minutes with you in the jury room as Exhibit CS:

"Up to this date we have established a limited credit with the American Can Company, a very satisfactory credit arrangement with the Independent Fruit Growers for fruit supply * * *

"We have succeeded in securing 1,000 tons of fruit at a price of $36 a ton from the Independent Fruit Growers to cover our sales, which price is 10 per cent below the current price requested by the Fruit Growers Exchange."

And in FG, another exhibit that you will have with you, it shows with respect to 1951, that Winckler & Smith were obtaining a substantial tonnage of Valencias elsewhere than from Sunkist. In fact, practically their entire source was the Independents, and it shows, moreover, that the price paid was not Sunkist's price, it was generally lower.

I call your attention particularly to this last column, which begins with June of 1951. That is in the Valencia season, and it shows the purchases which he made at $35, $32, $35, $32, $34, $32.50, $32.50, and so on.

In addition to that, there were other sources. Mutual Citrus Products Company was on the market, and it was able to buy. We have two exhibits which you will have with you in the jury room, BZ and CA, showing the tonnage that [4561] they bought, very substantial tonnage of Valencias. In 1950 they bought 2,753 tons of Valencias from sources other than Sunkist, and only 39 tons from Sunkist.

The following year, 1951, which is the year Mr. Dixon argues in which Winckler-Smith was put out of business, it shows the Mutual Citrus was buying fruit, it bought 2,432 tons, and all of it was bought at less than $40 a ton.

We also had the testimony of Mr. Nels Warner of Golden Citrus: In normal years the fruit that is available to us is in excess of the capacity of the plant to process it. We have fruit to sell every year.

As to the year 1951, he said: I believe we sold about a thousand tons at between $30 and $35. It varies in price. Sometimes it is 30, other times it would be as high as 35, but it would average, I believe, around $33 or $34 per ton.

And Mr. McCracken of TreeSweet, the man who was charged to be a co-conspirator, one of the co-conspirators—or his company is charged to be a co-conspirator—he testified that he bought fruit, Valencias, in 1951 from sources other than Sunkist. His testimony was that he bought 1,114 tons, other than from Sunkist, and that the average price he paid his suppliers was $32.97 a ton.

Finally, Morgan Ward testified as to his prices. He said: In 1951 we tried to get the Sunkist price, but we couldn't get it on all of our fruit. We didn't even get it [4562] on 80 per cent of our fruit.

Now, the result of all those pieces of evidence, and they are not all that are in the record either, but those that I have mentioned is, I submit, to show that when they claim that there was a monopoly of the by-products fruit, or that the price was fixed as a monopoly price, it just is not substantiated by the evidence in this record.

Now, there were several matters that affected the success or lack of success of the Winckler-Smith operation far more than anything that was done out here in California.

The first of those was the economic impact of Florida in 1951 on the fruit juice market. Florida crops and prices, you will remember, were testified to as being the controlling, the dominating influence over the California market. You will recall there were various reasons for that.

One was that they had lower costs of production, lower land costs, less irrigation. Another factor is that by comparison with the California fruit juice crop, the Florida crop was huge. It is nine or ten times that of California.

And you also recall that the Florida juice can be sold in competition with the California juice right here in Los Angeles. There is a 75 cents freight differential a case, to get the Florida juice into the Los Angeles market, but in spite of that the Florida juice outsells California juice right here. [4563]

Another exhibit that I want you to consider here and in the jury room is Exhibit CH. It is a tabulation which shows the relationship between the United States' total production of orange juice and the California production of orange juice. This is what I think you will see when you look at this exhibit:

One of the things is this: There were two three-year cycles, and they coincided with the two three-year cycles through which the Winckler-Smith business went. In the first year, 1946, California had 16 per cent of the total market; in the next year it had 11 per cent; and in the next year the year in which Winckler-Smith went into Chapter XI, they had only 5 per cent.

Now, there is a drastic reduction in the market in which the juice could sell. From 15, almost 17 per cent, down to 5 per cent.

Then in the first year, 1949, the first year after the Chapter XI proceedings, we started another similar cycle. Eleven and four-tenths per cent California, nine and seven-tenths, seven and [4564-5] one-tenth.

There again we had a shrinking market for the California product. That latter three-year period is shown on this graph you will find in Exhibit BU. This shows the Florida citrus co-operatives' average price f.o.b. Florida for the years 1949, 1950 and 1951. You remember Mr. Warner was the witness who testified to this. He was here for a co-operative convention of some kind.

Here is where the market stood in June, 1949, when Winckler-Smith resumed operations after the first reorganization. Florida was completely out of the market. So California dominated the market all through this year.

Then there began a slight decline, the price leveled off during the year 1950 for a time down to about August or September, had reached nearly $3.50 a case. That means Florida juice price would be considerably higher than that price, $4 a case, so during all that period the price of juice was one at which a California packer could make a profit, $4 juice. This was the highest price ever reached.

Then we had a precipitous drop in September, 1950. We had a sharp drop. A slight recovery up until April, and then the market dropped. Here is where the market was in the summer of 1951 when Case-Swayne had a participating contract with the Independent Fruit Growers and when Mr. Winckler found that he was out of the market because the price was so low. [4566]

Now, Winckler recognized what was happening. You will find in Exhibit AP he writes—this is in June, 1949:

"We are familiar with the market conditions existing in your territory. That is alike due to the lower rates in Florida, but you will agree that this year"——

This is 1949——

"conditions are not normal because Florida is practically sold out and our prices are competitive."

That was in 1949, the year that Hodge said was the true Valencia year.

Also, Mr. Winckler recognized 1949 was an unusual year when he reported to his executive committee in June, 1949, that:

"This year due to favorable conditions existing in the canned citrus market created by a shortage existing in Florida, the importance of sweetened juices, namely, orange juice and blend juice, has increased considerably over the past. Our company has already secured orders amounting to $400,000. It is expected that business will increase, prices will increase during August and September and culminate in October."

So there again is an indication that when he was successful in the year 1949, he was successful because of abnormal conditions, the abnormal price of Florida juice, which made it [4567] possible for him to compete in that first year.

And in August of 1950, the conditions still continued.

"Inadequate supplies of Florida juice assisted the California packers in readily selling their current pack of orange juice."

Now, in describing what was happening during this period, Marvin Walker—I said Warner, but it is Walker from Florida who testified:

"By September of 1949 our average price had gone over $4.50 per dozen. I think that is an all-time record high. I recall no higher price. Prices started to go down some time in the season of 1949-50, and they dropped greatly in the season 1950-51."

He said:

"We had two or three very profitable years. Prices were going up and we had a big increase in our crop production, an increase in our yield. We raised our product prices to levels which naturally reduced the quantities purchasers were willing to purchase, so inventories were building up, and our packers, with the approval of our bankers, decided to unload that juice, and unloaded the juice and unloaded it fast."

Here is that unloading which brought the price from $4 down to $1.75, that would be $4.50 down to $2.20 in that [4568] short period, and that is the period when Mr. Winckler found himself in trouble and it was trouble that was caused, not by anything that these defendants did, but by economic factors that are beyond the control of these defendants and were beyond the capacity of the Winckler-Smith company to cope with.

Now, there was another such economic occurrence that also should be noticed. The development of frozen concentrate had a revolutionary effect on the entire citrus fruit industry. For the industry as a whole, its effect was favorable. It found a new outlet for orange products. For the canners that were able to can the frozen concentrate and had the capacity to do that, it was a bonanza, but for the canners of single-strength juice, the effects were highly unfavorable.

Mr. Finley testified in this connection that: "It is just since the days of frozen concentrate that there has been a home for all the fruit. That is what the frozen concentrate technique did for the citrus industry. It gave it a home for all the fruit and a profitable home for all the fruit where single-strength had not been able to accomplish that."

Now, I want to show you a bar chart which shows how from year to year the orange juice produced in the California area was utilized, and here again we have these two cycles. Here is the year 1946. In that year the highest quantity [4569] of single-strength juice was packed. That was the year, you remember, when California had 17 per cent of the total output.

The following year it dropped from 12,500,000 to 7,750,000, and then in the next year, the year that Winckler-Smith resorted to Chapter XI, the product dropped down to $5,000,000, and that is what caused the first resort to bankruptcy.

Now, in that same year, with a little bit of frozen produced, 75 per cent of the total California juice was of the single-strength. 25 per cent was of the frozen.

Then let's see what happened in the next year. That year the total production of juice was the highest that had ever been seen at that time. It went up to fifteen million and some gallons of juice. There was a slight increase there, back to seven and a half million, nearly the level it had been here. But in that year the production of frozen concentrate represented over 50 per cent of the total utilization of California oranges.

Then next this, down goes the single strength until it is back down about the 5,000,000 gallon level. But here is what is happening to the frozen: 68 per cent or 13,960,000, almost 14,000,000 gallons is frozen, and in the following year it is a still greater quantity, nearly 17,000,000.

That, I think, graphically shows not only what was [4570] happening in the industry, the revolutionary effect of this frozen concentrate, to give a home to all the fruit, 22,000,000 more total, as compared with twelve, which was the highest before that, but it also gives clear indication of an economic adjustment in the citrus industry which Mr. Winckler was not prepared to cope with.

Mr. Winckler recognized that. You will see it in a number of his anagrams. In 1950, long before his failure:

"Production of single-strength juice remains extremely small due to high fruit prices paid by the low temperature concentrators which puts the squeeze on the canners and makes production unprofitable."

Another one, June, 1950:

"Unfortunately, the crop is short this year. A great portion of the fruit available to processors is going to be used by the frozen concentrators, who can afford to pay more for fruit than canners. For this reason, our fruit supply will be short."

Again in the spring of 1951, February, 1951:

"There is a scarcity of fruit which processors in California never experienced before, due to the fact that the fresh fruit markets have taken practically all of the fruit at higher prices than the canners can afford to pay." [4571]

And then in July, 1951, this is just when his troubles were coming to a peak:

"California plans to pack very little single-strength Valencia juice this season and no inventories of grapefruit. Most of the Valencia crop is going to go into frozen concentrate rather than single-strength juice."

That is in 1951. Then again in September, 1951, you will see this anagram which is identified as EC, which puts the proposition very bluntly:

"We indicated repeatedly in our previous bulletins the shortage of California Valencias is increasing from week to week because of the fact that available fruit for processing is going into the more profitable frozen concentrate than into the unprofitable single-strength juice."

There is the fact that controlled Mr. Finley's judgment that he should not process any more single-strength juice than he had to, that everything possible should be put into frozen concentrate, and that the only reason for packing single-strength juice would be to take up whatever juice there was that could not be accommodated in the frozen, and also to make up enough inventory to keep a little California juice on the market under well-known trade names.

Now, Mr. Winckler didn't keep up with this drastic [4572] change in the industry in which he was competing. He says he spent about $100,000 equipping himself to go into the frozen concentrate business. He said that he did that in order that, "We shouldn't be left out completely from the frozen concentrate field."

But he also testified that he had not—he said by January 31, 1951, he had spent $97,800 on frozen concentrate facilities, but even then he had not equipped himself for frozen concentrate.

Then in September, 1951, he writes to a broker in Honolulu and he says that:

"We think you will agree with us that there are two ways of promoting sales, and this is particularly true in the frozen concentrate field. One way, and that has been used by Sunkist and Snow Crop.

is to intensively advertise their products. But Sunkist is selling their frozen concentrate at $2.11 a dozen. A portion of this price goes to stimulate customer acceptance through advertising sales. We are just starting out in the frozen concentrate field. It is our intention to put out good quality of merchandise equal in many respects to Sunkist, but it is to be sold at what is being termed a B brand price, which means it will be sold at a price."

There is a late start. In 1949 the handwriting was on [4573] the wall, the single-strength processor was going to be squeezed by the frozen concentrator, and Mr. Winckler for one reason or another, possibly financial inability, perhaps inexperience in business, had not equipped his plant to take advantage of the change which brought prosperity to the industry and left Mr. Winckler in a failing condition.

Now, one of the claims that is made here is that the Winckler-Smith company had good will, a repute in the trade that was damaged as a result of what they call was unlawful conduct. The fact is, I think the record will show that there was no good will. There was no willingness of customers to buy repeat business. You will remember that Mr. Lynch made a computation to determine whether there was any good will and the court asked him if he could ascertain from the books and records of the corporation alone, without investigation of the customers, whether there was good will and what that good will is.

He said, "Yes, your Honor, it is customary to make a calculation based on the earnings history of the company."

He described to you the formula that is used by the United States Government for revenue tax purposes, used by the Supreme Court, written in the handbooks, for determining good will.

That is determined after you have arrived at the earnings and have found that those earnings reflect something over [4574] and above the earning capacity of a like investment in the business. That is good will.

Because there were no net earnings, the computation of good will under the formula showed that there was a negative good will. That is about what is shown by the other evidence in this case.

You will remember that Mr. Winckler testified that he packed a lot of navel orange juice and it was very badly received in many quarters. It was bitter. He testified that the brokers complained that they got stuck with the product. Some had Anagold that stood on their shelves for years. Some of them complained and wondered whether the Anagold product was a current product because it had rusted cans and swell cans.

He testified, too, that he, although he knew that the navel juice was inferior or second quality, would pack that on request under the Anagold name. [4575]

He said, "I prefer to pack under another label. Why would I prefer that unless I realized I would risk the name of the Anagold label if I packed merchandise which is second grade or not up to standards?"

Well, he did pack it. He packed this second grade product, and it did hurt the Anagold name.

When you get into the jury room, you will have before you a series of letters written by his broker organization, and some of those have been read to you. I won't read them all, but I will just mention a few of these. You can read them when you get in there.

Exhibit Z, July of 1949, written by Kriekhaus:

"We received some samples of Anagold brand orange juice and cut the samples with several buyers that were somewhat interested. None of the buyers liked the quality of this orange juice for it has an aftertaste that is objectionable."

Another one:

"Smith Bros. & Burdick Company have had trouble with this juice from the day it arrived." Anagold blend juice. "They have sent the merchandise out and it has been returned so often that the cases are practically worn out and those cases that are not worn out, the cans have swelled and blown up all over the merchandise so that it is one grand mess. They advised us today that they were going to [4576] truck the whole mess down to the city dump and junk it"——

The Court: Are you reading these for the truth of the matters contained in those letters?

Mr. Strachan: I didn't intend to, Your Honor——

The Court: Then call the attention of the jury for what purpose they were offered.

Mr. Strachan: Yes. They were offered for various purposes, but they were received only for the purpose of impeaching Mr. Winckler.

The Court: All right.

Mr. Strachan: "To make a long story short"—this is again in '49, written by Bobzien Company. "To make a long story short, the three largest buyers here of orange juice, namely, Malone & Hyde, Liberty Cash Grocers, Inc., and Weona Food Stores, Inc., state that your Anagold brand was very materially damaged in this particular market and territory when you shipped to this market, around two or three years ago, some of your Anagold brand Citrus Cocktail.

"The buyer for Malone & Hyde stated that if he bought any California fancy orange juice, he could not use the same under the Anagold brand because of the sad experience they had with your Anagold brand Citrus Cocktail * * * he feels that a good part of the public would be reluctant to buy the Anagold brand of orange juice.

"If you have another label for your fancy sweetened [4577] orange juice, please include such label with your letter. If you are not in position to furnish some other label, we will be unable to make up even a half a pool car."

Then here is a complaint against another thing, the pricing practices. Young Company of Salt Lake complained twice. Their first letter said:

"Frankly, we are at a loss to understand your method of operation * * *

"We have just rechecked wires received on quotations and to us they appear to be erratic, always higher than our competition. For instance, on August 5th you wired that your official opening price on Anagold Valencia fancy grade orange juice would be $4.35, while Exchange offered and sold it at $4.20. It is just impossible for us to follow your sales policy thus far. Our jobbers wonder if we really are in the business * * *"

And they make the same complaint again:

"We have been interested in the bulletins you have been sending us together with the different price changes, up and down, as they have fluctuated each week. This procedure has so unsettled our buyers that they don't know whether we have a price, or not. In fact, I have had two of them ask me if Winckier & Smith knew what they were doing."

Then here is one written to Charley Sisk, one-time sales manager, by Graves-Chambers of Seattle, Washington: [4578]

"Charley, while I was at National, Pat brought your old friend, George Paquette, in on the tasting and they used a sample of their own Happy Home to compare with. Both of them stood there and swore up and down that your acid content was too high for them.

"Pat said, 'I want to do business with Charley Sisk but, in this particular case, I cannot because of the difference in the quality and the fact that his product does not come up to our standard.'"

And another one in 1950, the summer of 1950, from Dickensheets-Potter Company, Portland, Oregon. It says:

"The product appears to be lighter in color and somewhat watery, with a considerable taste of peel in it. We thought it best to pass this information on to you, as it might be advisable for you to check carefully on your plant operations."

The same brokerage firm writes again:

"General Grocery Company are not very happy over the quality of the orange juice that they just received packed under their Preferred Stock label. I just sampled a can that they had opened out of the delivery, and had to confess it was not as good as the samples we received last week."

And then in October, a broker in Cleveland writes:

"Dear Friend Winckler: We have just checked back [4579] with Haserot Company of Cleveland, Ohio, in regards to the samples of juice forwarded to them, and just this morning they cut the grapefruit juice out of the sample they received and compared it with two others. One outside the state, and one which was from California. Their report was, of five samples, Anagold brand checked fifth, and when I heard the story I didn't believe it, but all five cans were still present, and we again checked the different cans, and, believe it or not, in my opinion, was by far last. There was a decided tin taste and seemingly a little oil taste, but the oil was not quite as noticeable as the very decided tin taste, and, of course, that was objectionable to the buyer who was interested in his own label." [4580]

Now, there was one more test for the existence of good will, and that is whether the company enjoys a good repeat business.

We investigated that in connection with the Winckler-Smith claim that they had good will. Mr. Bylin testified what he had done. He made a list from the records of the Winckler-Smith Company of the customers who purchased Valencia juice in the 1949 season, and a list of the customers who purchased those same products in 1950, and compared the two lists to determine how many customers of 1949 continued to be customers in 1950. He found that a total of 708 customers had bought Valencia juice in the year 1949, and, of course, only 93 had returned as customers in the year 1950.

So that the repeating customers represented only 13 per cent of the 1949 customers.

Now, I say, ladies and gentlemen, in view of all that, it is impossible, I think, to conclude that there was any good will. And over and beyond that, there is a very clear indication that from 1949 to 1950 the chain reaction of causation, as Mr. Dixon has said, had set in. Winckler & Smith for the second time were grinding down to a business failure.

The difference between 1949 and 1950 is far more striking than the difference between 1950 and 1951. [4581]

I mentioned that bad financial practices had also played a part in the failures. It was the lack of a sound financial structure which led up to the failure in 1948, and to the later failure in '51. From the start to the finish Winckler & Smith operated primarily on borrowed money, rather than capital furnished by the owners.

You will have in the jury room, ladies and gentlemen, the balance sheets, and I hope you will look at them.

I want to call your attention to this: On the balance sheet of January 31, 1946, which is the balance sheet that was set up at the time the partnership operation was turned over to the corporation, down here in the corner of the exhibit, which is called A-1, you will see the original investment of the three partners; Goodland, Smith and Winckler. Goodland, $12,000; Smith, $40,000; Winckler, $10,000; total, $62,000.

For that $10,000 contribution to capital, plus $21,000 of undistributed earnings which remained in the partnership at the time the corporation took over, Hodge testified that Winckler secured $135,000 in face value of stock, and that $135,000 of stock gave him a 50 per cent control of the corporation. And the books show that that $10,000 was the only contribution that Mr. Winckler ever made to this business.

Now, let's look at the financial condition at the time, [4582] the corporation took over. Cash on hand was only $100, the current assets were only $48,000, and the current liabilities were $77,000. Nearly $30,000 in excess of the current assets.

Here is the balance sheet at the end of that year, there the current assets are $267,000, current liabilities $325,000. About $60,000 short.

Exhibit A-4 is the next balance sheet, and it shows an even worse condition. This is on the eve of the Chapter XI reorganization. Cash on hand, $59.85; current assets, $137,000; current liabilities, $336,000. Nearly $200,000 deficient, and a bank overdraft of $2,796.69.

Here is another exhibit which I want to commend to your attention, and that is BB. It is a comparison of the current assets and the current liabilities of the company for the two three-year periods in which it engaged in operations. Here is the first: The current assets are deficient by $29,000, in this year $57,000, and then $198,000 in this year, and there is the chapter XI reorganization (indicating). When they came out the situation was not much different. They had only $64,000 of current assets in excess of their liabilities, a very dangerous position in 1950. By January of 1951 they had only $16,000. And by July 31st of 1951 they were in the red, so far as current assets and current liabilities were concerned, by $120,000. [4583]

Now, the Chapter XI bankruptcy proceedings did nothing whatever to improve the financial basis on which this business rested. In fact, the financial condition was worse than it was at any other time.

No owners' capital was created——

The Court: You mean Chapter X?

Mr. Strachan: Chapter XI. The first one was Chapter XI, wasn't it?

The Court: The first one was X.

Mr. Fisher: The first was XI.

The Court: Then I am in error.

Mr. Strachan: No owner's capital was created in the course of that proceeding.

What happened was this: They entered into a sale of the property to Rubin and Parvin for $50,000. Leased the plant back again with an option to repurchase.

This arrangement was one of the major contributing causes to the later Chapter X proceeding. And I will tell you why that was.

This sale was not a sale, it was really a loaning transaction, whereby Rubin and Parvin advanced to Winckler the $50,000 and were to get it back later on.

Winckler described it in this fashion: It was just like putting in the pawn shop a diamond ring for $100, which was worth a thousand dollars, and as long as you get the diamond [4584] ring back for the thousand, plus interest, we are not interested in the price.

But when the company came out of the transaction, after having put its plant in pawn, it was in very much worse condition than it had ever been before.

Mr. Winckler reported to his executive committee that he had trouble getting credit, that the banks complained that they couldn't extend credit because the property, the ownership of the property, had left the corporation, and explained that in the first instance they had owned the property, and, therefore, had a basis of credit, but with the property transferred to the stockholders under this arrangement, it no longer had a sound basis for credit. And that was one of the things that brought on this failure.

Our company, he reported, is in very definite and urgent need of credit requirements. We have not succeeded in establishing the necessary bank credits. Our negotiations with the bank have not been concluded satisfactorily, because the bank is objecting to the fact that the ownership of the property is divorced from the corporation.

They not only stripped the corporation of its principal asset, and left it with practically nothing to work on, but the deal worked out was one that was costly in the extreme.

Under the least arrangement for which Rubin advanced the $50,000, the company agreed to pay $1,500 a month in [4585] rent, but in addition to that, the company was obliged not only to pay the rent, but to pay the taxes, the insurance, the maintenance, the repairs, the principal and interest on the RFC loan, so that it had not only all of the obligations that it previously had, but in addition it had incurred an obligation of $1,500 a month.

They went to Hanson and tried to borrow money from him, and he said from an examination of the financial condition of the Winckler & Smith affairs I concluded that the bank could not providently loan Winckler & Smith except on a secured and guaranteed basis.

That this transaction was extremely costly and was responsible for a part of the financial difficulties that he was in, Mr. Winckler testified that "we found it didn't work out too well. It was too expensive for us."

Now, the lease remained in effect from March of 1949 until April of 1950, so that the rent that was Parvin and Rubinfi further depleted the assets of 500. The repurchase, further, of the property from Parvin and Rubin, further depleted the assets of the company and depleted them at a time when the financial condition was desperate. [4586]

You recall Mr. Brown testified that as early as January, 1951, Winckler had said he was short of money. In addition to that, you will recall that Mr. Walker was on the stand and he testified as to the condition of the RFC mortgage. His testimony on that was that the mortgage went into default on February 5, 1951.

Now, with that RFC mortgage in default and with Winckler & Smith short of money, Rubin and Parvin decided it was time to sell the plant back. So they took the plant back and they took it back on payment of $17,325, so that, together with the rent that they had received, gave them back their $50,000 and more, and in addition to that they took one hundred thirty some thousand dollars of preferred stock to make up a total purchase price of $150,000. Now, here is where the transaction took place.

Exhibit BC is a comparison of total assets and the total liabilities by months from 1949 through 1951, down to 1952, and here in April is the time when the company has gone in the red and when its mortgage to the RFC is two or three months in default, and they pay out $17,500 in cash. That is what finally strapped the company. Winckler allowed Rubin and Parvin to siphon off that much cash when the company was in desperate financial condition.

Now, the income account for the first six months shows this, that in the six-month period from January down to [4587] July, the company had lost in current assets position $133,000. They had sustained a total loss for that period of $148,000, all of which occurred before the Valencia season started, and the company at the beginning of that Valencia season had on hand only $5,000 in cash, had current assets of $100,000, but offsetting those were $220,000 of liabilities. The company was hopelessly insolvent. It was broke and, as Hodge testified, at that time it was in extremely poor financial condition. It was in no condition to weather the competition that was to come from the Florida packers dumping their crops in the summer of 1951.

Is that a convenient place to stop, your Honor?

The Court: Yes, it is convenient.

I will excuse you until 1:30. Do you all understand? 1:30 this afternoon. Remember the admonition of the court. The case is not yet submitted to you.

(The following proceedings were had outside the presence and hearing of the jury.)

The Court: The record will show the jury absent.

What is your estimate, Mr. Strachan, as to how much more time you want?

Mr. Strachan: Well, I think about not over 40 minutes.

The Court: Mr. Dixon, how much time are you going to want in rebuttal? Don't ask for too much.

Mr. Dixon: Well, your Honor, I certainly think I should [4588] be able to do it in a half hour or less. I will endeavor to confine it to that. I am certain it will not be any more than that. If your Honor will give me, or I can ask counsel to give me some warning after 20 minutes has passed, I think I can complete it within that period of time.

The Court: You have more time available, Mr. Strachan, if you want to use it. I am not trying to cut you off. I just want your estimate because this is outside of bounds already. Mr. Dixon has had three hours.

Mr. Strachan: I planned for two and a half hours and I think I will come very close to that.

The Court: I think you should limit any rebuttal to 30 minutes at the outside.

Come back at 1:30.

(Whereupon, an adjournment was taken until 1:30 o'clock p.m. of the same day.) [4589]

February 8, 1956—1:30 P.M.

The Court: The record will show the jury present.

Mr. Strachan, you may proceed.

Mr. Strachan: Yesterday in the course of his remarks Mr. Dixon adverted several times to free American enterprise and to the necessity of protecting risk capital.

So far as risk capital is concerned, there is none involved in this case.

You will recall that the investment initially made by Mr. Winckler was an investment of $10,000, and his other partners made other capital contributions. At the time of the Chapter XI arrangement the claims of the unsecured creditors were paid off at 11 cents on the dollar, but that didn't apply to the owners of the business.

One of the first things that was done following that reorganization was that Mr. Winckler used about $10,000 of the $50,000 that Rubin and Parvin had provided to acquire the stock of Smith and Goodland, so the other two original partners were out, and Winckler had their stock, and he bought it with corporate funds.

Now, part of that $38,000 of forgiveness of indebtedness was represented by that $10,000. The balance of it represented other items. A bonus that had been paid Mr. Winckler before it was earned, and it subsequently developed that it [4590] never was earned.

So with the forgiveness of that indebtedness, Mr. Winckler not only withdrew his $10,000, the equivalent of his $10,000 in initial capital, but he got his capital back four times over.

The same can be said as to Rubin and Parvin. They never put a thing in this corporation. They put up $50,000 temporarily. They got $37,500 in rent, they got another $17,325 in bonus, and they also got the balance up to $150,000 in preferred stock, but never did they put a cent into the business. The business was being run on the creditors' money. The creditors lost in both reorganizations.

Now, I want to talk about the arrangement that Case-Swayne worked out with Morgan Ward.

You will recall that Case-Swayne was consulted by Finley when he was trying to find capacity for processing the enormous crops that he expected when he was working in the spring of 1951, and Case-Swayne decided they were not interested in the deal. But later they made a deal with Morgan Ward, and under that deal they had a participation arrangement, the fruit was furnished, they processed it under their own label, sold it and accounted for the sale price, and were allowed over and above their manufacturing costs 5 per cent on the selling price. [4591]

Now, Case-Swayne had a price policy and Swayne testified to it before you ladies and gentlemen of the jury. He said that, "Generally Case-Swayne's prices are lower than TreeSweet and Sunkist. It is our intention, if possible, to maintain a differential in the neighborhood of 15 cents a case of 12/46's."

Now, that is the policy of the company with which Morgan Ward contracted.

The contract was entered into early in the summer, perhaps May or June, and it continued in effect throughout the Valencia season down to perhaps October of 1951. It was in effect when the

Florida canners started unloading their juice and unloading it fast.

You will find among the exhibits Exhibit AB, which is this curiously printed communication from Dickensheets & Potter, Portland, Oregon, to Winckler & Smith:

"Too late to dictate, but I ran across some real competition when I started working juice. Case-Swayne are booking orange juice here at $2.60 a case for the balance of the season with full protection against decline."

How did that come about? It came about because——

The Court: Mr. Strachan, I hate to interrupt and I try not to, but that again is one of the letters which was offered, not for the truth of the facts contained therein. That [4592] is the danger of that kind of evidence. Now you proceed to argue it as if those were facts. I have told the jury, and you heard me inform them and inform you, this letter has a place in this case, it was admitted in evidence for a limited purpose, but it can't be argued fairly as if it was any proof of the facts contained therein.

Mr. Strachan: Well, it is proof of this, I take it, your Honor. Mr. Winckler's statement was——

The Court: Just a minute. You are a good lawyer. You know what it is admitted for, for the purpose of impeaching Mr. Winckler, and you can argue it for that purpose. That isn't the way you were arguing it.

Mr. Strachan: You will recall——

The Court: If you were going to prove those facts a witness should have been called to prove those alleged facts.

Mr. Strachan: Mr. Swayne was called.

The Court: You can argue Mr. Swayne's testimony.

Mr. Strachan: And Mr. Swayne testified what he did during the summer of 1951 was to cut prices in order to meet the Florida competition, and he testified what his prices were. June 9 they were $2.92. June 23, $2.71. July 7, $2.68. July 21, $2.62. August 4, $2.22. August 19, $2.14. September 1, $2.16.

He was asked why he brought his prices down in that precipitous way. He said, "It was necessary for ourselves, [4593] as well as any other packer if they wanted to sell merchandise, to compete with the Florida market wherever it was."

Now, it was on August 3 that the first prices were quoted by TreeSweet and Sunkist on the new crop of Valencia oranges, and those prices were $2.20. The reason for those prices has been testified to before you, and that is that the price of Florida juice at that time had dropped to $1.75 or even lower, and it was necessary to quote the $2.20 price in order to meet Florida competition.

During that period Mr. Winckler had for a period of several weeks been discussing with Morgan Ward the possibility of getting a contract of the Case-Swayne type. Mr. Ward testified that he received a letter dated August 17 from Winckler-Smith, that prior to that letter there had been a lot of discussions with Mr. Winckler with respect to his desire to obtain a contract similar to the Case-Swayne contract. The discussions covered a period from whenever the Case-Swayne deal was made until the letter was written, perhaps six or eight weeks, and here is the letter which was the follow up on these discussions:

"We discussed with Mr. Borden, the chairman of your by-products committee"——

this is by Winckler-Smith——

"the uncomfortable situation that we have to face with regard to the supply of Valencia oranges. Our [4594] discussion was centered around the possibility that we buy from growers fruit which we would put through various packing houses owned and operated by the independents in order to secure by-product fruit at a price comparable to our competitor.

"The contract of the Case-Swayne Corporation negotiated a few weeks ago was discussed, and we made the statement that due to this contract the pace was set for the canned juice prices for the coming season. These prices were entirely out of line with the fruit prices requested by the packers which has made it impossible for us to pack canned citrus juice up to this writing.

"We pointed to the fact that it would have been more advantageous from the angle of the independents to offer the same deal to us which was offered to Case-Swayne, and by doing so to create in the interest of the independents a competitive situation, rather than a monopolistic situation. Such competitive situation would probably have resulted in better returns all along the line.

"Moreover, when we consider that during the past two years we have purchased close to a million dollars worth of fruit from the independents, we feel that a great injury was done to us of entering [4595] into such a contract without even having had a chance to be consulted or without any part in such surplus fruit being offered us.

"We suggest that from here on we should be supplied for the purpose of single-strength juice canning with an equal amount of fruit received in the past by Case-Swayne at terms and conditions similar to such a contract." [4596]

There is no question, ladies and gentlemen, that that act on the part of the Independent Fruit Growers, in refusing to deal with Winckler & Smith on the same terms as they dealt with Case-Swayne, had a serious and prejudicial effect on the business of Winckler-Smith. Because Winckler-Smith for a long time had been dependent not on Sunkist but on Morgan Ward for the tonnage of fruit that he was processing into single-strength juice.

You will find Exhibit BQ, which is a tabulation of the purchases of raw fruit of Winckler-Smith, according to sources of supply, and as Mr. Winckler testified, the amount that was bought over these last three years from Sunkist was so small it was laughable.

The first year after the Chapter XI reorganization, 17 per cent, or 2,025 tons was purchased. That was in the year 1950—that was the fruit season of

1949. In the next season only 127 tons of Valencias, less than 2 per cent of the total used. The balance of the fruit was bought either from Morgan Ward or other sources.

In the first year 73 per cent of the tonnage was bought from Morgan Ward, 9 per cent from others.

In the season of 1950, 91 per cent from Morgan Ward, 7 per cent from others.

And in the last year Morgan Ward's percentage dropped down to 86 per cent, and 13 per cent was purchased from other [4597] sources.

Mr. O'Hanlon testified to what was going on during the summer of 1951 while he was acting as sales manager for Winckler-Smith. He said:

"Q. Did you ever discuss whether Case-Swayne was obtaining oranges from Morgan Ward at a time when Winckler-Smith was not getting oranges?

"A. I know at times, because of the fact that fruit seemed difficult to get, Mr. Winckler mentioned that he was trying to get fruit from various sources, including Morgan Ward. My understanding of the situation at the time Mr. Winckler and I were discussing this shortage of fruit, primarily Mr. Winckler's intentions were to go into frozen concentrate, he seemed to be having difficulty getting fruit for some reason or other. His source of supply that he had been receiving fruit from previously was not supplying him with fruit."

That was one of the very important causes of the failure of Winckler-Smith, coming as it did when the company was financially incapacitated.

Now, I want to review briefly Mr. Finley's testimony as to why, when he was making plans to handle a bumper crop, it didn't occur to him to include Winckler-Smith in his plans.

Of course he starts off with the proposition that they [4598] hadn't done any business with Winckler-Smith since 1947. Winckler-Smith was not a customer of Sunkist, had not done business with Orange Products Company. But he told you what the experiences had been prior to that time.

You will recall he told you about the time in 1947 when Mr. Winckler was badly in need of cartons, and he called on Finley to buy some cartons, and Finley said no. Cartons were hard to get, they were in short supply. Then Winckler said, "Then lend me some. I have a shipment coming in next Wednesday, and I will return them."

So on that understanding Finley shipped the cartons.

They hadn't been returned by the end of the week. He checked with Winckler. Winckler told him the cartons he expected still hadn't come in. He checked in another week and another week, and the same thing happened, and he never did get those cartons back. And in 1948 he still hadn't gotten the cartons back, so he had to file a claim in the Chapter XI proceedings, and he got 11 cents on the dollar, or $11 for some $300 worth of cartons.

That wouldn't, I think, leave a very good taste in anyone's mouth.

Then there were two other transactions in 1947. Both of them involved a custom packing deal for hot concentrate. One of those occurred, I think, in May of 1947, and as the hot concentrate was delivered by Winckler & Smith to Orange [4599] Products it was found to have black specks in it, and the black specks were of such a character that they indicated inadequate preparation of the fruit for processing. They had lumps of dirt or smudge that had not been washed from the fruit before it was processed in the Citromats. The product had to be diluted, reprocessed and reconcentrated to make it satisfactory.

In addition, there were yeasts and active bacteria in this pasteurized product, and that spoiled something.

In order to prevent further occurrence of that, the plant sanitarian was sent by Mr. Finley, in order to try to improve the quality of the product sent out of the Winckler-Smith plant.

They tried another deal in August. Again they had no success.

They started off with a fairly acceptable product, but before long the product was worse than it had been the first time, had active yeasts and other bacteria, with the result that part of that, several barrels of it, had to be thrown down the sewer.

Mr. Winckler knew that this wasn't satisfactory. He testified before you that he did deliver this spotted and unsatisfactory concentrate. So he knew what the fact was.

Mr. Dixon asked Mr. Finley whether they asked Winckler [4600] to pay or make good for any of this product that they dumped. And he said no, by the time we discovered it they were in bankruptcy.

Then Finley testified that he knew of Winckler-Smith's financial condition because that was a matter of common knowledge. [4601]

Mr. Dixon mentioned yesterday that Harts at the time Mr. Finley contacted them in 1951 for the processing of frozen concentrate was having financial difficulties. That, however, has no bearing on the question which is at issue in this case. The issue in this case is whether it was unreasonable and unlawful to refuse to deal with Mr. Winckler on the TreeSweet basis. The deal with the Harts people was quite a different deal. It was simply a processing deal, what Mr. Armstrong called hiring of a plant to make your product for you.

You don't rely on the solvency of that kind of a processor if he simply takes your fruit and processes it and returns it. But that is not what the TreeSweet arrangement was.

The TreeSweet arrangement was a long-term arrangement. TreeSweet had committed itself to buy within a period of a year 275,000 cases of single-strength juice. Now, it does make a difference whether you are dealing with a solvent or an insolvent concern when you are making a contract and relying on a contract that they will be able to pay you within a year from now for 275,000 cases of juice.

So the financial condition of Winckler-Smith in the summer and spring of 1951 was a relevant and an important consideration which Finley rightly relied on.

Then as to the quality of the product. We [4602] had a considerable amount of testimony on that. Finley testified what the Citromat process was, how it resulted in the crushing of the peel and injecting of the peel juices and the taste of peel and rind into the juice, and he said the Citromat never could and never had been able to make a juice of the standard of quality that Sunkist insisted on. He said, "It would not make a satisfactory juice. I am satisfied of that in my mind."

We had another witness who testified to the same effect, Mr. Rodgers. He had worked in the Winckler-Smith plant. He had worked in a number of citrus plants, and he testified there never was a plant except Winckler-Smith that tried to make single-strength juice on Citromat machines. You either couldn't get the yield and quantity, or if you got the yield and quantity of the juice, you got peel.

So the quality of the juice which Winckler & Smith would have produced was a quality which Finley did not find acceptable. It was not the same quality of juice.

Now, the reason for the TreeSweet deal we can cover very briefly, and the policy behind it and the basic reasons for having the participation arrangements I have already covered.

But now why was TreeSweet the one that had the original participation agreement, and why was it the one that was continued year after year? [4603]

After the first year, it was apparent to Finley that TreeSweet and Sunkist organizations could get along satisfactorily. They were both high quality producers. They both marketed on a high level basis. So by the time 1951 came along, there was a long-continued satisfactory relationship.

Another element was quality of product, which I have already mentioned, and the Citromat problem.

Another was that by the very nature of things the TreeSweet operation fitted in to what Sunkist wanted, that is, a packer who packed against inventory and kept the goods on the shelves on a 12-month basis.

Another was that they had a fine trade name. It was the best trade name in the business. In fact, Mr. Winckler said TreeSweet had the best distribution system. In the Los Angeles market, it was higher by far than any other canner. TreeSweet had a market for 20 per cent of the citrus juices. Sunkist had only 6 per cent, Anagold, only 4½, and they mentioned others which made up the balance.

But the ability of the sales organization to distribute high quality merchandise on a national basis was a quality that Finley was looking for when he dealt with TreeSweet, and it is one he got only with TreeSweet and certainly could not have had with Winckler & Smith. The label alone was worth much to Sunkist and Finley. [4604]

All in all, Finley figured that TreeSweet had a capacity to distribute 600,000 cases a year of single-strength juice. That was 200,000 more than Sunkist was able to produce.

I want to say one thing more about these arrangements. They were not arrangements that were made to suppress trade or to act as a restraint on trade or to fix prices. Nobody was committed under these contracts to sell at any particular price. The sole commitment on the part of TreeSweet, for example, was that when they took the goods down for the purpose of sale and made a sale, they had to pay Sunkist. That is the only obligation they had. If they wanted to cut prices, they could. If they wanted to put their prices above Sunkist, they could.

But when you look at it realistically, neither TreeSweet nor Sunkist, nor the combination of TreeSweet and Sunkist and Silzle had a monopoly of juice sales or could have a monopoly. That is by reason of the fact that Florida controlled the juice market, and not any of these California packers.

So I say to you that by entering into this deal with TreeSweet, the growers were not only served by having made available to them a fine sales organization known to produce a fine quality, but they also, Sunkist, had put into the field a competitor, a competitor to compete with themselves, and the whole effect of that deal was neither to fix [4605] prices nor to monopolize but, on the contrary, was to stimulate competition, just as Mr. Winckler's letter to Morgan said, "If you give us a contract as well as Case-Swayne, it will have a tendency toward improving competition rather than fostering monopoly."

That is precisely what Finley was doing.

Now, we get down to the final phase of the evidence here, and that is what happened as between Finley and Winckler in 1951, the summer of 1951.

Finley had correctly interpreted the Florida conditions with regard to inventory and markets. The fact was that Florida had packed an unusually large amount of single-strength juice and had underpacked on frozen concentrate. So that was why Finley made his plans and correctly planned, as far as the California growers were concerned, to minimize the production of single-strength and to pack as much frozen concentrate as the facilities available to him would pack, and acting on that theory, he signed up all the frozen concentrate processors that he could find that he thought were reliable and could produce the quality of product that he wanted, and when he had done that, there was still some juice, some by-product fruit to produce juice in excess of the frozen capacity, but it didn't amount to very much.

You will remember that when Finley got through making the arrangements for handling the bumper crop that he expected, [4606] he had made arrangements for some 18,000 tons of capacity per week, and that left in the industry something like 14,000 tons of capacity available to other owners and other growers and other processors. He had something like 55 or 56 per cent of the capacity arranged for. That, I might mention in passing, is less than the 65 per cent of the products fruit that Sunkist controlled.

There was a bumper crop in 1951, but it was not as large as he had calculated on. There had been over-estimates of the crop by the Government. So that actually the receipts of fruit were falling short during the whole season of what had been planned for.

You will find this chart, a graphic chart, FD, among the exhibits. This black line shows, as Mr. Dixon said yesterday, the receipts of fruit, and it shows, I will agree, that it was higher than in any prior season. [4607]

I called your attention to the fact this morning that the other chart showed that with the advent of frozen concentrate the total demand for fruit had risen extremely high. There was a home for all the fruit, as they say in the trade.

So Mr. Finley had capacity enough to handle 18 or 19 thousand tons a week, and that is up here clear off the chart (indicating). Here is the 15,000 line. And this chart shows very graphically that never did the receipts approach the capacity which Finley had. It got up here around the 14,000 ton level in late July and early August. And then instead of staying up at that level, or going higher to the 16 or 18 thousand, it dropped very, very sharply.

Mr. Finley said that the first time Mr. Winckler talked to him it was just before July 16th when that letter, which Mr. Dixon read, was written, he told Winckler that he didn't sell fruit, if he wanted to buy fruit he should go to Kelly. And Winckler said, "My facilities are available for packing."

Winckler says that he wanted a custom packing deal, a participation arrangement.

He didn't ask for that. He asked for that when he was dealing with his regular supplier, Morgan Ward. But he simply was notifying Finley that the capacity of his plant, 400 tons, was available. And Finley said he did not have any need for further capacity. All of his fruit had a home. [4608]

And here is the period, right in here (indicating), when that request was made, and the chart shows beyond any question that when Finley told Mr. Winckler that he had a home for all his fruit, he was telling the truth.

The only other time that the matter was discussed, and the only time, according to Finley, when Winckler asked for a participating contract, the TreeSweet kind, was in September. It was in September about this time of year, September 15th. The fruit available was low then, and the fruit available at that time was not sufficient to keep the frozen concentrate packers busy.

You will find this Exhibit FE, which is a tabulation of the Valencia orange utilization by Exchange Orange Products Company, by weeks. You can do, if you care to, what I have done: Strike a line across here in the middle of July. I think I may have said June. It was July when they had that first talk, middle of July, when Finley got the letter from Winckler, and here is what that will show. It will show that Cold Gold had only run 24 tons at that time, Hart's hadn't started any production of frozen, ELP hadn't started any production of frozen, Hyland-Stanford was not operating on its deferred-payment plan, Mission Dry had no fruit, and TreeSweet had not yet commenced to run. It shows in total, if you add the columns across there, that the day in July when Winckler said that his plant was available, and Finley [4609] said that he didn't need it, that the total utilization of all facilities was 12,000 tons for the week. And that is only about two-thirds of the available capacity.

Similarly, you can strike a line across here in September, and you will see here Hyland-Stanford is not operating, Mission Dry is not operating, ELP is, Hyland-Stanford is not, Mission Dry is not operating here on the deferred payment plan, and there again the utilization was 12,000, and only 12,000 tons. That was the time when Finley was cutting off the processors because of shortage of fruit.

There was a shortage of fruit for frozen concentrate. There wasn't enough. There was no surplus to go into single strength. And you will remember Finley's testimony that the reason for packing single strength was that they were afraid not to have some on the market under good California brand names during the coming season. The only reason that he packed any single strength that year was for that purpose.

Ladies and gentlemen, this damage suit rests upon a claim asserted by the plaintiffs that the defendants in what they did acted criminally, with criminal motives, against the plaintiff's business. That they conspired to restrain trade, they conspired to monopolize.

There is not one word of evidence in this record to show any monopoly or attempted monopoly, or any restraint of trade, or attempt to restrain trade, nor is there any evidence of a [4610] combination or a conspiracy between defendants and anybody else.

The plaintiff would have you sustain its bare assertion of criminal illegality against these defendants upon surmise and inference.

Has there been pointed out here any possible motive or reason that the Sunkist people would have for punishing or doing anything to Mr. Winckler?

After all, he had a 400-ton capacity single strength plant. He had only 50 tons of frozen capacity. They had been doing business side by side there, not doing business with each other, for many years, there had been nothing happened to him, and there is no motive assigned for why Sunkist would want to do anything harmful to Winckler & Smith.

I wasn't here at the time of the opening argument, but I have read it, and I have reread it. Mr. Dixon in that opening argument said that he would show that Sunkist wanted to eliminate the competition of Winckler-Smith, because Winckler-Smith was a price cutter.

That was not shown.

Mr. Winckler, himself, said he was not a price cutter. He said sometimes his price was higher, sometimes it was lower, and sometimes it was the same as Sunkist's.

So there was no price cutting.

There is no motive described for what the plaintiffs [4611] claim was done to them.

I might say Case-Swayne was a price cutter. Admittedly they were trying to maintain a 15 cent differential below Sunkist.

He is still in business.

It is just inconceivable. I think, ladies and gentlemen, that there was any intentional injury to the plaintiff, or any intent to affect his business in any other way.

Both the direct and the indirect evidence refute plaintiff's claim that there was intention to eliminate him from the industry.

You will recall in 1948, before during the first bankruptcy reorganization, Winckler had entered into a contract or had made a bid to enter into a contract for the production of concentrate for the school lunch program, and he was not able to fulfill that, because he had not had the foresight to assure himself of fruit in order to perform that contract. The Sunkist organization went completely out of its way to make it possible for Lynch, the receiver, to obtain fruit, deliver it under the contract, and they made a profit of $50,000, for which Mr. Winckler testified he thanked them, and the receiver thanked them.

Is that compatible with an intention to eliminate Winckler from competition? Is that compatible with Mr. Dixon's theory that since 1947 they were trying to conspire? [4612]

It certainly is not.

If they had desired to eliminate Winckler-Smith from the competitive field, Sunkist would have done nothing, allowed Winckler-Smith to default on a contract with the government and take his consequences, and that very likely would have been the end of Winckler-Smith.

But they didn't do that. They pulled him out of a jam.

Then Mr. Dixon has mentioned what I think is clear evidence that in 1951 there was no intent to harm Mr. Winckler. In fact, Sunkist went out of their way to keep him from harming himself. That was the occasion in September of '51, when Mr. Winckler's organization, which admittedly had not processed any single-strength juice during the season, took an order from Ralph's Grocery for a carload of single-strength juice. It was not, as Mr. Dixon indicated, a transaction where Hildebrand said, "If you can't deliver me juice I am going to kick Anagold out of the store for good"; it was Mr. Hildebrand saying that, "You have a contract to deliver juice, and if you don't do it, Anagold is going out for good."

So what did Sunkist do then? They let him have a carload of juice, and they let him have a carload of juice at a time when they weren't offering it generally. And they let him have the carload of juice at the price which they had last quoted, and that was considerably less than the price at [4613] which they handled juice generally a few weeks after that.

They gave him a bargain. They went out of their way to keep him in business, and to keep him from defaulting on a contract with his principal customer.

Now, they say they charged him $400 more on a carload of juice than TreeSweet would have had to pay under the contract.

Well, that has no significance, ladies and gentlemen. If TreeSweet had come around and said, "We want to buy a carload of juice, one carload of juice," they would have had to pay the posted price.

It was only under this long-term arrangement, this arrangement under which they were committed to buy 275,000 cases of juice, that they could get a lower price.

And on that sort of an arrangement, and that sort of quantity, you can't make a comparison of price with a spot transaction for one carload, isolated by itself.

Now, I think I have reviewed the evidence which we have introduced to show the policies, the lawful motives and the reasonableness of the policies and activities conducted by Sunkist on behalf of their growers; I think I have reviewed the evidence which shows that it was lack of business experience, lack of sound finances, lack of honest financial practices, that it was the working of economic forces, poor product, lack of good will, and the loss of a regular [4614] source of oranges to a competitor in single strength that were the real causes of the downfall of Winckler-Smith's business. [4615]

Sunkist, ladies and gentlemen, is a symbol of free enterprise by the growers. The growers don't have any quotas, they don't plow their crops under under Government directions. The growers are free to produce all the oranges they can, and when they produce those oranges, it is the function of the Sunkist organization to harvest, sell, and otherwise utilize those citrus products.

They have done it with such success against even the terrible competition from Florida that the citrus industry, I understand, is the second largest agricultural industry in the State of California.

You have heard Paul Armstrong testify. You saw his intimate understanding of the techniques of cultivating, processing and marketing citrus and citrus products. You heard him explain why and how his Sunkist co-op had developed. You heard him trace the development of that co-op from the time when Mr. Storey, his predecessor, first set up this cooperative arrangement, because farmers were getting 10 cents a box. The span of Mr. Storey's contact and Mr. Armstrong's contact with the co-operative movement is about 70 years, and the accomplishments in that 70 years have made the Sunkist co-op system the model which the Government encourages other agricultural interest to follow.

It could not have been based on the sort of immoral, unethical, illegal conduct that has been charged here. [4616]

There is a principle involved in this litigation over and above money, ladies and gentlemen. Armstrong, the whole Sunkist system, defend themselves against what they regard as an utterly false charge, that they conspired with criminal intent and committed criminal acts.

Here is what Armstrong testified.

"Do you know of any instance in which any member of the Sunkist organization or of its components made or refrained from making an arrangement for the use of independent processing facilities for the purpose of or with the hope of eliminating any independent processor from the competitive field?

"A. No. There was no such intent on my part or on the part of anyone within the organization. I know that."

Ladies and gentlemen of the jury, if you believe Paul Armstrong, you will find a verdict of not guilty. Unless you believe that Paul Armstrong and his Sunkist co-operative stooped to perpetrate a foul and unfair wrong on Winckler-Smith, you will, I am sure, return a verdict of not guilty. That I submit is what the evidence calls upon you to do.

Thank you for the many weeks that you have given faithfully. I want to thank you for the attention. [4617]

* * *

CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

Mr. Dixon: May it please the court, ladies and gentlemen of the jury.

As his Honor has told you, as I am sure you are all aware, this is not a criminal case in which Mr. Armstrong or any other individual connected with Sunkist or EOP is on trial and is charged with any commission of any criminal act. This is a civil case brought by the plaintiff which contends, and we submit the evidence supports our contention, that it has been damaged and is entitled to relief under the antitrust laws in accordance with the instructions as his Honor will give them to you. [4618]

Before I make any effort to answer some of the contentions of the counsel for the defendants in his closing argument, I would like to refer to just one of the statements which he made and which seems to me in a sense typifies many of his statements made with reference to the evidence in this case and indicates perhaps the fact that you will, as I know you will, analyze and consider all of the evidence in this case before reaching any decision.

Counsel stated something with reference to the 1947 deal that you have heard something about and said that the previous experience of Sunkist with the plaintiff in this case was such that they didn't want to do any business with them, that there was a batch or several batches of product that was processed under that deal in 1947 that had to go down the sewer, that they didn't find out about it until this company went into bankruptcy, which was some time in 1948, and it didn't go into bankruptcy, I remind you, it went in for reorganization under Section 11 because of inventory losses it sustained in the manner I have previously discussed.

Don't take my word for it, ladies and gentlemen. I merely suggest that you read Exhibit 56 and Exhibit 57, which deals with this transaction and arrangement, and refer particularly to 56, in which you will find that the plaintiff who was performing this contract provide samples as the work went forward for inspection and examination, and we [4619] assume that that was complied with.

There was, as Mr. Winckler testified, some difficulty about specks, but nothing with reference to anyone else.

This contract, ladies and gentlemen of the jury, was for the British Ministry, so we presumed that this orange concentrate was not kept around after it was processed, but it was shipped, and yet counsel made the statement that they didn't find out about this difficulty until after the company had the reorganization proceeding in 1948.

I merely submit that to you, ladies and gentlemen, to indicate the necessity of carefully analyzing the contracts or the evidence in this case before you arrive at any final conclusion with reference to what the evidence shows or what it doesn't show.

Now, first, some discussion was had by counsel about the fact that the growers here that are members of Sunkist occupy some special place in our economy. They aren't any different, ladies and gentlemen, after they have started to do business, than you or I or any other business man who is endeavoring to compete and make a living in our free enterprise system. They are given the right to organize and to market their product. That's all. They are not given a right, ladies and gentlemen, as I am sure his Honor will instruct you, to enter into arrangements such as the plaintiff contends were entered into in this case with their [4620] competitors which had the effect of eliminating competition, not only between themselves, but because of the control over the price at which the product which the plaintiff had to have to remain in business, was kept up at a time when there was an abundant supply, so that the law of supply and demand did not govern that price, merely to protect those who had purchased previously, according to testimony of Mr. Kelly and Mr. Finley, from the company that had the monopoly control.

I will briefly deal with the question of monopoly control because counsel has said that the plaintiff could have got plenty of oranges from many sources in 1951, and he points to the fact that the plaintiff did get some from Morgan Ward. That is true. But let us get back to the facts, ladies and gentlemen.

It is not disputed here that the defendants had at least 65 per cent of all of the products oranges available for processing in 1951. Now, where is the balance of it? It is in the record here. You remember Mr. Ward's testimony, and I think the same perhaps in a sense came from Mr. Finley, but we rely on Mr. Ward, a competitor of Sunkist, to tell you where the rest of it was.

The Independent Fruit Growers represented by Mr. Ward was a co-operative growers organization, the same as Sunkist, and what did he say? On examination he stated that Exchange, [4621] that is Sunkist, and M.O.D. and American Fruit Growers were the only supply available to independent processors, and as previously stated, this is a summary of his testimony, M.O.D., that is another co-operative and American processed their own fruit and didn't sell any, so that the only other source, ladies and gentlemen, from which the plaintiff could get any oranges at any time in any quantity necessary to operate their plant was from Ward, Morgan Ward and his co-operative organization of growers.

Now, Mr. Ward said he sold about 12 to 15 per cent of the total supply of the 100 per cent available. Let's eliminate all M.O.D. and American Fruit Growers had of the balance of 30 per cent that was remaining after Sunkist had theirs taken care of.

and what is left? The only amount that could come into the market for an independent processor such as the plaintiff, ladies and gentlemen, was what could come from the Morgan Ward organization of independent growers.

What did he say? What is his testimony about why he made this contract, not only with Case-Swayne, but with the plaintiff in 1951? He was asked these questions.

"Well, about the price, my price was the same price as California Fruit Growers Exchange, $40 a ton on 120 pounds solids, and since I couldn't sell it at that, I was forced to go into contracts such as I did with Paramount, with Winckler and [4622] with Case-Swayne, which constituted better than 80 per cent of all fruit that season. You couldn't sell a great percentage of it for $40 a ton."

Of course he couldn't, ladies and gentlemen, because what processor could pay that price unless they had a deal like TreeSweet had with Sunkist in which they didn't have to pay anything for it.

But he goes on:

"Because we have no more customers left"—that is his testimony——

"I only had three plants, Case-Swayne, Winckler & Smith and Paramount, that I could even get to run for me. All the rest of the facilities for running were taken up in the state."

Ladies and gentlemen, I want you to get back to that, because one of the charges here is monopoly control over this industry by the defendants, and the inference is the facility to control under the Hyland-

Stanford contract, and the various other contracts, all those that you have heard mentioned before in this argument.

He said further, and this is on cross-examination, not my cross-examination:

"I think that was the first year we ever worked on a participating deal with any processor, because we were faced with a situation, I don't think in the [4623] whole history of the citrus business the situation had been any worse as far as our standpoint is concerned.

"Q. What was unusual about the situation?

"A. Too much fruit. Too much fruit and very few facilities to have to run it."

That is the situation, ladies and gentlemen, and yet the defendants in this case say that the plaintiff was put out of business because of the Florida situation, because the law of economics operated against him.

Well, it certainly did in this case, and how did it operate against the plaintiff? To get back to our original contention, TreeSweet and Sunkist and its subsidiary, Exchange Orange, combined to sell—Sunkist sold, Exchange Orange did the processing end of the business, so that this price was to be $40 a ton on the basis of soluble content. If you wanted to buy, you had to go to Kelly and pay his price. Anyone who wanted any other arrangement, the only place they could go to was EOP and Mr. Finley, and when he got there, what did the plaintiff say? He didn't know anything about this deal with TreeSweet at that time, ladies and gentlemen. That contract was unknown to us and everybody else in the industry until 1952, after this lawsuit was filed. But something was wrong, and so the plaintiff asked the defendant, in his letter he said: [4624]

"We have facilities available for processing"—if you will read the letter——

"under your supervision, if you want it, and inspection."

There wasn't even a reply to that letter, ladies and gentlemen. I know now why there wouldn't be, because of the arrangement here with TreeSweet which was given first call on the entire crop in the sense of anything that went into single-strength Valencia juice, because, don't forget that in 1951, as in previous years, they processed over 20,000 tons, more even than Exchange Orange, but merely because it happened to be the TreeSweet label, according to Mr. Finley, and not the Anagold label, TreeSweet was the favored processor because of this monopolistic control of a company which was able to exercise that control, and they did exercise it in the manner which I have described in my argument before.

Now, counsel went into a discussion of what caused the decline here, I mean the plaintiff going out of business. He said it was a decline of sales in 1949. Of course, there was of Valencia sales because there were lesser oranges available—in 1950, I mean, not 1949, but 1950. In 1949 there were plenty of them. In 1950 there was a lesser amount and the price went up twice, you recall, so the plaintiff didn't buy as much, because it didn't want to take a chance of getting into the same situation it got into which [4625] caused the reorganization in 1948.

In 1951, of course, you know what the situation was.

But compare that with what TreeSweet was getting all this time. Was TreeSweet having to concern itself at all about the Florida situation? Did they have to concern themselves about what Sunkist was selling oranges for to the other independent processors? Did they have to concern themselves about where they were going to get money to finance the corporation, I mean the amount that they processed? Did they have to concern themselves with whether they would have to go out and borrow money for operating capital for the seasonal operation from a bank?

No, ladies and gentlemen. The contract answers that question better than I can, and the facts show clearly that they had none of those problems.

Wouldn't you and I like to have that kind of arrangement?

The plaintiff could, indeed, had that kind of deal been available to it, it would never have had any financial troubles of any kind, would never have to borrow money form any source whatsoever.

But what is the background? In accordance with the principles of our free enterprise system, as I said yesterday, and the initiative of American businessmen, Mr. Winckler who did most of the work in this company, who built it up with his energy and his capital—true, it is small, but [4626] if that is to be charged as a crime in our free enterprise system, then let all small business fall by the wayside. Let's never start any business and let's never put any money into any institution or corporation unless we are sure we have enough to compete with someone who has a business like Sunkist with $125,000,000 a year, and who can afford to pay a million and a quarter for a trade name, and to spend a million dollars a year on advertising.

I don't believe that is the principle under which our free enterprise operates. I know it is not, because the very purpose of the Sherman Act under which you are going to decide this case sets up the rules of the game. Regardless of whether you are small or big, the rules of the game apply to everybody regardless of whether it is a marketing co-op, whether it is United States Steel, Ford Motors, or whether it is Winckler & Smith. So that is the situation.

Let's get back to that point and let's consider the evidence from that situation and not whether or not the co-op, this defendant Sunkist, has done a wonderful job for the growers, because that isn't the question. [4627]

That is just the mere effort to throw a little smoke in your eyes, so that you don't see the real issue in this case, which is whether or not, ladies and gentlemen, there has been an abuse of a legal monopolistic power by this defendant in a manner which has eliminated competition in this industry. And I submit that if economics mean anything at all, and they were called and referred to by this defendant constantly as causing the downfall of this plaintiff corporation, particularly the Florida situation, why, ladies and gentlemen, to me it is just fundamental economics that when you have an abundant supply, such as was available in 1951, and you have—and bear in mind Exchange Lemon had to throw out at least 3,000 tons that they couldn't process because they weren't good enough, they were spoiled—that under those circumstances, if you had the real interest of your buyers, and the buyers in this case were the plaintiff Winckler & Smith, they were a potential buyer, just as much as anybody else, if TreeSweet didn't have this contract they would have been a buyer, and if Silzle didn't have it—they started out as a buyer, but they didn't stay on that basis very long—the economic and fair thing to do, if you wanted to treat all processors alike, and that is what they purported to want to do, but they didn't, they kept their $40 price up there, ladies and gentlemen, and as a result of that, with their monopolistic control of the product that was available, this plaintiff was put in the position [4628] where it couldn't acquire from any source, whether it was Sunkist or Morgan Ward, any oranges on a basis where he could buy them and process them into single-strength juice, and sell it at a price which would be competitive in this market.

Now, everybody else seemed to be able to do it. TreeSweet did it, Silzle did it. And of course you know how Case-Swayne did it with 20 per cent, that is all, of their production. That wasn't their main source of product and operation expense. But the plaintiff who relied upon it, because the plaintiff had the foresight in 1950 to spend some money, and there is about $100,000 here spent in developing new processing facilities in this plant of the plaintiff, they had the foresight to do that, they did get some of the Morgan Ward oranges in 1951 to process into frozen concentrate, ladies and gentlemen, the rest of it went to Case-Swayne, and you heard the testimony of Mr. Ward as to why he let them have the single-strength oranges that were available for processing into that form, and why he gave the rest of it to the plaintiff in this case.

But that isn't the question. The question in this case is whether or not this combination had the power to do what the plaintiff claimed they did, whether in combination with TreeSweet, in particular, they were able to control and dominate the amount and the quantity and the price at [4629] which single-strength orange juice was sold in this area and in other parts of the country.

Well, we contend, and we submit, that the evidence clearly shows that they had that power, that they did combine, and that as a result of keeping this price up at $40, and as a result of not making anything else available to the plaintiff, or any other processor except the favored one, that the plaintiff was eliminated as a competitor in this industry.

The Court: You have had about 20 minutes now. You wanted me to warn you.

Mr. Dixon: Thank you, your Honor.

I want to come down briefly to the question here of the capital invested in this plant by the plaintiff and the stockholders of that company.

One of the reasons they say that the plaintiff failed was because they didn't have adequate capital.

Well, there, again, capital, ladies and gentlemen, let me remind you of this fact, that after they came out of the reorganization in 1949, and they came out clean, no debts, that is true, but they needed some capital, and they got it, with practically only what was loaned to the corporation by the stockholders, trying to rebuild this business, and what happened? They made a profit of $120,000 in that year, because they had a plant, because they had good management, and because they had the customers, and because they had a trade [4630] name, ladies and gentlement, the Anagold label.

The defendants say they didn't have anything. No good will at all.

Well, let me say this, in answer to that, ladies and gentlemen: That if they had no good will, and if the Anagold label didn't mean anything, why was it that in 1951 when the plaintiff couldn't produce or process any single-strength juice for its customers, and was endeavoring to keep what they had, their customers, that right here in this area Ralph's, a good customer, and a large chain, told the plaintiff, well, you better get us some more of your juice or we will take your whole line out entirely.

In other words, there was acceptance of the Anagold brand in 1951 by one of the large chains in this area. And in order to keep that business, even at a loss, the plaintiff went to Sunkist, through the sales manager, and got the 1,400 cases that have been referred to.

Now, about the computation of the damages.

I want to suggest to you, ladies and gentlemen, that this is the question: Whether you are going to believe Mr. Hodge, who was the accountant, and he is a certified public accountant, who kept the books and records of this company all during the periods in question, and whose entries were examined by the defendants and their auditors, who were well paid for what they were doing—you are going to have to decide [4631] whether you will take Mr. Hodge, who prepared this estimate of what the 12,000 additional tons would have meant to the plaintiff had they been available, or whether you are going to take the notions of Mr. Regan and Mr. Lynch. And they admitted on cross-examination, you will recall, that they had never been in a processing plant, they knew nothing about the business, this was their first experience with it, yet on that basis they would have you believe that this plaintiff by having an additional 12,000 tons available to it in 1951—that isn't too much, ladies and gentlemen, that is probably what they would have processed in 1951—that instead of making a profit of $20,000, which would include the recovery of the loss that is referred to, and which was actually sustained, that they would have lost more money.

In their computation, you will recall, good will, they said, why, on our basis it was worth a minus close to one million dollars.

I don't know how they figured it, but I am not surprised. They weren't in the citrus business, they were paid to do a job, and they did it well. And it is up to you, ladies and gentlemen, to decide which of these two, Mr. Hodge, or Mr. Lynch and Mr. Regan, you are going to give credence to when you arrive at a determination of what amount should be allowed the plaintiff in this case.

I am sorry that I don't have time to answer some of the [4632] other arguments, but in closing I just want to say this. The issue in this case is clear, ladies and gentlemen. This is an important case to the plaintiff, of course, it is an important case to the defendants, but as I stated before, it is equally as important, and perhaps much more so, to the free enterprise system, that you determine, when considering this case, whether or not a company as small as this one was, relatively speaking, is going to be treated equally, and have an equal opportunity. That is all the plaintiff asks in this case, that is all it ever asked of the defendants or anyone else. They didn't ask any special privileges. They merely said, we want equal consideration, at least.

Why?

Because you control the price. The price is too high. And even then, try to give us something, at least, so we can remain in business. Our processing facilities are available.

When we find out about this contract, as we did after the lawsuit, we merely ask that equal treatment and consideration be given to this plaintiff in your deliberations, as the defendant gave to its competitor TreeSweet for a period of five years, which was wholly unknown to anyone else in this industry, ladies and gentlemen.

If you examine the evidence, you will see that the only one that had a producer's contract, whatever they call it, [4633] was TreeSweet during all this period of time. Mr. Finley said he wouldn't give it to anybody else in the industry.

That is the answer to the question whether there was a combination here, and a conspiracy as charged in violation of the antitrust laws. Whether it operated to eliminate competition between the companies and between this plaintiff, by making it unable for it to secure any oranges. If there hadn't been that contract, I submit, with the surplus, the price would have gone down, the plaintiff would have made some orange juice and been able to compete and stay in this market.

It was eliminated.

The monopoly over the juice part of the market was perfected. TreeSweet, Silzle, and Exchange Orange accounting for 85 per cent of the total amount produced during the 1951 season.

So in closing we ask you to consider seriously, and I know you will, the fact that the free enterprise system is involved in this case, American initiative, and that we, the plaintiff in this case, are entitled to the protection of those laws as you see that they may apply to the evidence in this case. And after considering all the evidence, we are sure that you will find, not that the defendants have, as individuals been nice people—they are not charged here with any criminal act—but find that there was a violation under the law, the antitrust laws, which proximately caused damage [4634] to this plaintiff in the amount which you will determine, based upon the considerations that I discussed and left with you yesterday.

In closing, let me thank you for the very careful consideration you have given this case, and the attention that you have given all of the evidence. I am sure and confident that in your deliberations you will consider the evidence and weigh it carefully. We are not asking for any privileges or favors. We are merely asking for equal consideration with the defendants in this case of a kind that we think any manufacturer or processor in this business is entitled to. Having determined that we are, if you so find, proceed then to determine the amount of damages that we claim we suffered in this case.

We are content, ladies and gentlemen, under the jury system, which is the backbone of our system of justice, to rely on and to submit to your judgment, and to submit the question to your consideration.

Thank you very much. [4635]

* * *

COURT'S INSTRUCTIONS TO THE JURY

The Court: The record will show the jury present and counsel present.

I have a tendency to talk too fast, not to speak up, so I am going to try to cure both of those in these instructions. In fact, I am going to try to read these instructions so that if one of you doesn't understand one, I want you to put your hand right up at that time and I will go back over and read it.

This has been a long case and when the case finally goes to you, I am going to make some suggestion about your deliberations. Certainly, they shouldn't be hurried. You can work some tonight. We won't expect probably to hear from you until at least some time tomorrow. You can set your own schedule, but both sides are entitled to fair consideration of this record and the exhibits. I want you to go about it in a leisurely manner.

The old English judges used to instruct the jury orally. The judge didn't read anything to them. It is too bad we don't have the ability today to do that. I know that I could talk to you about this case much easier than I can read instructions. However, if there is any case that is difficult, it is an antitrust case, and the instructions tend to be technical and intricate and, of course, the old English judges probably didn't have those kinds of cases. They are products of our modern age. [4639]

So that you are up against the problem of my having to read to you a large number of instructions. They are divided roughly into some general instructions to start with, some instructions on proximate cause, some instructions on conspiracy, some instructions on the plaintiff's claim, a set of instructions on the contentions of the plaintiff, and the contentions of the defendant, and some instruction on the antitrust laws, some miscellaneous instructions as to certain of the evidence, instructions on damages, and some general instructions that wind the matter up.

Members of the jury:

You have heard the evidence and the argument. Now, it is the duty of the court to instruct you as to the law governing the case. It is your duty, as jurors, to follow the law as stated in the instructions of the court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court.

You have been chosen and sworn as jurors in this case to try the issues of fact present by the allegations of [4640] the complaint of the plaintiff, Winckler & Smith Citrus Products Company and Ronald Walker, Trustee and Intervener, and the answer thereto of the defendants Sunkist Growers, Inc., a corporation, sued as the California Fruit Growers Exchange, and the Exchange Orange Products Co., a corporation. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the court, and reach a just verdict, regardless of the consequences.

Let me summarize here and say that you are the sole judges of the facts. You must take the law as given to you. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his case by a preponderance of the evidence; and if the plaintiff fails to prove any essential element of his case by a preponderance of the evidence, then you must find for the defendant.

The term "preponderance of the evidence" means the [4641] greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your minds conviction of the greater probability of truth.

If your minds are in even balance on any issue, you must decide that issue for the defendants and not for the plaintiff. The plaintiff does not have to persuade you beyond a reasonable doubt, but it does have to persuade you that it is the more probable version.

Evidence may be either direct or indirect. Direct evidence is that which in itself, if true, conclusively establishes a fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, even though true, does not itself conclusively establish the fact in question, but which affords an inference or presumption of the existence of such fact. Indirect evidence is of two kinds, namely, presumptions and inferences.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved. A presumption is an inference which the law requires the jury to make from particular facts. Unless declared by law to be conclusive, a presumption may be overcome or outweighed by direct or indirect evidence to the contrary of the fact presumed; but unless [4642] so outweighed, the jury are bound to find in accordance with the presumption.

Now, let's see if I can simplify that for you. Direct evidence, we know what that is. Somebody testifies to a certain fact. The credibility of that witness is for you, whether you believe him or not. A written contract is direct evidence. You may draw inferences from it, but you must interpret the contract as it is written.

An example of inference, a very crude one, would be a person is standing somewhere and they hear a shot fired across the street and they see a man fall down. They walk over and find a bullet hole in the man. They never saw the bullet leave the gun and enter the man's body. But reason and common sense from those facts, the explosion of the gun, the man falling with a hole in him, leads you to draw an inference that one man shot the other. That is a very easy inference to draw, but that is what we mean by inference. You are not bound by the bald statement of any witness. In drawing those inferences, reason and common sense tell you what to draw.

As to presumptions, the instruction is that a presumption is an inference which you must recognize and draw. The most common presumption we have is that which accompanies every witness who gets in the box, that he is presumed to speak the truth. That is an inference which you are required [4643] to draw. But that presumption in that particular case is not conclusive and may be overcome, and so forth.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such inferences as seem justified in the light of your experience.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the [4644] witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollections, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilfull falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, [4645] as you may think it deserves.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An exception to this rule exists in the case of an expert witness. A witness who by education and experience has become an expert in any art, science or profession, may state his opinions as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness [4646] or give it such credibility as you may think it deserves.

While the burden rests upon the party who asserts the affirmative of an issue to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, or such degree of proof as produces absolute certainty; because such proof is rarely possible.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if the evidence favoring such party's side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that the probability of truth on such issue favors that party.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

The testimony of a single witness, which [4647] produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if, after weighing all the evidence in the case, you believe that the balance of probability points to the accuracy and honesty of the one witness.

A corporation can act only through its officers, agents or employees. Any act of an officer, agent or employee of a corporation in the performance of his duties is held in law to be the act of the employer.

It is for you to determine whether the 16-man executive committee, and the committee of managers, if such you find, and the members thereof were acting, if such you find, in the performance of their duties and whether, if they acted, they acted for Sunkist, or EOP, or ELP, or all or some or none of such entities.

The proximate cause of an injury is that cause which, operating in natural and continuous sequence, unbroken by some other and superseding cause, act or force which in itself becomes the sole cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish an injury. [4648]

This does not mean that the law seeks and recognizes only one proximate cause of the injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, two or more acts or forces may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or forces is regarded in law as a proximate cause.

I have here some general instructions on conspiracy.

I charge you that no formal agreement is necessary to constitute a conspiracy or combination. A combination or conspiracy in violation of the law or statute may be inferred from a course of dealing as well as through direct exchange of words. An unlawful conspiracy may, and often is, formed without simultaneous action or agreement on the part of the conspirators. It is not necessary to a conspiracy that all of the conspirators be a part of the conspiracy from the beginning. A person may join a conspiracy after it has been agreed upon.

You are instructed that men or entities who combine for illegal purposes will normally not tell openly everything about their purposes. Thus, it is often impossible to prove the existence of an illegal agreement by what is known as direct evidence. Very [4649] often, particularly in conspiracy cases, there cannot be direct proof of the making or existence of an illegal understanding. The acts of the parties over a period of time, their course of conduct and declarations, either written or oral, and all the surrounding circumstances may then be considered by you for the purpose of determining whether or not an illegal understanding was entered into. [4650]

It is sufficient if there is a concert of action, all of the parties working together understandingly, with a single design and for the accomplishment of a common unlawful purpose. It is not necessary that each conspirator have knowledge of all the details of the conspiracy, or the means to be used; nor is it necessary that the conspirators should meet together, in order to constitute an unlawful combination. If they have a mutual understanding, and act through one or more individuals as a consequence of such mutual understanding, the conspiracy is complete.

The acts of a conspirator after the conspiracy is formed and while it is in existence, done in furtherance of the conspiracy, binds all the other coconspirators. Any admission of a conconspirator binds only the conspirator making the admission.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Co-operation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, [4651] with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

I charge you that the acts of The Exchange Orange Products Company may be the acts of its parent corporation Sunkist Growers, Inc. I further charge you that a parent corporation and its wholly-owned subsidiary can be guilty of combining or conspiring together to violate the antitrust laws. The defendants Sunkist Growers, Inc., and its wholly-owned subsidiary Exchange Orange Products Company, can accordingly combine or conspire together or with others to violate Sections 1 and 2 of the Sherman Act as charged in the first and second causes of action, subject to other instructions concerning the Capper-Volstead Act, and Section 6 of the Clayton Act, and the exemptions contained therein.

I charge you that acts lawful in themselves become unlawful when part of an illegal scheme or plan or when used to accomplish an illegal purpose. If you find as a fact that either or both of the defendants combined or conspired with [4652] Tree-Sweet or Silzle as charged in the first and second causes of action, and that any one or more of the acts alleged by the plaintiffs to have been committed pursuant to the combination or conspiracy were committed by either one of the defendants or coconspirators, that you find were a party to such combination or conspiracy, that the act or acts so committed would then become the act of all members of the combination or conspiracy.

Plaintiff need not show that any of the acts which the defendants are alleged to have performed in combination under the first cause of action were done with the specific intent of eliminating the competition of the plaintiff in the interstate market for citrus fruit juices. It is sufficient if you find that any acts charged by the plaintiffs to have been done pursuant to the combination alleged actually and necessarily resulted in the elimination of the competition of the plaintiffs in such market since everyone is presumed to intend the natural and probable results or consequences of his conduct or business arrangements.

You will note that I have said you need not find a specific intend. However, the very charge of conspiracy requires the intent of the parties acting in conspiracy or combination.

You have been told that the plaintiff corporation is in reorganization under Chapter XI of the Bankruptcy Act, and [4653] that Mr. Walker, whom you have seen in the courtroom, is the trustee appointed by the court to look after plaintiff's affairs during reorganization. You are instructed, however, that as against the defendants in this case, Mr. Walker's rights as trustee are no different from, or any greater than, the rights of the plaintiff corporation itself. For the purposes of this case, Mr. Walker simply stands in the shoes of the plaintiff.

The plaintiff alleges that it has sustained injuries, proximately resulting from six specific items or matters set forth in the second amended complaint, and has sustained general damages in the sum of $800,000.

These allegations are not evidence, of course, but merely the extent of the plaintiff's claims, and must not be considered by you as evidence.

Neither the allegations of the complaint as to the amount of damage plaintiff claims to have suffered, nor the prayer asking for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in the complaint does fix a maximum limit, and you are not permitted to award plaintiff more than that amount.

The court will now attempt to inform you as to what are the plaintiffs' contentions and what are plaintiffs' theories in this case. Please bear in mind that these are, as stated, [4654] the contentions and theories of the plaintiff. The court will subsequently inform you as to the the defendant's theories and contentions.

The plaintiff contends first, as a preliminary matter and as background for the entire setting of the case, that the defendants, Sunkist and Exchange Orange Products, had a monopoly of product Valencia oranges in the California area, and the Exchange Lemon Products, not a defendant but an alleged co-conspirator in this case, had a similar monopoly of products lemons in the same area.

Plaintiff concedes that defendants, Sunkist and Exchange Orange, could legally acquire a monopoly of the Valencia product oranges available for processing into citrus juices processed in the California area, and likewise concedes that Exchange Lemon could also acquire a legal monopoly over the amount of product lemons that might be available for processing into lemon citrus juices, in California.

We come then to what plaintiffs contend are violations of the antitrust laws by the defendants and what the plaintiffs contend are the proximate causes of the plaintiff's alleged damage. Plaintiffs contend that the defendants and alleged co-conspirators combined, conspired and contracted to restrain interstate trade and commerce in California citrus juices and particularly single-strength Valencia juice processed in California and sold in interstate commerce in 1951, in violation [4655] of Section 1 of the Sherman Act.

Plaintiffs further contend that the defendants and co-conspirators combined or conspired to monopolize the market for California citrus juices and particularly single-strength Valencia orange juice processed in California and sold in interstate commerce in 1951, in violation of Section 2 of the Sherman Act.

Plaintiffs further contend that the defendants actually monopolized the processing and marketing of California citrus juices, particularly single-strength Valencia orange juice, processed in California and sold in interstate commerce in 1951 in violation of Section 2 of the Sherman Act.

Plaintiffs further contend pursuant to the combination, conspiracy and monopolization charged by the plaintiff that the defendants and alleged co-conspirators committed certain acts and engaged plaintiffs' claimed damage. These six specifications which plaintiff alleges were the proximate cause of plaintiffs' claimed damage. Theses six specifications will be referred to in these instructions as the "acts complained of" and I will instruct you further as to plaintiffs' allegations and contentions in these six specifications. [4656]

Now, let me say further in this connection that you will note from that last instruction that there is a reference to two alleged monopolies. You must keep these contentions in mind in analyzing this case.

The first alleged monopoly spoken of was the monopoly over product oranges, and I informed you plaintiff concedes that was a legal monopoly. I will instruct you later as to how a legal monopoly might become illegal by things that were done. Plaintiff concedes it is to start with a legal monopoly, because these statutes I am going to read as soon as I get to them on the Capper-Volstead Act and the Clayton Act exempt marketing associations from violations of the antitrust laws. So that as far as this alleged monopoly on product oranges is concerned, which the defendants deny exist and which plaintiff contends exists, in any event, if it did exist, it was a legal monopoly on product oranges, because that is what these marketing associations were in part set up to do.

I told you the defendants deny that there is a monopoly over product oranges. Plaintiffs say there is. Plaintiffs say that that monopoly could have been legal, a legal monopoly, but plaintiffs say defendants misused or illegally used that monopoly which started out as a legal one.

Now, the second monopoly that is talked [4657] about, plaintiffs' allegation is that the defendants monopolized the market in the juices apart from the product oranges. I think you are entitled to keep this in mind in considering both the plaintiffs' contentions and the defendants' contentions.

Now, I will go ahead. I just wound up by telling you about the six acts which we will talk about, the acts complained of or the acts alleged.

In a civil damage suit under the antitrust laws, the plaintiff must go farther than merely to rely on proof of a violation of the antitrust laws. The plaintiff must alleged and prove the particular acts or conduct or happenings which it is claimed caused the damage. Here the plaintiff particularly complains of six matters, which will be referred to in these instructions as the "acts" alleged by plaintiff.

1. The alleged oral contract between Exchange Orange and Exchange Lemon, under which it is alleged that Exchange Lemon processed oranges for Exchange Orange during the 1951 processing season.

2. The alleged oral contract between Exchange Orange and Exchange Lemon, under which it is alleged that Exchange Orange processed lemons for Exchange Lemon during 1951 processing season.

3. The allegation that Sunkist and [4658] Exchange Orange Products agreed "to establish and maintain the price to independent processors like the plaintiff" of product oranges, and the allegation that the price made it impossible for independent processors, such as plaintiff, to acquire product oranges from Exchange Orange or any other sources at a price or under arrangement enabling plaintiff or other independent processors to compete with defendants and TreeSweet and Silzle.

4. The contract between Exchange Orange and TreeSweet in 1951.

5. The contract between Exchange Orange and Silzle in 1951.

6. The allegation that Exchange Orange refused to give plaintiff, upon request, a similar contract.

It is also alleged by plaintiff that the contracts referred to alone were performed and carried out.

The other contracts entered into evidence between Exchange Orange and Hyland Stanford, Harts, Case-Swayne, Mission Dry and General Foods, also referred to as Bireley's, were offered and received for the general purpose of showing the operations of Exchange Orange and such bearing as they may have in general, but are not claimed or alleged by the plaintiffs to be any cause of their claimed damage.

The court will now attempt to advise you concerning [4659] the contentions and theories of the defendants in this case.

It is defendants' position, first of all, that they did not have a monopoly of products oranges or a monopoly of the business of processing the oranges and selling the juice in interstate commerce. Defendants contend that such monopolies would have been lawful, if they had existed, because of the statutes relating to marketing associations, but they deny that there were such monopolies.

With respect to lemons, it is defendants' position that whether Exchange Lemon had a monopoly of products lemons or of the business of processing and selling lemon juice, is immaterial in this case, since, defendants claim, the plaintiff was not in the lemon juice business except in a very minor way.

In any event, defendants deny that they misused any power that they may have had with respect to products oranges or lemons.

Defendants also deny that they violated the antitrust laws in any way. They deny they combined or conspired with Exchange Lemon, TreeSweet and

Silzle, or any of them, to restrain trade and commerce in single-strength Valencia orange juice or and other citrus fruit juice processed in California and sold in interstate [4660] commerce, or that they combined or conspired with Exchange Lemon, Tree-Sweet and Silzle, or any of them, to suppress or eliminate the competition of the plaintiff.

Defendants also deny that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to monopolize the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to exclude the competition of the plaintiff from such market.

The defendants also deny that they and Exchange Lemon and TreeSweet and Silzle, or any of them, actually monopolized the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce.

With respect to the six acts complained of as causing plaintiff's damage, defendants contend that such acts were lawful and that they were not performed pursuant to any combination or conspiracy or for the purpose of restraining or monopolizing trade and commerce or for the purpose of injuring the plaintiff.

It is also defendants' contention that they were under no legal obligation to do business with the plaintiff, and that even if defendants had had some obligation [4661] to do business with independent processors generally, there was ample justification for not doing business with the plaintiff.

Defendants contend, finally, that what happened to the plaintiff in 1951 was caused, not by any act of the defendants, but by the general economic conditions in the citrus fruit industry and by plaintiff's lack of capital and the mismanagement of its business. [4662]

Now, we get more into the antitrust problem. Section 1 of the Sherman Act reads as follows:

"Every contract, combination in the form of trust or otherwise, conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.. * * *"

That is part of the section.

Then the law holds that restraint referred to in the statute must be an unreasonable restraint.

Section 2 of the Sherman Act provides, in part, that no person "shall monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * *"

There is but one combination or conspiracy charged in this case, namely to restrain trade and commerce and to monopolize. Combination and conspiracy mean substantially the same thing.

The first cause of action charges a combination or conspiracy to restrain trade and commerce. The second cause of action charges a combination or conspiracy to monopolize and also charges actual monopolization. But if plaintiff's case is proved plaintiff may have but one recovery.

The same acts or course of conduct may violate both Section 1 and Section 2 of the Sherman Act. The jury may find [4663] that the acts or conduct only constituted a violation of Section 1 and not Section 2, or constituted a violation of Section 2 and not Section 1; or it may find that it constituted a violation of both sections or that no violation of either section occurred.

You have those alternatives before you.

The Federal Antitrust Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

This is a general statement and is subject to the more particular instructions contained herein.

The purpose of the antitrust laws is to preserve the freedom of interstate trade and commerce, to secure unrestricted equality to engage in such trade, and to protect the public against the evils incident to the destruction of competition, by striking down combinations which tend unduly to interfere with the free exercise of the right of those engaged or desiring to engage in such trade, or which may tend directly to suppress competition therein.

The complaint defines citrus fruit juice as natural and frozen concentrate juice produced from by-products fruit.

I charge you that the single-strength orange juice and other citrus fruit juices produced in California and sold in intra and interstate commerce constitute part of the total trade in commerce in these products and may be the subject of [4664] restraint and monopoly under the Sherman Act.

You are instructed that the defendants Sunkist and Exchange Orange and the alleged co-conspirator Exchange Lemon are co-operatives entitled to the exemptions from the antitrust laws as are afforded by Section 6 of the Clayton Act, which is one of the antitrust laws, and by Section 1 of the Capper-Volstead Act, which relates to associations of producers of agricultural products. Section 6 of the Clayton Act provides, in part, "nothing contained in the antitrust laws shall be construed to forbid the existence and operation of * * * agricultural * * * organizations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws."

Section 1 of the Capper-Volstead Act provides that "fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; [4665] provided that such associations are operated for the mutual benefit of the members thereof, as such producers."

I will refer to these two statutes as the statutes relating to marketing associations.

The second cause of action alleges, among other things, that defendants Sunkist and Exchange Orange and alleged co-conspirator Exchange Lemon have a monopoly control over product fruit available for processing in California and Arizona. You are instructed, in this connection, that it is not a violation of the Sherman Act, or any other anti-trust act, for co-operatives, such as defendants Sunkist and Exchange Orange and alleged co-conspirator Exchange Lemon—and they are admittedly co-operatives—to acquire or control a large or even 100 per cent of the citrus product fruit grown in California and Arizona, if they do so solely through co-operative or collective action authorized by the statutes relating to marketing associations.

The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful

The defendant Sunkist is permitted under the law to acquire a legal monopoly over product Valencia oranges that are available for processing into citrus juice products, including single-strength Valencia juice. Sunkist or Exchange Orange could in 1951 have legally processed all of such [4666] oranges in their own plants into citrus juice products and not made any of them available to independent processors, such as the plaintiff, TreeSweet or Silzle, if they had been able to, and cared to do so. Defendant Exchange Orange, as the processing company for the grower members of Sunkist, could also enter into lawful processing contracts with independent processors to have the oranges of the grower members of Sunkist processed into citrus juices to be thereafter sold by Sunkist as the citrus juice products of its grower members to prospective buyers thereof, including independent processors. However, such contracts must be lawful processing contracts and not devices which are resorted to pursuant to the conspiracy charged to illegally restrain trade, or to illegally monopolize that part of the citrus juice market which is represented by such citrus juices as are processed in California and thereafter sold in interstate commerce. It is for you to decide whether the contracts which Exchange Orange entered into in 1951 with TreeSweet and Silzle, when coupled with any refusal of the defendant Sunkist or Exchange Orange, to make oranges available to the plaintiff under comparable arrangements pursuant to the combination or conspiracy charged, were lawful processing contracts, or whether they were contracts which were made pursuant to the combination or conspiracy charged and had the purpose and effect of restraining and/or monopolizing interstate trade and commerce in the citrus juices and particularly single-strength [4667] Valencia orange juice processed in California and sold in interstate commerce, by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts.

Now, so that you will not be confused, let's back up. Here are co-operatives which are permitted to combine together to produce and market their fruit. The antitrust laws say that they may lawfully do that, and the antitrust laws say that they shall not be in violation of any—are you sleepy down there?

Juror Daiker: No.

The Court (Continuing): ——shall not be in violation of any antitrust law in so doing.

The plaintiffs claim that the defendants did actually have a monopoly of product fruit through their co-operatives. The defendants say, "We didn't have it. But, if we did, it was legal." And the court has told you that it was legal. So there is no dispute about that.

As the court has told you, the defendants Sunkist, Orange, and co-conspirator Lemon, could have had 100 per cent monopoly of all the oranges and lemons grown in Southern California, so that isn't our problem. It is what you find happened or did not happen from there on out.

If they had this monopoly control of product oranges, then they could not use it illegally. They could use it legally. [4668] Likewise, the plaintiff contends that the defendants conspired and combined to restrain trade and commerce, and conspired and combined to monopolize the citrus fruit market, which is something different from the product fruit.

The question that is being left to you as jurors is not the question as to whether these co-operatives could have legally had a monopoly of all the oranges or lemons in California; there is no argument about that; the question on that phase of the case is whether or not, if plaintiff proves they did have such monopoly, did they use it legally or illegally. That is a question of fact. You are the sole judges of the facts.

Sections 1 and 2 of the Sherman Act have both the geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of the things forming a part of interstate commerce. If you find that either or both of the defendants combined with TreeSweet or Silzle to eliminate the competition of the plaintiff in the market for citrus fruit juices, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that any of the acts charged to have been performed by such defendants were performed in furtherance of such combination or conspiracy, and that the performance of any of such acts was the proximate cause of any damage to the plaintiff, you should [4669] find that there was a violation of the antitrust laws and proximate causation, and you should proceed to the question of damage.

Any combination effectively excluding outsiders from the business altogether is a monopoly and is unconditionally unlawful.

No claim or contention is made herein by the plaintiff that defendants, or either of them, attempted to monopolize.

This may be a technical distinction. There is a charge that they conspired to monopolize. That is different from an attempt to monopolize, to go back to those instructions that I gave you on conspiracy. Attempt to monopolize is something different. For instance, one individual could attempt to monopolize, without any conspiracy. But there is no charge of attempt to monopolize.

In considering the matter of monopoly power two ingredients are of outstanding significance: the power to fix prices and the power to exclude competition.

The words "to fix prices" refer to price fixing activities which tamper with or affect price structures in interstate trade or commerce. [4670]

Whether monopoly power existed in a defendant or defendants, and whether such power was illegally used or misused, is a question of fact for the jury.

Agreements which create potential power for price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints on interstate commerce within the meaning of the Sherman Act.

Any combination which tampers with price structures is engaged in an illegal activity. Even though the members of the price fixing group are in no position to control the market, to the extent that they raise, lower, or stabilize prices, they would be directly interfering with the free play of market forces. The Sherman Act places all such schemes beyond the pale and protects that vital part of an economy against any degree of interference.

If you find that the effect of the action of Exchange Orange Products Company in entering into the 1951 contracts with TreeSweet and Silzle and in refusing to enter into a comparable arrangement with the plaintiff whereby it could have secured oranges or single-strength Valencia orange juice was to exclude the plaintiff as a competitor of Exchange Orange Products Company, TreeSweet and Silzle from a substantial market for [4671] single-strength Valencia orange juice processed in California and sold in interstate commerce, such exclusion would be unreasonable in and of itself, and illegal.

You are to determine whether TreeSweet and Silzle were selling single-strength orange juice in interstate commerce in competition with single-strength orange juice processed by Exchange Orange and sold by Sunkist in interstate commerce. It is illegal per se, that is, it is illegal in itself and in violation of the Sherman Antitrust Law for any two or more competitors to enter into any agreement which fixes or otherwise tampers with the price or price structure at which the products which such companies sell shall be sold in interstate commerce. If, therefore, you find that the 1951 TreeSweet or Silzle contracts had the necessary or intended effect of fixing or tampering with the price or price structure at which Sunkist, TreeSweet or Silzle sold single-strength orange juice in interstate commerce, you may consider such fact in determining whether such contracts were in fact entered into as part of a conspiracy to restrain interstate commerce, or a conspiracy to monopolize or control the production and sale of California citrus fruit juices in interstate commerce as charged by the plaintiff.

Monopoly power is the power to exclude a competitor [4672] from a market. Such power may, however, be lawfully acquired. If you find that the defendants Sunkist and Exchange Orange Products had such power over product oranges, they could lawfully exercise it in the case before you by deciding to process or retain for their own use all of the product oranges of their grower members. They could even destroy such oranges if they cared to do so. However, if and when Sunkist or Exchange Orange Products offered to make product oranges available to independent processors by sale or under other arrangements and made them available to their competitors such as TreeSweet or Silzle, then Sunkist or Exchange Orange must exercise their monopoly power, if such they possessed, over the product oranges of their grower members in such a manner as not to illegally restrain competition in any citrus fruit juices that may be processed therefrom.

I charge you that even though the defendants Sunkist and Exchange Orange Products might lawfully have a monopoly control over the product oranges available in California for processing into citrus juice products, such control could not be illegally exercised by them or either of them to extend such control over citrus juices processed in California and sold in interstate commerce by illegal means which had the necessary [4673] effect of eliminating a competitor or eliminating competition in such products as such action would restrain interstate trade and commerce. If, therefore, you find that Sunkist and Exchange Orange Products, or either of them, by the combination or conspiracy charged, were endeavoring to extend their control into such market by making contracts with independent processors, TreeSweet and Silzle, and that as part of such conspiracy and combination they refused to make oranges available to the plaintiff under comparable arrangements, and that such refusal eliminated the plaintiff as a competitor of Sunkist, TreeSweet and Silzle in such market, then you may find that the defendants violated the antitrust laws.

If you find as a fact that the defendants Sunkist and EOP exercised such control over the price and amount of California product Valencia oranges in 1951 that they had the power to determine the price and quantity of Valencia oranges that were available to independent processors in California for making single-strength Valencia juice or other citrus juice products, such power would constitute monopoly power.

If you find that either Sunkist——

Let me stop there. That monopoly power would be legal, monopoly power over the product oranges.

If you find that either Sunkist or EOP or [4674] both together had such power, it would not, however, have been illegally acquired in violation of the antitrust laws as they could legally acquire such power as corporations organized under Federal and state laws which permit producers of agricultural products such as oranges to combine together in organizations comparable to that of the defendants Sunkist and Exchange Orange Products for the purpose of marketing and processing the products of their members in interstate commerce. Such laws do not, however, permit Sunkist or Exchange Orange Products to combine together with an independent processor such as TreeSweet and Silzle for the purpose of restraining or monopolizing trade and commerce in California citrus juices, such as single-strength Valencia juice or frozen orange concentrates that are processed in California from such oranges and thereafter sold in interstate commerce.

You are instructed that you may not find that defendants Sunkist or Exchange Orange had monopoly control or power over the distribution of products oranges unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange, or either of them, had such monopoly control or power as described under the instructions that I have given you.

It is for you to decide whether the [4675] defendants, Sunkist and Exchange Orange or either of them ~~had~~ such power or control over the amount of product oranges that were available in 1951, to independent processors for processing into citrus juice products, that they or either of them were able in fact, to determine the price or terms and conditions at which product oranges would be made available to independent processors by the defendants and any other actual or potential supplier of product Valencia oranges, for processing into citrus juice products, particularly single-strength Valencia juice processed from product Valencia oranges in California in 1951.

I charge you that the defendant Exchange Orange may legally enter into a processing contract whereby Valencia oranges furnished by Sunkist or Exchange Orange may be processed into single-strength orange juice for Sunkist by an independent processor party to such contract. However, such processing contracts cannot be entered into by Exchange Orange as part of a combination or conspiracy which has the purpose or effect of fixing the prices at which single-strength Valencia juice processed by TreeSweet and Silzle for Exchange Orange may be sold or offered for sale by TreeSweet or Silzle in interstate commerce as such contracts would then be illegal contracts.

In other words, you have got a question of fact there. Were these legal processing contracts or were they [4676] illegal? I am trying to present both sides of the problem to you.

The right of a private business concern to select its customers is neither absolute nor exempt from regulation. Its exercise as a purposeful means of maintaining a monopoly is prohibited by the Sherman Act.

I charge you that the plaintiff need not show by direct evidence that the alleged refusal of the defendant Exchange Orange to enter into an agreement with plaintiff comparable to that entered into by the Exchange Orange Products Company in 1951 with TreeSweet and Silzle, or to make Valencia oranges available to the plaintiff under terms and conditions comparable to those at which Exchange Orange made Valencia oranges available to TreeSweet and Silzle during the 1951 packing season, was pursuant to the combination or conspiracy charged, and a purpose on the part of Exchange Orange or Sunkist, its parent corporation, to eliminate the competition of the plaintiff in the interstate market for single-strength orange juice or to create or maintain a monopoly over the processing or selling of Valencia single-strength orange juice processed in California and sold in the interstate market as charged in the first and second causes of action.

That's a long one. The gist of it is that plaintiff need not show by direct evidence the things the plaintiff [4677] charges.

Such a combination, conspiracy or purpose frequently cannot be shown by direct evidence, but may be shown by circumstantial evidence and from all just and reasonable inferences which may be drawn therefrom.

However, the plaintiff has the burden to prove such matters by a preponderance of the [4678] evidence.

Exchange Orange would have had a legal right to refuse a contract to plaintiff comparable to the TreeSweet and Silzle contracts unless such refusal was a part of a violation of the antitrust laws.

The first cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators, Exchange Lemon, TreeSweet and Silzle, combined and conspired with each other at a date unknown to the plaintiff, and entered into contracts and did certain other things in 1951 with the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juices, particularly single-strength Valencia orange juice produced in California and marketed throughout the United States, with the resultant injury and damage to the plaintiff, i.e., that Sunkist and Exchange Orange and the alleged co-conspirators combined and conspired to eliminate the competition of the plaintiff in the interstate market for canned citrus fruit juices and particularly single-strength Valencia orange juice in the year 1951, and performed certain acts pursuant to such combination and conspiracy which proximately caused damage to plaintiff.

Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either TreeSweet, or Silzle, or ELP, and in 1951 did one or more of the specific acts charged—those are the six acts, one or more of the six [4679] acts—charged in the first cause of action, and that such act or acts had the purpose or necessary effect of damaging or eliminating the competition of plaintiffs in the interstate market for California canned citrus fruit juices or single-strength Valencia orange juice, your verdict must be for the defendants on the first cause of action.

The second cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators Exchange Lemon, TreeSweet and Silzle combined and conspired together, and performed the same six acts alleged in the first cause of action, which are incorporated by reference into the second cause, in order to monopolize the production and interstate sale of California citrus fruit juices, especially single-strength Valencia orange juice, and that pursuant to such conspiracy they actually monopolized such production and interstate sale of California citrus fruit juices, and particularly single-strength Valencia orange juice, with resultant injury and damage to plaintiff. Unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange, or either of them, and one or more of the alleged co-conspirators, combined and conspired, and pursuant to such combination or conspiracy did one or more of the acts charged, and complained of, in order to acquire effective control of the interstate market for California citrus fruit juices, with the purpose or necessary effect of [4680] eliminating competition, including that of the plaintiff, from such market, your verdict must be for the defendants on the second cause of action.

Those are summary instructions which sort of sum up what is charged and what the plaintiff must prove.

We are getting towards the end.

The plaintiff claims that the six acts complained of were performed, pursuant to a combination or conspiracy to restrain or monopolize interstate commerce, and that it was injured by reason of the performance of one or more of these acts. You are, therefore, to determine from the preponderance of the evidence whether these acts, or any one or more of them, were performed pursuant to the combination or conspiracy charged in this case, and with the purpose or the necessary effect of eliminating the competition of the plaintiff in the market for citrus fruit juices processed in California and sold in interstate commerce.

Here are some miscellaneous instructions. We are going on to another subject.

The court believes it is its duty to inform you of the legal effect of Exhibit 84-A, which concerns the reorganization proceedings in 1948 and 1949. Exhibit 84-A was the large photostatic exhibit substituted for an abbreviated one which we originally called 84. Exhibit 84-A consists of a petition by Winckler & Smith to present a third [4681] modified arrangement, and the third modified arrangement itself, and an order approving it.

The purpose of Chapter XI proceedings is to permit a debtor to propose a plan of arrangement. If the plan of arrangement is approved, the debtor's business and property then passes from the possession of the Receiver—and from the control of the Bankruptcy Court—back to the corporation itself.

Winckler & Smith was the debtor from the time of the beginning of the proceedings under Chapter XI, and Lynch was the Receiver for Winckler & Smith from a date some time thereafter and until the approval of the third modified arrangement. During this time the Bankruptcy Court controlled the title and possession of Winckler & Smith's business and property through its powers and from the date of the appointment of Lynch as Receiver, through its receiver.

So on February 14, 1949, Exhibit 84-A, this third plan of arrangement and order of the Bankruptcy Court approving it, were filed.

Incidentally, when you look at that petition you will find that it is the complete plan. It classifies the creditors which get 100 per cent, and those which just get a few cents on the dollar, and so forth. It was the plan that was submitted. And then the order of the Bankruptcy Court, Referee Head approving it. [4682]

Both the plan and the order referred to an escrow wherein the real property and the plant of Winckler & Smith were being sold to Rubin and $40,000 was to go from the escrow to the Receiver Lynch, to be paid to creditors; and referred to a second escrow where other moneys were on deposit to be paid to Lynch, the Receiver, to reimburse him for certain expenses from December 14, 1948, to the date of the close of escrow wherein the money was deposited.

Why that only concerned the period from December 14, '48, to the close of the escrow I don't know. I don't think it is important. At least, that is what the documents talk about.

To get everything accomplished, that is, to get the $40,000 from one escrow to the Receiver, and to get the money from the other escrow to the Receiver, to get a clear title, subject to the RFC loan, to Rubin, to get the hold of the Bankruptcy Court under Chapter XI released from the real property so that the $40,000 escrow could be closed —to get all these things done, the court made its approval of the third plan conditional. That is, provided that the order would be set aside, unless the things above were all done within a fixed time. These things were actually done, so the order of approval was never set aside.

The Court, therefore, instructs you, as a matter of law, that the sale of the real property and the plant to Rubin, [4683] and the receipt of $40,000 from the escrow by the Receiver, was a part of the Chapter XI proceedings; and, further, that regardless of when the deed to Rubin was delivered, its effect related back to February 14, 1949, the date of the approval of the plan and the date of the release of Winckler & Smith from the Chapter XI proceedings.

It follows, also, as a matter of law, and the court instructs you that for accounting purposes the sale of the real property and plant by Winckler & Smith should be considered as occurring during the Chapter XI proceedings and not during that portion of Winckler & Smith's fiscal year which occurred after the reorganization proceedings under Chapter XI.

The loss of $169,000 or $170,000 resulting from the sale of the real estate and plant referred to in the evidence should not have been taken into account during Winckler & Smith's fiscal year ending January 31, 1950, and Mr. Lynch, the expert witness for the defendants, should not have so considered it, and the court was in error in permitting him to do so in his computations.

Now, the reason for that is this: While a company is in reorganziation under bankruptcy, it does not have either title or possession of its property. A separate legal entity has it. Maybe the debtor in possession may start out under an order of the court as debtor in possession, and then later [4684] a receiver will be appointed. Sometimes a receiver is appointed immediately that the debtor in possession files. But during that time the title is controlled by the Bankruptcy Court, possession is controlled. Therefore, what happened during the period from the time it goes into bankruptcy or reorganization, until it comes out, is not a part of the operation of the company.

Now, for tax purposes you may have other problems. I don't know.

But this has been an issue in the case, and I felt it was my duty to instruct you.

If I am wrong in this, the defendants aren't hurt, because then they have error. But I have looked it over, and I have decided that I shouldn't let you, as laymen, flounder through petitions and orders and try to decide what they meant. I have told you, therefore, what as a matter of law they mean.

There have been offered in evidence certain letters from brokers, allegedly making complaints to plaintiff about products. These letters were admitted into evidence solely for the purpose of impeachment of the testimony of Winckler concerning complaints, and are not to be considered by you as any evidence of the truth or falsity of the alleged facts contained therein. To be considered in this latter manner they would violate the hearsay rule, and if the truth of falsity [4685] of such alleged complaints were to be considered by you, the brokers or the writers of the letters themselves would have to be called as witnesses before this court.

Letters written by the plaintiff, Winckler & Smith, or its agents, and so-called anagrams, were admitted into evidence for the purpose of showing admissions against interest, if any, on the part of the plaintiff.

You are instructed that the plaintiffs have offered financial statements and opinion testimony on the question of damage, and the defendants have offered opinion testimony concerning the financial statements of the plaintiff, also on the question of damage and causation. This testimony was admitted and may be considered by you on the question of damage, that is, what damage, if any, did the defendants cause to Winckler & Smith in 1951, and may also be considered on the question of causation, that is, whether the acts of the defendants in 1951 caused or contributed to the failure of Winckler & Smith or to its damage or injury, if any. [4686]

The refusal to EOP, if such you find, to give a contract to plaintiff similar to the Silzle and Tree-Sweet contracts must be judged on the basis of the evidence and instructions in this case and upon such knowledge and information as EOP and its officers, agents and employees had at the time of such refusal, if any, and not upon the basis of facts or information thereafter discovered or ascertained by EOP.

The law provides in part, the antitrust laws:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover * * * the damages by him sustained * * *"

If the plaintiff is entitled to recover, your interest will be solely with respect to actual damages, and that only in the event that you shall first find under the law and facts that the plaintiffs are entitled to a recovery.

A tort feasor, wrongdoer, is liable for all consequences naturally resulting, all injuries [4687] actually flowing from his wrongful act, whether in fact anticipated or contemplated by him when his tortious act was committed. If plaintiff is entitled to damage then recoverable damages include compensation for all injury to plaintiff's business arising from wrongful acts committed by defendant or defendants provided such injury was the natural and proximate result of the wrongful acts. This includes injury to business standing or good will, loss of business, additional expenses incurred because of the tort and all other elements of injury to the business. When determined by the trier of the facts, their propriety cannot be governed or measured by any precise yardstick. They must bear some reasonable relationship to the injury inflicted and the amount must rest largely in the discretion of the trier of facts.

But even where one who has violated the antitrust laws has by his wrong prevented a precise computation of damages, the jury may not render a verdict based on speculation or guesswork. It may make a just and reasonable estimate of the damages based on relevant data and render its verdict accordingly.

If you as jurors, based on all the evidence and instructions in this case should determine that plaintiff's business or property was injured and that the defendants or either of them is liable therefor the question will [4688] arise as to how plaintiff's damages should be computed. Since proof of the damages suffered may be diffcult, a wrongdoer may not object to the plaintiff's reasonable estimate of the cause of the injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoers' misconduct has rendered unavailable. The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

Upon the question of claimed loss of earnings, you may consider the evidence in respect to plaintiff's earnings since the time of its incorporation, and whether plaintiff operated at a profit or loss during the period from its incorporation.

I charge you that the law permits you to take into account both the damages, if any, which are inflicted on existing property and damages, if any, which were sustained by being unable to make profits which reasonably could be anticipated and would have been realized had it not been for the wrongdoing of the defendants, if such you find.

If you find that neither of the defendants has violated the antitrust laws, it will be unnecessary for you to consider whether any acts of the defendants injured [4689] the plaintiff. If you find that the defendants, or either of them, have violated the antitrust laws, you will then have to consider under all the evidence in the case whether or not any of the acts complained of as part of the combination or conspiracy charged were the proximate cause of injury to the plaintiff. The fact that the plaintiff may have lost a substantial sum of money or suffered a business failure in 1951 does not by itself prove that such loss or failure was caused by any illegal act of the defendants. Before you can return a verdict for the plaintiff, you must find not only that either or both of the defendants have violated the antitrust laws but that one or more of the specific acts complained of under all the evidence in the case was the proximate cause of injury to the plaintiff. If you find that plaintiff's loss or business failure in 1951 resulted not from any violation of the antitrust laws and not from one or more of the acts complained of but from some other proximate cause or causes, then the acts of the defendants relied upon by the plaintiff in this case would not have been the proximate cause of an injury to the plaintiff, and your verdict should be for the defendants.

I call your attention in this connection to the general instructions on proximate cause, that there may [4690] be two or more proximate causes or forces contributing to injury or damage, and if the defendant's act is one of those proximate causes, defendant is liable. If some other force, which I called another or superseding force comes in and becomes the sole cause of injury, the defendants, even if the other things are proved, are relieved from liability because that new sole cause then becomes the cause of the damages.

Damages must be reasonable. In the event that your verdict is for the plaintiff you may award them only such damages as will fairly and reasonably compensate them for the injuries or damages which you believe from a preponderance of the evidence they have sustained as a proximate result of the acts complained of.

You are not permitted to award any party speculative damages. This means you are not to include in any verdict compensation for prospective loss which, although possible, is remote or conjectural.

If you find from the evidence that the plaintiff is entitled to a verdict, you must not, in ascertaining the amount, resort to the pooling plan or scheme which has sometimes been adopted by juries for fixing such amount. That plan or scheme is where each juror writes the amount to which he considers the plaintiff is entitled, and the amounts so written are added together [4691] and the total is divided by twelve. This is a scheme of chance and no element of chance may enter into your verdict or into the determination of any question necessary thereto.

I have told you about that nefarious scheme. I have told you that it is not to be used if you reach that part of the case.

The law of the United States permits the judge to comment to the jury on the evidence in the case. I do not think I have commented on the evidence. If you find any such comment, you may disregard it. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts.

The fact that I have instructed you as to the measure of damages in this case should not be considered as intimating any view of mine as to which party [4692] is entitled to your verdict. Instructions as to the measure of damages are intended for your guidance in the event you find from the evidence in favor of the plaintiff.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

The attitude of jurors at the outset of their deliberations is important. It is seldom helful for a juror, upon entering the jury room, to announce an emphatic opinion on the case or a determination to stand for a certain verdict. When a juror does that at the [4693] outset, individual pride may become involved, and the juror may later hesitate to recede from an announced position even when shown it is incorrect. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth. You will make a worthwhile contribution to the administration of justice if you arrive at an impartial verdict in this case.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the bailiff. But bear in mind you are not to reveal to the court or to any person how the jury stands, numerically or otherwise, until you have reached an unanimous verdict.

You can't send down a note saying we stand 10 to 2, what do we do? Or you can't send down one saying, "We favor the defendant" or "the plaintiff."

You can send down notes, if you have to, where you ask particular questions, or on reasonable problems, but don't tell us how you stand.

Upon retiring to the jury ~~room, you will~~ select one of your number to act as foreman. The foreman will preside over your deliberations and will be your spokesman in court.

Forms of verdict have been prepared for your convenience. [4694]

If you agree upon a verdict, we have two forms of verdict, one for the plaintiff and one for the defendant. The plaintiff's verdict reads:

"We, the jury in the above-entitled cause, find in favor of the plaintiffs, Winckler & Smith Citrus Products Company, a corporation, and Ronald M.

Walker, as Trustee, and against the defendants, Sunkist Growers, Inc., a corporation, and the Exchange Orange Products Company, a corporation, and assess the damages in the sum of ...."

Place for signature and for date.

Now, if you find that one defendant is liable and not the other, you may cross up this verdict.

The second verdict reads:

"We, the jury in the above-entitled cause, find in favor of the defendants, Sunkist Growers, Inc., a corporation, and the Exchange Orange Products Co., a corporation, and against the plaintiffs, Winckler & Smith Citrus Products Co., a corporation, and Ronald M. Walker, as Trustee,"

with a blank for the date and place for the foreman's signature.

You are to take these forms to the jury room, and when you have reached unanimous agreement as to your verdict, you will have your foreman fill in, date and sign [4695] the form which sets forth the verdict upon which you agree; and then you will return with your verdict to the courtroom. [4696]

* * *

(The following proceedings were had at the bench outside the hearing of the jury:)

The Court: First, let me say that there will be incorporated herein, by reference, all objections and arguments that were made at the time that we settled the instructions.

Now, does plaintiff have any further objections?

Mr. Dixon: Your Honor, I think these were words of omission. I think you stated, if I got your charge correctly, "defendants combined or conspired to monopolize the citrus fruit market." It is the citrus fruit juice market.

The Court: All right.

Mr. Dixon: Then, second, you said that defendants monopolized the market for citrus juices. In other words, it is the citrus juices processed in California. It appears in other parts, but standing alone——

The Court: It has to be read together.

Mr. Dixon: In one place you said that a legal monopoly may become illegal.

I don't know whether you had "a legal monopoly may be used to accomplish an illegal purpose."

The Court: Yes.

May I see those?

Mr. Dixon: Yes; those are the only three (handing paper to the court).

The Court: All right. Now, does the defendant have [4697] additional objections?

Mr. Fisher: I think on two occasions you suggested during the instructions that the defendants monopolized the market for citrus fruit juices.

The Court: For citrus fruit juices, or citrus fruit products?

Mr. Fisher: Citrus fruit juices. The charge is not that the defendants did this, but that there was a conspiracy, and a successful conspiracy to monopolize.

Mr. Dixon: Citrus fruit juices processed in California.

Mr. Fisher: And that conspiracy was with TreeSweet and Silzle and ELP.

And then on occasion I think you stated that the defendants were charged with conspiracy to restrain trade.

And, again, the conspiracy alleged is a conspiracy of the five, that is to say, with TreeSweet, Silzle, ELP——

The Court: Do you want me to straighten some of these things out, or are you objecting to the instructions that I gave, or what?

Mr. Fisher: Objecting to the instructions which were given, your Honor.

The Court: Are these things that were read out of the instructions, or were they matters that I interpolated to the jury.

Mr. Fisher: I think they were in matters that were interpolated [4698] to the jury.

That, again, occurred when you were stating that there was no charge of attempt to monopolize. You said that the defendants conspired to monopolize. The same matter occurred. There was not the reference to conspiracy or alleged conspiracy with TreeSweet, Silzle, or ELP.

The Court: What is your first point, again? That I referred to monopolization—what is your point on that?

Mr. Fisher: It related only to the two defendants, rather than mentioning the three others.

I think your Honor referred to citrus juices, as referring to natural and frozen. Of course, it would also include hot concentrate.

Mr. Williams: Three types; hot concentrate, the frozen, and single-strength, are all included in the complaint.

The Court: I read that right off of the instruction. I took the definition out of the complaint, but I will correct it if there is a mistake.

Citrus juices refers to what?

Mr. Williams: Single-strength, frozen concentrate, and hot pasteurized concentrate.

The Court: I think it said "natural and concentrated juices."

Mr. Williams: Natural and frozen, as I recall it.

The Court: There are three kinds, single-strength, hot [4699] concentrate and frozen concentrate. All right.

Anything else?

Mr. Dixon: I would say the products involved in the conspiracy charged are those products, particularly single-strength Valencia orange juice. I think if they are going to ask for a special definition now of the products, which is already covered in the general charge, that it ought to be——

The Court: Anything further?

Mr. Fisher: I would also like to object to the interpolations, particularly with reference to the charge with reference to Exhibit 84-A. It seemed to me that they were not necessary and were contained in the charge as originally prepared, concerning which we objected.

The Court: The objection is overruled. All your objections incorporated by reference are overruled on both sides.

(Whereupon the proceedings were resumed in open court within the hearing of the jury, as follows:)

The Court: Ladies and gentlemen, in the charge that I have given you, when I was speaking extemporaneously and not from my notes, I may have been a little sloppy in some of the things that I said in trying to describe or explain these things to you.

You could tell from my reading, and talking, when I was reading and when I was talking. I would suggest that you be [4700] controlled by the things that I read to you, and that the things I spoke to you extemporaneously be merely to assist in understanding it.

For instance, I may have stated some things that weren't quite accurate. I talked about a legal monopoly, and may have said that a legal monopoly may become illegal. But that is not correct. A legal monopoly would still be legal, but it might become usable for an illegal purpose. A legal monopoly would still be good for those purposes that it should be used for.

I don't think you are confused about that. [4701]

I also made some reference to defendants combined and conspired to, an allegation that the defendants combined and conspired to monopolize citrus fruit market. If I said market, I meant citrus fruit juices processed in California and sold in interstate commerce. That is the phrase I tried to use throughout here.

I also apparently erroneously talked about the charge was that the defendants had actually monopolized. The charge is that the defendants and the co-conspirators had monopolized, they succeeded in their conspiracy and had accomplished monopolization. In other words, the co-conspirators are named in there. It does not involve solely the two defendants.

I also am told that I spoke about how the defendants had conspired on one occasion. The charge is not that the defendants conspired. The charge is that the defendants and co-conspirators conspired.

However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number less than the total conspired. It is your task to decide the facts.

Also, I talked about some definition of citrus fruit juices, and if I was erroneous in that respect, let me advise you that there are just three citrus fruit juice products that are involved, single-strength juice, frozen [4702] concentrate and hot concentrate. I think you are all familiar with that from the evidence.

Now, do you want to come back up again, or are you content? Is that satisfactory?

Mr. Fisher: I think we are content.

The Court: Satisfactory, Mr. Dixon?

Mr. Dixon: Satisfactory.

The Court: I think the safest thing for you to do is to realize that those instructions that I read to you are the ones we worked on and they are written with more precision.

Before the bailiffs are sworn, let me say one thing more. It has been a long case. The case is important to the plaintiff and the case is important to the defendants. There is a lot of evidence here. You are supposed to elect a foreman, and you will find if you elect a foreman and conform with the rules of parliamentary order, if you can, you will get along a lot better, if you have some order in your deliberations and you don't all talk at one time. Go around and give everybody a chance to be heard. That is just a matter of your own internal organization. You can do what you want.

I don't think you should approach the matter hurriedly. We will leave it to you when you want to adjust your hours of eating and working. You can proceed to work as [4703] long as you want this afternoon, or you can go to dinner and then come back and work some after dinner. You decide when you want to go to bed. Decide what time you want to come back tomorrow and work. You work those things out with the bailiff. Write your own ticket. But you have got a job on your hands.

I have been very much impressed by this jury and I think you will go about it diligently and intelligently.

All right, Mr. Clerk, swear the bailiffs. [4704]

* * *

The Court: The jury may now retire in the custody of the bailiffs to consider your verdict. But not the alternates.

(Whereupon, the jury retired from the court room and the following proceedings were had in the absence of the jury:) [4706]

* * *

(Whereupon, the jury returned to the courtroom and the following proceedings were had in the presence of the jury:)

The Court: The record will show the jury present in their proper places. Counsel present. [4713]

* * *

Juror Berger: May I ask the judge to explain to us again the six stipulations on the antitrust laws, and the six you told us about, monopolies, yesterday? There seems to be a bit of confusion on that.

The Court: Well, I think I know what you mean, although you haven't worded your question artfully.

Juror Berger: Under Sections 1 and 2 of the antitrust law. You gave us six counts by which we could determine, the contentions of antitrust.

The Court: I think I know what you mean. I think I can do this orally if nobody objects, and then I will give you a chance to make your objections in the absence of the jury.

There is a charge of a violation of the antitrust laws in this case, but the burden is on the plaintiff to go further than merely to show a violation of the antitrust laws. Plaintiff must show that its damage came from one or more of six particular acts or things which were complained of.

Those were the six things which I spoke of as being the acts complained of, things complained of.

Maybe I had better get my file.

(Addressing the bailiff.)

My instruction file is laying right on my desk. Bring it in. [4717]

The burden is, therefore, on the plaintiff to prove that damage, injury to the plaintiff, resulted from the violation of the antitrust laws, and from one or more of these six specific acts that were referred to. We call them "acts." Some of them were contracts, but we spoke of them as the acts alleged or the acts complained of. [4718]

These six items were as follows:

One was the alleged oral contract between Orange and Lemon under which it was alleged that Lemon processed oranges for Orange during 1951.

The second was the alleged oral contract between Orange and Lemon whereby it was alleged that Orange processed Lemons for Lemon during 1951.

The third was the allegation that Sunkist and Orange agreed to establish and maintain the price to independent producers like the plaintiff of product oranges, and the allegation that the price made it impossible for independent processors such as plaintiff to acquire product oranges from Exchange Orange or any other source at a price or under an arrangement enabling plaintiff or other independent processors to compete with the defendants Tree-Sweet and Silzle—with the defendants and Tree-Sweet and Silzle. 5

Four was the contract between Exchange Orange and TreeSweet in 1951.

Five was the contract between Exchange Orange and Silzle in 1951.

Six summarized was the allegation that Orange refused to give plaintiff on request a similar contract.

Are those the six things you are talking about?

Juror Berger: Yes, sir.

The Court: Will counsel approach the [4719] bench?

(The following proceedings were had at the bench outside the hearing of the jury:)

The Court: Any objection by the plaintiff to what I have said to the jury?

Mr. Dixon: No; there isn't, your Honor. It is a restatement.

The Court: Is there an objection by the defendant?

Mr. Strachan: Yes. I think it has a prejudicial effect in that it highlights the allegations of the complaint and it repeats out of context and out of reference to the other instructions a particular instruction. I don't know that there is any way of curing it now, but I do think it is prejudicial, your Honor.

The Court: They asked for a specific thing.

Mr. Strachan: That's right.

The Court: And I tried to limit myself to what they asked for. I told them also, in addition to what they asked, the plaintiff must prove violation of the antitrust laws and must prove one or more of these acts, so your objection is overruled.

Mr. Strachan: There is this other aspect, the instruction is out of context with the instruction on conspiracy.

The Court: I will again advise the jury when you leave the bench that all instructions must be considered together and they must not look to one instruction alone as the law. [4720] I will remind them of that instruction.

(The following proceedings were had in open court in the hearing and presence of the jury:)

The Court: I have only one other thing I want to say to you, and that is, the instruction given you before, that you must treat all instructions as a whole and not single out any one of them, and any one you are considering you must consider in connection with all the other instructions.

All right. You will now be excused to continue with your deliberations.

The court will remain in session.

(The jury left the courtroom and the following proceedings were then had outside the hearing and presence of the jury:) [4721]

* * *

(The jury returned to the courtroom at 9:35 o'clock, p.m.)

The Court: The record will show the jury is present and in their proper places.

Mr. Foreman, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Will you hand it to the bailiff.

The clerk will read the verdict.

The Clerk: "United States District Court, Southern District of California, Central Division.

"Winckler & Smith Citrus Products Co., et al., Plaintiffs, vs. Sunkist Growers, Inc., et al., Defendants.

"No. 13788-C Civil.

"Verdict of the Jury.

"We, the jury in the above-entitled cause, find in favor of the Plaintiffs, Winckler & Smith Citrus Products Co., a corporation, and Ronald Walker, as Trustee, and against the Defendants, Sunkist Growers, Inc., a corporation, and The Exchange [4724] Orange Products Co., a corporation, and assess the damages in the sum of Five hundred thousand and no/100 Dollars ($500,000.00).

"Dated: Los Angeles, Calif., February 10th, 1956.

"/s/ JOSEPH C. BERGER,
"Foreman of the Jury."

* * *

The Court: Ladies and gentlemen of the jury, before we [4726] proceed any further, I am going to excuse you and thank you for your work. I think you have reached a fair verdict. I will tell you now that your work is concluded that I have been discussing a question with counsel. I have a question before me as a judge which was not before you, as to whether a restraining order should be granted as prayed for in the complaint. That is a matter in equity, it is not a matter for your consideration but is a matter for my consideration. I think your verdict has been a fair one. [4727]

* * *

The Court: I want the jury verdict filed, but the judgment cannot be entered until we do these other things.

I have looked upon this as a dangerous case. I think I mentioned $25,000 or $500,000 or $600.000 might result. The jury has been, I shouldn't say generous, but the jury has taken plaintiffs' view of their damages. And maybe I should not do this, but I am inclined to think that rather than raise questions on the amount of the TreeSweet settlement, which would be a relatively small settlement, that I would take defendants' view on it and deduct the treble damages. That would be an easy way out of that one.

Mr. Dixon: That would certainly solve the problem. I mean, that would take care of that part of it.

The Court: The matter of further considering the entry of judgment and the hearing on attorneys' fees, the hearing on the question of equitable relief prayed for in the complaint, all other loose ends of the case, will be continued to Monday afternoon at 2:00 o'clock. [4732]

* * *

Monday, February 13, 1956, 2:00 P.M.

The Clerk: No. 13788-C Civil, Winckler & Smith Citrus Products Company vs. Sunkist, et al. Further trial. Hearing on allowance of attorneys' fees and further proceedings relative to entry of [4736] judgment.

* * *

The Court: I will continue the matter concerning attorneys' fees to the 24th, then, at 10:00 o'clock. And continue, also, until that time the question of the prayer for equitable relief and further proceedings on that, with an understanding that we can't do it that day, but merely to keep it on our calendar to see whether or not we are going to do anything about it, or whether we set some further day for hearing.

Mr. Fisher: Then, as I understand it, the matter of the prayer for equitable relief wouldn't be heard that day, but you are simply continuing it to that date?

The Court: That's right.

However, I want you both to give some attention to this matter for equitable relief, and if the plaintiff is going to press it, I want a memorandum on it; and if the defendant is going to oppose it, I want a memorandum on it, which can be done very promptly. And on the 24th, although we will not get to it, my calendar is such that if I get some days open, and if we decide to go ahead with it, we are going to go into it right [4752] away. In other words, the following week, beginning the 28th, if, for instance, I could get time available, we might proceed immediately into it on the 28th. So you have to just hold yourselves ready to see what date we can get. In other words, I am continuing the matter for what amounts to almost two weeks, ten days here, to give you a chance to look into this. I think the plaintiff should—today is the 13th, I think the plaintiff by Thursday, the 16th, should file a memorandum (1) indicating whether they are going to press for this relief, and (2), if they are, their views and the law on additional issues that should be tried. And, thirdly, their summary, which doesn't have to be lengthy, of the reason why the relief should be granted.

And the defendants should by the following Wednesday, that is, February 22nd, if the plaintiff says it is still interested in this relief, then address themselves to the two matters which I asked the plaintiffs to address themselves to. What other evidence must necessarily be considered, and in the case of the defendants, why the relief should not be granted, and a summary of your position on the law in that respect, so we will have both of those by the 24th. And, meanwhile, we can be looking, if the plaintiff decides by Thursday of this week that he is going to go ahead on that, we can be looking for time to try out that issue.

Make it the 23rd. The 22nd is a federal holiday. We [4753] didn't get the 12th, but we get the 22nd. So make it the 23rd for the defendants. That is Thursday before the hearing on Friday.

I also would like to explore briefly with you this question of the hearing on attorneys' fees. I just wonder how much expert testimony I ought to listen to in connection with this application. Certainly I am not going to listen to a series of witnesses come down here and tell me what they think the fees ought to be.

How many witnesses did you have in mind calling?

Mr. Fisher: Your Honor, I frankly hadn't considered it, as yet, as to just how many we might want to have. I would certainly think not more than two or three.

The Court: Do you realize what a hypothetical question you would have to ask a witness in order to get any kind of an opinion from him on this question?

Mr. Fisher: I think I am aware of that; yes.

The Court: Are you prepared to state what the defense of this action has cost the defendants at this time? The plaintiff claims that is a yardstick that could give the court some assistance in passing on fees.

Mr. Fisher: Your Honor, in that respect, I am not, because I, frankly, have not inquired into it. However, I think it is the defendants' position that that is not a factor to be taken into account, as to whether the defendants have overpaid [4754] or underpaid their counsel in the defense of the matter.

The Court: This has been done quite often. Judge Westover has done it. [4755]

* * *

The Court: And I think, further, to resolve this matter of opinion testimony, I don't know how fast you can put an opinion witness on, but we have got one day set aside for this hearing, and I think that the defendants should limit themselves to not in excess of two hours on this opinion testimony. Not over three witnesses, if you can call three witnesses in two hours on that subject, why, that is all right. But it is going to take you about an hour to ask the hypothetical question, to tell all that has been done in this [4757] case, and then ask what it is worth.

Mr. Dixon: If the court please, we would, of course, prefer not to have to put on opinion evidence in this case. I think your Honor is capable of deciding it, and is certainly familiar with what has been done for the most part in this case, so that it would be repetitious, in a sense, to go into it. But if the defendants are going to confront us with expert testimony, we don't want to be standing alone in the cold without at least comparable testimony, to the extent that your Honor wants to hear it.

The Court: I have indicated already that it is only opinion testimony. I certainly am not bound by it.

I have been trying to throw some cold water on the idea. But do I have a right to say to the defendants that they cannot put it on?

Mr. Dixon: Oh, no; of course not.

The Court: I certainly think you have got to take into account that I sat through this case and know something about it; and, secondly, that anything this witness testifies to is opinion, opinion testimony.

If that is all there is in the record, I doubt if any court would say that I was bound by the opinion of that expert, if the plaintiff never put an iota of evidence on. There are numerous cases to the effect that the judge who tries a lawsuit is a lawyer and has a knowledge of what went on in the [4758] case, and what he saw and observed and what he knows about the case is the basis for the fixing of attorneys' fees; and I would think that the law would be if the plaintiff merely said, "I submit our application on the basis of what you know about the case," and the defendants called three or four experts who gave opinions and who were not cross-examined, I don't think I would be bound to be governed by the opinion of those experts.

Do you think I would be, Mr. Strachan?

Mr. Strachan: I think you would be required to weigh that evidence, and the question of weight would be something——

The Court: Suppose I weighed it and disagreed with it, would that be error?

Mr. Strachan: I think it would depend, in part, upon the extent to which you disregarded it.

I would be disposed to leave the matter as to whether or not it was error to a higher court. [4759]

* * *

HEARING RE ATTORNEYS' FEES

The Clerk: No. 13788-C Civil, Winckler & Smith vs. Sunkist. Hearing motions of the defendants to set aside the verdict and enter judgment for defendants; and further trial on the issues of injunctive relief, allowance of plaintiffs' attorneys' fees, and further proceedings relative to the entry of judgment upon the verdict.

Mr. Dixon: Ready for the plaintiff.

Mr. Fisher: Ready for the defendants.

The Court: I suppose we should take up first this motion the defendants have made.

I have read the motion and the grounds of it, and looked over the memorandum of authorities, and it is my recollection that there is nothing new in this motion. Most of the cases are cases which we discussed before, with the possible exception of points 5 and 6 in the memorandum.

I think we have covered most of it.

Mr. Fisher: Your Honor, so far as the defendants are concerned, I think your Honor is correct. We are willing to submit it and would ask that the previous motions be incorporated. We are willing to submit it on the defendants' motion for a directed verdict filed January 17, 1956, and the argument made by Mr. Williams in support thereof at the close [4764] of the plaintiff's case. That argument appears in the reporter's transcript at pages 2281 to 2380. And upon the defendants' motion for directed verdict made at the close of the case on February 2, 1956. And that argument appears in the reporter's transcript at 3865 to 3898.

You will recall that with respect to that latter motion there was incorporated by reference the arguments which were made on the previous motion, which had been at the close of the plaintiff's case. And upon our motion filed herein and the memorandum of points and authorities in support of it.

The Court: The matters referred to by counsel may be incorporated by reference. I see no new problems, and my ruling, therefore, will be the same as heretofore. The motion is denied. [4765]

* * *

The order of the court will be that that part of the case involving equitable relief, and the prayer therefor, may go off calendar, without prejudice to either party taking such steps as it sees fit. Without prejudice to the right of the plaintiff to ask for a hearing on that subject, and without prejudice on the part of the defendant to move to dismiss that part of the case, or to ask for a hearing [4769] on it.

* * *

I am going to decide that the TreeSweet settlement is to be deducted from the amount of the judgment to be entered, from the amount of the verdict trebled. In other words, the $2,500 will be deducted from the trebled amount. You can include that in the form of judgment that will be prepared. [4773]

* * *

The Court: Let's pass for the moment this question of allocation, which my present view is shouldn't be made here, and let's proceed to the question of what is a reasonable attorneys' fee for plaintiffs' and the trustee's attorneys in this proceeding.

Mr. Dixon: May it please the court, on this application, and as part of the evidence on which we will rely, I would like to ask counsel for the defendants, as previously requested, to indicate for the record at this time the total amount of attorneys' fees paid, and/or billed and not paid, or to be billed to the defendants if not already billed, for services rendered by the various counsel for the defendants in this case to the defendants.

As your Honor is well aware, this has been in many respects a most difficult and a most unusual case. In considering the application now before your Honor, it seems to me that is one of the bits of evidence which are properly a part of the record in considering this question, on a comparative basis, and to indicate the extent of work done by the defendants in this case, which, of course, had to be met by the plaintiff, in not only preparing this case for trial, [4779] but also in trying it, and should be before your Honor for consideration on this application. I would, therefore, like to ask counsel for the defendants to submit the information requested, which they informed us they would do, rather than have the records subpoenaed for this purpose.

The Court: Before I hear from you, Mr. Fisher, the defendants have filed, in my opinion, a very excellent memorandum on this matter of attorneys' fees, and they list on page 9 the factors which in their opinion are proper to be considered, and it continues on to page 10, and then on page 10 the factors which should not be considered. The factors listed as proper by the defendants are: (1) The time and labor which has been fairly and properly expended in the case.

(2) The novelty and difficulty of the questions

presented and the quality of skill demanded in the case.

(3) The skill employed by counsel.

(4) The amount involved as it reflects the risk of the client and the commensurate responsibility of the lawyer.

(5) The result achieved.

(6) The eminence, ability and standing of the counsel.

(7) The testimony of experts.

Then there is listed, "The factors which are not to be taken into consideration in determining what is a reasonable fee are the following:" [4780]

(1) The ability of the defendants to pay.

(2) The financial condition of the plaintiff.

(3) Uncertainty of the fee.

(4) Punitive damages resulting from trebling the verdict. And,

(5) Fees paid to defendants' attorneys.

As I studied this over, I am generally in accord—"generally," which would leave some room for minor disagreement—generally in accord with all except the last item, that is, fees paid to defendants' attorneys.

There is little law on that subject, but to give you something to direct your attention to, it seems to me that there is a lot of logic in letting that matter be considered.

If it is proper to consider the novelty and difficulty of the questions presented, in other words, the type of case, the magnitude of the case, the length of time it took to try it, various factors of that sort, now, what would be a better—not as a complete yardstick standing by itself, but what would be a better factor to take into account, along with all the other factors, than what the defendants themselves thought about this case? Did they consider it some simple little case where they could give a man a $10,000 retainer and give him $100 a day in court and say that is all that we think this case is worth? Or did they consider it a case of such magnitude that they had secured eminent counsel of ability [4781] and standing? Did they pay substantial fees to these attorneys that represented them?

Since we don't have much authority on this problem, you have to approach it from the standpoint of logic. It seems to me that that follows.

Mr. Fisher: Your Honor, we object. I am prepared, if your Honor rules that we have to disclose it, we are prepared to do it, but we do not believe that it is a factor.

We cited the two cases where it was held not to be a factor. Counsel for the defendants might have been underpaid or overpaid, and that is not a factor in determining the reasonable value of the plaintiffs' attorneys' services.

That is what is before the court. What might have been paid by the defendants to their counsel I think is no concern of the court's. It is not a factor to be considered. They might have been doing it for nothing, they might have been doing it for a very high fee. It doesn't seem to me that it is a factor which should be considered by the court.

The Court: I certainly think it is not conclusive, and I certainly think if I heard what was paid to defense lawyers I would have a right, in having sat in this case, to determine whether they were under or overpaid in my mental calculations in making some decision. In other words, supposing I found, which I know will not be true, that these defense lawyers got $1,000,000 for defending this case, I would draw [4782] a mental conclusion that they had been overpaid, but I would also draw a further inference, that probably the defendants had thought this was a very important case, in which they required excellent lawyers, or they wouldn't have paid a million dollars. In other words, I don't think that the matter is conclusive, nor is it a matter of laying down plaintiff's request alongside of what defendants' attorneys were paid, but I think it is a factor in assisting the court in evaluating the difficulty and the importance and so forth in this lawsuit.

Mr. Fisher: I think, your Honor, the very nature of the case, the very complaint, makes it obvious that the defendants would feel that it is an important case and had to be defended. What the defendants' attorneys might have been paid for their services in the case, I think, has no bearing on the issues of this case.

The Court: Of course, your opposition to the amount of attorneys' fees for the plaintiff is predicated, in part, upon the fact that this case in your opinion was not a case that involved any particularly novel factors, or if they were at all novel they could be easily solved, and that counsel for the plaintiff were not particularly eminent or skilled counsel, although you concede that they did a pretty good job. You have issues in here that I think this matter would have some bearing on. I will overrule the objection. [4783]

I understand, also, that there may be amounts paid to different parties. For instance, Exchange Orange started in this case, went out of the case as a defendant——

Mr. Dixon: You mean Exchange Lemon, your Honor.

The Court: Exchange Lemon—that the Stark firm was originally in the case only for Lemon, and later was in the case for Orange and Sunkist. But I think all those facts should be brought out for what they are worth in the general appraisal of this case.

Mr. Fisher: If your Honor please, answering the court's requirement, and which I take it is that we disclose the amounts which have been paid by defendants Exchange Orange Products and by Sunkist Growers, Inc., to counsel, from the inception of the matter to the end of the trial, we may say in that regard that there are certain unbilled matters covering some of the period of the trial and we have estimated those, and according to our best estimate on the amounts paid and to be paid it would be approximately $160,000 to all counsel.

The Court: That is for EOP and Sunkist?

Mr. Fisher: That is correct.

The Court: Can you break down the amount paid and the amount estimated, roughly?

Mr. Fisher: I can give that to you exactly. It will take a little computation, your Honor. Just a moment. [4784]

Mr. Fowle: I take it, your Honor, that our objection may be a continuing one so we don't need to renew it?

The Court: It may be a continuing objection to the entire line of questioning.

I also understand from our previous discussions that Mr. Dixon is content to accept the word of counsel on these matters.

Mr. Dixon: Yes.

I would like to ask just a few questions when counsel is through about the matter.

Mr. Fisher: The amount which has been billed and paid would be $106,375 of the total.

The Court: The balance are estimates?

Mr. Fisher: And the balance is estimated. [4785]

The Court: All right.

Mr. Fisher: I may say in that regard, that in that total there are some amounts which I do not believe are properly attributable to this case. That is to say, some of my time given over to the problem of processing contracts in other years was included in this, and has not been segregated out.

The Court: Do we have any information as to ELP?

Mr. Fisher: Your Honor, does your Honor's requirement go that far? Because they have been dismissed out, and certainly it would not seem to me—that is even more remote than we think this is.

The Court: I will not pursue that.

What about amounts to Stark and his firm after their association with the case?

Mr. Fisher: That is included.

The Court: Mr. Dixon, did you want——

Mr. Fisher: Just one moment, your Honor.

No, I am in error. There is an amount of $7,300 for Mr. Stark's services during the course of the trial.

The Court: That is an additional amount?

Mr. Fisher: That would be in addition.

The Court: And is that an estimate or has that been paid, or is that paid and estimated?

Mr. Fisher: That has been actually billed. Whether it has been paid or not, I don't [4786] know.

The Court: That is to the end of the trial?

Mr. Fisher: That is my understanding.

Mr. Fowle: That is correct, your Honor.

The Court: Then you would have a rough total of about $167,300?

Mr. Fisher: Less, as I say, I would estimate several thousand dollars off of that on matters which are not really connected with this lawsuit.

The Court: In addition to the attorneys' fees, I take it that the defendant prepared itself by investigation, by auditors and accountants?

Mr. Fisher: Well, yes.

The Court: Were there other investigators employed other than auditors and accountants? I am not going to go into amounts on that, but I would like a general statement of yes or no on that. In other words, were there investigators employed to investigate the case other than auditors and accountants and lawyers?

Mr. Fowle: Again, I say I want the record to show that we have a continuing objection to this line of inquiry. I take it that may be understood?

The Court: That may be understood.

Mr. Fowle: We had one investigator who worked on the case.

The Court: Most of the investigating work was of either [4787] a legal or an accounting nature?

Mr. Fowle: The investigative work, did you say?

The Court: Was either of a legal or an accounting nature?

Mr. Fowle: No. This investigator happens to be a lawyer, but his work was largely interviewing people and running down bits of evidence here and there and the other place. He did no legal work or any accounting work.

The Court: You didn't understand my question. Your major problem in the case, and where most of the time was spent, was on accounting matters or on problems on which lawyers worked, legal problems?

Mr. Fowle: I would say that is correct.

The Court: Mr. Dixon, did you have any further inquiry you wanted to make of counsel?

Mr. Dixon: Yes, your Honor.

As I understand counsel's statement, this represents the amount—if I am wrong, correct me—paid Chicago counsel——

The Court: Paid all counsel.

Mr. Fisher: Paid all counsel.

Mr. Dixon: All right. I would like to ask counsel whether the amounts paid are exclusive from any retainers paid to counsel for both Sunkist, EOP, which is your firm, Mr. Fisher, and counsel for ELP, which is Mr. Stark's firm—are they computed exclusive of that arrangement, if there is one? [4788]

The Court: I will not go into the question of the amounts of your retainers, but I will permit an inquiry as to whether or not there were amounts in addition to these amounts, also retainers which your firm had? You can answer that yes or no.

Mr. Fisher: Again on this continuing objection, we do have a retainer from Sunkist, which does not cover litigated matters.

Mr. Fowle: I might say, Mr. Dixon, that we have no retainer in Chicago.

Mr. Dixon: I assumed that, counsel. Thank you. I would like to ask this further question of counsel, as to whether or not the fee arrangement up to the time that ELP was dismissed from the case was on any basis where there was a pro rata allocation of the amount paid counsel? In other words, the reason for my question is that at the time I got into the case, Mr. Williams from the Chicago firm was carrying the ball, so to speak, for the entire case, and he was at that time, as the record shows, merely counsel for ELP. I understood that there was some arrangement whereby that fee was divided, and I am merely inquiring as to whether that was a fact.

In other words, I know that additional amounts were paid ELP, and I am not inquiring of counsel as to what those were, I am merely inquiring as to whether the fees paid counsel in [4789] this case were determined on any allocation basis between ELP, Sunkist, and EOP, up to the time ELP was dismissed from the case.

Mr. Fisher: Do I have to answer that, your Honor?

The Court: I don't know that I understand it. I take it from your statement that the figure that you have given me is the amount which EOP and Sunkist have paid or have estimated will be paid from the start of the case to the end of the trial?

Mr. Fisher: That is right.

The Court: And that, therefore, it does not include what ELP has paid or may have to pay thereafter?

Mr. Fisher: That is correct.

The Court: I don't think we need any further inquiry. When Williams was examined, at that time he was attorney for——

Mr. Dixon: For just ELP, your Honor.

Mr. Fisher: I may say that the firm of Pope & Ballard was not retained by Sunkist and Exchange Orange until the date, you remember, that I gave you, which was March 21 of 1955. So that the amounts were paid to Mr. Williams up to that time by ELP and not Sunkist.

The Court: Then I think you want to go a little further. This case started out with Pope & Ballard and Mr. Williams acting solely for Exchange Lemon. [4790]

Mr. Fisher: That is correct.

The Court: And in the various discovery proceedings had before me, and in the matters preliminary to trial, although Williams was not acting as attorney of record for Sunkist and EOP, he was actually carrying the ball, if we can use that term, was acting as lead man among the various counsel that participated, and of course had done the preliminary work in the case on the inspection of records and so forth, which later was used by him in the defense of the action, after he came into the case for EOP and Sunkist. And overruling your objection on the same ground, I think there should be a statement of what ELP has paid and obligated itself to pay in connection with this case.

Mr. Fisher: Your Honor, before answering that I would like to make this statement, and that is in the initial part of the case and particularly during the period of time that it was pending before Judge Byrne, there were separate motions filed in all instances, and I recall Judge Byrne took the position that it made it more laborious for the plaintiff where we were proceeding that way, and thereafter wherever we could we cooperated in the type of motion which was filed.

The Court: I know that, and I know also——

Mr. Fisher: And Mr. Williams was appearing for Exchange Lemon Products. It is true that he took, perhaps, a more active part with respect to the various motions which were [4791] filed than I did in the actual presentation.

The Court: My inquiry, and the only significance, and the major significance it has, is this: It became obvious during the trial of this matter that the defendants, or ELP, while it was a defendant, somebody who was connected with the case had practically photostated every record of the plaintiff corporation. You had photostats of complete sheets of accounts and books, the files of the Corporation Commissioner; there wasn't a thing that turned up here that there wasn't a photostat of it. Now, that took a lot of work. Now, supposing that that work—I am not talking about the mechanical part of photostating it, but examining all these files—was done for ELP and paid for by ELP, and then Williams is later on associated as attorney—strike out "Williams"—Pope & Ballard and Williams are then associated for EOP and Sunkist, and then proceed to defend the action on the basis of the previous work done for ELP, it seems to me that that has some significance in the case. It might be entirely possible that the major share of the attorneys' fees were paid out in connection with the so-called preliminary work that extended over a year or so.

Mr. Fisher: Your Honor, with reference to the large amounts of records which were photostated, that was occasioned not by our desire at all, it was occasioned by the fact that, and so far as Sunkist and Exchange Orange were concerned we [4792] prepared interrogatories, which were heard before Judge Byrne, and Exchange Lemon Products prepared requests for examination of the books, and Judge Byrne, like yourself, said, "Here is a corporation which is unable, doesn't have the money," and so forth, and took cognizance of their financial condition, and denied our request for interrogatories, and hence we were required to proceed the other way.

It would have meant much less work for us had we had our interrogatories answered.

The Court: It may have little moment, but I would like to know what the facts and figures are as to ELP.

Mr. Dixon: I might say for the record at this point, your Honor, that Mr. Williams, I think, conducted practically all of the examination under the depositions that were taken in this case. I don't think any other counsel, with the exception of counsel for TreeSweet, actively participated in those discovery proceedings.

Mr. Fisher: Your Honor, the only deposition which the defendants took was the deposition of Mr. Winckler, which was taken by Exchange Lemon Products very early in the action. Mr. Williams did conduct that examination. I was present at the taking of both depositions.

So far as the depositions taken by the plaintiff were concerned, and there were some six of them, I don't believe that Mr. Williams was present at the taking of any of them. [4793] He may have been. I don't exactly recall.

The Court: All right.

Mr. Fisher: This, again, requires a little computation.

Mr. Fowle: I hope you will excuse the delay, your Honor, but things got so mixed up starting along about March, 1955, as to who was doing what for whom that we are having a little difficulty.

The Court: I imagine so. It is perfectly all right.

Mr. Fisher: It would be, we think, approximately $60,000.

The Court: Total of billed and paid?

Mr. Fisher: Yes.

The Court: All right.

Can we proceed to something else?

Mr. Dixon: Yes, your Honor.

Insofar as we are concerned we are content to rest on the affidavits filed in support of the application, subject of course to cross-examination by counsel for the defendants, and I think perhaps Mr. Reich wanted to say something.

Mr. Reich: No. I merely want to bring the court's attention to the fact that we have Mr. Clore Warne, a member of this Bar here before this court as an expert witness. The only point that I have in mind is the court's convenience as to whether you want to hear him after the expert witnesses of the defendants or hear him as part of our case. I [4794] think he is part of our case.

The Court: First of all, Mr. Fisher and Mr. Fowle, do you want to cross-examine Mr. Dixon on his affidavit?

Mr. Fowle: Yes, your Honor; we do.

The Court: Do you want to cross-examine Mr. Irwin on his?

Mr. Fowle: I think we do.

The Court: And Mr. Reich on his?

Mr. Fowle: I don't think we need to cross-examine him.

The Court: Mr. Warne, do you want to be called and get away?

Mr. Warne: Having in mind the proceedings here, I would prefer to listen to them until that time.

The Court: All right. Mr. Dixon.

Mr. Dixon: I might say, further, your Honor, that we would also wish to incorporate and make part of this record, on the application, the files of the case which are referred to in the affidavit.

The Court: The files of the case and the reporter's transcript will be considered as a part of this application.

Swear Mr. Dixon. [4795]

WILLIAM C. DIXON

called as a witness, after having been duly sworn, testified as follows:

The Clerk: What is your name?

The Witness: William C. Dixon.

The Court: Mr. Dixon is tendered for cross-examination on his affidavit. Is that satisfactory? Rather than have Mr. Dixon repeat by direct testimony what is in the affidavit?

Mr. Fowle: It is, your Honor.

The Court: Fine.

Cross-Examination

By Mr. Fowle:

Q. You are the same Mr. Dixon who tried this case, are you not?

A. I think I am, counsel, yes.

Q. Where did you go to law school, Mr. Dixon?

A. University of Michigan.

Q. And what year were you admitted to the Bar in the State of Ohio? A. 1928.

Q. And in the State of California?

A. 1948.

Q. I notice in your affidavit you state that at one time you were a member of the Supreme Court of Ohio? A. That is correct, counsel. [4796]

Q. For how long a period were you a member of that court?

A. I was elected to that office for what they call an unexpired term in 1938.

Q. And how long was the unexpired term?

A. It was about a three months' term. I did not run or file for re-election to the office.

Q. You did not run for re-election?

A. I did not run or file for re-election to the office. The records of the court and of the Supreme Court, and the cases during that year will indicate, counsel, the extent to which we were a member of that court and participated in the decisions of that court.

Q. You were a member of that court for approximately three months?

(Testimony of William C. Dixon.)

A. That is correct.

Q. Now, where did you practice, Mr. Dixon, before you joined the Department of Justice?

A. I was a practicing attorney in the City of Cleveland, Ohio, for a good many years, from the time of my admission to the Bar of Ohio in 1928 until I was appointed to the Department of Justice in 1944.

Q. So that your professional career before you joined the Department of Justice was in Cleveland?

A. Yes, that is correct. [4797]

Q. Were you with a firm there or did you practice alone?

A. I was with a firm of attorneys when I left law school, and stayed with that firm for a period of five years. The firm was then known as Holliday, Grossman & McAfee. They were general counsel for the Standard Oil Company of Ohio and many other clients, and I specialized during my period of practice with that firm in trial work, trying many cases of the Standard Oil Company during that period of time.

Q. What types of cases were they?

A. General litigation.

Q. When you joined the Department of Justice in 1944, I believe it was, you became assistant chief of the trial section, is that correct?

A. No, not at the time, counsel. I might say that during the period of time I also served as assistant director of law of the City of Cleveland for a period of about two years, again trying cases for the City

(Testimony of William C. Dixon.)

of Cleveland. One case in particular involving public nuisance law is the only case of record, I believe, in which a company was required to remove its plant from an area——

Q. Will you excuse me, Mr. Dixon? I was asking you about your experience with the Department of Justice.

A. I just wanted, counsel, to let you know that I have been actively engaged in the practice of law—— [4798]

Q. I just would like you to answer my questions.

The Court: Let me hear about this. This would have some significance locally.

A company was required to move its plant in a certain area?

The Witness: Yes. It was a company emitting fumes in a quasi industrial area, and complaints had been made to the mayor and the city council to do something about it. The law director and the mayor assigned the case to me, and we brought an injunction suit, and after a period of three weeks of trial the court made an order requiring the company to either abate the nuisance complained of within a period of 60 days or to remove its plant from the neighborhood. This was in the depths of the depression, 1932. The plant employed about 200 people. The order was appealed to the Court of Appeals, but we moved for dissolution of any stay or opposed any stay, and within the 60-day period the corporation decided that it had better dismantle

(Testimony of William C. Dixon.)
its plant and move to an industrial area. That abatement resulted.

* * *

The Witness: You don't get much satisfaction out of [4799] public service, as a rule, the salary is not commensurate to what is paid in private industry, but after the lawsuit was over and the plant was removed from the neighborhood, the neighborhood people did get together and have a celebration and awarded me a watch, which I still have, and in which they inscribed on the back, "In recognition of public service." So that was a compensation, at least, for doing the job.

But that is the only case that I know of, your Honor, in which a court has ever actually required a plant, and this was a large plant—it cost at that time in excess of half a million dollars—to be dismantled and removed from the neighborhood.

Go ahead, counsel.

Mr. Fowle: Your Honor, I have been very much interested in this, also, but I think perhaps——

The Court: That is because of your long stay out here in the smog.

Mr. Fowle: But perhaps I have a duty to my client to move that all of that answer be stricken as not being responsive to my question.

The Court: Overruled. I was interested. I had never heard about this.

Go ahead.

Q. (By Mr. Fowle): Mr. Dixon, during what period of time were you the assistant chief of the trial section of [4800] the Antitrust Division of the Department of Justice?

A. Counsel, it was shortly after I completed the trial of the National Lead-DuPont case, when the chief of the section asked me to join him as assistant chief of the general litigation section. I believe it was in the early part of 1945.

Q. You went to Washington at that time?

A. I was stationed in Washington, counsel, from the time of my appointment in April of 1944, I think it was, until I was assigned out here to the West Coast in charge of the West Coast offices in 1947.

Q. And you remained in the West Coast office from '47 to '54?

A. No, I didn't, counsel. The Attorney General and the Assistant Attorney General in charge of the offices, I mean in charge of the Justice Department, at that time, Mr. Berge, asked me, when I was in Japan where I had gone as a member of the joint War and State Department Zaibatsu mission, to consider an appointment to the West Coast offices here upon my return from that mission.

I might say that when I went with the Government in 1944, I went primarily at the request of Mr. Berge, who was then the Assistant Attorney General in charge of the Antitrust Division, for the purpose of trying lawsuits, primarily the cartel case, which was the one I mentioned against [4801] National Lead and DuPont, which was the first cartel case that was brought to trial.

(Testimony of William C. Dixon.)

Q. That was an equity case, was it not?

A. Yes, it was an equity case. And it was released for trial by special presidential order because of the importance with which that case was regarded by the Government at the time. So that an early adjudication and determination could be secured of the legal questions which were involved in that lawsuit.

But, as I said, when I went with the Department I did not intend to stay with the Department. I so informed Mr. Berge. I expected to return to private practice after the end of the war.

As I said, when I returned from Japan I was requested to come out here to the West Coast to become head of the three West Coast offices, Los Angeles, San Francisco and Seattle. Which I did in 1947.

I should add, however, counsel, that while I was stationed in Washington as assistant chief of the general litigation section I was called upon by Mr. Berge and Mr. Baldridge, who was then head of the section, to go into the A & P case while it was on trial in Danville, Illinois. One of the counsel in that case, Mr. O'Donnell——

Q. Did you help try that case?

A. Yes. But I am trying to tell you how I got into it. [4802] I knew nothing about the case, but I was requested to go in and take over the work when Mr. O'Donnell, who was trying a very important part of the case at that time, collapsed in court, and had been rushed by ambulance from Danville to Chicago, Illinois. Judge Lindley, who is now on the Court of Appeals in that Circuit, was the trial judge. This happened on a Monday morning, and he gave the Government until the following Monday to get someone in there and continue with the case, that part of it which Mr. O'Donnell was trying.

The Court: All right.

Q. (By Mr. Fowle): Was that a jury case?

A. That was an equity case, counsel. Most Government cases, as you probably well know, are equity cases.

Q. Well, looking at some of the cases that you cited in your affidavit, Mr. Dixon, as I recall it, the National City Lines case was a jury case?

A. That was a jury case.

Q. Did you try that?

A. I did not try that case, counsel. That case was transferred from this court to Chicago. I had conducted the hearings, with of course the help of the counsel in the office, before the grand jury, had prepared the indictment, and expected to actually try the case. It was, however, transferred to Chicago, and due to the fact that I could not [4803] leave the office here, and in view of the fact that that was expected to be a long trial, I assigned Mr. O'Malley of our staff to try that case.

I was, however, in constant touch with him during the trial.

The Court: Was he lead counsel in that case?

The Witness: Mr. O'Malley, yes.

(Testimony of William C. Dixon.)

The Court: And was acting out of your office here?

The Witness: He was acting out of our office. That case, your Honor, was tried entirely by the staff from our office, which was under my immediate supervision. It was my responsibility.

The Court: That was a criminal case?

The Witness: That was a criminal case, yes.

Q. (By Mr. Fowle): But you didn't participate in the trial?

A. I couldn't, counsel, for the reasons that I just gave.

Q. Prior to the time that you left the Department of Justice had you tried any jury cases yourself, Mr. Dixon? A. Yes.

Q. Jury antitrust cases?

A. Yes, indeed I had.

Q. Will you tell me which ones they were, just naming them? [4804]

A. Yes. United States vs. Local 36, the A.F.& I.W.A., which was a criminal case——

Q. If you will just list the cases for me.

The Court: Is that the one we speak of as the Fishermen's case?

The Witness: That is the one known as the Fishermen's case, your Honor, yes. And it was a situation which involved new law——

Q. (By Mr. Fowle): I wonder if you would just list the cases, name the cases for me.

The Court: When a lawyer gets on the witness stand it is a wonderful opportunity to do something

(Testimony of William C. Dixon.)

he has never had a chance to do. But to speed this up——

The Witness: That is the only jury case, your Honor. Most of our cases out here did not go to trial. I mean we brought numerous cases, but most of them were settled.

Q. (By Mr. Fowle): So there is just one jury case that you tried during the 10 years that you were with the Department of Justice; is that correct? A. Well, that is correct.

Q. Did you try the Local 36 case all by yourself, Mr. Dixon? A. Counsel, no, of course not.

Q. Did you interrogate all the witnesses yourself?

A. No, I did not, counsel. I always believe when you [4805] are in charge of an office, to give everyone on the staff a chance to do the job, if they can do it. So the staff that were assigned to that case conducted most of the direct examination of the Government witnesses, because there were many, many of them. I made the opening statement; I let the men in the office, as I think they should, handle the witnesses that were assigned to them; and I think I conducted most of the cross-examination of the defendant's witnesses, but not all of it, and I made the closing arguments. That case, incidentally, counsel, involved new law, in that it applied to labor unions who called themselves independent—well, co-operatives in a sense.

That decision was of course appealed to the Court of Appeals, I argued the appeal, prepared the briefs on it, and the Supreme Court refused—denied certiorari.

Q. I was merely interested in the extent to which you participated in the actual presentation of the case to the jury, and I think you told us that.

A. I might say, counsel, that all of the grand jury proceedings, since you have suggested that I haven't tried cases, I participated in those, I was present at every grand jury proceeding——

Q. I am not only suggesting it, but it is a fact, isn't it, except for the Local 36 case?

The Court: Let's go ahead. I will instruct you like [4806] we have to instruct witnesses: You listen to the question and answer it.

Q. (By Mr. Fowle): May I ask this question, Mr. Dixon: Was the Winckler & Smith case the first treble damage suit that you were involved in under the antitrust law?

A. It is certainly the first one, counsel, because I have been out of Government service——

Q. Answer the question yes or no.

A. Yes.

The Court: The answer is yes.

Q. (By Mr. Fowle): I take it in view of your Government employment during the 10-year period ending 1954, you were not engaged in any private practice during that time?

A. Of course not, counsel.

Q. What was the amount of your Government salary, Mr. Dixon, the last year that you were employed by the Government?

A. It was, I believe, $12,300 a year, which was the top salary then paid any member of the staff, with the exception of those that were exempt, in the exempt classification. That is my recollection.

The Court: The record will show that I was United States Attorney and he was getting more money than I got.

Mr. Fowle: I know that you were United States Attorney at the time, your Honor, because one could look at the cases [4807] and see the association.

The Court: I was getting $10,000 a year, and I didn't know until now that he was getting $12,000.

Q. (By Mr. Fowle): When you entered private practice in 1954, Mr. Dixon, did you start out to practice alone or were you in a partnership?

A. No, I had some opportunities if I wished to do so to join legal association with firms. I did not desire to do so. I, therefore, initiated my private practice as an individual practitioner.

Q. You left the Government, I believe, in April of '54?

A. I think it was a little earlier that that, counsel. It was the early part of that year.

Q. And you did not get involved in the Winckler case until the latter part of 1954, is that correct?

A. I believe that is correct, counsel, yes.

Q. What type of a practice did you have, Mr. Dixon, between the time you left the government in 1954 and the end of that year, shall we say?

A. Do you mean what type of practice?

Q. Yes.

(Testimony of William C. Dixon.)

A. I was specializing in trade regulation matters entirely. There were a few matters that I handled for private clients, but I am not engaged, counsel, in general practice, if that is your question. [4808]

Q. Would you be able to tell me approximately what your earnings were from the practice of law, from the private practice of law, during the year 1954?

A. Well, the first year when you are starting out in private practice, counsel——

Q. It is likely to be lean, I know, Mr. Dixon. But I wonder if you could give me an approximate figure.

A. Well, you tax my memory. I would say it was less than my salary from the government, after I paid the office overhead and everything that goes along with it. I knew it would be, and I expected it would be.

Q. Did you have, during this portion of 1954, after you left the government, did you have per diem rates or hourly rates which you charged clients for the work you did for them?

A. No, I didn't. The per diem system, counsel, applies to large law firms. Having started to practice with a large law firm, I know exactly how that system works. And an individual practitioner when he represents clients usually makes his own arrangement with the client, at least I do, and I inform them in advance of what the arrangement is under which I will handle the matter.

(Testimony of William C. Dixon.)

The Court: But you didn't have it?

The Witness: That is right, I had no per diem charge.

Q. (By Mr. Fowle): How did you determine just what you would charge the clients for whom you did work during 1954? [4809]

A. Well, I think I determined it based on the results achieved, the general amount of time put in, the capacity and ability of the client to pay, and all those factors that usually enter into a matter when you are billing a client.

Q. But you didn't use a per diem rate?

A. Sometimes I billed nothing, if that is of any assistance to you.

Q. We all have that experience. But you didn't use an hourly rate or per diem?

A. No, I used no set hourly rate, because I don't think it is applicable to a specialized type of practice that you are trying to develop.

Q. Incidentally, did you keep time records during 1954?

A. Mr. Fisher asked me that, and I answered it that when I got into this case I did make a few notes, I wouldn't call them time records, counsel, at the outset. They were not complete, as I explained to Mr. Fisher. After I had been in this case for, I think it was a month and a half or two months, I ceased to keep any time records, because it became practically a full-time job. By that I mean not only every day, but Saturdays, as well.

Q. Sundays? A. Sometimes, yes.

(Testimony of William C. Dixon.)

Q. What other practice did you have during 1955, Mr. [4810] Dixon, than the Winckler-Smith case? A. I had practically none, counsel.

Q. Did you have some?

A. I had some. Very little.

Q. Did you charge clients that brought that practice to you fees? A. I certainly did.

Q. How did you determine those fees? Did you use an hourly rate or per diem rate?

A. On the basis of the questions presented, the risk involved, insofar as the client was concerned the results achieved for the client, and of course to some extent the amount of time that was put in. The time was not the determining factor, I assure you.

Q. You don't pay much attention to that?

A. No, I don't. And you can't in this kind of business, unless you are making an arrangement on that basis, counsel. And I have one of those, a client, that—I will just answer the questions. Go ahead.

Q. When you first were retained in this case, did you have any understanding as to what your compensation was to be?

A. No, I fully understood, counsel, that there was nothing here with which to pay a lawyer; that whatever fees were determined due me, assuming that there was something with which to pay them, that those fees would be determined by [4811] this court or by the court.

Q. Did you understand that you were to receive any compensation other than that fixed by the court

(Testimony of William C. Dixon.)

—that might be fixed by the court, in the event of a success?

A. I think the order is on. I frankly didn't pay much attention to it, but it is my understanding that the order provides that it is a matter for the court to determine what my fee shall be, based on all of the factors that usually go into a consideration under which a lawyer is paid for services rendered.

Q. I don't believe my question is quite answered, Mr. Dixon. Did you understand that you were to receive compensation from any source other than the order allowing fees by the court here, in the event of a success?

The Court: What do you mean, other source? Do you mean some outside party?

Mr. Fowle: Correct.

The Witness: No one has ever told me that they would pay me a dime, counsel, if that is your question.

Whatever I am paid, if anything, will have to necessarily come from whatever this corporation has.

There is no other source to pay me, and no one has promised to pay me anything, and I wouldn't solicit any promise from anybody to pay me.

Q. (By Mr. Fowle): As I understand it, when you were [4812] first retained in this case——

A. You use the word "retained" wrong, counsel. There was no retainer paid me in this case, if you are using "retained" in that sense.

(Testimony of William C. Dixon.)

Q. Thank you for your correction.

When you first came into the case, shall we put it that way—when you first came into the case, I believe you made a rather extensive investigation before you decided whether to go ahead with it; is that not true? A. I spent some time, yes.

Q. How much time did you spend doing that?

A. That would be hard to estimate, counsel. It antedated, I think, the sheet that I gave to Mr. Fisher. I can't answer you on that. As to the amount of time, I couldn't say. It would be a guess at best.

Q. Would you give us your best guess?

A. Well, I would hate to hazard a guess. I would say that I spent, at intermittent periods, at least three or four weeks, counsel. I may be wrong one way or the other. It is a matter of recollection. I just can't give you any better answer than that.

Q. Is that time included in the 2,500 hours to which you referred?

A. No, it is not, counsel. Yes—no, it isn't, to answer your question, it is not. [4813]

Q. Which is it?

A. It is not included in that.

Q. At what point does the 2,500 hours begin?

A. It starts about the time that I started to keep the time sheet there that I showed to Mr. Fisher, and that is only my recollection of the approximate time, because there were things there which developed from time to time that developed rather quickly I can't tell you just when it was.

(Testimony of William C. Dixon.)

Q. Mr. Reich was attorney for the trustee for some period of time, was he not?

A. No, I don't believe Mr. Reich was ever attorney for the trustee. But if he was, I am not aware of it.

Q. Who was he attorney for?

A. For Mr. Irwin.

The Court: Mr. Reich?

The Witness: For the trustee, he said.

The Court: He said who was Mr. Reich attorney for.

The Witness: Oh. I think Mr. Reich, as I recall it—my contact with him was as the attorney who filed the lawsuit in the first instance.

The Court: For the corporation?

The Witness: For the corporation, and before there was any proceeding under Chapter X.

Q. (By Mr. Fowle): You know Mr. Reich, I take it? A. Of course I know him. [4814]

Q. Was he not in the case in some capacity when you came into the case?

A. Well, counsel, I would hate to have to answer that, because I don't know. I know there was some question as to whether he was in or out of the case at that time.

Q. I heard you mention earlier at this hearing this morning, I believe, that he withdrew from the case?

A. I think he did, yes, he ultimately withdrew.

Q. Do you know why he withdrew?

A. I would prefer to have him answer that. I

(Testimony of William C. Dixon.)

can't speak for Mr. Reich. I knew that he withdrew from the case, and I entered the case.

Q. He withdrew about the time that you entered?

A. I can't even answer that, as to when he actually formally withdrew.

The Court: There is an order in the file both as to the withdrawal of Mr. Reich and the employment of Mr. Dixon. Have you looked at them?

Mr. Fowle: I believe we have.

The Court: I was going to suggest, paraphrasing that old story, that if you are doing this for me, speed it up; if you are doing it for the Circuit, then take your time.

Mr. Fowle: Must I answer that on the record?

The Court: No, you don't have to say a word.

Q. (By Mr. Fowle): At some stage of the game, Mr. Dixon, [4815] you had to learn a good bit about the citrus fruit business, didn't you?

A. That is an understatement. I was learning about it right up to the time of trial and during the trial.

Q. Did you learn anything about the citrus fruit business from Mr. Reich?

A. I don't think Mr. Reich is in the citrus business, counsel.

Q. Well, have you read his affidavit?

A. To be perfectly frank with you, I haven't, no.

Q. Well, you didn't learn anything about the citrus fruit business from Mr. Reich, I take it?

A. Well, I had some conferences with Mr. Reich.

(Testimony of William C. Dixon.)

It depends on what you mean by, Did I learn something about the citrus fruit industry.

Yes, Mr. Reich had been in the case, and he obviously knew something about it, and I had some questions which I asked him about it.

I might say that I got some information from him.

Q. To what extent was the case prepared for trial by the time you came in?

A. That is a very difficult question to answer, counsel. Insofar as I was concerned, it was not prepared. I was not ready to go to trial, and would not think of proceeding to trial on the status of the situation as I discovered it at [4816] that time, after investigation.

Q. Certain depositions were taken prior to your appearing on the scene? A. That is correct.

Q. Did you use those at the trial of this case?

A. I did not. I read them, however, not once but several times.

Q. Did you find them useful?

A. They gave me some background information, yes.

Q. Did you receive any legal memos from Mr. Reich at the time you came into the case?

A. What do you mean? Did I ask him for advice—to prepare some legal memos for me?

Q. No. Did he have some legal memos in the file that he turned over to you?

A. Counsel, the file contained a voluminous amount of legal memoranda, if that is your question.

(Testimony of William C. Dixon.)
I naturally examined those to familiarize myself with the background of the case, and to the extent that those legal memoranda were in the file and prepared by Mr. Reich, they were examined by me, if that is your question.

Q. You say that substantially all of your time was spent on this case since September, 1954; I take it that is correct?

A. That is in substance correct. I don't want you to [4817] get the impression——

Q. Approximately what proportion of your time did you not spend on this case? A. Well——

Q. Could you just give us a rough estimate?

A. I would say about 5 per cent, counsel. It was dealing with things that I could dispose of in a short period of time. In other words, I could not get committed to anything which would take any long period of time, with this lawsuit. I was accordingly unable to make any commitments to any other clients on any matters that would require an extended period of time, as far as I was concerned, as long as I had this case.

Q. Could you tell us how you computed the figure of 2,500 hours, or somewhat in excess of 2,500 hours, could you tell us how you reached that figure?

A. Yes, that is very easy. I know that the average law office figures about five or six hours chargeable time, I figured on this case an average of at least eight hours, a day, for a full work week, and there were of course many Saturdays, and considerable evening work that was involved in the prep-

(Testimony of William C. Dixon.)

aration of this case for trial, and while I have had the responsibility for it.

Q. You say you figured you worked eight hours a day on the average? [4818]

A. That is right.

Q. For what—for this entire period?

A. You are correct.

Q. You mean seven days a week?

A. No, no; I didn't say seven days a week, counsel. I said a five-day week with many Saturdays, and frequently Sundays. Many a time I have taken files home and exhibits, and so forth, in this case, not only for Saturdays, but Sundays as well. I did not have the benefit of several assistants that I had when I was with the Department of Justice. Otherwise I could have done it in a five-day week.

Q. I take it you had no assistants in your office?

A. I had no assistance, other than what Mr. Irwin gave me in this case.

Q. Of the 2500 hours that you estimate you spent on this case, how much of it would you estimate was spent before the trial started, before December 13, 1955?

A. That is a very difficult question to answer, counsel.

Q. Well, do the best you can.

A. There was very little difference in the amount of time spent prior to trial and the time spent afterwards, except that the pressure in-

(Testimony of William C. Dixon.)

creased, and more evening and Saurday and Sunday work——

Q. Perhaps you don't understand my [4819] question.

A. I understand your question. I am trying to answer it by telling you that I can't give you an answer except to indicate in general terms what I did, because I did not keep any time records, as you do in a large law office where you are charging a client on a per diem basis.

Q. Do you mean you are unable to answer the question?

A. Rephrase it, or give it again, and I will try to do the best I can.

Q. I am asking you if you will to the best of your ability divide the 2500 hours into two parts, one part prior to December 13th when the trial started, and the other after that date.

A. Counsel, in arriving at the 2500 hour figure, approximately, and it is approximate for the reasons that I have given, I took into consideration the fact that I had devoted substantially all of my time to this case from the time I mentioned. That as we approached the trial date, and keep in mind that we had, I believe, two trial dates set in this case, counsel, and they were changed, to that the pressure was always on—we had, as you may not know, I don't know whether you do or not, but it is my recollection that in this case we had two prior trial dates before we actually came into court to start the trial of this case. So that after we got into trial, or as we approached the trial, it was constant night work, Saturdays and some Sundays. During the trial it [4820] was constant. I had no help in preparing instructions, or those various other things that had to be done. Someone had to do it, and I was the only one that could do it.

Q. I am just trying to get from you how much of your time was spent before the case went to trial. If you can't answer it, perhaps the best thing to do is to say you don't know.

A. I don't want the record to show anything other than what I have indicated, counsel, and you can draw your own conclusions or inferences from it. I can't tell you approximately how much time was spent before the time of trial. Maybe you could say two-thirds of it was. I don't know. It would be purely approximate and purely a guess. But the time was spent, that I would assure you.

Q. I am not questioning that the time was spent, Mr. Dixon; I am simply trying to find out how much of it was spent before the trial started.

A. Certainly I would say the greater substantial part of it was spent before trial, because you don't go into trial in an antitrust case unless you are thoroughly prepared, and you don't prepare a case of this kind on 24 hours' notice, counsel.

Q. I think we both understand that. Let me just ask you this, Mr. Dixon: Supposing you had a law clerk in your office who could have helped you with this, how much of the [4821] 2500 hours do you suppose would have been his?

(Testimony of William C. Dixon.)

A. It would have probably been very little, counsel, to be perfectly frank with you.

Q. Well——

A. Because when I prepare a case, as I have had to prepare this case, there are things that you cannot delegate or assign, but which you must do yourself, if the case is to be properly prepared and properly presented in court, because no law clerk can get things for me, and couldn't get them in this case, that would be of too much assistance to me in cross-examining some of the witnesses that I had to examine in this case.

Q. When you were with the government you had assistants helping you with the trials of cases there, didn't you?

A. Of course, counsel. And when you are with the government you have the FBI to go out and do all of your investigative work, you have relatively speaking unlimited facilities at your command. Those were not available to me in this case.

Q. Supposing you had had an investigator here, how much of the 2500 hours that you estimate was spent here would have been turned over to the investigator?

A. To answer your question, I would say practically none, counsel. The type of investigative work that I had to do—that is your question—related to the kind of thing [4822] that we did out at the office here of Exchange Orange when we went out to look at your records to see what you had, and to read them, and to take from those records the things that I regarded as important to this lawsuit.

Now, you couldn't trust that assignment to any law clerk. At least I wouldn't.

Q. So you say practically none of the time would have been put in by an investigator if you had had one?

A. I could certainly have used not one but several, counsel. There were plenty of things that I would like to have done in this case that I couldn't do.

Q. I am trying to find out just to get an estimate from you, as to how much of this 2500 hours would have been put in by an investigator if you had had one.

A. From that point of view, you can say practically none, as I stated a few minutes ago.

Q. And the same thing is true, then, I take it, of a potential law clerk, if you had had a potential law clerk he wouldn't have spent any of this time either?

A. He might have been of some assistance.

Q. Some minor assistance to you, perhaps?

A. He could have been, yes.

Q. So the lack of funds which the plaintiff had here, which is mentioned in your affidavit, really didn't handicap you very much, did it? [4823]

A. Well, yes, it did substantially, counsel, although it wasn't a factor. Let me explain what I mean. You well knew, counsel, what your staff was constantly doing during the preparation of this

(Testimony of William C. Dixon.)

trial. You were constantly examining the files and records of this company. I am frank to say that apart from the services of Mr. Smith, whom I asked, I said, "well, try and find out what they are looking at, and be sure that if they are taking something that you at least know what it is so that you can tell me what it is, and I will then have a chance to look at it"—that is the type of thing that I am talking about, counsel, and Mr. Smith did do some investigative work of that kind of the books of the company. But I could certainly have used the service of three or four men to work with your staff, had they been available, and I would have been much better prepared, probably. Whether it would have changed the result is problematical. But I would certainly have been much better informed, put it that way.

Q. But your statement to me, I take it, is essentially this: If you had had additional assistants, legal assistants, or investigative assistants, it would not have substantially reduced the number of hours which you say you spent on this case?

A. As far as I am concerned, it would not have detracted to any extent at all from the time that I would have had to put in this case, counsel, because I would have had to [4824] have directed that work to be done, and that is my point, that is the investigative type of work that I mentioned, to the extent that I had to do it myself, of the kind I mentioned, I did it. But there were many, many things which I would have liked to have done, which I would have instructed someone to have done, had the funds been available to do it.

Q. So your 2500 hours would have remained approximately the same?

A. They would have, counsel, yes.

Q. Do you place the same value, Mr. Dixon, on the hours you spent in examining documents, as you place on the hours you spent here in the court room?

A. Of course not, counsel. If you want to separate the two, and if you are trying to say that the services should be valued on a per diem basis, the answer is obviously no. No lawyer goes into the court room and tries a lawsuit on the same basis that he charges a client on per diem work in his office.

Q. Let me ask you how you computed the sum of $350,000?

A. Well, counsel, it is computed, based on the amount, in part, which the court allowed in the Emich case in which your firm was counsel.

Q. You know what happened to the Emich case, don't you?

A. Yes, I know very well what happened to the Emich [4825] case, but that doesn't change the fact that the trial court allowed attorneys' fees in that case.

Q. The judgment was reversed, wasn't it?

A. But the attorneys' fees was not reversed. The case is still back for a new trial.

Q. The entire judgment was reversed. Mr.

Dixon, you know that. The allowance of attorneys' fees is out the window, isn't that true?

A. No, it isn't out the window.

Q. Of course it is. You know that.

A. The case is still pending, as far as I am concerned, as far as I know.

The Court: Look, both of you are wasting time. In the Emich case the judgment was reversed, but it wasn't reversed, as you read it, because of the award of attorneys' fees. Having been reversed, now, there is no award of attorneys' fees.

Mr. Fowle: That is my point. There is no award left.

The Court: You don't have to pound these things into my head about these cases. I know a little something about it.

Q. (By Mr. Fowle): You say you used the Emich case as basing your attorneys' fees of $350,000. What other factors did you take into consideration?

A. Counsel, I prefer not to—unless you want me to—discuss conversation I had with a member of your own firm about the fees, when I was still considering getting into this [4826] case, Mr. Williams. I will be glad to recount it if you wish me to do it. But I would prefer not to.

Q. I know nothing about the conversation.

A. I know Mel Williams very well, and I prefer not to recount that conversation, but I assure you—well.

Q. You and he discussed a possible fee for you?

(Testimony of William C. Dixon.)

A. No, indeed not, counsel. But it was indicated what the fees of your firm might be if this case went to trial.

Q. Were you surprised when you heard the figures today? A. Not too much, no.

Q. Well, aside from this conversation that you had with Mr. Williams, and the Emich case, what other factors did you take into consideration?

A. The results achieved, I think, are one of the things entitled to be taken into consideration. Second, the fact——

Q. Are these things that you actually took into consideration?

A. Yes. You asked me that question, didn't you?

Q. I did.

A. I will be glad to relate some of the others if you wish.

Q. Let me ask you this: Did you consider the question of the ability of the defendants to pay?

A. Well, no. I assume they are collectible, or would be, on any judgment that would be [4827] secured.

Q. Did you take into consideration the contingent nature of the fee here?

A. No, I did not, counsel.

Q. Did you take into consideration the verdict itself, or the verdict as trebled?

A. Well, I considered the verdict as trebled, in part, and I have in mind, of course, that as being one of the results of this lawsuit. The recovery here, although that is not a factor in determining

(Testimony of William C. Dixon.)

the application or the amount requested, it is certainly one of those things that should be taken into consideration in determining the fee, in my judgment. [4828]

* * *

HARRY M. IRWIN

called as a witness, after being first previously duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Harry M. Irwin.

Cross-Examination

By Mr. Fowle:

Q. You are the same Mr. Irwin who has been present here throughout this trial representing the trustee, Mr. Walker; is that correct?

A. So far as I know, I am.

Q. I understand that you have been admitted to the Bars of the States of California and Missouri, is that correct? A. That is true.

Q. When were you admitted to the Bar of the State of California, Mr. Irwin?

A. I don't remember the exact year. About 1917. [4830]

Q. Missouri?

A. Missouri was some three or four years before that.

Q. What was the nature of your legal education, just in general? Where did you go to law school?

(Testimony of Harry M. Irwin.)

A. I never went to law school. As a matter of fact, I began court reporting when I was 16 years old and continued court reporting for 17 years back in Missouri, and during that time I studied law in contact with the lawyers and judges on the bench, and some two or three years before I stopped court reporting, I was admitted to the Bar in the Circuit where I was court reporting, and afterwards was admitted by the Supreme Court.

Q. And you have been practicing in Los Angeles ever since 1917 or thereabouts?

A. Approximately that time, yes, engaged in civil practice in Los Angeles.

Q. Have you been practicing law alone or with others?

A. I never had a partnership. I have been alone. And, of course, in individual matters I have been associated with other attorneys.

Q. But you have not been a member of a partnership? A. I have not.

Q. In a general way what has been the type of your practice during say, a 10-year period prior to the commencement of this lawsuit? [4831]

A. I would say civil, and mostly as relating to business matters. I never handled any criminal matters, except on exceptional occasions in small matters.

Q. To what extent have you participated in litigation?

A. I have tried to avoid trials as much as I can,

(Testimony of Harry M. Irwin.)

but each year I have had several cases which could not be settled or adjusted in any way, and I have conducted various trials. Practically every year throughout that period of time since 1917.

The Court: I think I ought to state for the record what may be known to some members of the Bar, but what may not be known to you. I had my first job in Harry Irwin's office, and worked there as a young lawyer for about a year, and wound up by almost getting fired, but not quite.

The Witness: That is Judge Carters' version of it.

The Court: I have a good bit of information, which I suppose all lawyers have about other lawyers in the community, about Mr. Irwin and his practice. I can't say anything about the last few years, but back in '28 and '29, and times before and after that.

Q. (By Mr. Fowle): These trials that you speak of, Mr. Irwin, did they involve juries, were they jury trials?

A. Yes, they involved both jury and court trials without a jury.

Q. But you don't regard yourself as a trial lawyer [4832] primarily?

A. I prefer others to express the opinion as to my ability on that. I have been reasonably successful in trials, both before the court alone and before juries.

The Court: May I say, also, that when I worked for him, he was known as the dead man's lawyer in Chinatown.

Mr. Fowle: I don't quite understand that.

The Court: Whenever some Chinaman got hurt or killed and wanted somebody to handle a good personal injury case, they generally looked up Harry Irwin.

Am I misstating that?

The Witness: No. That was the nickname by which some of the Chinese knew me.

Q. (By Mr. Fowle): Prior to this case, Mr. Irwin, had you engaged in any antitrust work?

A. Only incidentally. I never engaged in any trial, and only casually.

Q. You had antitrust law problems in your office, did you?

A. Only incidentally. I wouldn't consider myself at all as a specialist in antitrust law or litigation.

I might say that I have learned quite a bit about it in the four years that I have been engaged in this case.

Q. Let's take the year 1951, Mr. Irwin, which was the first year immediately prior to the beginning of this lawsuit; [4833] would you state, please, what your earnings were in that year from the practice of law?

A. I couldn't possibly state that from memory. Earnings of a private lawyer with such practice as I had would vary greatly from year to year. And purely as a matter of guesswork, I would say,

(Testimony of Harry M. Irwin.)

if I had to guess or estimate it, I would say in excess of $25,000, although I would have to look at my records to ascertain.

Q. What about the year 1950?

A. I can't separate years. My earnings, to cover a general average, have ranged from, considerably in excess of $50,000 down to a much smaller amount.

Q. What would you say the average was during the five-year period immediately preceding the institution of this case?

A. I couldn't possibly answer that question.

Q. In your practice did you and do you have regular per diem rates that you charge clients?

A. I never charged a client on a per diem rate so far as I can recall, in my whole experience.

Q. Or on an hourly basis?

A. Never base my charges on an hourly basis. I base my charges largely on the importance of the matter to the client, the difficulty of the situation, and the results accomplished. [4834]

Q. Do you keep time records, Mr. Irwin, of the time spent on clients' matters?

A. I never kept anything that would approach a time record, except in, we might say, bankruptcy matters. And even that is not a time record. But I am a little more particular in noting in my daybook that I have been engaged in something relating to a bankruptcy matter than I would for the regular private client. Because I understand that while I am not what would be a regular specialist in bank-

(Testimony of Harry M. Irwin.)

ruptcy matters, I do understand that in bankruptcy matters in an application to the court for an allowance of fee there must be some general statement as to the time employed.

Q. Have you kept any records of the time spent on this particular case?

A. Yes, sir, I have kept and do keep an office daybook in which I simply note down the name of the client, the telephone call, the letter, or the matter in which I am engaged. I very seldom put in the length of time. And in this case I very, very rarely put the length of time, unless it would be several hours, or perhaps for a whole day that I would spend in this particular case.

Q. But you have no really accurate time records of the time spent in this case?

A. Not a regular time sheet such as I understand the larger offices keep. [4835]

Q. Do you have any lawyers working for you, Mr. Irwin? Any lawyer employees in your office?

A. No. At this time I do not have anyone employed by me.

Q. I mean since 1951, or thereabouts.

A. No. I might say that since about that time I have given my time to substantial matters for clients, or in which I would be employed, and I have not handled what you might term as smaller matters wherein you would use an assistant or law clerk. In those matters, when the matter is of sufficient importance, I would associate somebody with me rather than employ a younger attorney.

(Testimony of Harry M. Irwin.)

Q. You came into this case on about what date?

A. Approximately April, 1952. That is to say, Mr. Walker was appointed trustee in the Chapter X proceeding in the latter part of March or first of April, and I was employed as his attorney in the Chapter X proceedings, and approximately at the same time I was informed of the pendency of this antitrust action, which had been commenced by the debtor before our appointment or employment, and one of my duties immediately was to look into this matter and to see what interest the trustee might have or the estate might have in this matter, and to determine what course we should pursue with reference to this litigation.

Of course that involved an investigation and study of the [4836] facts and the law, and a determination as to whether or not we would intervene in behalf of the trustee as a plaintiff in this action.

Q. Did you make such a study?

A. Yes, I did.

Q. What study of the law did you make?

A. I examined the pleadings, I conferred with Mr. Reich as to his theory of the case. I looked into the matter generally. I can't tell you in detail just everything that I did.

Q. Well, after the trustee intervened in this case, with you as the trustee's attorney, what if any understanding did you have with respect to what your compensation was to be for services rendered in connection with this case?

A. Nothing whatever, except only that under the law my fee in this Chapter X proceeding for my services to the estate, and to the trustee, would eventually be fixed and determined by the court.

Q. At that time Mr. Reich, as I understand it, was attorney for the Winckler & Smith Company?

A. He was at the time, and has continued to be, so far as I know. But he is the attorney who originally brought the action for Winckler & Smith.

Q. Do you know whether Mr. Reich or any other attorney for either the plaintiff or the intervenor has any [4837] contingent fee interest in any judgment that may be rendered in this case?

A. So far as I know, I think I can say that I do know that there is no such contingent fee.

Mr. Reich was employed as special counsel by an order or orders in the Chapter X proceeding, and that order—well, there was an order and an amended order, and the amended order provided that he should be paid such amount for his services in the proceeding as should be fixed and determined by the court. Thereafter, when he retired as attorney for the trustee, a subsequent order was made to the same effect, that is, that he eventually—I don't know if it specified a time—but that the court could fix and determine what fee he should be entitled to for his services up to the time that he withdrew from the case as attorney for the trustee.

Q. So that so far as you know Mr. Reich's fees here will be only such as may be allowed by the court; is that correct?

A. My understanding is—I don't want to fall nto the fault of talking too much, but if you want ny understanding of the law, I understand that the rustee took over, under his appointment as trustee, ll of the rights of the debtor Winckler & Smith, nd thereafter all fees, costs, and expenses were nder the jurisdiction and direction of the judge n the Chapter X proceeding, including the fixing f the fees. [4838] And the contingency, if any, I uppose, would be whether or not the estate had ny money out of which to pay the fee that the ourt might allow to him.

Q. When did Mr. Reich withdraw?

A. The order terminating his employment was nade some time in October. But we were adised——

Q. October of what year?

A. October of 1954. But we were advised in bout July or perhaps August of 1954 of his desire nd intention to withdraw. And it was at that time hat we began conferring—I say "we," meaning Ir. Walker, the trustee, and myself—began conerring with Mr. Dixon here with regard to his mployment to act as special counsel in the conduct f this action.

Q. Did Mr. Reich participate in the preparation or trial, or any aspect of the work in connection vith preparation for trial, after he withdrew in or bout October, 1954?

A. The word "participate" has a rather sweepng meaning. As far as I know, I think he—I don't hink I should say that, but I think Mr. Dixon is more informed, and I think he has testified as to just what occurred between him and Mr. Reich.

So far as I was concerned, I left the conferences of those matters, and whatever may have been done, to Mr. Reich and Mr. Dixon.

I will only say that I am sure that Mr. Reich furnished [4839] whatever information that Mr. Dixon called on him to give, which was within his power.

Q. I was simply trying to find out how much you knew about what work Mr. Reich did on the case after October, 1954.

A. All I can say is that I never participated, so far as I know, perhaps, more than once or twice in conferences—in the midst of my answer I recall that Mr. Reich was in Mr. Dixon's office on perhaps two or more occasions after that time when certain matters were discussed. But so far as conferences personally with Mr. Reich after that time, I had none, and, of course, I understood that his official employment as special attorney for the trustee was terminated by the court's order. But I want to say that Mr. Reich at all times showed a willingness to give to Mr. Dixon and to me, as attorneys in the matter, any matters or information within his possession. But those conferences or communications were between Mr. Dixon and Mr. Reich, almost altogether. Hardly any with me personally.

Q. I understand that your estimate is that you have devoted approximately 2,000 hours to this case; is that correct?

(Testimony of Harry M. Irwin.)

A. Yes. And I base that on the number of notations in my book as to the various things—my daybooks—as to what I did, and on the basis of those I can account for approximately 1,200, somewhere in there, hours, and in addition to that [4840] I know, as perhaps every attorney knows, that there were conferences, time spent in study, and so on, that do not go down in such a day book as I kept.

I will have to qualify that from the standpoint of being completely accurate. I said not much was in the book. I have not noted, since about the 1st of December, or even before that—I have made very few notations of the fact that we were engaged in the preparation of trial or conducting the trial of this case, so I made a broad estimate as to the time that I know was employed both in trial and in preparation for trial, and I have included that in the time that I stated.

Q. Does the 2,000 hours include any time devoted to representation of the trustee, other than the trustee in his capacity as an intervenor in this case?

A. No. I have tried to exclude, in coming to that conclusion of 2,000 hours, I have tried to exclude all time that was spent in the other matters, in the Chapter X proceedings, except only matters relating to this particular antitrust action.

Q. The TreeSweet Products Company was involved in this case at one time, as you recall?

A. That is true.

(Testimony of Harry M. Irwin.)

Q. A settlement was made with them, as I understand it?

A. Yes, they paid a consideration and the trustee [4841] executed a covenant not to sue, and an amount was paid——

Q. Did you participate in the negotiations for that settlement?

A. I had several conferences with the attorneys for TreeSweet and with the trustee, and also with Mr. Reich, and the trustee and I had to determine whether or not such an instrument would operate as against our continuing the prosecution of the action against the remaining defendants. I can't tell you the time I spent on that, but I did give serious consideration to that matter.

Q. You spent some time in negotiations of the matter with counsel for TreeSweet, did you not?

A. So far as the negotiations were concerned, I do not recall that I participated in the negotiations. I know Mr. Walker, the trustee, participated in those, and I am sure that Mr. Reich did, but I do not know that of my own knowledge.

Q. Was the time that you devoted to this problem, the TreeSweet settlement, included in the 2,000 hours? A. Yes, I think so.

Q. And approximately how much?

A. I considered that as a part of the attorneys' services that were tried to be rendered in this action.

Q. And after the TreeSweet settlement you filed a petition for allowance of attorneys' fees in the

Chapter X [4842] proceedings or Chapter XI proceedings? A. I did not.

Q. Did Mr. Reich file such a petition?

A. Not to my knowledge.

The Court: I think that both of them filed some application for the fixing of some percentage of fees, and then you withdrew——

The Witness: That is correct. I hadn't recalled that, but Mr. Reich filed an application along about July or August of 1954 for revision of the terms of his employment, so that his fee would be based on a certain percentage, and at that time I did file a petition that if the court should grant Mr. Reich's petition to fix a percentage, that the court should at that time fix my attorney's fee at such amount or percentage as the court would deem just.

Q. (By Mr. Fowle): Was there a hearing on that matter?

A. I wouldn't say that there was a hearing on my motion, because it was only in the alternative, and would not be a motion unless the court granted Mr. Reich's motion, and Mr. Reich's motion was denied.

Pardon me. One thing. You asked me if I filed a petition after the conclusion of the TreeSweet matter, and I understood you to mean for attorneys' fees in connection with the TreeSweet settlement, and my answer, "No," was intended to mean that I did not file any petition for an allowance of fees [4843] for my services in connection with the TreeSweet settlement.

(Testimony of Harry M. Irwin.)

Q. To return for a moment to your estimate of 2,000 hours, Mr. Irwin, can you give us an estimate of how much of that time was spent before the trial began in this case?

A. That would be a very rough approximation.

Q. Can you give us an approximation?

A. Before the actual trial commenced, and including the time spent immediately before—when I say "immediately," within two or three months of when the case was set and afterwards reset for trial—I would say that one-third or more of the time was spent during the trial, and perhaps two-thirds before the trial. I base that on this statement: The trial continued approximately two months, and if I would undertake to average the time working day and night, Saturdays and Sundays, too, I know I would be on the conservative side if I would say that I spent more than 10 hours every day or an average for the 60 days during the trial working in direct connection with the trial. In other words, that would be 600 hours that I spent during the trial.

Q. You would estimate that approximately two-thirds of the 2,000 hours was spent before the trial started?

A. I would. I would say I spent more than 12 hours a day during the trial, actual trial of the case.

Q. How much was that? Twelve hours a day?

A. Yes. [4844]

Q. Every day?

(Testimony of Harry M. Irwin.)

A. I would say it would average that. Some of them a great deal more than that.

I know we were usually down in court before 9:00 o'clock, at the office working on this before 9:00 o'clock, and many nights I spent until after midnight in reviewing the testimony of the day, and preparatory evidence, in preparing evidence and analyzing evidence either to rebut the evidence that had been introduced or to prepare for our own presentation of the case. And I think I may say——

Q. You think you averaged 12 hours a day for two months?

A. Yes. That is not an unusual time for an attorney who is busily engaged in a case, to do that. I spend a great deal more than that many times.

Q. Your affidavit says that you examined and digested voluminous and complex records and facts of the plaintiff and the defendants. Do you recall that statement? A. Yes.

Q. How much of your time, that is, of the 2,000 hours, would you say, Mr. Irwin, was devoted to that type of work?

A. I can't apportion that. But I might say that primarily it was more or less delegated to me, or I assumed the work of making an examination and an analysis of the cost [4845] and damage records, because of the effect of the defendants' act, and as a causation of the damages which we claimed for the plaintiff and trustee, and the evidence which would bear thereon; and also an analysis of those facts so as to prepare or be prepared to present a

(Testimony of Harry M. Irwin.)

concise and a simple statement thereof, and thereby make the matter as clear as possible and as simple as possible for presentation to the jury in court. And that required a tremendous amount of time. I can't apportion it.

Q. I imagine it might have been as much as a half of the 2,000 hours, might it not?

A. It might have been.

Q. Or perhaps more?

A. We not only had to analyze the records of the plaintiff to try to determine, because of the extensive photostating that the defendant made of the plaintiff's records, just what the defendants might be intending to present from those records, but we had the situation where the company was in virtual bankruptcy, we had to get those records out, and then the responses to interrogatories, which we addressed to the defendants, were neither complete nor clear as to the facts which they were giving.

Q. You had no one to help you in this, did you, Mr. Irwin? A. Yes, I did. [4846]

Q. Who did you have?

A. I had a Mr. Smith, who was working as a bookkeeper and accountant for Winckler & Smith, or for the trustee, I should say, not for Winckler & Smith; I had my associate, Mr. Walker, who was trustee; and we necessarily occupied a tremendous amount of time of Mr. Dixon in going over these matters.

Q. I notice both you and Mr. Dixon in your affidavits say that you were handicapped because you had no investigator. A. We were.

Q. If you had had an investigator here, how much of the 2,000 hours that you put in would he have put in, do you suppose?

A. I would say there would be practically no difference, because in preparing evidence of the kind required in this case an investigator would have only served to accumulate data, but it was necessary for an attorney to go through all of that data, because no investigator would be able to pick out this item here, there, and yonder, either in the minutes of the corporation or in the bookkeeping items, and evaluate that and determine what facts of those would be introduced in evidence, and what were not material or important. Therefore, the attorney had to do all the work. Whereas, if you have an investigator, he can simply bring the data to your office, but still you have to do the [4847] work.

Q. But what you are saying, then, is if you had had additional help, additional investigators, that would not have reduced the amount of hours that you put in; is that correct?

A. No. I think my answer to that is that if we had had additional investigators, we would have had more information as to the facts. But we, nevertheless, would have had to spend as much time as either Mr. Dixon or I did in evaluating that testimony and in determining just what portion of it is relevant and material and should be used.

(Testimony of Harry M. Irwin.)

and what might be disregarded as being of little importance.

Q. By the way, Mr. Irwin, do you know whether or not there is a going rate, per diem rate, or an hourly rate, in Los Angeles for lawyers who try antitrust cases?

A. I have an impression that the Bar Association has—or some group has fixed a standard or a minimum rate; but I do not understand, even, in fixing that rate, that they undertake to apply it to a particular attorney's practice or particular litigation.

In my own matters I have always based—I have practically disregarded the hours spent.

Q. What is this rate that you have just mentioned that has been fixed by the Bar Association?

A. I don't know. People have talked about $250 or $500 per diem in court.

Q. Is that what the Bar Association talks [4848] about?

A. I am not informed. I don't know. I don't know that the Bar Association has actually formulated any such schedule.

Q. I thought you said that the Bar Association had formulated some minimum schedule.

A. I evidently did not make myself clear. I said in general terms that I had heard that the Bar Association or some group of lawyers, and I did not undertake to identify them, and I do not know, but I have heard of such a schedule. In fact, I think the Los Angeles Daily Journal some several years

(Testimony of Harry M. Irwin.)
ago printed a schedule of minimum charges for attorneys to make for specified services.

Frankly, I never paid any attention to it.

Q. If there is a going rate in the Los Angeles area for trial lawyers who specialize in the trial of antitrust cases, you don't know what it is?

A. I never heard of such a rate.

The Court: For your benefit, Mr. Fowle, not being a resident of our bright and glorious state, it is my understanding that the L. A. Bar itself has never prepared one of these fee schedules, but that the Bar Associations of various communities surrounding Los Angeles, like Inglewood, Long Beach, San Fernando Valley, a number of the smaller bar associations, have published from time to time tentative lists of suggested fees, so much for a corporation, so much for defense of a criminal trial on a per diem, a civil trial, and entirely [4849] suggested fees. There are minimum fees. I think that is about the picture.

Mr. Fowle: Your Honor, I might say, and I say this quite respectfully, I am not asking these questions, really, so much for my information as I am for the record.

The Court: That is one reason why I thought I would say that.

I think my statement is fairly accurate. I don't think the L. A. Bar ever did. I might be subject to correction there.

I have never seen one yet where they had listed anything about antitrust matters.

(Testimony of Harry M. Irwin.)

It generally talks about civil, criminal, and so forth.

Q. (By Mr. Fowle): Mr. Irwin, in your affidavit you say that you believe that $350,000 is a fair fee for plaintiffs' attorneys in this case.

A. That is true.

Q. How did you compute that figure?

A. Well, I computed it on the basis of similar charges, somewhat in proportion to charges which I have made in my experience and practice, and charges that I know other attorneys have made; and you will understand that I have testified already that I have not made any charges in antitrust litigation, and consequently I have no experience as to charges made in antitrust matters, except as those charges [4850] might be incidentally referred to in the various cases.

Q. Did I understand you to say that you took into consideration the charges that had been made in similar cases?

A. I said similar cases, but excluded charges in antitrust matters, because I said I had limited experience in antitrust matters.

Q. When you speak of similar cases, what kind of cases do you have in mind?

A. Cases where there is an action for recovery where the service is rendered without any previous fixing of fees on any daily or per diem rate, on a charge of what is a reasonable fee for the services as determined at the end of the litigation.

(Testimony of Harry M. Irwin.)

Q. Are those cases in which there was a contingent fee arrangement?

A. Sometimes there would be, sometimes there wouldn't, but I have taken all of the experience into consideration in arriving at this fee.

Q. Did you take into consideration the fact that the fee in this case would be contingent upon a successful outcome?

A. Only to this extent: If my employment, we will say, in this case—it is hard to imagine, perhaps, but suppose I were employed alone in this case, and had the ability to handle it, as I know Mr. Dixon did handle this case, and at [4851] the conclusion of the case, considering all the facts which we are all acquainted with in this case, I would have fixed my fee at, at least 40 per cent of the entire recovery. That is to say, that I would have fixed the fee at at least $600,000.

Now, I did take that fact into consideration, and I also took int consideration the fact that in my opinion I should not consider that this case was actually, if not literally, on a contingent basis. So I undertook to eliminate the contingency from my estimate of the fee in this case, so that I determined whereas if this case had been on a contingent basis a reasonable fee would have been $6,000 as a minimum.

Q. $600,000?

A. $600,000. 40 per cent of the entire recovery of one million and a half. I reduced that amount down to $350,000, and on that basis, as well as other facts within my knowledge, I concluded that $350,000 would be a reasonable fee to be charged in this action, where the contingency is completely eliminated in estimating the fee. And inasmuch as there is only one attorney fee that can be fixed, it doesn't make any difference whether there is one or more attorneys.

I have made my affidavit and representation that in my opinion $350,000 is a reasonable fee to be allowed in this case.

Q. You take into consideration the amount of the [4852] verdict as trebled, I take it?

A. I told you that that was one of the premises which I considered. I started out with what my fee would have been on the assumption that the recovery was $1,500,000, I took into consideration trebling and the contingency, and knew that the normal fee, according to my basis of charging, and I think the basis of most of the attorneys, would have been on the basis of 40 per cent of the entire recovery. Then I undertook to eliminate those factors as to the trebling, and the recovery, and the contingency, and I came to the conclusion that $350,000 under all the circumstances, as well as I could weigh the matter, would be a reasonable fee.

Q. Do you know of any other antitrust cases, Mr. Irwin, in which a fee has been allowed which is in excess of 50 per cent of a verdict as large as the verdict is in this case?

A. I told you my experience in antitrust matters is limited. I simply am testifying to my own

(Testimony of Harry M. Irwin.)

opinion with the full realization that the court will weigh all opinions and determine what is fair and just.

Q. Did you take into consideration what you may have thought the defendants paid their lawyers in this case?

A. No, not in fixing the fee, although I do think that is somewhat of a criterion. If the defendants paid as much as they have, as I was informed—of course I did not know those facts when I gave my estimate—I was of the opinion [4853] that the attorneys for the defendants had been paid approximately that amount, and I thought the services of the attorneys for the plaintiff would be worth equally that much.

I think the services that the defendants' attorneys rendered in this action were of equal quality and value as the services that were rendered—I mean of the plaintiffs' attorneys were of equal quality and value as the services rendered by the defendants' attorneys, and vice versa, Mr. Fowle. I would say that it works both ways. [4854]

* * *

CLORE WARNE

called as a witness by and on behalf of the attorneys for the plaintiff and trustee, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Clore Warne.

Mr. Reich: Let the record show that Mr. Warne is called as a witness for all attorneys for the plaintiff and trustee.

Direct Examination

By Mr. Reich:

Q. What is your business address, Mr. Warne?

A. 6535 Wilshire Boulevard, Los Angeles.

Q. Are you a member of a firm at the present time? A. I am.

Q. The name of it, please?

A. The firm of Pacht, Ross, Warne & Bernard.

Q. Prior to that name, you were a member of the predecessor firm of what name?

A. Pacht, Tannenbaum & Ross.

Q. Prior to that time?

A. Pacht, Warne, Ross & Bernard.

Q. And how long have you been, yourself, practicing in this community?

A. Since May 1, 1920. [4855]

Q. 1920? A. 1920.

Q. Have you and your firm handled antitrust cases? A. We have.

Q. In this district? A. Correct.

Q. Will you name those that you can remember?

(Testimony of Clore Warne.)

A. There was the defense of a case, Finley vs. Music Corporation of America; there was the prosecution of a case, three cases, as I recall, for Fanchon & Marco, or their subsidiary corporations, I have forgotten the corporate name, one against Warners—all of these were against the major motion picture studios, and Fox West Coast.

Q. May I name them? If I am correct, Fanchon & Marco, the Manchester Theatre, and the Southside Theatre cases, three different cases?

A. Correct.

Q. Incidentally, I was a member of Pacht, Tannenbaum & Ross, was I not?

A. Correct, and the prior firm of Pacht, Warne, Ross & Bernard.

Q. And I handled some of those antitrust cases in conjunction with your office, did I not?

A. That is correct; you very largely handled them after the initial case, and worked actively upon the initial case? [4856]

Q. Go on with this list.

A. I believe there were two cases which were brought for drive-in theatres.

Q. Pacific Drive-In?

A. Pacific Drive-In Theatres was one of them. I have forgotten whether that was the corporate name of the second one. It may have been. There were two cases.

Q. The other one was San Pedro against Warner Bros.?

A. It involved a drive-in situation, as I recall.

(Testimony of Clore Warne.)

There was an appearance—I was thinking of the defense of an action—in which Fanchon & Marco were charged as defendants in one of the cases, but I think there was a dismissal as to that.

Q. One moment, Mr. Warne. In the Cal-Pac or the Pacific Drive-In cases, do you remember how many different plaintiffs there were and how many different drive-ins were involved?

A. I do not know, except that there were a number. I know that it presented an involved—quite an involved situation then existing with reference to procuring product for drive-in theatres in competition with, shall we say, non-drive-in movie theatres.

Q. Pacific Drive-Ins was the single largest drive-in enterprise in this community, was it not?

A. I believe it was at that time. [4857]

Now, then, there was another case that we brought, which involved the Richfield Oil Company.

Q. Was that Henry Munson against Richfield?

A. Yes, Munson. Which involved a private lawsuit against Richfield, both for injunctive relief, which, as I recall, was successful at the injunctive level, and for damages, and it was settled at the damage level under one of their lease contract operations.

Q. Mr. Dixon, as a matter of fact, was attorney for the government in the basic case which the government brought, and on which this Munson case was founded in part, isn't that true?

A. I didn't recall that he was that counsel, but

I remember that there was a pilot case decided by Judge Yankwich, as I recall, which went to the Supreme Court.

Q. I have always thanked Mr. Dixon for that fee.

Mr. Dixon: Thank you.

The Witness: I believe that covers the antitrust phase of the litigation in which I have any familiarity.

Q. (By Mr. Reich): You, yourself, despite your modesty, Mr. Warne, were actively engaged in all those cases, were you not?

A. Yes, I was somewhat considered in those cases.

Q. As a matter of fact, you were my senior in those cases? [4858] A. Correct.

Q. Have you read Mr. Dixon's affidavit of February 13th?

A. That is the affidavit filed here in support of the application for fixing fees?

Q. Yes. A. Yes, I have.

Q. Did you hear Mr. Dixon's cross-examination, that is, the cross-examination of Mr. Dixon?

A. I did.

Q. And have you read the affidavit of Mr. Irwin, dated the same date, February 13, 1956?

A. I did.

Q. And did you hear the cross-examination of him? A. I also heard that.

Q. Did you read my affidavit of February 12, 1956? A. I did.

(Testimony of Clore Warne.)

Q. Did you examine my time sheets in support of that affidavit? A. I did.

Q. Have you examined the pleadings in this case, both the original pleadings and as they were amended, and the answers to the amended complaint? A. I did.

Q. Mr. Warne, have you formed an opinion as to the reasonable value of the services that were rendered by the attorneys [4859] for the plaintiff and the trustee? Either yes or no.

A. Considering another factor, which has been expressed to me and I believe was included in part in the affidavit——

Mr. Fowle: May we have this answer confined to yes or no so I may make an objection?

Mr. Reich: Again, we are dealing with a lawyer witness.

The Court: The question is, do you have an opinion, and you want to add another fact before you answer yes or no?

The Witness: That is correct.

The Court: What is this additional fact?

The Witness: The additional factor is, and I am not sure that it is recited in that form in the affidavits—that is, that there was a verdict rendered here in favor of the plaintiff in the sum of $500,000.

The Court: Yes. I don't know whether the affidavits you refer to, either, disclose the fact that this case started to trial before a jury on December —10th, was it?

Mr. Reich: Yes, it does.

(Testimony of Clore Warne.)

The Witness: Mr. Dixon's affidavit recites those facts.

The Court: Now, do you have an opinion?

The Witness: My answer is yes.

Q. (By Mr. Reich): What is that opinion?

Mr. Fowle: Objection, if the court please. I believe, as your Honor indicated to us the other day, that the proper way to proceed here is to propose a hypothetical question to [4860] the witness, and no such question was posed, and the questions that have been asked are so far from containing anything remotely approaching the various factors and problems here, that it is not even possible for us to point out what has been omitted, and what may have been included that shouldn't have been. The omissions are, of course, obviously great, and we object to this question and to the witness answering it on that ground.

The Court: I didn't understand that I had limited you to ask a hypothetical question. The record on which this witness is basing his opinion is his inspection of these pleadings, as amended, and the answers thereto, the time involved in trial, the affidavits of Mr. Dixon, Mr. Irwin and Mr. Reich, and the cross-examination which he heard, which is all in the record.

What other major elements would there be? It seems to me this is a matter for you to cross-examine on.

The objection is overruled.

The Witness: The question, as I understand it,

(Testimony of Clore Warne.)

is what in my opinion is the reasonable value of the services rendered?

The Court: By the attorneys.

The Witness: By the attorneys, yes. I would say the reasonable value of those services would be $400,000.

Q. (By Mr. Reich): What are the factors, Mr. Warne, that give rise to that opinion, that you considered in making that [4861] opinion?

A. I considered a number of factors.

Factor (1), the problems that are involved when an attorney is presented by a client with a set of facts in which he indicates that he requires the assistance of an attorney in order to secure legal relief, if possible, and which the attorney at that time is required to consider, as the problem is stated to him by the client and by way of an investigation, and the particular skill and ability that is shown in approaching and solving that problem, or at least in approaching and presenting a solution to that problem, and then undertaking the responsibility of a lawsuit in aid of the client in that type of situation. Having in mind that in the first instance what is required is the ability to see a basis for relief, and for damages, if damages are allowable that can be recovered in a lawsuit on behalf of the client, and then engaging in that lawsuit.

I consider, also, secondly, the nature and character of services peculiarly required to be rendered in connection with the prosecution of an action, I

(Testimony of Clore Warne.)

mean an action such as here, where, as I read the pleadings, and the issues presented by the pleadings, it is not a pattern type of action. By that I mean the type of action where, shall we say, you follow the general rule laid down in the Paramount case, or where there is a prior government decision in a given case, [4862] which, shall we say, lays the law, or which can be used as a basis, as a fact and law basis, as I understand it, not necessarily for recovery, but at least to develop a theory in the action. And the particular skill and ability which is required in order to, shall we say, make a case for the client by the bringing of a lawsuit and using the processes of discovery, and of developing facts which are permitted under the procedure of the federal court, and in antitrust cases.

Thirdly, the particular skill and ability of trial counsel. And if I may say so, the eminence of trial counsel who conducted the trial of the action.

I will say, also, that in all of these, including trial and preparation, and the initial work, the matter of time which such a diligent and qualified counsel, or qualified counsel, rather, working diligently, would be required to devote in connection with the rendering of such services.

I would consider, also, the fact that, as is indicated here—the, shall we say, speculative character of the litigation, having in mind the fact, again, that this is a type of case where there was no pattern for recovery and where, shall we say, the case had to be made from the facts elicited and de-

(Testimony of Clore Warne.)

veloped in the particular lawsuit, and the facts as found very largely in connection with the preparation for the trial of the lawsuit.

I should have mentioned, also, not as a separate item, [4863] but in connection also with the trial of the case and the preparation of the case for trial, the work involved in connection not only with the fact of discovery, but then making the facts discovered available for trial use, which is a very considerable job required in connection with any intricate litigation, and ordinarily, as I understand it—and as I have known the fact to be—this type of litigation is of such a character.

I would consider also as a factor, the next in order, the results in the case, which in this instance involved—resulted in a verdict of damages, as I understand it, of $500,000 for the plaintiff in the action, and which amount is required to be trebled under the statute.

I would consider, also, the fact that in litigation of this kind the matter of attorneys' fees being a part of the penal provisions of the statute is properly to be given consideration on the basis that all of the facts can be considered or should be considered, in my opinion, by the court, in fixing the matter of attorneys' fees, these matters such as I have stated and presented, and should be considered liberally in aid of the attorneys, or rather in aid of the plaintiff who brings the action and who procures attorneys in such an instance to bring the action and prosecute it to successful judgment.

(Testimony of Clore Warne.)

Those are the factors which I have considered in connection [4864] with this.

Q. Did you consider, also, Mr. Warne, the nature of the opposition in this case?

My affidavit makes mention of the opposition. Did you consider that factor in making your opinion in fixing the fees?

A. I did, and particularly with reference to the matter of that opposition always making, shall we say, at least, difficult, and even more than difficult, requiring extraordinary services in the preparation and in the trial of the action.

Q. Did you consider as one of the factors the inability of the plaintiff to give a retainer to its counsel?

A. I considered the fact that there was no retainer given in this instance, as I understood the fact to be, and that the employment was not on the basis of a retainer.

Q. Did you give any consideration to the inability of the plaintiff—that inability being caused as alleged by the acts of the defendants charged?

A. Putting it exactly that way——

Q. No. Put it any way you like.

A. No, I cannot say that I considered that as a factor directly.

Q. Do you consider it a factor, now that I bring it to your attention? [4865]

A. I would consider that under the general first category that I mentioned, namely, part of the man's problem is that he was met with a commer-

8

cial situation, which as stated in the complaint was in effect putting him out of business, and as I understood it, it eventually did so.

Q. Would you put under that same factor the different positions of the parties, that is, the position in the community of the plaintiff and the position in this case of Sunkist—is that a consideration, sir?

A. Only as it would come under the difficulties of the problem overall presented.

Q. It is easier to find a lawyer for Sunkist than it is to find a lawyer for Winckler & Smith, which is my question?

A. I think counsel would agree to that.

Mr. Fowle: If the court please, I wish to object to the manner in which counsel is leading this witness. It is perfectly obvious that Mr. Warne knows the basis for his opinion, and I don't think it is necessary for counsel to put words in his mouth.

Mr. Reich: I withdraw the question, sir.

The Court: All right. You may cross-examine.

Mr. Fowle: Your Honor, I wonder if we might have a five-minute recess before we commence the cross-examination.

The Court: Let's make it rather short, because we may have to have another one later. [4866]

Mr. Fowle: It will be a short one.

The Court: Step down, Mr. Warne.

(Recess taken.)

The Court: Proceed.

(Testimony of Clore Warne.)

Cross-Examination

By Mr. Fowle:

Q. Mr. Warne, your firm, I take it, has had some experience with treble damage suits under the antitrust law? A. Yes.

Q. Do you know of a case in which in a treble damage suit under the antitrust laws that a court has awarded plaintiffs' attorneys in a successful case for the plaintiff attorneys' fees amounting to 80 per cent of the verdict?

A. If you want to go into the history of all these cases, I do not know of any, put exactly in that fashion.

Mr. Fowle: That is all I have.

The Witness: But, wait. I have not finished my answer, sir.

Q. (By Mr. Fowle): All right.

A. I do know of a case in this district that I assisted in trying before Judge McCormick—I mentioned the Finley case, the Music Corporation of America, where a judgment was awarded in favor of the plaintiff—correction—a verdict was returned in favor of the plaintiff in the action, [4867] and whereupon a motion for a new trial the judgment was vacated, and at the same time an application to fix attorneys' fees—the judgment was vacated insofar as the plaintiff's recovery was concerned, on the ground that no recoverable damage could be shown, but where the court made an allowance of $17,500 for attorneys' fees.

(Testimony of Clore Warne.)

Q. How much was that?

A. The amount of attorneys' fees was $17,500. This was for a short trial, I think, of five or seven days, or thereabouts, a case tried before Judge McCormick to a jury.

The Court: And a judgment had been entered on the verdict, but on the motion for a new trial the judge set aside the judgment?

The Witness: Correct, in favor of the plaintiff as to damages, but allowed the plaintiff attorneys' fees in that amount.

The Court: Was there any type of relief still remaining to plaintiff?

The Witness: There was none. There was no relief in the case at all, whatever. There was no injunctive relief—while it was prayed for originally, there was no injunctive relief sought, nor before the court at any time.

The Court: What theory did Judge McCormick base the award on?

The Witness: Upon the theory that this was an action in [4868] which, by reason of the jury's verdict, the fact of violation of the antitrust law had been proved, although there could be no proof of damages, that is, the evidence on damages was insufficient to support the verdict, nevertheless, by reason of the fact that there is a penalty provision in the statute in favor of the plaintiff prevailing in an action of this kind, that the plaintiff should be allowed attorneys' fees for services rendered. That was the theory that he announced.

(Testimony of Clore Warne.)

Q. (By Mr. Fowle): Was there an appeal in that case?

A. There was an appeal—we appealed that ruling of Judge McCormick.

The Court: Were you on the defendant's side?

The Witness: We were, sir.

The Court: What happened?

The Witness: We settled the matter before it was determined on appeal.

Q. (By Mr. Fowle): It never came before a Court of Appeals?

A. It was not decided by the Court of Appeals.

Mr. Fowle: Thank you, very much.

Mr. Reich: There is another case, is there not, Mr. Warne, where the amount of attorneys' fees was 1,500 per cent of the amount of the verdict? That was in Judge Westover's court in the Banning case, where the jury came in with a [4869] verdict——

Mr. Fowle: Are you testifying, Mr. Reich?

The Witness: I read of that fact, and I think the judge read it, also.

The Court: That is a fact of which I can take judicial notice. All someone has to do is call it to my attention. Do you agree?

Mr. Fowle: Yes.

The Court: I had reference to it in the brief. What was the amount of the verdict?

Mr. Reich: $1,000. And Judge Westover allowed counsel $15,000.

The Court: How long did it take to try?

Mr. Reich: Less time than this one, this case that was tried here. I think it took seven [4870] weeks.

* * *

CHARLES E. BEARDSLEY

called as a witness on behalf of the defendants, being first previously duly sworn, testified as follows:

The Witness: My name is Charles E. Beardsley.

The Court: I never cease to be amazed at the ingenuity of lawyers. The defendants in this case had found every opinion that I had ever written where I had said anything that in any way pertained to the issues in this case. I complimented them before, and I will compliment them again. Mr. Reich calls Clore Warne as a witness, an old friend of mine that I am well acquainted with; the defendants call Charles Beardsley, whom I have known since——

The Witness: 1927.

The Court: He and I got by the bar at about the same time.

You are on an equal basis. [4871]

Mr. Fisher: Your Honor, may I say for the record, that at the time I interviewed Mr. Beardsley with reference to becoming a witness, I didn't know that he was a particularly close friend of yours.

The Court: Well, you can't blame the court for having a few friends now and then.

(Testimony of Charles E. Beardsley.)

Mr. Fisher: I am sure that that friendship will neither influence Mr. Beardsley nor your Honor.

The Witness: I admitted the friendship. If that is guilt by association, I am guilty. I also said it would make no difference to this judge no matter how good a friend the witness was of his. And I think I see Mr. Warne nodding his head.

Mr. Warne: I may agree, for the record.

The Court: That is true.

Go ahead.

Direct Examination

By Mr. Fisher:

Q. Mr. Beardsley, what is your occupation?

A. I am an attorney at law, licensed to practice in California and in this District, and in the United States Supreme Court.

Q. How long have you practiced?

A. Since October, 1927. [4872]

Q. Where did you obtain your legal education?

A. Stanford University.

Q. Are you a member of a firm?

A. Yes. Beardsley, Hufstedler & Kemble.

Q. How long has that firm existed?

A. The firm has existed in name since I was spending most of my time away from the office in 1951. It has existed as a true partnership since January 1st, 1955.

Q. Prior to that time you practiced as an individual, is that correct?

A. Yes, I began with my father, John Beards-

(Testimony of Charles E. Beardsley.)

ley, in 1927, was with him until 1934 when he went into public office, then I practiced in association with George P. Adams until 1939, and then I practiced individually and with employees, accumulating up to two employees, who are now my partners, as I have stated, for the period that I stated.

Q. I believe you stated the courts to which you are admitted?

A. I think so. All courts in California, this District, the United States Supreme Court, the Court of Claims. I never appeared there except to be admitted, I might confess.

Q. Have you been active in state and local bar activities? A. Yes.

Q. What offices have you held? [4873]

A. I was chairman of the junior committe, junior barristers—that taxes my memory, that was in 1928; I was on various committees of the Los Angeles Bar Association and of the State Bar; I was for five years a member of the committee of bar examiners of the State Bar, from 1941 to '46, chairman the last year; I was for three years a member of the Board of Governors of the State Bar, and president in the years '52 and '3, I believe.

Q. What has been the general nature of your practice?

A. Mine has been a general civil practice, practically no criminal work; of recent years, a good deal of trial work for other attorneys, as well as for my own clients, with considerable probate work,

(Testimony of Charles E. Beardsley.)

real estate law. No antitrust work.

Q. Would you say that you have more or less specialized in trial work?

A. In the last six or eight years I would say that that has been the major part of my work.

Q. Are you a fellow of the American College of Trial Lawyers? A. Yes, I am.

Q. For how long have you been?

A. I would say three or four years. I am not sure.

Q. Practically since its organization?

A. About a year after its organization. [4874]

Q. You say you have not specialized in antitrust work?

A. No; I say I have never handled an antitrust matter.

Q. Would you give us an indication of some of the more important trials in which you have participated?

A. Each of them to my client has been the most important trial that ever came along. Just now I seem to be in the garbage business. Atkinson vs. the County of Los Angeles.

I would say that my clients largely are individuals. I have no large corporate retainers. I don't represent any insurance companies. Let's say I am a people's lawyer. The cases are more for individual clients, rather than for large organizations.

Q. Are you generally familiar with the charges made by attorneys in this locality, would you say?

A. Yes, sir, I think I am quite familiar. Very much more so since my time on the Board of Governors, which handles disciplinary matters, and since my service on the arbitration committee of the Los Angeles Bar Association, and as chairman, as I recall, of that committee which settles disputes between lawyers and clients, and particularly because of my interest in public relations of the profession, which are very, very profoundly affected by the matter of the fees charged by lawyers. [4875]

Q. Are you familiar with the charges in more important and complicated cases, also?

A. I think I am, yes.

Q. Mr. Beardsley, have you examined the files in this case?

A. I have gone through most of the files. I was advised that the clerk's files were away because of some appeal, and I examined, with the court's permission, in the absence of the judge, in the anteroom of his chambers, the court's duplicate copies of the pleadings. There are about some 12 file folders. I haven't finished going through them. I have gone through all of the pleading folders, and the various motions, the interrogatories, the discovery proceedings, the motions under various Federal civil rules, and there are some miscellaneous files which I have not examined fully. Now, I don't mean that I have gotten outside of this lawsuit, because I first was approached by you on Sunday last, and have done this at odd times since then as I was able to take time.

(Testimony of Charles E. Beardsley.)

Q. Have you examined the answer which we filed to the plaintiff's application?

A. Yes, I have read the affidavits of the three attorneys for the plaintiff, and your answer.

Q. You have been in court today and have heard Mr. Warne's testimony, and the other testimony given? [4876]

A. Yes, sir, with the exception of brief runs out to the telephone to try to keep the store going while I was here, I have heard practically all of it.

Q. Mr. Beardsley, I would like to state a hypothetical question to you.

And, your Honor, I don't think it will take two hours to read.

The Court: Was that my prophecy? [4877]

Q. (By Mr. Fisher): Mr. Beardsley, I want you to assume a hypothetical state of circumstances. I want you to assume that in the year 1951 a corporation by the name of Winckler and Smith Citrus Products Company, which corporation will be hereafter referred to as Winckler & Smith, was engaged at Anaheim, California, in the business of processing citrus fruit into citrus fruit juices, particularly single-strength orange juice, and of selling such products in intra and interstate commerce. Assume that during that year a non-profit co-operative agricultural producers association known as California Fruit Growers Exchange whose name was later changed to Sunkist Growers, Inc., and which will be hereafter referred to as Sunkist, sold products citrus fruit to processors.

(Testimony of Charles E. Beardsley.)

Assume that during that year Sunkist had a wholly-owned subsidiary known as Exchange Orange Products Company, which will be hereafter referred to as Exchange Orange, which was engaged in the business of processing citrus fruit into citrus fruit products, including single-strength orange juice, and that it marked such products through Sunkist. Assume that in that year Exchange Orange made a written processing contract with a corporation known as TreeSweet Citrus Products Company, which will be hereafter referred to as TreeSweet, and another one with the E. A. Silzle Corporation, which will be hereafter referred to as Silzle. Assume that under each of these contracts TreeSweet and Silzle, respectively, were to [4878] process oranges for Exchange Orange, and were to be paid their processing costs for manufacturing canned single-strength Valencia orange juice and that the contracts provided for the purchase by these two concerns of said canned single-strength Valencia orange juice so processed at Sunkist's market price for such juice at the time of purchase, less certain discounts. Assume that with respect to TreeSweet similar contracts had been made in prior years. Assume that on one or more occasions in the year 1951 Winckler & Smith had requested of Exchange Orange and Sunkist a similar processing contract and assume that no such contract was given to Winckler & Smith. Assume that Winckler & Smith subsequently claimed that it was unable to buy or acquire

(Testimony of Charles E. Beardsley.)
oranges from Sunkist or Exchange Orange or anyone else at prices which would enable it to process the oranges into single-strength orange juice and to sell the juice in competition with Sunkist, TreeSweet and Silzle.

Assume that prior to February 1, 1952, Winckler & Smith retained an attorney officing in Beverly Hills, California, whom we will call Bernard Reich, to pursue claimed violations against Sunkist, Exchange Orange and others under Federal and State antitrust laws. Assume that on or about January 15, 1952, said Reich sent a letter to Sunkist enclosing a copy of a proposed complaint setting forth said claims. Assume that on February 1, 1952, through said attorney, a complaint for equitable relief and for treble damages under the Federal and [4879] State antitrust laws was filed in the District Court of the United States for the Southern District of California, Central Division, and was assigned to Judge Byrne. Assume that said complaint was prepared by said Reich, was eighteen pages long, and that Winckler & Smith was the plaintiff and that Sunkist, Exchange Orange, Exchange Lemon Products Company, an affiliate of Sunkist hereinafter referred to as Exchange Lemon, and TreeSweet, together with a number of John Doe defendants, were named as defendants. Assume that said complaint set forth five causes of action, (1) an alleged conspiracy among the defendants to restrain trade and commerce in violation of Section 1 of the Sherman Antitrust Law, (2) an al-

(Testimony of Charles E. Beardsley.)

leged monopolization, and attempt to monopolize and conspiracy to monopolize the California citrus fruit juice industry, in violation of Section 2 of the Sherman Antitrust Law, (3) an alleged violation of the Robinson-Patman Act, (4) an alleged violation of the State of California Cartwright Act, and (5) an alleged violation of the California Unfair Trade Practices Act. Assume that said complaint charged that the said alleged violations of law caused said Winckler & Smith damage in the amount of $800,000, and asked for treble said damage, and for injunctive relief. Assume that the claims of plaintiff were novel and complicated. Assume that Sunkist and Exchange Orange employed the law firm of Farrand, Fisher & Farrand of Los Angeles to defend them; that Exchange Lemon employed the law [4880] firm of Clayson, Stark & Rothrock of Corona and the firm of Pope & Ballard of Chicago and Washington, D. C. (the Washington office of said firm being known as Pope, Ballard & Loos), to defend it, and that TreeSweet employed the law firm of O'Melveny & Myers of Los Angeles to defend it. Assume that stipulations and orders extending the time of said defendants to plead to and including March 25, 1952, were entered into. Assume that said defendants moved to dismiss or strike the complaint or portions thereof for a more definite statement, and filed in that connection a thirty-page memorandum of points and authorities and that said Reich prepared and filed a 36-page memorandum of points and authorities in opposition to said motion.

Assume that on March 15, 1952, said Reich on behalf of plaintiff prepared and filed interrogatories directed to defendants consisting of some eight pages, containing twenty-four questions with many subdivisions, and that defendants other than Sunkist filed objections to many of the interrogatories. Assume that a hearing was had before Judge Byrne on defendants' motion to dismiss, to strike and for a more definite statement and on said objections to interrogatories which lasted an entire day, and that said Reich appeared and argued on behalf of plaintiff at said hearing, and that defendants' motion to dismiss said complaint was denied, their motion to strike was granted only in part, and their objections to said [4881] interrogatories granted only in part. Assume that said Reich prepared, served and filed the Court's order thereon, consisting of four pages.

Assume that on or about March 20, 1952, plaintiff filed a petition under Chapter X of the Bankruptcy Act in said District Court which matter was assigned to the Honorable James M. Carter, Judge, and that in said proceedings he appointed a trustee, whom we shall call Ronald Walker. Assume that Ronald Walker as such trustee employed an attorney to represent him whom we shall call Harry M. Irwin. Assume that Mr. Irwin appeared at said hearing on said motion to dismiss and filed a petition for leave for said trustee to intervene in said

(Testimony of Charles E. Beardsley.)

antitrust action, which petition Mr. Irwin had prepared. Assume that said petition was granted a few days later without opposition, and that Mr. Irwin prepared, served and filed a two-page order thereon.

Assume that on or about May 26, 1952, Sunkist and Exchange Orange served and filed their answers to plaintiff's interrogatories consisting of about 115 pages including exhibits, and Exchange Lemon served and filed its answer to plaintiff's interrogatories consisting of approximately 34 pages, and TreeSweet served and filed its answers to plaintiff's interrogatories consisting of 14 pages, and that each of said answers were reviewed by Mr. Reich.

Assume that on or about May 26, 1952, Sunkist and Exchange [4882] Orange served and filed their answer to plaintiff's complaint consisting of 16 pages, Exchange Lemon served and filed its answer on said day consisting of nine pages, and TreeSweet served and filed its answer to said complaint consisting of nine pages and that each of said answers were reviewed by Mr. Reich.

Assume that on June 16, 1952, Sunkist, Exchange Orange and TreeSweet served and filed interrogatories propounded to plaintiff consisting of 79 interrogatories, and that in July, 1952, Exchange Lemon served and filed a motion for discovery and the production of documents of plaintiff under Rule 34 of the Rules of Civil Procedure together with supporting affidavits. Assume that Mr. Reich prepared, served and filed a statement in opposition

(Testimony of Charles E. Beardsley.)

to said motion, together with affidavits in support thereof and memorandum of points and authorities consisting of 26 pages, and prepared, served and filed objections to said interrogatories and affidavits and memorandum of points and authorities consisting of approximately 15 pages.

Assume that Sunkist, Exchange Orange and Tree-Sweet served and filed an answer to said objections to their interrogatories consisting of 20 pages and that Exchange Lemon served and filed a reply memorandum in opposition to said statement consisting of 11 pages, all of which were reviewed by Mr. Reich.

Assume that said discovery motion and said interrogatories came on for hearing before Judge Byrne on September 8, 1952, and Mr. Reich and Mr. Irwin attended said hearing which [4883] lasted a full court day, and opposed the granting of said motion and said interrogatories. Assume that said court sustained plaintiff's objections to said interrogatories, without prejudice to later renewal, and granted said discovery motion in the main. Assume that Mr. Reich and Mr. Irwin prepared and filed objections and supplemental objections to the proposed order and that the discovery order was made and entered.

Assume that plaintiff by Mr. Reich and Mr. Irwin prepared, served and filed notice of motion directed to Sunkist and Exchange Orange requesting further answer to two interrogatories, and that this was opposed by said defendants and Mr. Reich and

(Testimony of Charles E. Beardsley.)

Mr. Irwin filed a reply to the memorandum of said defendants in opposition to the motion, and that said motion was heard on March 8, 1954, at which time the Court granted the motion with respect to the answering of one of said interrogatories and that Mr. Reich and Mr. Irwin attended said hearing. Assume that defendants Sunkist, Exchange Orange and Exchange Lemon filed a motion for inspection of documents, that Exchange Lemon filed a motion for further answers to its interrogatories, that plaintiff filed a motion to suppress Exchange Lemon's interrogatories and a motion directed to Sunkist and Exchange Lemon to produce documents, and that all of plaintiff's motions were prepared by attorneys Reich and Irwin, and that they attended the hearing on said motions on March 8, 1954, before Judge Carter, the case having been transferred [4884] on February 2, 1954, to Judge Carter on account of the illness of Judge Byrne, at which time said matters were presented, resulting in the granting of the motion of defendants Sunkist, Exchange Orange and Exchange Lemon for inspection in the main, the granting of Exchange Lemon's motion for further answers to interrogatories in the main, and that plaintiff's motion to suppress interrogatories directed to it was denied, and that the hearing on the motion of plaintiff for production of documents was continued until March 11, 1954, and that conferences were had between attorneys for plaintiff and counsel for defendants prior to said continued date, and that on said continued hearing at which Mr. Reich and Mr. Irwin were present disposition was made of the motions, and that plaintiff's motion was granted in the main.

Assume that Mr. Reich and Mr. Irwin prepared, served and filed orders granted by the Court to the plaintiff at said hearing, and that objections to the form of said orders were interposed by the defendants, and that a supplemental order was made thereon also prepared by Mr. Reich and Mr. Irwin. Assume that the defendants took one deposition, that of the president of the plaintiff, and that said deposition was taken in Corona on two different days, and that Mr. Reich and Mr. Irwin attended the taking of the deposition. Assume that the plaintiff took the depositions of six persons and that some of the depositions so taken took an entire day, and assume [4885] that Mr. Reich handled the taking of these depositions.

Assume that extending over a period of approximately one year from time to time there were conferences participated in by Mr. Irwin and on several occasions by Mr. Reich, exploring the possibility of settlement of the action, but that no settlement was effected.

Assume that the plaintiff made a separate settlement with defendant TreeSweet, resulting in an order dismissing said defendant, and that shortly thereafter Mr. Reich asked leave of the Court to be relieved as counsel for the trustee and that he

(Testimony of Charles E. Beardsley.)

was so relieved, the order thereon being made on or about October 11, 1954.

Assume that an attorney whom we will call Mr. William C. Dixon became the attorney for the plaintiff and the intervening trustee on or about September 27, 1954. Assume that prior thereto Mr. Dixon had investigated the action. Assume that shortly thereafter the Court fixed the date of November 15, 1954, as the date for pretrial and the trial date for March 22, 1955, after a conference in his chambers attended by Mr. Reich. Assume that prior to said pretrial hearing date defendants served and filed on November 12, 1954, a 21-page pretrial brief, and that on the afternoon of November 15, a pretrial hearing was held in Judge Carter's chambers attended by Mr. Dixon and Mr. Irwin, and that said hearing was continued until November 18, 1954. A further pretrial hearing [4886] was held in chambers attended by Mr. Dixon, and that said pretrial hearing was further continued until November 24, 1954, and that at said hearing in the Judge's chambers attended by Mr. Dixon and Mr. Irwin the Court granted leave to the plaintiff to file an amended complaint on or before December 24, 1954, and that on or about December 15, 1954, such amended complaint was filed, prepared by counsel for plaintiff. The amended complaint, alleging in essence the same five causes of action as were alleged in the original complaint, named Sunkist, Exchange Orange and Exchange Lemon as defendants, and TreeSweet and Silzle as coconspirators.

(Testimony of Charles E. Beardsley.)

Assume that on or about January 28, 1955, the defendants served and filed a notice of motion, motion and points and authorities to strike portions of the amended complaint, and for a more definite statement. Assume that counsel for plaintiff and intervening trustee prepared, served and filed a brief in opposition to said motion which was replied to by a reply memorandum. Assume that the hearing on said motion was held before Judge Carter on February 14, 1955, that Mr. Dixon and Mr. Irwin appeared for the intervener and that Mr. Reich appeared for the plaintiff, and assume that after argument the motion to strike was denied. Assume that thereafter on February 21, 1955, defendants served and filed their answers to said amended complaint. Assume that Mr. Dixon attended a conference in the judge's chambers regarding the trial date and [4887] that the date of the trial was fixed as June 28, 1955. Assume that counsel were directed by the court to file a statement of issues, which was done. Assume that in the latter part of May further pretrial conferences were held between Mr. Dixon and counsel for defendants and several pretrial hearings were held in court looking toward the limitation of the issues and the entering into a stipulation of fact. Assume that at one of these pretrial hearings Judge Carter revoked the right of Melville C. Williams, one of the attorneys for the then defendant Exchange Lemon and an out-of-state attorney, to appear in the case. Assume that thereafter counsel for defendants

2

(Testimony of Charles E. Beardsley.)

moved to have attorneys, whom we will call Ferris E. Hurd and Thomas C. Strachan, Jr., to appear in the action, and that such motion was heard on July 11, 1955, and that Mr. Dixon attended said hearing and that at said hearing the court fixed the trial date as November 15, 1955. Assume that the court directed Mr. Dixon to prepare findings of fact and conclusions of law and the order revoking the special admission of Melville C. Williams, and that he did so prepare the same and they were filed on July 27, 1955. Assume that Mr. Dixon prepared a proposed stipulation of facts to which counsel for defendants had objections, and that there were several letters written by Mr. Dixon to Mr. Hurd with reference to the terms of this proposed stipulation of facts. Assume that at various times during the summer Mr. Dixon and [4888] Mr. Irwin made an examination of certain of the records of defendants Sunkist, Exchange Orange and Exchange Lemon, and that in that connection they made several trips to Corona and Ontario, each of a day's duration. Assume that Mr. Dixon and Mr. Irwin had a number of conferences during the summer and fall of 1955 with counsel for the defendants regarding the production of documents and the assembling of material. Assume that on or about October 20, 1955, the court granted permission to Mr. Hurd and Mr. Strachan to appear on behalf of all the defendants. Assume that on October 21, 1955, a conference was held in Judge Carter's chambers, participated in

(Testimony of Charles E. Beardsley.)

by Mr. Dixon, Mr. Irwin and Mr. Reich, at which further pretrial matters were discussed.

Assume that the attorneys for plaintiff on the same day served and filed a trial brief of some 35 pages in length, and that on the same date a formal substitution was filed substituting Mr. Dixon and Mr. Reich in the place of Mr. Reich as attorneys for the plaintiff, with Mr. Dixon being designated as the chief counsel for the plaintiff and intervener.

Assume that on November 3, 1955, defendants moved for a continuance for the reason that plaintiff had still not furnished all of the records which it had been ordered to produce and that this motion was denied. Assume that on the same occasion when Mr. Dixon stated that he had been called to Washington to testify before a Senate committee the trial [4889] was reset for November 29, 1955.

Assume that on November 25, 1955, the defendants filed a trial memorandum which was reviewed by the attorneys for the plaintiff and intervener. Assume that on the same date there was signed a stipulation of facts which had been prepared by Mr. Dixon. Assume also that on November 25, 1955, the Court of Appeals for the Ninth Circuit issued an order staying the trial, so long as this court's order of July 26, 1955, with respect to Mr. Williams' permission to appear on behalf of Exchange Lemon Products Company remained unrevoked. Assume that on November 29, when the case was called for trial, the court continued it to December 8.

(Testimony of Charles E. Beardsley.)

Assume that on the same day the plaintiff moved to dismiss the action as to Exchange Lemon Products Company with prejudice and that the motion was granted, and that on November 30 the court granted the application of Mr. Williams to appear on behalf of the two remaining defendants, Sunkist and Exchange Orange, and that Mr. Dixon attended these hearings.

Assume that at a pretrial conference on December 7 plaintiff voluntarily dismissed its fourth and fifth causes of action, that is, the causes of action based upon the California state statutes, the Cartwright Act, and the Unfair Practices Act.

Assume that because of the illness of Mr. Hurd, chief trial counsel for the defendants, the case was again continued until December 13. [4890]

Assume that the trial commenced on December 13 and lasted until February 8, 1956, when the case was submitted to the jury, there being approximately 33 days of actual trial time and 4,700 pages of reporters' transcript of the trial.

Assume that plaintiff's case consumed approximately 19 days of trial time, during which plaintiff offered the testimony of 12 witnesses and approximately 90 documentary exhibits, many of which consisted of numerous pages.

Assume that the 12 witnesses called by the plaintiff included six officials of Sunkist Growers, Exchange Orange Products Company, and Exchange Lemon Products Company, five of whose depositions had been taken, the President of TreeSweet

(Testimony of Charles E. Beardsley.)

Products Company, the Secretary of E. A. Silzle Corporation, Mr. Winckler, the President of the plaintiff, a Mr. Morgan Ward whose principals, the Independent Fruit Growers Ass'n., had supplied fruit to the plaintiff, Mr. Hodge, who was plaintiff's accountant, and Mr. Walker, the trustee for plaintiff.

Assume that there was extensive cross-examination by defendants of Mr. Winckler and Mr. Hodge.

Assume further that defendants' case consumed approximately nine days and that defendants offered the testimony of some 16 witnesses and introduced approximately 105 documentary exhibits, and offered approximately 65 others [4891] which were rejected.

Assume that the defendants' witnesses included two certified public accountants from Chicago who had made an extensive examination of plaintiff's books and records, four former employees of the plaintiff, a certain Mr. Walker from Florida, two independent California citrus fruit processors, the Secretary of E. A. Silzle Corporation, four brief rebuttal witnesses, and four officials of Sunkist Growers, Exchange Orange Products Company, and Exchange Lemon Products Company.

Assume further that of defendants' witnesses only two, the two accountants, were cross-examined at any length.

Assume that throughout defendants' case there were numerous offers of evidence, oral and documentary, which were rejected after considerable argument at the bench or in chambers.

Assume that before defendants closed their case they moved to amend their answer so as to make more definite certain of their defenses and so as to assert that plaintiff had come into court with unclean hands, and that this motion was denied.

Assume that at the close of all of the evidence plaintiff asked leave to file a second amended complaint and that this motion was granted.

Assume that the second amended complaint abandoned the [4892] third cause of action, that is, the cause of action relating to the Robinson-Patman Act, and that it modified the second cause of action so as to eliminate the claim that Sunkist Growers, Exchange Orange Products Company and Exchange Lemon Products Company had attempted and had conspired to monopolize the market for California citrus fruit juices and to substitute the claim that Sunkist Growers, Exchange Orange Products Company, Exchange Lemon Products Company, Tree-Sweet Products Company, and E. A. Silzle Corporation had conspired to monopolize the market for California citrus fruit juice and had succeeded in doing so.

Assume that at the close of plaintiff's case and at the close of all the evidence, defendants moved for a directed verdict and that such motions were denied, without extensive argument from the plaintiff.

Assume that after all the evidence was in, approximately three days were spent with the court in chambers on the subject of proposed instructions to the jury.

Assume that closing arguments to the jury consumed approximately a day and that the case went to the jury on February 8 after it had been instructed by the court.

Assume that on Friday, February 10, the jury returned a verdict for the plaintiff in the sum of $500,000.

Assume that Mr. Dixon handled the entire presentation of plaintiff's case, examining all of the witnesses and [4893] alone addressing the court on behalf of the plaintiff.

Assume that Mr. Dixon was assisted throughout the trial by Mr. Irwin.

Assume that Mr. Reich was not present at the trial at all.

Assume that Mr. Hurd of Pope & Ballard made the opening statement to the jury on behalf of the defendants and participated only briefly in the trial thereafter.

Assume that Mr. Strachan of Pope & Ballard became and acted as chief counsel for the defense from and after the time Mr. Hurd was incapacitated because of illness and that he was variously assisted throughout the trial by Mr. Fisher of Farrand, Fisher & Farrand, by Mr. Stark of Clayson, Stark & Rothrock, by Mr. Williams of Pope & Ballard, and by Mr. Fowle of the same firm.

Assume that Mr. Dixon is a member of the Bars of California, Ohio, and the United States Supreme Court, that he is a former member of the Supreme Court of the State of Ohio, and that he has been a practicing attorney since 1928.

Assume further that Mr. Dixon was a Special Assistant to the Attorney General of the United States, assigned to the Antitrust Division of the Department of Justice, for a period of approximately ten years commencing in April, 1944, and ending in April, 1954, at which time he resigned from the Department of Justice to enter private practice [4894] in Los Angeles.

Assume further that during this period Mr. Dixon acted as Assistant Chief of the Trial Section of the Antitrust Division of the Department of Justice and as Chief of the West Coast offices of the Antitrust Division of the Department of Justice, with headquarters at Los Angeles.

Assume further that while Mr. Dixon was with the Department of Justice he was chief trial counsel for the government in many litigated and important antitrust cases, including U. S. v. National Lead Company, 63 F. Supp. 513, 332 U. S. 319; U. S. v. Standard Oil Company of California, et al., 78 F. Supp. 850, 337 U. S. 293; U. S. v. Richfield Oil Corporation, 99 F. Supp. 280, 343 U. S. 922; U. S. v. Nat'l City Lines, Inc., et al., 186 F. 2d 562 (certiorari denied, 341 U. S. 916); Local 36 v. U. S., 177 F. 2d 320 (certiorari denied): CO² Fire Equipment Company v. U. S., 197 F. 2d 489 (certiorari denied).

(Testimony of Charles E. Beardsley.)

Assume further that Mr. Dixon entered the instant case for the purpose of preparing and trying the same during the month of September, 1954, and that substantially all of his time since then has been spent in the preparation and trial of this case.

Assume that Mr. Dixon has spent approximately in excess of 2,500 hours of work as an attorney in the course of preparing and trying said case, but that he kept no time [4895] records except for the period from September 27 to December 8, 1954, during which period his records show about 116 hours devoted to the case.

Assume that the actual trial of the case consumed approximately 33 trial days, which does not include Mr. Dixon's time in court in connection with pretrial and other matters directly related to the preparation of the case for trial.

Assume further that Mr. Dixon was without any funds with which to secure proper and investigative assistants in preparing for trial, that the only legal assistance available to him was that of Mr. Irwin, the attorney for the Intervening Trustee, and that it was accordingly necessary for Mr. Dixon personally to do much of the investigative and preparatory work, aided and assisted by Mr. Irwin and the Trustee, Mr. Walker.

Assume further that Mr. Irwin is a member of the Bar of the States of California and Missouri and a member of the Bar of this court and that since 1916 he has continuously engaged in the practice of law in the courts of California and in this

(Testimony of Charles E. Beardsley.)

court, and that throughout this period he has specialized in the practice of civil law in connection with the business transactions of corporations and of individuals and the legal problems and litigation arising therefrom. [4896]

Assume further that because of the lack of funds available to the Trustee for plaintiff, Mr. Irwin was unable to employ investigators and that he was required to and did, personally and in association with Mr. Dixon and with Mr. Walker, examine and digest the voluminous and complex records and facts of the plaintiff and of the defendants pertinent to the issues in this case, and also the questions of law applicable thereto.

Assume further that Mr. Irwin spent in excess of 2,000 hours in the preparation for trial of this action and in the trial thereof, but that he kept no complete or accurate records of his time.

Assume that Mr. Reich has practiced law since 1937 except for 13 months in the armed services and that for more than half of the years of his practice he has specialized in this and allied fields.

Assume that Mr. Reich was sole attorney for the plaintiff from February, 1952, and that he became junior to Mr. Dixon in October, 1954.

Assume further that Mr. Reich became co-counsel for the Trustee in June, 1952, and remained such until he withdrew as co-counsel for the Trustee on October 11, 1954.

Assume further that since October, 1954, Mr.

(Testimony of Charles E. Beardsley.)

Reich has not actively participated in the preparation or the trial of this action. [4897]

Assume that Mr. Reich learned the citrus fruit business, and to that end held approximately fifty conferences with plaintiff's president and others, that he studied the plant at Anaheim on three different occasions and examined into thousands and thousands of documents and records.

Assume further that Mr. Reich made 21 court appearances, three trips to Anaheim, two trips to Corona, participated in the depositions of six of defendants' officers, participated in two sessions of depositions of Mr. Winckler at Corona, prepared 30 motions and petitions and 25 law memoranda, made 425 telephone calls, engaged in 75 conferences, wrote 250 letters, and prepared 150 miscellaneous documents including interrogatories, admissions, memoranda, stipulations, orders and pleadings.

Assume that Mr. Reich was handicapped in his work by the lack of funds with which to prosecute this action and that it was necessary for him to make economical use of his time.

Assume that Mr. Reich's time records show 571 hours spent on this case but that a fair estimate of the actual time expended, properly adjusted to reflect recorded and unrecorded time, is 685 hours.

Assume that Mr. Reich analyzed and digested the pleadings, depositions, interrogatories and admissions, so that he was able to turn organized files over to Mr. Dixon. [4898]

Now, Mr. Beardsley, based on these assumed facts,

(Testimony of Charles E. Beardsley.)

do you have an opinion as to what would be a reasonable amount to be allowed the plaintiff for its attorneys' fees?

A. There are two points that I would like to have you clarify before I answer that. [4899]

Mr. Dixon: Your Honor, may I just at this time make an objection solely for the record? I think there are some obvious and unintentional errors in the statement as prepared by counsel, and some things that have been omitted, but I would certainly not want to have the objection sustained so we would have to go over the question again.

Mr. Fisher: Will you point them out to us so that they may be incorporated?

Mr. Dixon: I think, Ross, one of the things you referred to was a motion to amend the complaint. It was to accord to the evidence. That is one of the facts that I caught. There were a few other things of a minor nature that were not included. I didn't make notes of them.

There is certainly nothing in this question relating to the nature of this lawsuit as being one which requires technical training and experience in the problems of this case as being different from others.

I might mention several other things, but I am just pointing those out for the record only.

Mr. Fisher: I will amend my question to include the points that have been made by Mr. Dixon.

The Court: All right, they may be included.

Do you understand the question now?

The Witness: Yes, I do.

(Testimony of Charles E. Beardsley.)

The Court: Do you have anything [4900] further?

The Witness: One of them I think is the same matter that Mr. Dixon had in mind. As I heard the question, at the bottom of page 4, there was some statement to the effect that the claims made were complicated, and I would ask that there be included in the question that the issues involved in the case and the legal problems were complicated and intricate.

That is based upon my examination of the files. I believe they are of that type.

Mr. Fisher: I so ask that the question be amended to include that.

The Court: It may be amended.

The Witness: The other was that I tallied, as you went along, the times you spoke of court appearances, 33 days of court time; does that include the three days discussing instructions, or were those in addition?

Mr. Fisher: It includes the instructions.

The Witness: That also includes the day of argument?

Mr. Fisher: It includes the day of argument. It does not include after the case was submitted to the jury. On two occasions I think we had conferences in chambers with Judge Carter.

The Witness: May I assume, Mr. Fisher, that while you spoke of 33 court days, I tallied the other days that you referred to in court and got something like 12 to 15, and I would assume that there were

(Testimony of Charles E. Beardsley.)

more parts of days, at least, in [4901] other words, 50 somewhere in the neighborhood of 50 days if you tie all these partial appearances together. Would that be somewhere near a fair statement of the total time in court?

Mr. Fisher: Do you mean in actual——

The Witness: Time in court?

Mr. Fisher: During the trial or all together?

The Witness: During the pendency of the litigation.

Mr. Fisher: I frankly haven't examined it. I would think it would be at least that many.

The Witness: Yes I have an opinion.

The Court: I have a couple of matters.

I don't want to take offense at this statement and waste time but the statement said that it took plaintiff 19 days of the 33 to put on plaintiff's case. Actually the majority of that was cross-examination of plaintiff's witnesses including one entire day spent upon the cross-examination of a witness as to one exhibit.

Is that right?

Mr. Fisher: That is correct. And we would ask the question to include that.

Mr. Fowle: I don't think that we would agree that most of the 19 days was taken up with cross-examination.

The Court: I said the majority.

Mr. Fowle: Or even the majority. [4902]

The Court: I haven't made an accurate estimate.

(Testimony of Charles E. Beardsley.)

but my guess would be that over half of those 19 days were cross-examination.

Mr. Fowle: We were aware of it that a good deal of it was cross-examination, and therefore we included in the hypothetical question a request that this witness assume that a substantial amount of cross-examination was engaged in.

The Court: I can't give you an accurate figure. I think we will both agree that there was extensive cross-examination, and that 19 days for plaintiff to put on its case might be misleading, standing alone.

Mr. Fisher: I will agree to that, your Honor, and ask that the question be amended to include that.

The Court: The other thing, which has nothing to do with the question, but which bothered me, was that you referred to a request for a continuance made by defendants, which you said that I refused, but that Mr. Dixon had to make a trip, so I granted a continuance. The implication there bothers me. Actually what happened was that a request for a continuance was made to a longer date than I continued it, and at the time the request was made for the continuance by the defendant, Mr. Dixon also called attention to his situation. I granted a continuance on defendants' motion, but not to the date you asked for.

Mr. Fisher: You are correct, your Honor, and I would ask [4903] that the question be amended in that respect.

The Court: It doesn't have, really, much to do with the question, but I didn't like to let it go by.

(Testimony of Charles E. Beardsley.)

Mr. Fisher: I do recall the incident where we asked for a continuance for the reason that we had not gotten the production of records requested, we asked for a longer date than your Honor felt he could give. I remember that at the time Mr. Dixon had been called to Washington before a Senate Committee.

The Court: And he was not opposing a short continuance because of his situation.

Mr. Fisher: That is correct.

The Court: Now, do you have an opinion?

The Witness: Yes, I have, on the question as amended.

Q. (By Mr. Fisher): What is your opinion as to a reasonable amount to be allowed the plaintiffs' attorneys?

A. In my opinion, the reasonable value of those services is $125,000.

Q. Will you explain to the court the basis of your opinion? A. Yes, I will be glad to.

The factors which I believe should be taken into consideration, and which I did take into consideration, in arriving at that sum, are these——

These are really headings, rather than full discussions. [4904]

(1) The time which the attorneys devoted, which is reported in their affidavits, the number of hours;

(2) The number of court days, roughly, the length of trial, and the number of court days otherwise;

(3) The amount involved in the lawsuit, which

(Testimony of Charles E. Beardsley.)

was a suit for $800,000, and in which a verdict of $500,000 was recovered;

(4) The intricacies of the legal problems, the difficulty of the problems which the lawyers who are seeking compensation had to solve, and they were difficult problems, in my opinion, from my rather hasty reading of going through the memorandum and points and authorities;

(5) The skill, the degree or quality of service rendered by the attorneys. And from my observations, and some of this is the rankest hearsay, because I was not in the court room during any of the trial, I believe the trial was very skillfully handled by principal counsel for the plaintiffs, and from what I have seen in a cursory examination of the papers, they are well done, and legal memoranda are well prepared.

These are not necessarily in order of importance, your Honor.

Another thing to be considered is the result obtained, which of course I believe was quite an exceptionally good result.

Another matter to be considered is the status of the [4905] lawyer. By that I don't mean whether he is the most brilliant lawyer that ever came out of law school, or just one that has worked his way up into the community, but I think fees in some measure have to be governed by a man's status in the community. If he is recognized—to take somebody who is deceased and who there can't be any issue about, Hubert Morrow of this Bar, or Walter Tuller,

(Testimony of Charles E. Beardsley.)

or some lawyer of 30 or 40 years in the community, who is both an able lawyer and a well-recognized lawyer, he can command higher fees than an equally able lawyer just out of law school or out of government service, and who hasn't won as many cases as big as this so as to establish his reputation.

I believe in the market of employing lawyers, that factor which I call status in the community has to be taken into account, because you can't hire Irving Walker for the same price you can hire a young man in my office, who I think will be just as good a lawyer as Irving Walker many years hence.

I think those are all of the headings or factors that I would take into account.

Now, after applying those tests, and each of those is a rather intangible test—after applying each of those tests, then I considered that the amount, $125,000, was a reasonable fee. Then I tested that in two or three ways. And this is something like saying if you are valuing real estate you take 100 times the monthly rental, or you figure the assessed [4906] value as being 40 per cent of the market value. If you take a lot of those you get some help. No one of them is conclusive.

In a case of this size, lasting this long, requiring this much of concentrated attention, in my opinion, if you figure it on an hourly basis, you wouldn't take the highest hourly fee which that lawyer might command. If he had a short piece of business that was going to take 15 hours or 10 hours, he might charge a much higher rate per hour than a case which was

(Testimony of Charles E. Beardsley.)

going on 14 months or three years, or something like that. I think the hourly basis has to be modified somewhat. On the other hand, the hourly basis is enlarged, because the case is a big case and the result was an excellent result. Just to test it I took an hourly basis of $25 an hour, and as I got it from the affidavits there was something like 5,100 hours spent by all of the lawyers, and at $25 an hour that came out, according to my mathematics, to $127,500.

Another possible way of testing it is on the contingent fee basis, and that doesn't fix reasonable value. Reasonable value of services, I think, is not the same thing as the price for which a lawyer would take a case on a contingent fee basis. If a lawyer is either appointed by a court, or is attorney for some trustee or court officer, where he doesn't have a contingent fee contract, I think the reasonable value of his service should be arrived at by a different method than the strict contingent fee method. [4907]

In my opinion it is wrong for lawyers, in cases where there are very large recoveries, to go very high on contingent fees. I think 40 or 50 per cent on a contingent fee in a case through the trial court is exorbitant, results in bad public relations, and is not the reasonable value of his services.

I think when you get into the hundreds of thousands of dollars the percentage should be either scaled so that it is high on the first one hundred or so and then scaled down, or should average out to an amount not more than 25 per cent.

(Testimony of Charles E. Beardsley.)

I tested this by 25 per cent of $500,000, which i $125,000.

If you test it by a third—and as I say, I don't think that that is fair in a recovery of this size—I think in a personal injury case, where the liability may be doubtful, a fee of a third is a very reasonable fee—if that is applied, you get $166,000. In my opinion, that is not a fair percentage in a matter of this size.

If you take it on another basis, and this is really not a good test at all, although some lawyers take cases on so much a day in court, which includes preparation—I don't think anyone in possession of all his faculties would take this kind of a case on that basis—but to test it, if there are 50 days in court, a fee of $125,000 for 50 court days, if you add all your one hours on motions and half a day [4908] on arguments, and you get 50 days, and including your 33 days of trial, that would be $2,500 a day, for which fee one could afford to spend a great deal of time in preparation for those days in court.

Those mathematical computations are not my method of arriving at the fee, but they are some hard and fast measuring sticks against which I try to test the fee of $125,000, which I arrive at by applying the general principles which I spoke of first.

I may have omitted one of those principles when I

(Testimony of Charles E. Beardsley.)

got mixed up in counting them with my thumb. If so, I trust Mr. Dixon will supply it to me.

Mr. Fisher: Thank you.

You may cross-examine.

Mr. Dixon: No questions, Mr. Beardsley.

The Court: Mr. Cohn, do you have any questions?

Mr. Cohn: No, sir.

The Court: I was going to ask one question. I don't want you to go without being cross-examined.

The Witness: I would rather have them cross-examine me, your Honor.

The Court: We start out with a premise that, of course, this is not to be fixed on a contingent basis, but what would you consider would have been a reasonable fee in this case on a contingent basis? [4909]

The Witness: That would be a matter of bargaining at the outset, and I am not thoroughly enough aware of the nature of the case to know what bargain would be made.

I anticipate that if somebody came to me with a case, and I am not in this field—let's say I got one of the cases where the Santa Fe jumped the track, or a group of them, which I thought might result in a $800,000 recovery, I believe if I knew, if I had a pretty clear liability case, that I would not go as high as a third; I think I might say, I will take a third on the first two hundred thousand, and 30 per cent on the next fifty, and 20 per cent—I would work out some kind of sliding scale, I think over all a 25 per cent contingent fee would be fair.

(Testimony of Charles E. Beardsley.)

no question raised, as I recall it, in the opinion of the Court of Appeals concerning the unfairness or the exorbitance of that fee. From what I know about the case, I don't think there was any more time put in on it by counsel for the plaintiff in that case than in this case. I may be in error, but from what I know about it. [4918]

Mr. Fowle: May I just say that I do have some familiarity with that case. The plaintiffs in that case, the plaintiffs' lawyers claimed, I think, 8,800 hours. I might also say that anyone who reads the opinion of the Court of Appeals and understands the tone and flavor of it can see what would have happened to that award of $275,000 attorneys' fees had the Court of Appeals deemed it necessary to go that far.

They reversed the judgment of the court below for letting error creep into the record in a great many different ways. They never reached the problem of whether or not the attorneys' fee was a reasonable one, and simply reversed the judgment, and when the judgment fell, so did the judgment for attorneys' fees.

Mr. Dixon: It stands, counsel, as the determination of the trial court, in any event, in that case of what it felt was a reasonable attorneys' fee, considering at least the amount of judgment.

The Court: I can read it as well as either one of you can.

The Witness: Has he asked me a question?

The Court: He asked no question.

(Testimony of Charles E. Beardsley.)

You admit you know very little about antitrust law?

The Witness: Nothing about it, except the way a general practitioner does. I don't know the intricate questions at all. [4919]

The Court: You would concede that the field of antitrust law is probably more intricate than the field of personal injury law?

The Witness: I would, certainly.

The Court: You also will concede that even with the study you made of the files and this hypothetical question, the chances are that you may not know as much about this case now as I do?

The Witness: I would be the first to say that, of course that is true. I couldn't in the few hours in examining files know a fraction of what you or any of counsel know about the case.

The Court: If I should disagree with you on what you think is a reasonable fee and an exorbitant fee—I am not saying that I am going to—but I trust that you will base it not on my utter rejection of your testimony but on the question of how familiar you were with the case and the work done.

The Witness: I said before, your Honor, that I knew that my being brought in here, a friend of yours, would not affect you in any way; and you know that your decision in this case will not affect my regard for you in any way.

I think that is a fair statement.

The Court: That is fair enough.

All right. Thank you, Mr. Beardsley. [4920]

(Testimony of Herman F. Selvin.)

Direct Examination

By Mr. Fisher:

Q. What is your occupation?

A. I am a lawyer.

Q. How long have you practiced your profession?

A. Since 1927, with the exception of nearly four years during the World War when I was elsewhere and otherwise engaged.

Q. At that time, as I recall it, you were in the Navy, were you not, as a Lieutenant Commander?

A. Yes.

Q. What was your legal education, Mr. Selvin?

A. I graduated from the University of California law school at Berkeley in 1927 with the degree of—which was then being conferred—of Juris Doctor. [4927]

Q. At the University of California were you not on the Law Review? A. I was.

Q. As a matter of fact, were you not born in Russia? A. I didn't hear you.

Q. Were you not born in Russia?

A. Yes, sir, in Lithuania, which was then, as I understand it, reluctantly a part of the czarist realm.

Q. And you came to this country at an early age?

A. In 1909 at the age of 5.

Q. And entered the University of California in what year? A. 1920.

(Testimony of Herman F. Selvin.)

Q. On completion of your work at the University of California were you then admitted to the California Bar? A. Yes.

Q. To what courts have you been admitted?

A. All of the courts of the State of California, Court of Appeals for the Ninth Circuit, United States District Court, Tax Court, and I think the Customs Court. Maybe others.

Q. Are you a member of a firm in Los Angeles?

A. Yes, I am a member of the firm of Loeb & Loeb.

Q. How long have you been a member of that firm?

A. Well, of that firm and its predecessor firm Loeb, Walker & Loeb, since 1934. Prior to that time, from the time [4928] of my graduation from law school until I became a member of the firm, I was associated with the firm in the customary or conventional salaried way.

Q. So that all of your practicing years you have either been associated with that firm or a member firm; is that correct? A. That is right.

Q. What has been the general nature of your practice, Mr. Selvin?

A. It has been almost entirely confined, after the first couple of years, to the trial and appeal of litigated causes.

Q. You have then specialized in trial work and appellate work during your practicing years, have you? A. Yes.

Q. Are you a fellow of the American College of Trial Lawyers, Mr. Selvin? A. I am.

(Testimony of Charles E. Beardsley.)

I can't appraise this. This is a matter of bargaining at the outset. I can't put myself back where they were.

The Court: We are not going to decide this on the contingency basis, but I notice you took your 25 per cent contingency on $500,000, not on $1,500,000, which is the recovery.

The Witness: Is this a question, or just an opening for me?

The Court: This is a question.

The Witness: I am not versed in the philosophy of antitrust cases. In my ignorance, I believe that $500,000 represents what the jury said was the damage actually sustained by [4910] reason of the acts complained of, and $1,000,000, the trebling, as I understand, is a penalty, because these people violated the law, the jury found they violated the law. It seems to me that the contingency should be based on the damage. If you are taking a contingency fee, it should be based on the amount of the damage.

There must be some law on that. I never looked it up.

I want to say something further, because Mr. Warne, who is a fine lawyer and a fine man, shocked me by his testimony as to the amount. It is just like the psychiatrists; one says he is sane and the other says he is not. In any event, Mr. Warne said something which I didn't fully catch as to the penalty aspect of the attorneys' fees. My answers have not been based on how much should be assessed as at-

(Testimony of Charles E. Beardsley.)

torneys' fees so as to penalize these people. My answers are based on the reasonable value.

If the law provides in a case where there is a $500,000 verdict, that automatically it is trebled, I don't think that adds to the value of the services rendered in getting the $500,000. I think the services are worth that to get $500,000, which automatically carries the treble.

The Court: I heard Mr. Warne's testimony, too, and I noticed that. But I think Mr. Warne's point was not that attorneys' fees should be so fixed by the court so as to penalize a defendant, but that the allowance of any attorneys' fees [4911] at all have been provided in the statute as a penalty. In other words, the only reason that the prevailing plaintiff in one of these actions gets any attorneys' fees is that the Congress has said, "That is one of your burdens that you will have to bear if you are found liable of violating the antitrust laws, you will have to pay a reasonable attorneys' fee."

There is a big difference between fixing an attorneys' fee for the purpose of penalizing the defendant, and on the other hand the fact that the Congress has allowed an attorneys' fee, which in a way is part of the penalty or burden which he must bear.

The Witness: If I say anything here, I think counsel should have a right to cross-examine me, because I am going beyond what I said in my direct testimony.

(Testimony of Charles E. Beardsley.)

The Court: Anyhow, I want to get back to this contingency matter.

It is true that $1,000,000 added to the half million is the penalty which the law provides. But the injured party recovers that money. That penalty does not go to the public, doesn't go to some charity. It goes to the injured plaintiff. Now, if you are figuring the case on a straight contingency basis, wouldn't you, regardless of what your percentage would be, wouldn't you take a percentage of what amount the plaintiff actually recovered in dollars?

The Witness: You mean I am the lawyer bargaining with [4912] the client?

The Court: Yes.

The Witness: I don't know, because I never had one of these.

In cases that I handle, personal injury, will contests, and so forth there are no penalty features at all. I think it would be, if I may express myself, morally wrong if the attorneys' fee, which the Congress said should be a reasonable fee, is trebled beyond what is a reasonable fee for these services, because of the penalty provisions which treble the damages. That seems to me to be morally wrong. If the Congress said attorneys' fees should be trebled, that is something else.

The Court: We are talking about different things. I agree with you that to treble attorneys' fees would be morally wrong, but I am posing this question: If you are bargaining with a client who had a potential recovery, where there was the pen-

(Testimony of Charles E. Beardsley.)

alty involved, on a contingent basis—and the court is not going to fix this fee on a contingent basis—but if you were bargaining with a client, wouldn't you bargain with him, regardless of what your percentage might be, on the basis of what the recovery was to him in hand at the conclusion of the case?

The Witness: I have never been in that position, and I think I should not—maybe the flesh is weak, maybe I would, because I want to get a fee based on a large amount. But I [4913] think we are dealing with something—maybe this shouldn't be taken into consideration by the court—but I think this subject of fees is one which reacts very badly on our profession. Ordinarily we get the worst reaction when a poor person is charged an exorbitant fee. But I know we get the reaction when a rich corporation—I don't mean this is a rich corporation, but let's take the Standard Oil Company is charged a million dollar fee, and the people read it and say, "Look, those lawyers are setting the price of gasoline up." I think it is bad for lawyers to charge exorbitant fees.

This is an opinion, but I think I may be qualified as an expert here, I think Mr. Warne's suggestion, and the plaintiff's attorneys' suggestion, in view of the size of this case, and all the factors that I have mentioned, is an exorbitant fee, which I think not only would react against the Bar generally badly, but I think might very well react badly against the lawyers who sought it and perhaps got it. I think they have made a name for themselves in

(Testimony of Charles E. Beardsley.)

the job they have done in this case, not just the result, but the quality of work that I have seen, and from the rumors, which are hearsay, about the way the case was tried, and I think that over a lifetime in law practice in the community lawyers come out better if they are more moderate in their charges than if they try to get it all in one case.

Mr. Dixon, I am not criticizing you personally, we have [4914] never met, but this is something that is rather close to my heart because of going around trying to sell the legal profession to the public for two or three years while on the Board of Governors.

The Court: I might say, Mr. Beardsley, when I was practicing law, I generally used a sliding scale on contingent fees based upon whether the case could be disposed of by settlement, preparation for trial, trial, or appeal. And I feel that sort of a thing is always fairer than this straight 40 per cent, or some of them took 50 per cent across the board.

The Witness: The lawyers who take 50 per cent I think are doing great harm to the profession.

Mr. Cohn: Your Honor, in view of the last colloquy, I have one question to ask, if I may.

The Court: Yes.

(Testimony of Charles E. Beardsley.)

Cross-Examination

By Mr. Cohn:

Q. Mr. Beardsley, would you consider a fee of $227,000 exorbitant and the kind of thing which would bring the Bar into bad repute, that being the exact amount paid to the attorneys for the defendants in this case?

A. I don't think I could answer that, Mr. Cohn, without having some of the information of the kind that was given to [4915] me in the question that I was asked, where there was 35 minutes of information given me. You are asking me a quick question.

I know the standing of Ross Fisher and Farrand, Fisher & Farrand in this community, and I know the standing of Pope & Ballard in Chicago. I know the quality of work that Ross Fisher does in this and many other cases, I know the kind of fees that that firm commands. I know the kind of fees that Pope & Ballard command, I have seen the quality of work of both of those offices, and the other lawyers out here in Corona, wherever it is, just as I have observed the work of the gentlemen at your table in this case. I have no idea how much time they put in. Maybe they put in 10,000 hours, and maybe they put in 1,000 hours.

Without knowing those other things, I couldn't answer.

They lost the case, which makes a lot of difference in the testimony about reasonable values. But I don't think there is enough information in what

(Testimony of Charles E. Beardsley.)

was elicited from them across the table while I was here this morning, on how much has been paid to them, for me to say whether it was a reasonable fee or not a reasonable fee.

Conceivably it could be an exorbitant fee, if they lost the case and they put in few hours. They still have stature and very good quality of work on both sides, but I don't know how much time they put in.

Q. The answer is you don't know? [4916]

A. I can't answer without—I would be glad to have you get that information for me. Because I don't think the Judge could pay any attention to that amount that was brought out, unless he knows what they did.

One thing more I would say, if I may, about that. I don't want to be arguing this, because if I begin arguing the case I destroy what little effect my testimony had.

The Court: You might have to get another fee.

The Witness: I am glad you brought that out.

I have never taken a fee for testifying about attorneys' fees. The reason is, I believe when an attorney—usually I have been on the side of the attorney asking for fees—I believe if he is asking for a reasonable fee he should have anybody who has any kind of standing come and tell the court, and the jury, and the public, that it is reasonable. And if it is unreasonable, I think it is the duty of other lawyers to come in and say it is unreasonable, for the protection of our profession.

I have never taken any fee for testifying for a

(Testimony of Charles E. Beardsley.)

lawyer on attorneys' fees, and in this case I am not testifying for a lawyer, but against lawyers, my brothers, and for a corporation, but I shall not bill this corporation for my fees—for my time, I mean. I don't care whether they pay anything or not. I am more concerned with there being a reasonable fee.

My study has been brief and concentrated of the case, and [4917] I am not as thoroughly familiar as I would be in a longer time. On that study I believe my testimony is sound.

Mr. Dixon: I would like to ask one question, Mr. Beardsley.

Q. (By Mr. Dixon): Are you familiar with the Emich case in which General Motors was the defendant?

A. No, sir, I never heard of the case until you cited it this morning.

Q. Counsel for the defendants in this case defended General Motors in that case, so obviously it was well defended. The judgment entered in that case was less than the judgment in this case, will be, exclusive of attorneys' fees. It was for $1,493,358.10. That included costs.

A. Is that before or after trebling?

Q. That is the trebled judgment. The court in that case awarded $250,000 to the plaintiff for attorneys' fees, and while the case was subsequently reversed by the Court of Appeals, and the Court of Appeals was then reversed by the Supreme Court and the cause remanded for a new trial, there was

* * *

The Court: You may proceed.

Do you have another expert witness that you want to call, Mr. Fisher?

Mr. Fisher: Yes, your Honor. This hearing was continued to this date for that purpose.

Before doing so, however, at the last hearing, your Honor will recall that over our objection you required the disclosure of the amounts that the defendants had paid, not only the defendants Sunkist and Exchange Orange, but also the defendant Exchange Lemon Products Company, had paid in attorneys' fees in the action. Without waiving our objection to your Honor's requiring us to disclose the amount paid, we would like to have shown, as long as the amount has to be shown, the number of hours which the attorneys spent on the matter, and that is a total of 8,768 hours. That is actual hours, except as to some of the recent time, in which it has been estimated.

The Court: Are you satisfied to take Mr. Fisher's figures for that, Mr. Dixon?

Mr. Dixon: Yes, your Honor. If he so states, that is sufficient for me. [4925]

The Court: Total hours for all lawyers, is that it?

Mr. Fisher: Yes.

Mr. Dixon: Does that include the time of trial, counsel?

Mr. Fisher: That includes the time of trial.

Call Mr. Selvin to the stand.

HERMAN F. SELVIN

called as a witness on behalf of the defendants, after having been first duly sworn, testified as follows:

The Court: Are you going to ask Mr. Selvin the same hypothetical question that you asked the other expert?

Mr. Fisher: I propose to do it, and I may say that I can shorten it.

The Court: Shall we do it by reference? I see Mr. Selvin has the transcript in his hand.

Mr. Fisher: That is right, I submitted to him the hypothetical question, and I also gave him the portion of the reporter's transcript which contains the amendments which were made to the question, at the suggestion of your Honor and counsel for the plaintiff, and I would ask that the hypothetical question which was read to Mr. Beardsley, as amended by the matters which appeared thereafter in the transcript, be taken as the hypothetical question which would be asked Mr. Selvin.

The Court: Is that satisfactory? [4926]

Mr. Dixon: Yes. If Mr. Selvin says he has read the question, that is satisfactory to the plaintiff.

The Witness: I have.

The Court: You read the question and the discussion that followed thereafter?

The Witness: Yes, I have, your Honor.

The Court: That will be satisfactory, then.

The Clerk: What is your name?

The Witness: Herman F. Selvin, S-e-l-v-i-n.

(Testimony of Herman F. Selvin.)

Q. Have you been active in state and local bar activities? A. Yes.

Q. Will you recite some of your activities in that connection?

A. Well, I am presently a member of the Board of Governors of the State Bar; I am a past president of the Los [4929] Angeles County Bar Association; I have been on the usual run of Committees and other activities, but I think those two are the only ones that need be mentioned.

Q. As a matter of fact, are you, in effect, the head of the trial work for Loeb & Loeb?

A. I am the senior man in that department. And while I don't handle the administrative details of the department I am the head of the department.

Q. You do supervise their trial work, do you?

A. To a considerable extent, yes.

Q. Has your firm had a number of antitrust cases? A. Yes, over the years quite a number.

Q. Including private treble damage antitrust cases?

A. That is right. In fact, I should say largely that, although there have been Government actions, too.

Q. Do you feel that you are familiar with the charges made by attorneys generally in this locality in more important litigated matters?

A. I believe so.

Q. Over the week end you have studied the hypothetical question which I propounded to Mr. Beardsley at the hearing last Friday, and did you

(Testimony of Herman F. Selvin.)

also study the transcript as to the suggestions to changes in that question?

A. I have studied both of those documents, yes.

Q. Based upon those assumed facts, which are contained [4930] in the hypothetical question as amended, Mr. Selvin, do you have an opinion of what would be a reasonable amount to be allowed the plaintiff and intervener as attorneys' fees in this action? A. I do.

Q. What is that amount?

A. In my opinion, in the range of $75,000 to $100,000.

Q. Would you explain how you would determine that amount to be a reasonable fee?

A. Having gotten an idea of the nature of the litigation and the type of work involved, I attempted first to evaluate it over all, taking into consideration the time which the hypothetical question indicated was spent, the nature of the responsibility assumed, the nature and complexity of what I gather to be the issues in the case, and the result accomplished.

Having done that, and having arrived at the opinion that a fee in the neighborhood of $100,000 would be a reasonable fee, I attempted to confirm or disaffirm that conclusion in several ways.

I first tried to compute a fee on a strictly time basis, assuming for that purpose that $500 a court day for the trial would be a reasonable fee, and that for the preparatory work $20 an hour would be reasonable. That brought me a figure of in the neighborhood of $120,000. That, in my [4931] opinion, confirmed my original estimate, because I had to make or felt that I had to make certain allowances on the time basis.

In the first place, inevitably, because there was somewhere in the course of the proceedings, as I understand the hypothetical question, a change of attorneys, or at least an addition of a chief trial counsel, there had to be, necessarily, in my opinion, some duplication of work, a recovering of past ground. Then judging from my own experience and noting in the hopothetical question that with the exception of the time attributed to the attorney called Mr. Reich in the hypothetical question, the time figures were estimates, and judging from my own experience, it seems to me that attorneys who are extensively engaged in a long drawn-out matter, and who even though they keep time records have pretty much of a tendency, certainly it is true of me, to over-estimate the time they actually spend. I also made some allowance for the fact that, as the hypothetical question indicates, some part, some unspecified part of the time spent by the attorneys was consumed in investigative work, which had there been other funds available would normally have been done by an investigator, or perhaps a law clerk, and for which of course the charge would be substantially less than that for an attorney's time. So it would seem to me that on a

(Testimony of Herman F. Selvin.)

time basis the figure of $100,000 was [4932] reasonable.

I then reviewed, although not exhaustively or intensively, the action of various courts of appeal in passing upon the reasonableness or unreasonableness of allowances in comparable circumstances, and the results that I saw there seemed to confirm my opinion.

And then in my own mind I compared the fee—and perhaps at this point I should interject that in arriving at my opinion I have made two fundamental assumptions: first, that the amount recovered for fee purposes must be deemed to be $500,000, rather than the trebeled amount by way of penalty; and, secondly, that the fee is to be fixed with respect to its reasonableness, and not on a contingent basis. Nevertheless, I attempted to arrive at an opinion as to what a fair contingent fee in a situation of this sort would be, in order to check my own opinion as to the reasonable value. I think in that regard, in order that the bases of my opinion should be fully before the court, so that it may be fully evaluated, I think that it is necessary that I explain my attitude toward contingent fees.

I think they are necessary, and from a social standpoint a desirable feature of the practice of law, because they permit persons with just claims to present them in circumstances where, but for the contingent fee basis, they might be unable to present them, or unable to obtain an attorney to

(Testimony of Herman F. Selvin.)

present them. However, I think, and have felt for [4933] some time, that one of the scandals, you might say, of the legal profession, has been for some time the exorbitant percentage which is sometimes charged by way of contingent fee.

I take the position that a lawyer practices, of course, to earn a living, but that he is also a member of a profession, a profession which is inseparably associated with the administration of justice; that anything that brings discredit on the profession necessarily brings discredit on the administration of justice. And I think that that is a factor that has to be taken into account in fee fixing, whether we are fixing a contingent fee or a reasonable fee. Because if lawyers acquire a reputation for charging exorbitantly for their services, it must inevitably reflect, in my opinion, on the administration of justice.

It is my feeling, and has been for a long time, that except in very exceptional circumstances a contingent fee in excess of one-third of the amount recovered is unreasonable and exorbitant, and unprofessional in my opinion.

On that basis, and on the assumptions which I have indicated, a fee in this case would be $166,000, and since on a reasonable fee basis the fee must necessarily be less than a fee on a contingent fee basis, because the speculative element which justifies the larger amount is eliminated, it again seemed to me that the range which I have indicated [4934] was reasonable.

Mr. Fisher: You may examine.

(Testimony of Herman F. Selvin.)

Mr. Cohn: If the court please, Mr. Dixon and I have agreed, if it is agreeable to your Honor, that I may take the cross-examination.

The Court: All right.

Mr. Fisher: May the court please, I believe Mr. Cohn is not of record in this case.

Mr. Cohn: That is right, I am not. I came into the case, I don't recall, on last Friday, and asked leave to appear on behalf of Mr. Reich, that circumstance arising out of a form of judgment which I called the court's attention to and which had been served on us.

The Court: I was under the impression that I permitted you to appear for Mr. Reich, but maybe I didn't.

Is there any objection to him being allowed to appear for Mr. Reich on the fee problem only?

Mr. Cohn: If there is any question, Mr. Reich can conduct the examination.

Mr. Fisher: We will waive any objection to his appearing on behalf of Mr. Reich.

The Court: The record may show that Mr. Cohn appears for Mr. Reich on the fee problem only, and by stipulation between Mr. Reich and Mr. Dixon this cross-examination is for the benefit of whoever may benefit by it. Is that [4935] right?

Mr. Cohn. Yes.

The Witness: Does that include me, your Honor?

The Court: I don't know.

Mr. Cohn: It may include you, Mr. Selvin.

Cross-Examination

By Mr. Cohn:

Q. Mr. Selvin, your firm has represented, in the past, a number of motion picture producing companies, has it not? A. Yes.

Q. And other clients who are in the entertainment industry, other branches of the motion picture industry besides the production?

A. If you include the distribution or exhibition, I would say yes. I don't believe we have gone into what you, Mr. Cohn, call the creative branches of industry.

Q. Have any of those firms, who have been your clients in the past, have they ever been defendants in civil treble damage antitrust actions?

A. Frequently.

Q. Would you estimate the number of such actions which have been brought against these clients, say during the past 10 years?

A. Well, it would be a guess, Mr. Cohn, but I think in this district alone there have at one time or another been [4936] as many as, I believe, 20 or 25 of such actions pending against various companies, some of whom are our clients.

Q. And are there any such actions pending against your clients at the present time?

A. There are.

Q. Does your firm have a reasonable expectancy,

(Testimony of Herman F. Selvin.)

in your opinion, to continue to represent some of these companies who are defendants in these antitrust actions?

A. We all hope so. And I think we have a reasonable expectancy.

Q. As a matter of fact, your firm has represented these unnamed clients in the motion picture industry for a number of years, more than 20 years, isn't that true?

A. Oh, yes. As a matter of fact, they were representing, generally, I don't believe the antitrust situation had arisen, but they were representing a number of them when I came to work for the firm.

Q. It is true, is it not, that these clients whom I have been referring to have an interest in keeping awards for attorneys' fees to plaintiffs as low as possible?

A. The clients have, but the clients also have no mortgage on my conscience, Mr. Cohn.

Q. Has your firm ever represented a plaintiff in an antitrust action?

A. Treble damage? [4937]

Q. Yes.

A. I don't recall any situation where an action has actually been commenced. However, we have represented clients who have had claims based upon alleged violations of the antitrust laws, which have been disposed of without action one way or another.

Q. I understand your answer to mean, then, that

(Testimony of Herman F. Selvin.)

your firm has never, to your present recollection, commenced such litigation?

A. That is true, I don't recall of any that we have commenced.

Q. Mr. Selvin, if I understood some of your answers correctly, there was at least one instance in which you stated that you departed from the hypothetical question and made some assumptions which were not contained in the question; is that correct?

A. Yes. Those two assumptions being that, No. 1, the fee had to be fixed with relation to the amount of actual damages awarded, as distinguished from the trebled amount; and, No. 2, that the fee had to be fixed on the basis of its reasonableness, and not on a contingent basis. Those are two assumptions of law, rather than fact, I should say.

Q. Did you not also say that you assumed that there had been an over-estimation of time spent by some of plaintiff's counsel? [4938]

A. I think that is probably the effect of it, judging from my own experience, that the time estimate would probably to some extent be liberal.

Q. So that your answer as given was not, in fact, based on the hypothetical question, but included—— A. Mr. Cohn——

Q. Please let me finish the question.

A. I am sorry. I thought you finished the question.

Q. (Continuing): ——but included an additional assumption, which is to say the one you

(Testimony of Herman F. Selvin.)

expressed, that the hours stated were over-estimated?

A. No. In that part of my testimony I was relating the processes by which I was checking the opinion which I had arrived at on other bases, and that was in the course of my explanation why on a strictly time basis a fee of something over $100,000 did not change my opinion that the overall value of the work here was $100,000.

Q. It may be a matter of some importance, Mr. Selvin, so I must ask you the question again. Did you assume that the time which was indicated in the hypothetical question was over-estimated by plaintiff's counsel?

A. For the purpose of my opinion as to the fee, no. For the purpose of checking the accuracy of that opinion, I made the assumption that I have previously indicated.

Q. Did you examine any of the files in this case? [4939] A. I did not.

Q. Did you examine the affidavits of any of the plaintiff's counsel in support of their application? A. I did.

Q. Mr. Selvin, you stated that you felt that one-third of the amount of recovery was in your opinion the maximum which should be allowed in a contingent fee arrangement?

A. I am expressing my general opinion with respect to contingent fees generally, whether in this type of case or any other, that in my opinion one-third was the maximum which, absent unusual or

(Testimony of Herman F. Selvin.)

exceptional circumstances, could in my opinion be justified from the standpoint of the standing and prestige of the Bar as a whole.

Q. Will you explain why it is, Mr. Selvin, that in checking your opinion which you gave in this case, and in adopting the assumption of a contingent fee arrangement, you did not use the total amount of the recovery, which is $1,500,000?

A. Again, because on the assumption of law which I have indicated I made, which I believe to be an accurate assumption, but that is not for me to determine, on the assumption of law which I made I am asked to testify with respect to an action which resulted in a verdict or judgment of $500,000. That is why I considered it that way.

Q. You also know that so far as the amount allowable [4940] in the test, that no contingency feature is taken into consideration, so I am directing my attention to that portion of your answer in which you tested the opinion which you gave, and you made an assumption for the purpose of testing your opinion that this was a contingent fee arrangement, and upon that assumption will you explain why you did not use the total amount of recovery, rather than the $500,000?

A. Mr. Cohn, I can't do anything else except repeat my previous answer, because as I understand the matter on which I ~~have been~~ asked to express an opinion it is in respect of a judgment which must be said to be $500,000. And since I have expressed an opinion as to the reasonable value of services which resulted in obtaining a judgment in that amount, for the purpose of testing that opinion I assumed a contingent fee arrangement in respect to the same amount.

The Court: You have been using the term "judgment" and "verdict"; they are two different things. The verdict in this case was half a million dollars; the judgment will be for that amount trebled, less a settlement made by Tree-Sweet.

The Witness: That is correct. And I am assuming, it would be more accurate to say that I understand that the fee must be fixed in relation to the actual damages awarded, which under the hypothetical question was $500,000.

I will say, Mr. Cohn, again, as I understand the law, that what the courts have said about that is the amount that [4941] results from the trebling is not due, so the cases say, not due to the services from the attorney, but something that the law automatically superimposes on the amount that is attributable to his efforts. That is just another way of saying why I assume $500,000 instead of a million and a half.

Q. (By Mr. Cohn): You would then, I take it, assume a different maximum of percentage in those cases in which the law trebles the judgment; is that the essence of your statement?

A. The maximum percentage?

Q. Yes.

A. No. If I understand your question correctly, it is not a question of percentage, it is a question of amount in respect of which the percentage is applied.

A contingent fee must necessarily be one by agreement. If a party is well advised and not taken advantage of, in an action of this sort, wants to agree on a contingent fee based on the trebled amount, rather than the actual damage, I suppose it is in the prerogative of the party to do it, and the attorney to work under that kind of arrangement. Whatever opinion I might have is its effect on the profession.

Q. Mr. Selvin, in giving your opinion as to the reasonable value of the plaintiff's attorneys' services, did you take into consideration the fact that in this case no retainer was paid to the plaintiff's counsel? [4942]

A. Yes. I saw no statement in the hypothetical question that a retainer had been paid. However, again, I have to point out that on the assumption that I have indicated, that the fee must be fixed on a reasonable fee basis, not on a contingent basis, that to my mind presupposes that there would be some compensation to the attorney regardless of outcome, even though no retainer had been paid. [4943]

* * *

The Court: The defendants' brief, as I commented before, had a fairly good summary, most of which I agreed with. One of the factors to be considered was the time and labor which has been fairly and properly expended in the case. And I am inclined to accept the figures of the estimates of the plaintiff lawyers in that respect.

(2) The novelty and difficulty of the questions presented and the quality of skill demanded in the case. And I have already commented that I thought the case is novel, it doesn't follow the pattern of the treble damage suits against the motion picture industry. Secondly, of course there was no decree, as there was in many of the motion picture cases, where the plaintiffs under the Supreme Court decision could get certain support out of the decree. Therefore, I considered the difficulty of this case as far greater and the quality of skill demanded in the trial as far greater. There was very little pattern material that could be used.

No. 3, the skill employed by counsel.

I have already complimented Mr. Dixon for his skill in the case, and Mr. Irwin's assistance and diligence.

(4) The amount involved as it reflects the risk of the client and the commensurate responsibility of the lawyer.

It is rather an intangible in this case, because the plaintiff was either out of business if there was no verdict—I mean if there was no recovery, and of course if there was [4944] no recovery, there would obviously have been no appeal available to the plaintiffs, as a practical matter.

(5) The result achieved. That speaks for itself.

(6) The eminence, ability and standing of counsel.

I think that we had good counsel on both sides of the case. I think Mr. Dixon is an outstanding authority in the field of antitrust law, and the results achieved by him in his service for the government clearly demonstrated that ability before he ever tried this case.

Mr. Irwin's reputation and ability, I am familiar with.

Mr. Reich, who has engaged in this type of case, and who has appeared before me, has an alert and facile mind. As a matter of fact, there are two considerations in connection with Mr. Reich; one negative and one positive. One, that he abandoned the horse in the middle of the stream for all practical purposes when he insisted that I fix a contingency fee for him or he would get out of the case, and I, following some exchange, had to ascertain whether he was making that statement as it sounded; when it appeared that he was, I turned down his request and he went out of the case.

On the positive side of the case, there is no doubt in my mind that the real contribution that was made by Mr. Reich was in analyzing this situation and in reaching a determination that there was a cause of action, and in originally having the insight to get the case started. I think that was an important [4945] contribution. How it fits in with the contributions made by other counsel is another question.

But that is a compliment as to your ability and eminence, Mr. Reich, because it is one thing for a judge to go through pleadings and see the point that lawyers make, but it is another thing as a lawyer to formulate a theory from nebulous facts and eventually see that theory work out.

Now, as to factors not to be taken into account, I agree No. 1, the ability of the defendants to pay, is not a factor, where the defendant has some reasonable ability to pay. If the defendant is, of course, a poor or impoverished person, that may become a factor.

(2) The financial condition of the plaintiff, defendants concede, should not be considered.

(3) The uncertainty of the fee, I agree, should not be a factor.

Certainly this should not be looked upon as a matter of a contingent fee.

I may have made some general remarks in the past about plaintiff's counsel undertaking this case on what I may have said was a contingency. That may have been properly said as to things occurring at that time. But a contingent fee is a fee by agreement, and this was not agreed to be a contingent fee, and I don't think that factor should be considered. Certainly this shouldn't be considered as a contingent fee. [4946]

The real two questions in my mind that I am not certain of are 4 and 5. (4), whether the punitive damages resulting from trebling the verdict may be considered at all; and (5), the question of the fees paid to defendants' attorneys.

Now, taking up the last one first. There is apparently no law squarely on that point. You have cited some cases with the word "see," and I don't think the defendants contend that those are authorities on that proposition. Certainly they are not cases in this Circuit. As I recall, they are both State cases.

Are they not?

Mr. Fowle: That is correct. They were decisions by the Supreme Court of Michigan, your Honor.

The Court: However, I think as a matter of logic there are some inferences, small they may be, that may be drawn from what the defendants thought about the case and what they did about defending it. I am not going to place any great weight on that fact. If anything, the defendants are in a better position on the present state of the record than they would have been without making that disclosure, because I would have guessed, probably, that your fees ran higher than the representations made by Mr. Fisher.

Of course, I know, also, that there were other moneys expended by the defendants in defending the case, which probably has nothing to do with the matter here, except the general [4947] feeling that the defendants spared no horses in defending this case. If it was necessary to photostat an entire booklet of accounts, it was photostated. There was available to defendants, to what extent they wanted it, a complete reproduction of the records of the plaintiff.

Plaintiffs, on the other hand, were at the disadvantage of having a company that had gone out of business, with records piled and stored away, and instead of having the ordinary opportunity of being able to have records available on call from employees of the corporation, they had as much difficulty, I would assume, and from what I have heard here I would infer, in getting specific information out of the records as the defendants themselves did.

Mr. Fisher: May the court please, I don't want to interrupt your Honor, but I would like to point out that the defendants—I don't think it is comparable, because the defendants' position is that there were the three defendants concerning whom you required disclosure. Now, the Exchange Lemon Products Company historically have been separately represented. There was a conspiracy charge. They had separate representation, and Sunkist and Exchange Orange had other representation, which required additional time.

Then there was the further fact that due to the rulings of Judge Byrne, and of your Honor, we were required to answer interrogatories, which required a great deal of attorneys' [4948] time in accumulating information for the other side, whereas we had to ferret out the information through examination of their records.

And, yet, another point is, and this goes to the comparablity of the matters, another point is that they brought an action based on five causes of action, which we had to defend against, and as to the State cause of action, it was not dismissed until just before the trial, and as to the Robinson-Patman

Act, it was dismissed pretty close to the end of the trial.

The Court: You were never deceived about that. In our pretrial discussions I can recall stating, and everybody seeming to agree, that if there was nothing to this lawsuit except the Robinson-Patman Act charges and the State charges, the case probably wouldn't be here.

Mr. Fisher: I remember your Honor inviting the dismissal as to that, but Mr. Dixon wouldn't do it. We had to defend against that. And then there is the further fact——

The Court: Well, the potential recovery under the Robinson-Patman Act was definitely limited in amount. The potential recovery under the Robinson-Patman Act could have been only a minor verdict.

Mr. Fisher: I admit it would have been a smaller amount. And, then, the further fact was that all of the time that the attorneys for Exchange Lemon Products spent, before [4949] the dismissal —Exchange Lemon Products was dismissed out of the case.

The Court: That is an unusual situation, and I have that in mind. Apparently Pope & Ballard came in for Lemon Products, did a lot of work for Lemon Products, and then subsequently Pope & Ballard came in for the other two defendants, and obviously what they had done for Lemon, in investigation and so forth, was utilized by Sunkist and EOP. I don't think there will be any denial of that.

Mr. Fisher: To a degree, of course.

The Court: To a degree that is hard to fix, but to a degree.—

Mr. Fisher: Yes. But insofar as the Exchange Lemon feature of it was concerned, the dismissal as to them, a great deal of the work could not be utilized.

The Court: But, also, I have in mind this—that Exchange Lemon, by its motions, was definitely trying to get itself out of the case on motion, and Mr. Williams' remarks on several occasions indicated that. Then you have an odd situation, where three defendants, all part of this cooperative organization, where the one defendant who apparently had the best defense apparently early in the stages at least spent the most money for defense, and then subsequently when Lemon went out of the case those same attorneys came over and represented Sunkist and EOP. I am not so sure that there are [4950] not certain inferences that I might be able to draw from that, if I wanted to draw them.

It could definitely be inferred that that was merely careful planning by defendants in connection with who was going to pay for all this preliminary work.

I say that is an inference that I might draw. I don't say that I am going to draw it.

I realize that this is an unusual situation as to Lemon and its relationship in this case.

At any rate, going back to what started this off. You will concede, will you not, Mr. Fisher, that the defendants didn't spare the horses as far as the defense of this action is concerned?

Mr. Fisher: We tried not to, yes, sir.

The Court: All right.

As I say, there is no law on this, but I am inclined to think that it is a proper matter to take into consideration, and although I am not attaching undue weight to it, I am going to consider that factor. And if there is error in fixing these fees, the Circuit can easily remedy that part of the case. It should not present problems to them that might possibly be presented by other matters in the case. It is a matter which could easily be presented and easily ruled upon.

No. 4 of this list, punitive damages, there is one loose end there which I don't think any research has been done upon, [4951] and I would hesitate to finally rule on this until someone advised me whether they looked into the matter, and that is this: I was thinking of this matter over the week end, and it is an amazing thing. Congress in passing federal statutes has known what to say when they wanted to say it about attorneys' fees. Congress has had no trouble in framing language about attorneys' fees. Now, in the case before us we have the section which says, so we will have it in mind, "* * * may sue therefor in any district court * * * without respect to the amount in controversy, and shall recover threefold the damages by him sustained,"——

Stopping right there. The plaintiff's recovery includes the penalty. This penalty isn't ordered to someone else. No one else is given the right to sue for the penalty. It is recovered by him.

Going ahead: "* * * and the costs of suit, including a reasonable attorney's fee."

No strings on it at all.

You have these cases in the two circuits which you cited to me pointing out that the punitive damages are not to be considered.

Certainly attorneys' fees are not to be trebled. But that is a different thing than saying whether or not a court should consider as part of the result accomplished what was obtained for the [4952] plaintiff.

Now, there are two statutes that come to mind immediately, where there is similar language to this language, and where there have been a number of cases decided involving the question of attorneys' fees. True, they are in smaller amounts, but the principle is the same. One was the Rent Act, which is in Title 50 Appendix USCA, Section 1895. It provided for treble damages, and provided for reasonable attorneys' fees.

There have been a number of cases decided under it, by many circuits, many courts.

You will find far more cases than in this section here, but it is the same language and it is the same problem, and I am interested to see whether the courts in those cases raised the question as to whether in fixing an award to the private litigant for treble damages, they raised this question of the trebling, and the penalty amount, or whether it has only been raised in the cases involving the antitrust act where the verdicts were generally bigger.

The principle should be the same. The amount should have nothing to do with the principle of law involved.

The second statute that had a similar provision is the Defense Production Act of 1950, which the particular section is 2109 of Title 50, Appendix, USCA. It provided for treble damages and for reasonable attorneys' fees.

That statute, by the way, is still in effect. The rent statute is out. But there are two statutes with similar [4953] language.

Now, to see how Congress knew what they were talking about when they fixed fees, take a few things more. Take the Tort Claims Act. Here was a statute which let a recovery be had against the government itself. It involved no treble damages, but the Congress had no trouble in fashioning a provision for attorneys' fees. They provided, first of all, that the statutory limits on fees, limitations, applied to amounts over $500. As I read it, the door is open for amounts under $500. And I assume that Congress left that to the discretion of the judge. In a recovery of $500 or less, the hands of the court should not be tied.

If it was one of the administrative matters under Section 2672, I think, handled administratively, there was a 10 per cent ceiling; and if it was a court action there was a 20 per cent ceiling. The court could not award more than 20 per cent. But there could be an award of 20 per cent of the amount recovered in an action against the government.

In these cases the Congress provided that these fees be paid out of the recovery and should not be in addition to the recovery.

In the penalty statutes the fees are expressly set by Congress to be in addition to the treble damages. A very important distinction, indicating this was another penalty which Congress attached to this type of action. [4954]

By the way, the Tort Claims sections are 28 USCA, 2672, 2678.

Then you have a section on the Japanese claims, claims of the Japanese because of their removal. Again, that is Section 1985.

Mr. Fisher: Is that of 28 USCA?

The Court: Wait a minute. No. 1985 is also in 50 Appendix, USCA.

There was a limit, I think, of 10 per cent awarded in the case of the Japanese claims.

There, also, is a provision for attorneys' fees in the Trading with the Enemy Act, under Section 20 of 50 Appendix USCA. With an exception in cases of a showing of hardship.

So I draw two conclusions. First of all, that Congress seemed to know what they were doing in enacting statutes as to attorneys' fees, and there is no string on attorneys' fees under Section 7 of the Sherman Act, and a similar worded section in the Clayton Act.

The judges in the cases that you have cited have laid down that limitation.

My second point is, I wonder what judges have done with similar sections in the Rent Act and in the Defense Production Act.

I don't like to have you do any more work than you have to on this, but I would appreciate it if you would run down [4955] some of those annotations on those two statutes.

Mr. Fisher: I will be glad to do so.

The Court: Those two sections have treble damages, and reasonable attorneys' fees.

Mr. Dixon: I think the Wage and Hour Law has similar provisions where up to a third is allowed.

The Court: I didn't check that. I had in mind the Wage and Hour Law. What is the maximum allowed there?

Mr. Dixon: A third of the amount recovered.

The Court: That is added on top of the recovery, or does it come out of the recovery?

Mr. Dixon: I believe it comes out of the recovery.

Mr. Walker: I perhaps could speak with authority on that, your Honor, having handled a number of them.

The amount of the award is trebled. The attorneys' fees is added to it. I have seen several actions tried by Judge McCormick here where he allowed a contingent fee of a third, so that the amount awarded to the attorney was exactly the same as the amount of the award—it was a group action—awarded to the plaintiffs.

The Court: That is apparently in line with Judge McCormick's thinking that the attorney fee angle is a penalty, and fits in with his decision mentioned by Clore Warne.

Mr. Reich: Finley against MCA.

The Court: In the Finley case, where although he had to [4956] set aside a recovery award to the plaintiff, he still allowed an attorneys' fee.

Mr. Fowle.

Mr. Fowle: I was simply going to say that there is no trebling under the Fair Labor Standards Act, Mr. Walker. It is double; not treble. I have been in many of those.

Mr. Walker: It has been a number of years since I handled them.

Mr. Fowle: It is an additional equal amount.

Mr. Reich: But Mr. Walker's point is that counsel fees are in addition. It is doubled, instead of being trebled, like under the antitrust law, but counsel fees are in addition to the doubling.

Mr. Fowle: But I know of no case under the Fair Labor Standards Act where I can recall the point is squarely raised as to whether or not the attorneys' fees should be based on the doubled amount or on the actual amount of wages found to be due.

Mr. Walker: I don't recall any, either, Mr. Fowle. I was simply recalling my activity in these courts.

Mr. Reich: I think I cited to you in the memorandum I filed, quoting from Hornstein in the last issue of the Harvard Law Review, in which I think that involved a wage case, but I am not quite certain of it.

The Court: I read it, but it involved a wage case and I [4957] didn't pay too much attention to it at the time. I didn't get too much help out of it, though.

How soon can you tell me what courts have done in these other cases of treble damages?

Mr. Fisher: I wonder if I might have five days. I have been pretty well occupied with this case.

The Court: If you are going to wait five days, I will have to do it myself, put my law clerk on it.

Mr. Fisher: I could take a lesser amount of time if your Honor directs.

Mr. Cohn: Two days?

The Court: I would suggest that you both take two days on it. This is Monday. Take Tuesday and Wednesday and file it Thursday.

I doesn't have to be detailed.

Maybe you won't find anything.

I could do it myself, but that is what you are supposed to be doing. That is what you get paid for.

Meanwhile the form of this judgment can be revised and re-presented with a blank for the attorneys' fees to the counsel, without allocation between them.

Mr. Dixon: We have a form prepared, your Honor. We will be glad to submit it to them at this time for their consideration. I assume when the judgement is finally entered, that the statements that your Honor has made may be regarded as an [4958] opinion on the question, which would be tantamount to findings of fact, in support of the judgment.

The Court: Is there going to be any request for any findings of fact, express findings of fact, on this matter of attorneys' fees?

Mr. Fisher: I think not, your Honor.

The Court: Unless there is some other request, I will consider that findings are waived, and the record will be available in connection with my ruling on it.

Do you have the formal judgment that you can serve now?

Mr. Dixon: Yes, we have, your Honor.

The Court: I would suggest that you serve it and get this matter in, and I will make the [4959] award.

* * *

TRANSCRIPT OF HEARING OF MOTION TO SET ASIDE THE VERDICT AND JUDGMENT AND FOR A NEW TRIAL

Monday, March 26, 1956, 10:00 A.M.

The Clerk: No. 11 on the calendar. No. 13788 Civil, Winckler & Smith Citrus Products Company. Hearing motion of defendants to set aside the verdict and judgment, and for a new trial.

Mr. Dixon: Ready for the plaintiff.

The Clerk: Mr. Fisher has handed to me a motion to amend their motion. [4960]

* * *

The Court: It will be deemed the amendment to the motion, without having to redraw the [4961] motion.

* * *

Mr. Fowle: May it please the court, before I begin I would like to point out that in the specifications of places in the record where we made objections, which we filed with the court last Thursday, in the final paragraph of that document we asked leave to make certain corrections by way of amendment in our motion for a new trial, since we found that there had been some errors in respect to transcript references, and so on.

The Court: They may be made.

Mr. Fowle: With respect, if the court please, to this point 16 of our motion for a new trial, which is that the court erred and materially prejudiced defendants by the manner and extent of his participation in the trial in a number of respects, I would like to say, first off, that the defendant does not urge that the court did this deliberately, but the defendants do believe that the court held certain definite views about the merits of this case, and that these views became known to the jury during the course of the trial. The defendants believed actually before the trial had commenced that the court was of the view that the defendants [4962] were wrong.

If there was ever any doubt in the minds of defendants' counsel on this score—and there wasn't, really—this doubt was certainly put to rest on the 11th of January when in chambers your Honor told all of us that the TreeSweet and Silzle contracts were discriminatory and could not be defended, and that you intended to issue an injunction against us irrespective of what the verdict might be.

The Court: That is a legal question. I don't think there is much factual dispute involved about that. It is a legal question. And I am still of the same frame of mind as to the illegality of the contracts.

There is no dispute of fact about that. The only open fact there was whether or not they had been continued or whether they had been terminated, and I accepted Mr. Fisher's word on that later on.

Mr. Fowle: In any case, your Honor, we would not agree, of course, that those contracts were illegal.

The Court: I know. We are in disagreement. But it is an expression on a legal question in the case.

Mr. Fowle: I was simply mentioning what you had told us. This was on the 11th of January, and it was before the plaintiff's evidence was all in, let alone the defendants' evidence.

The Court: All the evidence was in on the contracts. [4963] There is no dispute about that.

Mr. Fowle: No dispute about the documents themselves.

The Court: That's right

Mr. Fowle: In any event, it is our view, your Honor, that you had strong views about the case, and that in one way or another these views were made known to the jury, despite your admonitions to the jury that you had no views, and that they were not to try to figure out how you felt about the case.

I wish to repeat that we are not complaining that the court deliberately made his views known to the jury. We are simply complaining that by the manner and extent of the court's participation in the trial, that you actually did make those views known to the jury to the prejudice of the defendants.

Now, the defendants' motion, paragraph 16 of that motion, cites a great many instances where the court did participate in the trial by questioning the witnesses, by commenting on the evidence, and by commenting on the conduct of counsel for the defense. In the main, the defendants would not complain of any single or particular instance of such participation by the court. What the defendants do complain about is the cumulative effect of this participation.

We believe and we in good faith urge that the cumulative effect of the court's participation in the trial was to [4964] prejudice the defendants and to prevent them from having a fair trial.

I realize I have to be brief about this, that there isn't much time, but I would just like to mention two or three or four cases to your Honor. [4965]

* * *

The Court: All right.

I am going to take the motion under submission. I will try to rule on it promptly. [4966]

* * *

TRANSCRIPT OF HEARING ON MOTION TO ADMIT MR. WILLIAMS FOR ORANGE AND SUNKIST

November 30, 1955, 10:00 A.M.

* * *

The Court: I asked you, both sides, to come up this morning in order that I might entertain a motion to admit Mr. Williams for Orange and Sunkist. I also told Mr. Fisher over the telephone that I would waive any formal documents. I see he has some in his hands. The practice around here ordinarily is to entertain these orally.

* * *

The Court: The motion is granted.

I will state very briefly why it is granted.

I have a great deal of respect for Mr. Ross Fisher and the representations he makes to this court. You have made a showing which in your opinion involves the substantial rights of your clients. The personal feelings that I might have one way or the other certainly should bow to the interest of the litigants in this case. I want to see that both this bankrupt plaintiff and these defendants get a fair trial. You feel this man is needed, so I am granting the [4968] motion.

* * *

[Title of District Court and Cause.]

INDEX TO CERTIFIED TRANSCRIPT

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 1836, inclusive, contain the original

Filing Date[1]	Nature of Document
	Flyleaf—Transcript of Record (1)[2]
	Index (2)
2/ 1/52—	Complaint for Equitable Relief (3-20)
2/ 8/52—	Summons as to All Defendants (21, 22, 23)
2/13/52—	Stipulation for Appearance of Sunkist and Ex. O (24, 25, 26)
2/25/52—	Stipulation & Order Thereon Extending Time in Which to Plead; O & M (27, 28)
2/25/52—	Appearance of Ex. L. & Stipulation Extending Time in Which to Plead (29, 30)
3/13/52—	Stipulation & Order Extending Time in Which to Plead; O & M (31, 32)
3/14/52—	Plaintiff's Interrogatories (33 to 41)
3/24/52—	Notice of Motion to Dismiss Complaint, to Dismiss First, Second, Third, Fourth & Fifth Causes of Action; to Strike Plaintiff's Complaint or Portions & for

---

[1] Dates and pagination in this index were interpolated by Appellants' Counsel.

[2] District Clerk's pagination on original certified Transcript of Record.

a More Definite Statement (Sunkist & EOP) (42-57)

3/24/52—Plaintiff's Interrogatories Addressed to Tree. (58-65)

3/25/52—Notice of Motion to Dismiss by Tree., to Strike from the Complaint & for a More Definite Statement & Points & Authorities in Support Thereof; T.S. (66-80)

3/25/52—Memorandum of Points & Authorities in Support of Motions of Defendant Exchange Lemon Products Co., in the Alternative (1) to Dismiss the Complaint, (2) to Strike the Complaint or Portions Thereof and (3) for a More Definite Statement; ELP (81-111)

3/25/52—Notice of Motions in the Alternative (1) to Dismiss the Complaint, (2) to Strike the Complaint of Portions Thereof, and (3) for a More Definite Statement; ELP (112-118)

3/26/52—Stipulation Extending Time of Sunkist Growers, Inc., and Exchange Orange Products Co. to Answer Plaintiff's Interrogatories (119-120)

3/27/52—Notice of Motion for Extension of Time to Answer Plaintiff's Interrogatories and of Hearing Objections to Plaintiff's Interrogatories; ELP (121-122)

3/27/52—Objections to Plaintiff's Interrogatories; ELP (123-127)

3/27/52—Memorandum in Support of Motion to Extend Time to Answer Plaintiff's Interrogatories; ELP (128-132)

4/ 3/52—Notice of Objections to Plaintiff's Interrogatories Numbers 11 & 12 & of Motion for Protective Order 3 TS and Affidavit of W. B. Taylor in Support Thereof (133-144)

4/ 3/52—Stipulation & Order Extending Time to Answer Plaintiff's Interrogatories Numbers 1 Through 10 and 13 Through 19, Inclusive; O & M (145, 146)

4/ 4/52—Plaintiff's Memorandum of Points & Authorities in Opposition to Defendants' Motions to Dismiss, etc. (147-183)

4/ 7/52—Plaintiff's Memorandum in Opposition to Motions and Objections re Interrogatories (184-194)

4/14/52—Stipulation & Order re Motions to Dismiss, Alternative, Relief, and Objections to Interrogatories; re cont to 5/5/52 (186, 197)

4/14/52—Minutes of the Court

5/ 3/52—Stipulations re Objection of Exchange Lemon Products Co. to Plaintiff's Interrogatories (199, 200)

5/ 5/52—Minutes of the Court

5/ 9/52—Stipulations & Order Putting Hearing on Interrogatories off Calendar (201, 202)

5/ 9/52—Waiver of Notice Required by Rule 24(c) of F.R.C.P.; Ptf. (203)

5/ 9/52—Petition of Ronald Walker, Trustee (204-207)

5/ 9/52—Order Permitting Intervention and Amending Caption; Petition of Ronald Walker; Waiver of Notice (208, 209)

5/12/52—Order re Motions heard May 5, 1952 (211-214)

5/12/52—Minutes of the Court

5/26/52—Answer of TreeSweet Products Co. (215-224)

5/26/52—Defendant TreeSweet Products Co. Answers to Plaintiff's Interrogatories 1 Through 10, and 13 Through 19, Inclusive (225-264)

5/26/52—Answer of Sunkist Growers, Inc., and Exchange Orange Products (265-283)

5/26/52—Sunkist Growers, Inc., and Exchange Orange Products Co. Answers to Plaintiff's Interrogatories Dated March 14, 1952 (284-401)

5/26/52—Answer of Exchange Lemon Products Co. to Complaint (402-411)

5/26/52—Answers of Exchange Lemon Products Co. to Plaintiff's Interrogatories (412-446)

5/28/52—Jury Demand (447, 448)

5/28/52—Notice of Deposition; & Affidavit of Service (449, 450), Deposition of Winckler (451, 452)

5/26/52—Deposition Subpoena to Ronald Walker 453

5/26/52—Affidavit of Service by Mail of Notice of Deposition on Irwin (454, 455)

6/16/52—Interrogatories Propounded to Plaintiff

& Intervenor by Sunkist Growers, Exchange Orange Products Co. and Tree-Sweet Products Co. (457-485)

6/16/52—Minutes of the Court

6/17/52—Stipulation Extending Time to Object, Answer or Otherwise Plead to Interrogatories dated June 12, 1952 (486-488)

6/30/52—Order re Local Rule 4(e) & Affidavit in Support Thereof (489-492)

7/ 9/52—Statement in Support of the Motion of Exchange Lemon Products for Discovery and Production of Documents Under Rule 34 (493-503)

7/ 9/52—Affidavit of Melville C. Williams in Support of Motion for Discovery & Production of Documents Under Rule 34 by Defendant Exchange Lemon Products Co. (504-508)

7/ 9/52—Motion for Discovery and Production of Documents Under Rule 34 (509-514)

7/ 9/52—Notice of Motion for Discovery and Production of Documents Under Rule 34 (515-518)

7/13/52—Reply Memorandum of Defendant Exchange Lemon Products Company to Plaintiff's Statement of Reasons in Opposition to Said Defendant's Motion Under Rule 34 (569-580)

7/14/52—Statement of Reasons in Opposition to Defendant ELP's Motion for Discovery and Production of Documents Under Rule 34; Affidavit in Opposition; Memorandum of Points and Authorities in Opposition (Reich) (519-545)

7/14/52—Notice of Motion to Suppress, and Notice of Hearing on General Objections to Interrogatories Propounded to Plaintiff and Intervener by Defendants Sunkist, EOP and TreeSweet; Affidavits, and Memorandum of Points and Authorities in Support Thereof (546-568)

7/21/52—Stipulation Extending Time of Defendants Sunkist Growers, Inc., a Corporation, The Exchange Orange Praducts Co., and TreeSweet Products Co., to Serve and File Memorandum of Points and Authorities, Affidavits and Other Documents in Opposition to Plaintiffs' Motion to Suppress the Interrogatories Propounded to Plaintiff and Intervener by Said Defendants (581-583)

8/15/52—Plaintiff and Intervener's Supplemental Memorandum in Opposition to ELP's Motion Under Rule 34 (584-597)

8/15/52—Answer to Plaintiff's General Objections to Interrogatories Propounded by Defendants Sunkist Growers' Inc., The Exchange Orange Products Co., and TreeSweet Products Co. to Plaintiff, Affidavit of F. R. Wilcox and Memorandum of Points and Authorities (598-620)

8/19/52—Reply Memorandum Re Plaintiff and Intervener's Motion to Suppress Interrogatories (621-632)

8/30/52—Reply of Defendant Exchange Lemon Products Co. to Plaintiff and Intervener's Supplemental Memorandum Re Motion Under Rule 34 (633-637)

9/ 8/52—Minutes of the Court

10/ 8/52—Plaintiff and Intervener's Objections to Proposed Order on Defendants' Motion Re Rules 33 and 34 (639-642)

10/15/52—Plaintiff and Intervener's Supplemental Objections to Proposed Order on Defendants' Motion Re Rules 33 and 34 (643-645)

10/30/52—Order for Production of Documents Requested in Motion of Defendant Exchange Lemon Products Co. Under Rule 34, and Granting Plaintiff's Motion to Suppress Interrogatories of Defendants Sunkist, EOP and TreeSweet (646-651)

12/ 9/52—Substitution of Attorneys by Defendant Exchange Lemon Products Co. (652-653)

12/29/52—Defendant Exchange Lemon Products Co.'s Request for Admissions Under Rule 36 (654-657)

12/29/52—Interrogatories Propounded by Defendant Exchange Lemon Products Co. (657-676)

12/29/52—Affidavit of Mailing Interrogatories and Request for Admissions (677, 678)

1/ 5/53—Stipulation Re Interrogatories and Admissions; Order (679)

3/ 4/53—Stipulation and Order Thereon; Reich Re Interrogatories (680, 681)

3/ 4/53—Stipulation and Order Thereon; Reich Re Interrogatories 3/13/53 (681 A & B)

3/10/53—Notice of Motion by Defendant Exchange Lemon Products Co. Under Rule 37 (682-684)

3/10/53—Statement and Reasons and Authorities in Support of Motion by Defendant Exchange Lemon Products Company Under Rule 37 (685-687)

3/10/53—Affidavit of Donald D. Stark in Support of Motion Under Rule 37 (688-690)

3/13/53—Plaintiff and Intervener's Answers to Defendant Exchange Lemon Products Co.'s Requests for Admissions Under Rule 36 (691-696)

3/13/53—Plaintiff and Intervener's Answers to Interrogatories Propounded by Defendant Exchange Lemon Products Co. (With Objections to Certain of the Interrogatories (697-751)

3/16/53—Affidavit of Bernard Reich in Opposition to Motion Under Rule 37 (752-770)

3/16/53—Reasons and Answering Memorandum of Points and Authorities in Opposition to Motion of Defendant Exchange Lemon Products Company Under Rule 37 (771-774)

3/20/53—Reply Memorandum by Defendant Exchange Lemon Products Company Re Motion Under Rule 37 (775-781)

3/23/53—Minutes of the Court

3/25/53—Notice of Motion to Be Relieved of Portion of Stipulation and Order Thereon (783-785)

3/25/53—Affidavit of Bernard Reich in Support of Motion to Be Relieved in Part of Stipulation and Order, and for Order Shortening Time (786-790)

3/25/53—Order Shortening Time for Hearing on Motion to Be Relieved (791)

3/27/53—Reply Memorandum ELP and Affidavit in Opposition to Motion of Plaintiff and Intervener Re Relief From Order (792-798)

3/30/53—Minutes of the Court

4/18/53—Notice Withdrawing Plaintiff's Motion Returnable April 20, 1953 (800, 801)

4/18/53—ELP Notice of Withdrawal of Motion Under Rule 37 (802, 803)

4/20/53—Minutes of the Court

7/ 7/53—Notice of Motion and Motion to Compel Plaintiff and Intervener to Answer the Interrogatories Served Upon Them by Defendant Exchange Lemon Products in Accordance With Rule 33 (805-828)

7/13/53—Plaintiff and Intervener's Reasons and Memorandum of Points and Authorities in Opposition to Defendant ELP's Motion Re Its Interrogatories (829-844)

7/20/53—Minutes of the Court

8/ 4/53—Plaintiff and Intervener's Additional Answers to Interrogatories Propounded by Defendant Exchange Lemon Products Company (With Objections to Certain of the Interrogatories) (846-875)

2/ 2/54—Minutes of the Court

2/ 9/54—Notification of Date for Setting (877)

2/19/54—Notice of Motion by Defendants Sunkist Growers, Inc., The Exchange Orange Products Co. and Exchange Lemon Products Co. for Discovery and Production of Documents Under Rule 34 (878-898)

2/20/54—Interrogatories Propounded by Defendants Sunkist Growers, Inc., The Exchange Orange Products Company and Exchange Lemon Products Co. (899-901)

2/20/54—Notice of Motion, Statement of Grounds and Points and Authorities in Support of Motion Under Rule 37 to Compel Plaintiff and Intervener Further to Answer Certain Interrogatories Served Upon Them by Defendant Exchange Lemon Products Co. (902-907)

2/23/54—Statement in Opposition to Motion Under Rule 37 to Compel Plaintiff to Make Further Answers to Interrogatories (908-910)

2/23/54—Statement in Opposition to Defendants' Motion for Discovery Under Rule 34; Points and Authorities (911-916)

2/23/54—Notice of Motion for Discovery Under Rule 34 of the Federal Rules of Civil

Procedure; Affidavit; Memorandum (917-929)

2/23/54—Notice of Motion to Suppress Interrogatories Propounded by Defendants; Objections and Memorandum (930-935)

2/23/54—Notice of Motion for Further Answers to Plaintiff's Interrogatories; Affidavit (936-943)

3/ 1/54—Minutes of the Court

3/ 1/54—Defendants' Memorandum of Points and Authorities Opposing Plaintiff's Motion for Discovery Under Rule 34 (945-957)

3/ 1/54—Substitution of Attorneys by Defendant Exchange Lemon Products Co. (958-960)

3/ 1/54—Memorandum of Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company in Opposition to Plaintiff's Motion for Further Answers to Plaintiff's Interrogatories (961-964)

3/ 4/54—Plaintiff's Reply Memorandum Re Motion for Discovery Under Rule 34 (965-972)

3/ 4/54—Plaintiff's Reply Memorandum Re Plaintiff's Motion for Further Answers (973-976)

3/ 6/54—Affidavit of Ross C. Fisher Amending Affidavit of Ross C. Fisher in Support of Motion for Discovery and Production of Documents Under Rule 34 Filed Herein February 19, 1954 (977-982)

3/ 8/54—Minutes of the Court

3/ 8/54—Order for Pretrial Hearing (985)

3/11/54—Minutes of the Court

4/12/54—Designation of Categories to Be Excluded from Supplemental Order for Production of Documents Pursuant to Plaintiff's and Intervener's Motion Under Rule 34 (987-991)

4/19/54—Minutes of the Court

4/19/54—Objections to Proposed Order for Discovery and Production of Documents Under Rule 34 Pursuant to Motion by Defendants (993-995)

4/20/54—Order for Discovery and Production of Documents Under Rule 34 Pursuant to Motion by Defendants Sunkist Growers, Inc., The Exchange Orange Products Company and Exchange Lemon Products Company (996-1004)

4/21/54—Memorandum Re Objections to Categories 14, 15, 16 and 17 of Plaintiff's Motion Under Rule 34 (1005-1007)

4/26/54—Order in Accordance With Motion for Further Answers to Plaintiff's Interrogatories Addressed to Defendants Sunkist Growers, Inc., and The Exchange Orange Products Company (1008, 1009)

4/26/54—Stipulation Re Hearing on Categories (1010-1012)

4/27/54—Objections ELP to Form of Order Submitted by Plaintiff and Intervener (1013-1020)

4/27/54—Objections of Defendants Sunkist Growers, Inc., and The Exchange Orange

Products Company to Plaintiff's Proposed Order for Production of Documents Pursuant to Plaintiff and Intervener's Motion Under Rule 34 (1021-1027)

4/27/54—Plaintiff and Intervener's Memorandum in Support of Form of Order on Their Motion Under Rule 34 (1028-1031)

4/29/54—Plaintiff and Intervener's Second Memorandum in Support of Form of Order on Their Motion Under Rule 34 (1032-1034)

5/ 3/54—Minutes of the Court

5/10/54—Minutes of the Court

5/10/54—Order Granting Motion of Defendant Exchange Lemon Products Company Under Rule 37 (1037-1039)

5/10/54—Order Denying Plaintiff and Intervener's Motion to Suppress and Overruling Objection to Interrogatories (1040-1042)

5/14/54—Objection to Form of Proposed Order, ELP (1043, 1044)

5/14/54—Objection to Form of Proposed Order, Sunkist (1045-1049)

5/17/54—Order for Production of Documents Pursuant to Stipulation (1050-1055)

5/17/54—Supplemental Order Re Production of Documents Pursuant to Plaintiff and Intervener's Motion Under Rule 34 (1056-1059)

5/17/54—Minutes of the Court

Notice of Hearing; Motion for Leave to

Compromise Petition; and Walker Petition for Fees T/S (1061-1065)

Affidavit of Service by Mail of Notice of Hearing and Motion to Fix Fees (1066, 1067)

7/19/54—Minutes of the Court

7/26/54—Minutes of the Court

7/29/54—Order Approving Compromise of Action No. 13788-C as Against Defendant Tree-Sweet Products Co. (1070, 1071)

9/30/54—Minutes of the Court

11/12/54—Pretrial Brief of Defendants Sunkist Growers, Inc., and The Exchange Orange Products Co. (1073-1097)

11/12/54—Pretrial Brief of Defendant Exchange Lemon Products Company (1098-1101)

11/15/54—Minutes of the Court

11/24/54—Minutes of the Court

12/14/54—Amended Complaint for Equitable Relief (1104-1124)

1/ 3/55—Stipulation and Order Extending Time to Plead to Amended Complaint (1125-1126)

1/ 3/55—Stipulation for Dismissal and Order Thereon (Re TreeSweet) (1127, 1128)

1/27/55—Notice of Motion and Motion of Defendant Exchange Lemon Products Co. (1) to Strike Portions of the Amended Complaint, and (2) for a More Definite Statement (1129-1137)

1/27/55—Memorandum of Points and Authorities of Defendant Exchange Lemon Products

Co. in Support of Its Motion in the Alternative (1) to Strike Portions of the Amended Complaint and (2) for a More Definite Statement (1138-1161)

1/28/55—Notice of Motion of Defendants Sunkist Growers, Inc., and The Exchange Orange Products Co. in the Alternative (1) to Strike Portions of the Amended Complaint and (2) for a More Definite Statement (1162-1176)

2/ 3/55—Brief of Plaintiff and Intervening Trustee in Opposition to Motions of Defendants to Strike and for a More Definite Statement (1177-1185)

2/ 9/55—Reply Memorandum of Defendant Exchange Lemon Products Company in Support of Its Motion to Strike Portions of the Amended Complaint and for a More Definite Statement (1186-1192)

2/10/55—Brief of Defendants Sunkist Growers, Inc. (Sunkist), and The Exchange Orange Products Company (EOP) in Reply to Brief of Plaintiff and Intervening Trustee in Opposition to Motions of Defendants to Strike and for a More Definite Statement (1193-1200)

2/14/54—Minutes of the Court (1201)

2/18/55—Answer of Defendant Exchange Lemon Products Company to the Amended Complaint (1202-1211)

2/21/55—Answer of Defendants Sunkist Growers, Inc., a Corporation, Sued Herein as California Fruit Growers Exchange, and The Exchange Orange Products Company, to Plaintiff's and Trustee and Intervener's Amended Complaint (1212-1231)

3/ 1/55—Minutes of the Court (1232)

5/25/55—Minutes of the Court (1233)

5/26/55—Minutes of the Court (1234)

5/27/55—Minutes of the Court (1235)

5/31/55—Minutes of the Court (1236)

6/ 1/55—Minutes of the Court (1237)

6/ 2/55—Minutes of the Court (1238)

7/ 1/55—Notice of Motion to Permit Ferris E. Hurd and Thomas C. Strachan Jr., Nonresident Attorneys, to Appear and Participate in This Action (1239-1258)

7/11/55—Minutes of the Court

7/27/55—Findings of Fact and Conclusions of Law (1260-1293)

7/27/55—Order Revoking Special Admission of Attorney Melville C. Williams (1264)

8/24/55—Notice of Appeal Filed August 24, 1955 (1267, 1268)

Bond on Appeal (1265, 1266)

9/ 6/55—Certificate of Service of Designation by Melville C. Williams of Contents of Record on Appeal (1269)

8/31/55—Designation by Melville C. Williams of Contents of Record on Appeal (1270-1273)

10/ 3/55—Order Extending Time for Filing Record and Docketing Appeal (1274)

10/ 3/55—Ex Parte Motion of Melville C. Williams for Order Extending Time for Filing Record on Appeal and Docketing Appeal (1275-1278)

10/18/55—Minutes of the Court (1279)

10/21/55—Trial Brief (1280-1315)

11/ 2/55—Subpoena Duces Tecum (1316)

11/ 2/55—Civil Subpoena; Re Thelma Silzle, Robert Clark (1317-1320)

11/ 2/55—Subpoena Duces Tecum (1321)

11/ 2/55—Civil Subpoena; Re Sam H. Kelly (1321)

11/ 2/55—Subpoena Duces Tecum (3) (1322-1330)

11/ 2/55—Civil Subpoena; Re Wendell K. McCracken (1322-1330)

11/ 2/55—Subpoena Duces Tecum (1322-1330)

11/ 2/55—Notice of Motion and Motion for Continuance of Trial Date; Statement of Reasons in Support and Authority for Motion (1331-1337)

11/ 3/55—Minutes of the Court (1338)

11/23/55—Defendants' Trial Memorandum (1339-1362)

11/28/55—Certificate Copy of Order of U. S. Court of Appeals for the Ninth Circuit, Dated November 25, 1955, for Continuance of the Trial, etc. (1363, 1364)

11/29/55—Minutes of the Court (1365)

11/30/55—Motion of Defendants Sunkist Growers, Inc., and the Exchange Orange Products Company to Permit Melville C. Williams to Appear and Participate in This Action (1366-1378)

11/30/55—Minutes of the Court (1379)

12/ 1/55—Order of Dismissal (1380, 1381)

12/ 7/55—Jury Instructions Requested by Plaintiffs (1382-1424)

12/ 7/55—Minutes of the Court (1425)

12/13/55—Request to Court for Special Questions to Prospective Jurors (1426, 1427)

12/13/55—Motion by Sunkist Growers, Inc., and the Exchange Orange Products Co. to Dismiss the Fourth and Fifth Causes of Action (1428-1431)

12/13/55—Defendants' Memorandum re the Statute of Limitations and the Silzle Contract (1432-1443)

12/13/55—Minutes of the Court (1444)

12/14/55—Minutes of the Court (1445)

12/15/55—Minutes of the Court (1446)

12/16/55—Minutes of the Court (1447)

2/20/55—Minutes of the Court (1448)

2/21/55—Minutes of the Court (1449)

2/22/55—Minutes of the Court (1450)

2/27/55—Civil Subpoenas re Morgan Ward and Robert Hodge (1451, 1452)

2/28/55—Minutes of the Court (1453)

2/29/55—Minutes of the Court (1454)

2/30/55—Minutes of the Court (1455)

1/ 3/56—Memorandum in Support of Winckler's Correspondence With Brokers (1456-1462)

1/ 3/56—Minutes of the Court (1463)

1/ 4/56—Minutes of the Court (1464)

1/ 5/56—Minutes of the Court (1465)

1/ 6/56—Minutes of the Court (1466)

1/10/56—Jury Instructions Requested by Defendants (1467-1535)

1/11/56—Minutes of the Court

1/11/56—Note from Jury to Court; re Visit Plant (1538)

1/12/56—Subpoena Duces Tecum; to Morgan Ward (1539)

1/12/56—Minutes of the Court

1/13/56—Minutes of the Court

1/17/56—Motion of Defendants for a Directed Verdict at the Close of Plaintiff's Case (1540-1545)

1/17/56—Minutes of the Court

1/18/56—Minutes of the Court

1/19/56—Minutes of the Court

1/20/56—Minutes of the Court

1/24/56—Minutes of the Court

1/25/56—Minutes of the Court

1/26/56—Minutes of the Court

1/27/56—Minutes of the Court

1/30/56—Civil Subpoenas re Mr. Ned Lewis, Guy L. Levingston, D. V. Brown, Ray Wells, John H. Arnold, Dwight C. Baun, H. E. Asher, George W. Palug-Selder, P. Covington, Myron Kunin, E. J. Evans (1556-1567)

1/31/56—Motion of Defendants for Leave to Amend Their Answers to the Amended Complaint (1568-1578)

1/31/56—Amendment of Answer of Sunkist Growers, Inc., and the Exchange Orange

Products Company to Amended Complaint (1579-1581)

1/31/56—Motion (Ptf) to Amend Amended Complaint to Conform to the Evidence (1582-1587)

1/31/56—Minutes of the Court

2/ 1/56—Minutes of the Court

2/ 2/56—Minutes of the Court

2/ 2/56—Second Amended Complaint for Equitable Relief and Treble Damages Under the Federal and California Antitrust Laws (1590-1604)

2/ 3/56—Minutes of the Court

2/ 4/56—Minutes of the Court

2/ 6/56—Minutes of the Court

2/ 7/56—Minutes of the Court

2/ 7/56—Answer of Sunkist Growers, Inc., and the Exchange Orange Products Co., to Plaintiff's and Trustee and Intervener's Second Amended Complaint (1610-1627)

2/ 7/56—Defendants' Request for Interrogatories to Jury (1628-1630)

2/ 8/56—Minutes of the Court

2/ 9/56—Minutes of the Court

2/ 9/56—Note from Jury to Court; re Use of Notes (1634)

2/10/56—Verdict to the Jury (1635 & 1637) (2)

2/10/56—Minutes of the Court

2/13/56—Application for Allowance of Attorneys' Fees (1638-1651)

2/13/56—Application of Frank F. Fowle for Permission to Appear and Participate in this Action (1652-1655)

2/13/56—Minutes of the Court

2/16/56—Brief in Support of Application for Attorneys' Fees (Dixon) (1657-1660)

2/17/56—Notice of Motion of Sunkist Growers, Inc., the Exchange Orange Products Co., for Judgment in Accordance With Said Defendants' Motion for a Directed Verdict at the Close of All the Evidence in the Trial of the above-entitled Action (1661-1670)

2/20/56—Affidavit of Service by Mail Filed (1671-1673)

2/20/56—Plaintiff's and Intervener's Supplemental Memorandum on Attorneys' Fees (1674-1676)

2/23/56—Answer to Plaintiff's Application for Allowance of Attorneys' Fees and Points and Authorities in Support of Said Answer (1677-1693)

2/24/56—Minutes of the Court

2/27/56—Minutes of the Court

2/29/56—Memorandum re Counsel Fees (Dixon) (1696-1699)

3/ 1/56—Defendants' Supplemental Memorandum of Points and Authorities on Attorneys' Fees (1700-1706)

3/ 2/56—Plaintiffs' Memorandum on "A Reasonable Attorney's Fee" (1707-1710)

3/ 5/56—Clerk's Notice Final Judgment (1711)

3/ 5/56—Final Judgment (1712-1714)

3/ 5/56—Minutes of the Court

3/ 5/56—Memorandum to Counsel (1716-1718)

3/ 9/56—Minutes of the Court

3/ 9/56—Cost Bill (1720-1722)

3/12/56—Minutes of the Court

3/14/56—Order Expunging from the Records of This Court the Order Entered July 28, 1955, Re: Melville C. Williams and the Findings of Fact and Conclusions of Law Pertaining Thereto (1725, 1726)

3/14/56—Mandate of the Court of Appeals for the Ninth Circuit dated March 5, 1956 (1727, 1728)

3/14/56—Notice of Motion of Sunkist Growers, Inc., and the Exchange Orange Products Co., to Set Aside the Verdict and Judgment Herein and for a New Trial (1729, 1730)

3/14/56—Motion of Sunkist Growers, Inc., and the Exchange Orange Products Co., to Set Aside the Verdict and Judgment Herein and for a New Trial (1731-1771)

3/15/56—Order (1772, 1773)

3/16/56—Memorandum of Points and Authorities in Support of Sunkist Growers, Inc., and the Exchange Orange Products Company's Motion to Set Aside the Verdict and Judgment Herein and for a New Trial, filed March 14, 1956 (1774-1787)

3/20/56—Minutes of the Court

3/22/56—Reply Brief in Opposition to Motions for Judgment Notwithstanding Verdict and for a New Trial (1789-1791)

3/22/56—Clerk's Letter re Taxing Costs (1792)

3/22/56—Specifications of Objections, Pursuant to Order of March 15, 1956 (1793-1803)

3/26/56—Motion of Defendants for Leave to Amend Their Motion for a New Trial by Adding Thereto a Paragraph 20 (1804-1807)

3/26/56—Minutes of the Court

3/30/56—Minutes of the Court

4/11/56—Notice of Motion of Defendants Sunkist Growers, Inc., and the Exchange Orange Products Co., for Leave to File Affidavit of Thomas C. Strachan, Jr., Esq., dated April 9, 1956 (1810, 1811)

4/11/56—Motion of Defendants Sunkist Growers, Inc., and the Exchange Orange Products Co., for Leave to File Affidavit of Thomas C. Strachan, Jr., Esq., dated April 9, 1956 (1812, 1813)

4/11/56—Affidavit of Thomas C. Strachan, Jr., dated April 9, 1956 (1814-1818)

4/12/56—Minutes of the Court

4/16/56—Minutes of the Court

4/27/56—Notice of Appeal to Court of Appeals for the Ninth Circuit (1821-1823)

5/22/56—Appellant's Designation of Contents of Record on Appeal (1824-1829)

5/24/56—Motion for Extension of Time for Filing Record on Appeal and Docketing Appeal (1830-1833)

5/24/56—Order Extending Time for Filing Record and Docketing Appeal (1834-1836)

Copy of all docket entries

Copy of Notification of Transfer dated February 2, 1954 (876)

Notification of Entry of Order Dismissing Defendant Exchange Lemon Products Co., dated December 1, 1955 (1382)

Notification of Entry of Final Judgment dated March 5, 1956 (1711)

Notification of Entry of Order Expunging from the Records Order Entered July 28, 1955, dated March 14, 1956 (1454)

58 volumes of Reporter's Transcript of Proceedings and Plaintiff's Exhibits 1 through 84A, inclusive, and Defendants' Exhibits A through FJ, inclusive.

Witness my hand and seal of the said District Court this 22nd day of August, 1956.

JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15242. United States Court of Appeals for the Ninth Circuit. Sunkist Growers, Inc., a Corporation, and The Exchange Orange Products Company, a Corporation, Appellants, vs. Winckler & Smith Citrus Products Co., a Corporation, and Ronald Walker, Trustee, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 27, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15242

SUNKIST GROWERS, INC., a Corporation, and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation, and RONALD WALKER, as Trustee of Winckler & Smith Citrus Products Co.,

Appellees.

APPLICATION BY APPELLANTS FOR AN EXTENSION OF TIME FOR FILING RECORD AND DOCKETING APPEAL AND FOR FILING DESIGNATION OF RECORD AND STATEMENT OF POINTS AS REQUIRED BY RULE 17(6) OF THE RULES OF THIS COURT

Appellants above named, pursuant to Rule 37 of the Rules of the United States Court of Appeals for the Ninth Circuit, apply to the court for an order extending the time for filing the record and docketing the appeal from July 26, 1956, to and including August 26, 1956, and for an order extending the time to and including September 26, 1956, within which they may file their statement of points on which they intend to rely and designation of that part of the record material to the consideration of their points.

This application is based upon the Rules of this Court, the annexed affidavit of Ross C. Fisher, and the files and records of this Court in this action.

Dated July 13, 1956.

/s/ ROSS C. FISHER,
On Behalf of Appellants Sunkist Growers, Inc., and
The Exchange Orange Products Company.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF ROSS C. FISHER IN SUPPORT OF APPLICATION BY APPELLANTS FOR AN EXTENSION OF TIME FOR FILING RECORD AND DOCKETING APPEAL AND FOR FILING DESIGNATION OF RECORD AND STATEMENT OF POINTS AS REQUIRED BY RULE 17(6) OF THE RULES OF THIS COURT

State of California,
County of Los Angeles—ss.

Ross C. Fisher, being first duly sworn, on oath deposes and says:

1. He is a member of the bar of this Honorable Court, and one of the attorneys for appellants Sunkist Growers, Inc., and The Exchange Orange Products Company in the above-entitled action.

2. He is familiar with the record on appeal in the above case, which consists of nearly 5,000 pages of transcript of proceedings had after commencement of trial, in excess of 200 admitted exhibits and other exhibits offered and rejected, and several hundred pleadings, motions, orders, memoranda, transcript of pretrial arguments, affidavits, etc., filed with the Clerk of the United States District Court for the Southern District of California, Central Division, since the commencement of the action.

3. Appellants filed their notice of appeal on April 27, 1956. On May 22, 1956, appellants filed their designation of contents of record on appeal designating the complete record and all of the proceedings and evidence in the action. On May 24, 1956, appellants secured an order from the District Court extending the time for filing the record and docketing the appeal to July 26, 1956. Notwithstanding this extension of time, he is advised by the Clerk of the United States District Court that due to the pressure of other work and the vacation schedule in the Clerk's office, the Clerk's office has not been able to commence the preparation of the record on appeal, and it is doubtful whether the Clerk of the District Court will be able to prepare and file the record and to docket the appeal by July 26, 1956, and said Clerk has requested affiant to secure an extension of time to and including August 26, 1956, in which to file the record on appeal and docket the appeal.

4. In order to comply with Rule 17(6) of the Rules of this Court, counsel for appellants are undertaking diligently to eliminate all portions of the record not necessary to decision on the errors to be specified. The burden of this work is onerous due to the size of the transcript of proceedings and the number of exhibits and pleadings, and also because some of counsel for appellants are located in Chicago, Illinois.

5. It is the opinion of affiant and of the other counsel for appellants that it will not be possible adequately to analyze the record and to prepare the statement of points and designation for printing within the time specified in Rule 17(6) of the Rules of this Court.

Affiant respectfully requests, on behalf of appellants, that the time for filing the record on appeal and docketing the appeal be extended to and including August 26, 1956, and that the time within which appellants may file their statement of points upon which they intend to rely and their designation of that part of the record material for the consideration of the appeal, be extended to and including September 26, 1956.

/s/ ROSS C. FISHER.

Subscribed and Sworn to before me this 13th day of July, 1956.

[Seal] /s/ STEPHEN M. FARRAND,
Notary Public in and for the County of Los Angeles,
State of California.

ORDER

So Ordered July 16, 1956.

/s/ ALBERT LEE STEPHENS,
Judge, United States Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed July 17, 1956.

[Title of Court of Appeals and Cause.]

JOINT AND SEVERAL STATEMENT BY APPELLANTS OF POINTS ON WHICH THEY INTEND TO RELY

Appellants above named jointly and severally make the following joint statement of the points on which they intend to rely on the appeal herein:

1. The court erred in denying the appellants' and each of their motions for a directed verdict at the close of the appellees' case.

2. The court erred in denying appellants' and each of their motions for a directed verdict at the close of all of the evidence.

3. The court erred in entering judgment on the verdict of the jury.

4. The court erred in denying appellants' and each of their motions for a judgment in their favor notwithstanding the verdict.

5. The court erred in denying appellants' and each of their motions for a new trial.

Each appellant will urge as to each of the foregoing points each and all of the grounds asserted in their said motions.

6. The evidence is insufficient to support the verdict of the jury or the judgment based thereon. It is also insufficient to support any finding of fact, implied or imported by the verdict, in each of the following respects:

(a) That the defendants, or either of them, conspired, combined or agreed or did any other act in violation of the antitrust laws.

(b) That plaintiffs were, or either of them was, damaged or injured by or as the result of any act or acts of appellants, or either of them, in violation of the antitrust laws.

(c) That defendants were not, or that either of them was not, or that any of their acts were not within the exemptions from the antitrust laws accorded by the Capper-Volstead Act and related legislation.

(d) That any public injury resulted from any act or acts of the defendants, or either of them.

(e) That plaintiffs were, or either of them was, damaged or injured in the amount found by the jury or in any amount.

7. The court erred in overruling and denying appellants' plea of the statute of limitations and of laches.

8. The court erred in granting plaintiffs leave to file a second amended complaint and a second amended complaint as amended.

9. The court erred in denying appellants leave to file an amended answer.

10. The court erred in bringing or permitting to be brought into the case the issue of price fixing by appellants, although that issue had not been raised or tendered by any of the parties.

11. The court committed substantial and prejudicial errors of law in the course of the trial in connection with the admission and exclusion of evidence, as follows:

(a) Excluding evidence offered by appellants and tending to show that plaintiff's product was poor, adulterated, unsanitary and generally unsatisfactory, and that its methods of operation were inefficient, obsolete and wasteful.

(b) Excluding evidence offered by appellants and tending to show that appellants had information of the poor, adulterated, unsanitary and unsatisfactory nature of plaintiff's product and of its inefficient, obsolete and wasteful methods of operation, and gave consideration and effect to that information in determining whether to have business relations with plaintiff.

(c) Admitting irrelevant and inadmissible evidence offered by appellees designed to show price fixing by appellants.

(d) Admitting irrelevant and inadmissible evidence offered by appellees designed to show agreements which were not claimed or shown to have injured appellees, or either of them, or which were not claimed or shown to have been part of any conspiracy, combination, agreement or act in violation of the antitrust laws.

(e) Excluding and limiting the nature and extent of evidence offered by appellants tending to rebut and negate the accounting and fiananacial evidence, theories and exhibits offered by plaintiff to show damages.

(f) Limiting the period of time in respect of which appellants were permitted to offer evidence as to the financial condition of plaintiff corporation; and excluding evidence offered by appellants tending to show that plaintiff's losses were caused by its poor financial condition and by transactions engaged in by the plaintiff corporation or its representatives rather than by any act of appellants or either of them.

(g) Excluding evidence offered by appellants of plaintiff corporation's income tax returns, applications for permits to issue its securities, and of its letters, all containing admissions relevant and material to the issues, and excluding letters from brokers and customers of plaintiff corporation offered to show their state of mind with regard to plaintiff's products.

(h) Limiting and curtailing unduly the cross-examination of plaintiffs' witnesses, Nicholas J. Winckler and Robert Hodge.

(i) Not permitting the jury to consider as a question of fact the evidence relating to the effect upon plaintiff corporation and its financial condition of its reorganization under Chapter XI of the Bankruptcy Act and the transactions which occurred therein or in connection therewith or as a result thereof.

(j) Excluding evidence offered by appellants tending to show reasonable business justification for the alleged refusal or failure to deal with plaintiff corporation.

(k) Excluding evidence offered by appellants tending to show the nature, extent and area of the market and the products embraced within that market in respect of which the acts and conduct of appellants or either of them should be judged.

(l) Excluding evidence offered by appellants tending to show that plaintiff's business was conducted in an illegal manner.

(m) Excluding evidence offered by appellants tending to show that appellees came into court with unclean hands.

(n) Permitting witnesses called by plaintiff (Winckler and Hodge) to testify to hearsay, conclusions and opinions, and to argument.

(o) In addition, in ruling on the admission and exclusion of evidence in each of the respects specified in paragraphs 10 and 11 of defendants' motion to set aside the verdict and judgment and for a new trial.

(p) The cumulative effect of the foregoing rulings on admission and exclusion of evidence was to deny appellants a fair trial.

12. The court committed substantial and prejudicial errors of law in the course of the trial in connection with its instructions to the jury, as follows:

(a) Giving plaintiffs' requested instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 15, 19, 23, 25, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38.

(b) Refusing to give defendants' requested instructions Nos. A, B, 2, 4, 5, 6, 8, 9, 9A, 9a, 10, 11, 12, 13, 14, 14A, 14B, 16, 16B, 18, 20, 21, 22, 23, 24, 25, 25B, 25-1, 25D, 34, 35, 36A, 41, 43, 44, 45.

(c) Modifying defendants' requested instructions Nos. 7, 15, 16A, 17A, 39.

(d) Giving on its own motion the court's instructions identified as B, D, E, F, J, K, N, P, Q, R, and Civil 12A, 12B.

(e) In the instruction given the jury, after it had retired, in response to the jury's request to repeat that portion of the charge identified in the record as court's B.

13. The court erred in its determination of the effect of the payment of $2,500 to appellee by a former defendant in this action in consideration of the execution by appellee of a covenant not to sue.

14. The court erred in failing to give full effect to the dismissal of the cause as to defendants who were alleged to be co-conspirators and joint tort feasors with appellants.

15. The court erred in fixing the amount awarded to appellees in respect of their attorneys' fees.

16. Further errors in law were committed at the trial by the judge and there were irregularities in the proceedings and abuses of discretion by the judge by which appellants and each of them were prevented from having a fair trial, and particularly in the respects specified in paragraphs 16 and 20 of defendants' motion to set aside the verdict and judgment and for a new trial.

Dated September 21, 1956.

ROSS C. FISHER,
HERMAN F. SELVIN,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,

By /s/ ROSS C. FISHER,
Attorneys for Appellants Sunkist Growers, Inc., and The Exchange Orange Products Company.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 24, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER REGARDING PRINTING OF EXHIBITS

It Is Hereby Stipulated by and between counsel for the respective parties hereto that the following exhibits, a part of the record on appeal herein, designated by appellants for printing need not be printed but may be examined in the original in connection with said appeal with the same force and effect as though said exhibits had been printed, to wit:

1. Plaintiffs' exhibits 1 through 84A, both inclusive, comprising all of the exhibits offered by plaintiff at the trial of the cause and there marked for identification or received in evidence.

2. Defendants' exhibits A through FJ, both inclusive, comprising all of the exhibits offered by defendants at the trial of the cause and there marked for identification or received in evidence.

Dated September 17, 1956.

ROSS C. FISHER,
HERMAN F. SELVIN,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,

By /s/ ROSS C. FISHER,
Attorneys for Appellants Sunkist Growers, Inc., and The Exchange Orange Products Company.

/s/ WILLIAM C. DIXON,
Attorney for Appellees.

[Endorsed]: Filed Sept. 24, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION FOR, AND SUPPLEMENTAL DESIGNATION OF RECORD TO BE PRINTED

A. It Is Hereby Stipulated that the Joint and Several Designation By Appellants of Record To Be Printed, heretofore served and filed herein, shall be supplemented and augmented in the particular respects hereinafter in section D of this stipulation specified.

B. It Is Further Stipulated that typographical errors appearing in appellants' original designation shall be corrected as hereinafter in section E of this stipulation specified.

C. It Is Further Stipulated hereby that if, by reason of delay in the mails or otherwise, this stipulation should not reach the Clerk for filing on or before September 26, 1956 (the last day now fixed within which appellants may make their designation), the matters herein specified shall be and be deemed to have been designated by appellees for inclusion in the record to be printed pursuant to Rule 17(6) of the Rules of this Court.

D. The following portions of the record herein, in addition to those already designated, are hereby designated to be printed:

1. The following additional portion of the Notice of Motion by Defendant Exchange Lemon Products under Rule 37; being the document heretofore referred to in Item 9 of appellants' original designation, and appearing at pages 682-684 of the Clerk's Transcript:

Page 2, lines 11 to 17, inclusive.

2. The following portions only of Affidavit of Bernard Reich in Opposition to Motion under Rule 37; filed March 16, 1953, and appearing at pages 752 to 770 of the Clerk's Transcript:

Page 4, line 21, to page 6, line 12.

3. The following portions only of Reply Memorandum by Defendant Exchange Lemon Products Company under Rule 37; filed March 20, 1953, and appearing at pages 775 to 781 of the Clerk's Transcript:

Page 1, line 22, to page 4, line 16.

4. The following additional portions of Reporter's Transcript of Pretrial hearing of 11/24/54; being the transcript referred to in Item 13 of appellants' original designation:

Page 19, lines 7 to 13;

Page 22, line 24, to page 25, line 8.

5. The following additional portion of Reporter's Transcript of Proceedings of 2/14/55; being the transcript referred to in Item 18 of appellants' original designation:

Page 10, line 20, to page 12, line 20.

6. The following additional portion of Reporter's Transcript of Proceedings of 11/29/55; being the transcript referred to in Item 23 of appellants' original designation:

Page 2, line 24, to page 6, line 2.

7. The following additional portions of Reporter's Transcript of Proceedings of 12/7/55; being the transcript referred to in Item 24 of appellants' original designation:

Page 41, line 2, to page 44, line 4;
Page 44, line 24, to page 45, line 17;
Page 48, line 21, to page 53, line 21;
Page 58, lines 9 to 22;
Page 59, line 7, to page 60, line 1.

8. The following portions only of the Reporter's Transcript of Proceedings for 11/30/55:

Page 3, lines 6 to 11;
Page 11, lines 12 to 21.

9. The following additional portions of the Reporter's Transcript of the Trial; being the transcript referred to in Item 36 of appellants' original designation:

Page 266, lines 1 to 23;
Page 345, line 5, to page 346, line 24;
Page 1003, line 4, to page 1005, line 5;

Page 1078, line 21, to page 1081, line 7;
Page 1314, line 11, to page 1315, line 3;
Page 4347, line 5, to page 4349, line 1;
Page 4485, lines 3 to 4.

10. The following additional portion of Reporter's Transcript of 3/26/56; being the transcript referred to in Item 46 of appellants' original designation:

Page 38, line 13, to page 40, line 5.

11. The following portion only of Plaintiff and Intervener's Answers To Interrogatories Propounded By Defendant Exchange Lemon Products Co. (with objections to certain of the interrogatories); filed March 13, 1953, and appearing at pages 697 to 751 of the Clerk's Transcript:

Page 1, line 22, to page 2, line 17.

12. The following portion only of Interrogatories Propounded To Plaintiff and Intervenor by Sunkist Growers, Exchange Orange Products Co. and TreeSweet Products Co., filed June 16, 1952, and appearing at pages 457 to 485 of the Clerk's Transcript:

Page 2, lines 4 to 14.

13. This Stipulation.

E. Correct the following typographical errors in appellaints' original designation:

1. In Item 36, at page 11, line 7, the reference to page 282, line 6, should read: Page 282, line 5.

2. In Item 36, at page 15, line 6, the reference to page 790, line 16, should read: page 794, line 16.

3. In Item 36, at page 17, line 14, the reference to page 1381, line 55, should read: page 1381, line 5.

4. In Item 46, at page 30, line 1, the reference to Page 47, line 24, should read: Page 47, line 23.

Dated: September 25, 1956.

ROSS C. FISHER,
HERMAN F. SELVIN,
THOMAS C. STRACHAN, JR.,
FRANK F. FOWLE,
MELVILLE C. WILLIAMS,

By ROSS C. FISHER,
Attorneys for Appellants.

WILLIAM C. DIXON,
HARRY M. IRWIN,

By WILLIAM C. DIXON,
Attorneys for Appellees.

[Endorsed]: Filed Sept. 26, 1956.

[fol. 3950]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * * * *

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 4, 1959 (omitted in printing).

[fol. 3951]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Stephens, Barnes, and Merrill, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—September 30, 1961

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 3952]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,242

SUNKIST GROWERS, INC., a Corporation, and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation, Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation, and RONALD WALKER, Trustee, Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

OPINION—September 30, 1960

Before: Stephens, Barnes and Merrill, Circuit Judges.

Barnes, Circuit Judge:

This is a private action for treble damages under the Sherman Act, 15 U.S.C. §§ 1-7, 15. Appellants are Sunkist Growers, Inc., a corporation (hereinafter referred to as Sunkist) and The Exchange Orange Products Company, a corporation (hereinafter referred to as Exchange Orange or EOP). Appellees are Winckler & Smith Citrus Products Co., a corporation and Ronald Walker, as trustee of Winckler & Smith (hereinafter referred to as Winckler or Trustee). The action was tried in the district court before a jury, which returned a verdict of $500,000. This was trebled to $1,500,000, and from that there was deducted the $2,500 originally paid in compromise by one-time defendant TreeSweet. There were added attorneys' fees fixed at $195,000, and costs. Timely appeal was filed in this Court. After argument, but before decision, one of the judges hearing this appeal died. It was thereupon set down for hearing a second time, was heard, and held pending the determination by the Supreme Court of *Milk Pro-* [fol. 3953] *ducers Assn.* v. *U.S.*, 1960, 362 U.S. 458, having to do with the antitrust exemptions of agricultural marketing cooperatives.

I

PARTIES

Sunkist Growers, Inc., a corporation, was sued in the district court originally under its former name, California Fruit Growers Exchange. It is and has been a nonprofit agricultural cooperative marketing association. The second defendant, The Exchange Orange Products Company, a corporation, was sued in the court below as The Exchange Orange Products Company. At all times it was a wholly owned subsidiary of Sunkist. Together with Sunkist and Exchange Orange, there was originally named as a defendant Exchange Lemon Products Company, a corporation, sued originally as Exchange Lemon Products Company, a nonprofit corporation (hereinafter sometimes referred to as ELP or Exchange Lemon).

On motion of plaintiff, Exchange Lemon was dismissed with prejudice as a defendant, and was subsequently named as a coconspirator in plaintiff's second amended complaint filed February 2, 1956, to conform to proof.

TreeSweet Products Company, a corporation (hereinafter referred to as TreeSweet) was an original defendant, but settled for $2,500, and was dismissed as a defendant. In the said second amended complaint, it was referred to as a coconspirator.

E. A. Silzle Corporation, a corporation (hereinafter referred to as Silzle) was never a defendant but was named a coconspirator in both plaintiffs' first and second amended complaints.

Appellee Ronald Walker is trustee of the estate of Winckler & Smith Products Co. in those proceedings in the district court below for its reorganization under Chapter X of the Bankruptcy Laws, being Number 538860-C of the records of said court. Mr. Walker was appointed March 26th, 1952 as such trustee, and by order made May 9, 1952 he was permitted to and did intervene in this case Mr. Walker is sometimes referred to herein as appellee, Walker, Trustee, or as Intervenor.

Thus on this appeal there are two appellants, Sunkist and EOP, and two appellees, the Winckler corporation and the Trustee.

[fol. 3954]

II

THE THEORY OF THE CASE

Appellees allege in their first cause of action (Section 1 of the Sherman Act; 15 U.S.C. § 1), and appellants deny, that appellants have conspired and entered into contracts which had the purpose and effect of unreasonably restraining interstate commerce in canned California citrus fruit juice, particularly single strength orange juice. This was proved, say appellees, by "six acts." These were:

(a) In the 1950-1951 canning season ELP processed 28,812 tons of oranges for EOP at cost, and without profit to ELP. Appellants *admit* this.

(b) During the same period, EOP processed 1,740 tons of lemons for ELP on the same basis. Appellants *admit* this.

(c) Sunkist and EOP agreed to establish and maintain the price of by-product oranges available to independent processors like appellees at a level making it impossible for processors like appellees to purchase oranges from EOP, or any other source, at a price or under any other arrangement enabling appellees and other processors to produce and sell canned natural orange juice and frozen concentrate juice at prices competitive with prices charged by appellants and their favored customers, TreeSweet and Silzle. Appellants *deny* these allegations.

(d) Under a contract effective July 23, 1951, between EOP and TreeSweet, TreeSweet received oranges from EOP, made single strength orange juice for EOP at cost and without profit to TreeSweet, and then bought the orange juice from EOP at Sunkist's then published price for single strength orange juice, less certain discounts not available to other customers, including appellees. The purpose and effect of this contract allegedly was to enable TreeSweet to obtain orange juice at a cost which prevented appellees from competing with Sunkist or TreeSweet in the natural orange juice market. Appellants *admit* the contract and supplying the oranges; *deny* the balance.

(e) Under a contract effective June 26, 1951, between EOP and Silzle, EOP furnished oranges to Silzle at $22.50 per ton, which was lower than the price to appellees or [fol. 3955] other processors. The purpose and effect allegedly was to give Silzle oranges at a price with which appellees could not compete. Appellants *admit* the contract and furnishing the oranges; *deny* the purpose or effect.

(f) EOP refused appellees a TreeSweet or Silzle type contract in 1951. Appellants *denied* the refusal, but *admitted* such a contract was not made.

Appellees allege that as a result of the above acts of appellants (listed in (a) to (f) above), and the monopoly control of Sunkist and Exchange Orange in 1951 over the amount and price of Valencia oranges available for processing, appellees were unable to process natural and frozen concentrate fruit juice in competition with Silzle, TreeSweet and Sunkist, which alleged facts eliminated appellees as a competitor, and forced the filing of proceedings under Chapter X of the Bankruptcy Act. These allegations were added in the second amended complaint filed after the close of evidence. They were materially different from those in the original complaint. Appellants *deny* all these allegations.

Under the second cause of action (brought under § 2 of the Sherman Act, 15 U.S.C. § 2) it was charged that acts (a) to (f) above were done by appellants with monopoly control over citrus fruit markets in California and Arizona, and in so doing and in making such contracts, the parties named conspired to monopolize, and monopolized, single strength Valencia orange juice.

The second amended complaint additionally alleged contracts with independent processors Hyland-Stanford and Mission Dry, giving them first call on oranges and processing to the exclusion of Independent Fruit Growers' Association and Morgan Ward, its selling agent, and one of the appellees' principal suppliers of by-product oranges.

Appellants plead five separate defenses:

First: The second amended complaint, the amended complaint, and the original complaint each failed to state a claim upon which relief could be granted.

Second: The applicable statute of limitations, Section 338(1) of the Code of Civil Procedure of California, bars all causes of action asserted in the second amended complaint and in the amended complaint.

[fol. 3956] *Third*: All causes of action alleged in the second amended complaint and the amended complaint are barred by the laches of appellees, in that appellees are barred by laches and estopped from relying upon any acts involving Silzle, as the Silzle contract was disclosed to appellees on March 14, 1952, and appellees did not amend their complaint to include this contract until December 15, 1954, and such a long delay was prejudicial to appellants.

Fourth: Appellees are barred by laches and estopped from relying on the Hyland-Stanford and Mission Dry contracts first referred to in the second amended complaint, as these contracts were disclosed to appellees on November 9, 1955, and appellees did not amend their complaint to refer to the Hyland-Stanford contract until January 31, 1956 (during the last few days of the trial) or to the Mission Dry contract until February 4, 1956 (after all the evidence was in), and such long delay was prejudicial to appellants.

Fifth: Appellees are barred by laches and estopped from alleging the new matters in the last paragraph of III(f) of the first cause of action (referred to in (f) above), because appellees knew of such matters through discovery long before trial and did not seek to amend its complaint to refer thereto until January 31, 1956, to appellants' surprise and prejudice, and such long delay was prejudicial to appellants.

This is a long record before us, and the matter is as complicated, both factually and legally, as is most antitrust litigation. We attempt to summarize the appellees' position by first stating what it was not. It was *not* appellees' position that appellants did not have certain exemptions from the antitrust laws under the Clayton and Capper-Volstead Acts, nor that they could not, as agriculturists, join together to make marketing agreements. It was appellees' position that such exemptions so granted were not absolute. Appellants could monopolize by-product oranges or single strength orange juice, either in the national market or in the California-Arizona area market, provided they achieved their monopoly position lawfully. Appellants could set any price they desired for their juice. They could make any "true" processing contracts with TreeSweet and Silzle, or with anyone else. They could refuse to make oranges available to appellees, if activated by "proper" business motives, as distinguished from "improper" motives.

[fol. 3957] Appellees insist, however, that appellants having monopolized by-product oranges from which single strength juice was made, and by such monopolization having control over the amount of by-product oranges available to independent contractors; having further set a price of $40.00 per ton for such oranges (a price alleged to have been one at which no independent processor could buy, process and compete with Sunkist in the single strength juice market); having at the same time (*i.e.*, during the one year of 1951, here involved) made oranges available to TreeSweet and Silzle, competitors of appellees, under so-called "processing" contracts which were more than that because they permitted the competitors to secure oranges at a price substantially lower than $40.00 per ton; the appellants were thus guilty of a conspiracy or combination unauthorized by antitrust law, even as modified by the limited agricultural marketing exemptions.

Under this theory of the case, the court sought to leave with the jury several *questions of fact*, namely:

(1) Whether appellants had a legal monopoly of by-product oranges (and a resulting legal monopoly in single strength orange juice) in the California-Arizona market.

(2) Whether, if appellants did have such legal monopoly, it was used legally or illegally, in the particulars alleged.

(3) Whether such monopoly, if proved, gave appellants power and control over single strength orange fruit juice prices in the California-Arizona market.

(4) Whether such power and control, if proved, was used with the purpose or with the effect of eliminating a competitor in such market, *i.e.*, eliminating appellees.

(5) Whether such power and control, if proved, was sufficient to enable appellants to determine the price or the terms and conditions under which by-product oranges were available in 1951 to independent processors, including appellees.

(6) Whether appellants had conspired with non-defendant coconspirators to unlawfully use their market power and control to appellees' alleged consequent injury, or whether appellants had unlawfully used such monopoly power and control to appellees' injury.

[fol. 3958] (7) What damages were proximately caused by appellants' alleged actions.

With this explanation of our understanding of the theory of the case, we pass to:

III

QUESTIONS RAISED ON THIS APPEAL

There are four principal questions raised on this appeal: Was *any* violation of antitrust laws made out? Was there error in instructing or refusing to instruct the jury? Was there error in rulings on admission and rejection of evidence? Was there error in affixing attorneys' fees of $195,000? We shall discuss each in turn.

A. *Was any violation of antitrust laws made out?*

1. *The Exemption of Agricultural Cooperatives Generally*

There can be no conclusion as to the first error alleged until we determine the nature and extent of the exemption granted by law to agricultural cooperatives. This was raised by the pleadings and particularly, appellants' first and separate defense.

Sunkist was a nonprofit agricultural cooperative marketing association. So was EOP, a subsidiary of Sunkist. So was ELP, an association of growers who were likewise members of Sunkist.

The exemption claimed by appellants rests within § 6 of the Clayton Act and § 1 of the Capper-Volstead Act. Section 6 of the Clayton Act (38 Stat. 731 (1914), 15 U.S.C. § 17 (1958)) reads as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects hereof; nor shall such organizations, or the members thereof, be held or construed to be [fol. 3959] illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 1 of the Capper-Volstead Act (42 Stat. 388 (1922), 7 U.S.C. § 291 (1958)) reads in material part as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in association, corporate or otherwise . . . in collectively processing, preparing for market, handling and marketing in interstate . . . commerce such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ."

The legislative history of the Clayton and Capper-Volstead Acts makes it clear that farmers (including orange growers) were granted the right to combine, contract and conspire together in restraint of trade in associations which, without the exemptions, would have violated the Sherman Act. Its purpose was to permit the farmers to compete with large corporations.[1] But by its terms, the exemption was not absolute—the individuals were permitted to associate in groups and the associations were permitted specifically to do but two things: "arrange marketing agencies in common," and contract and agree with their members participating, if necessary, to effect such purposes. As the most recent Supreme Court decision states:

> "Thus, the full effect of § 6 is that a group of farmers acting together as a single entity in an association

---

[1] "In the early 1900's, when agricultural cooperatives were growing in effectiveness, there was widespread concern because the mere organization of farmers for mutual help was often considered to be a violation of the antitrust laws. Some state courts had sustained antitrust charges against agricultural cooperatives, and as a result eventually all the States passed Acts authorizing their existence. It was to bar such prosecutions by the Federal Government as to interstate transactions that Congress in 1914, inserted § 6 in the Clayton Act exempting agricultural organizations, along with labor unions, from the antitrust laws." *Milk Producers Assn.* v. *U.S.*, *supra* at 464.

> cannot be restrained 'from lawfully carrying out the [fol. 3960] *legitimate objects* thereof' (emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will." *Milk Producers Assn.* v. *U.S., supra,* at 465-6.

There have been few cases dealing with the Capper-Volstead Act exemptions.[2] At the time this case was tried in the district court, *United States* v. *Borden Co.,* 1939, 308 U.S. 188, was the leading case. It held that Capper-Volstead does not wholly exempt cooperatives, and particularly those conspiring with nonexempt legal entities. This same principle has been applied to labor unions, which have no absolute exemption from antitrust laws. *Allen Bradley Co.* v. *Union,* 1945, 325 U.S. 797, 805. The Clayton Act, § 6, applied only to nonstock agricultural cooperatives. Section 1 of the Capper-Volstead Act extended the same exemption to capital stock agricultural cooperatives.

> "[T]he general philosophy of both [acts] was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." *Milk Producers Assn.* v. *U.S., supra,* at 466.

And in conclusion, Mr. Justice Black stated:

> "[T]he [Capper-Volstead] Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative." *Id.* at 467.

---

[2] *Milk Producers Assn.* v. *U.S., supra; Tigner* v. *Texas,* 1940, 310 U.S. 141; *United States* v. *Borden Co.,* 1939, 308 U.S. 188; *United States* v. *Maryland & Virginia Milk Pro. Assn.,* D.C.Cir. 1949, 179 F.2d 426; *Hinton* v. *Columbia River Packers Ass'n.,* 9 Cir. 1942, 131 F.2d 88; *United States* v. *Maryland Cooperative Milk Pro.,* D.C. 1956, 145 F.Supp. 151; *Cape Cod Food Products* v. *National Cranberry Ass'n.,* D.Mass. 1954, 119 F.Supp. 900; *Manaka* v. *Monterey Sardine Industries,* N.D.Calif. 1941, 41 F.Supp. 531.

We conclude, therefore, that no blanket exemption is created by either Section 6 of the Clayton Act or Section 1 of the Capper-Volstead Act which permits an agricultural [fol. 3961] cooperative to either unlawfully monopolize, or attempt to monopolize, under Section 2 of the Sherman Act, nor to do any acts to restrain or suppress competition, or which result in the restraint or suppression of competition prohibited by Section 1 of the Sherman Act, if such acts, in either event, fall within the prohibitions of the respective Sherman Act sections. Thus the question as to whether there has been a violation of the antitrust laws is ordinarily one to properly go to the jury.

We next consider if there was proof of the violation of antitrust laws, despite the limited exemption the appellant Sunkist enjoys, sufficient to make out a question of fact for the jury. To pass upon this, we must consider certain of the facts of this case in detail in an attempt to establish and define the product and the pertinent market with which we are here concerned.

2. *The Product Involved*

As the case went to the jury, the defendants Sunkist and EOP were charged, as appellees' counsel put it on oral argument, with "a combination and conspiracy [under Sections 1 and 2 of the Sherman Act] to restrain trade in California citrus juices and to monopolize the production, processing and sale of those juices, primarily, insofar as appellee is concerned, single strength juices." The contracts charged to be in restraint of trade were allegedly made with the purpose of eliminating a competitor, the appellees.

In the first cause of action contained in appellees' amended complaint, the relevant market was designated as "canned citrus fruit juice, produced and processed in the State of California, and marketed throughout the United States." Thus originally all citrus fruit juice was involved; orange, lemon and grapefruit. By the amendment to the complaint to conform to evidence, the relevant market was restricted to "single strength Valencia [orange] juice."

In that respect it was alleged (again to conform to proof) that:

> "A total of approximately 5,400,000 gallons of single strength Valencia juice was processed in California in 1951. Of this amount, defendants EOP, TreeSweet and Silzle processed approximately 4,511,202 gallons, of which amount approximately 3,044,394 gallons were processed by TreeSweet and Silzle under the contracts and arrangement [complained of] .... Because of the [fol. 3962] monopoly control by Sunkist and EOP over the quantity and price at which Valencia product oranges were made available to independent processors of single strength juice other than TreeSweet and Silzle, and the aforesaid contracts, plaintiff was unable to and did not process any single strength Valencia juice in 1951."

3. *The Relevant Market*

The record discloses that entirely apart from the marketing of citrus fruit itself as the end product, an important consideration in the citrus industry is the utilization of by-products, such as oils from the peel, peel and pulp for cattle feed, and the juices themselves. Juices are divided in the trade into three categories: (1) The so-called "hot concentrate juice" (the syrup base for mixed citrus drinks); (2) the cold, or so-called "frozen concentrate," which is used to prepare the canned or frozen juice; and (3) the so-called "single strength," being the natural and untreated juice of the orange. Oranges for fruit juice purposes are valued and sold by the extent of their sugar content. Valencia oranges are apparently particularly valued for their high sugar content, and perhaps for their time of arrival on the market (although this advantage, of course, partially disappears when juices are kept from one season to the next).

Oranges are grown primarily in three states—California, Arizona and Florida. Oranges from both East and West Coasts compete in the national markets, both in fresh oranges and by-products. Due to the freight rates, California and Arizona oranges and juices are sold on a two-price structure—cheaper in the East, where Florida is closer and the freight costs on Florida juice lower, and more expensive in the West, where transportation from Florida costs more. We conclude the relevant market area here involved was the California-Arizona area.

4. *Competition and Prices in the Product Involved in the Relevant Market*

During the year 1951, Sunkist controlled approximately seventy per cent of the total by-product Valencia orange market in the California-Arizona area, or 318,000 tons of by-product oranges.

[fol. 3963] The remaining thirty per cent of by-product Valencia oranges grown in California-Arizona came from scattered growers such as: (a) Independent Citrus Growers & Shippers Association, a grower cooperative (Morgan Ward, selling agent); (b) Mutual Orange Distributors of Anaheim, California, a grower cooperative; (c) American Fruit Growers Company, an independent grower, packer and shipper; (d) Paramount Citrus Association, a corporation organized by various growers for profit; (e) an unorganized group of individual growers, members of (a) above, who did not desire to market through Morgan Ward.

In 1951 in the California-Arizona area, there were three principal independent processors of by-product oranges: Winckler & Smith, TreeSweet and Silzle. These had no growers to supply them oranges, so they were required to buy their by-product oranges from the aforementioned five "independent" groups of growers, or from Sunkist or its subsidiary EOP, or (as to a very small amount of fruit) from even "more independent" growers than the five independents above mentioned. Mutual, American and Paramount, mentioned in (b), (c) and (d) above, had their own processing facilities, and by 1951 were processing all their own fruit, so had none to sell to independent processors.

"Independent Citrus Growers & Shippers Association" had no processing facilities of its own and no sales organization. It therefore sold to independent processors. Whether these independent processors would buy by-product oranges to process into single strength juice depended, obviously, on the price they might be forced to pay for the oranges, and the price the might get for the canned or bottled single strength juice. If the processors could see no chance to make a profit, then the growers' representatives were forced to make processing contracts with hired processors in order to realize anything on their by-product oranges, and to prevent a loss.

There is no question but that Sunkist was the "leader" on pricing within the industry. In 1951 Sunkist admittedly set a price of $40.00 per ton on oranges containing 120 pounds of "soluble solids." (This is a term descriptive of what is left from an orange when water is extracted. It includes sugars, citric acid, and other solids. The average Valencia orange contains 120 pounds of soluble solids per ton of oranges.)

[fol. 3964] In 1951, "Independent Citrus Growers & Shippers Association" made a contract with Case-Swayne Co., Incorporated, an independent processor with no grower's supply, to process its by-product oranges into canned single strength juice, selling it under the Case-Swayne label, paying a net to Independent after deducting costs and a profit. Independent had twelve to fifteen per cent of the total supply of by-product oranges in the California-Arizona market, or at least 53,000 tons.

On August 6, 1951, Morgan Ward for Independent, signed a processing contract with Winckler by which Ward agreed to deliver sixty tons of by-product oranges per day up to three hundred and sixty tons per week during the two-months' canning season for the production of frozen concentrate, but this did not produce single strength juice for Winckler to sell. On August 17, 1951, he wrote to Morgan Ward (Exhibit AZ) in which he complained that he was not getting oranges for single strength juice. He charged monopoly against Morgan Ward, and requested the latter to put the matter up to the By-Products Committee of the Independent Citrus Growers & Shippers Association. This was done; the matter was left entirely to Morgan Ward's discretion. That company still refused to sell oranges to Winckler's for single strength processing. Mr. Ward's explanation is of interest. He said:

"Well, in 1951 I knew that we would be faced with a lot of fruit, there being no home for it outside of Winckler-Smith, Case-Swayne, Paramount and a few other small plants, a few small plants otherwise. I knew that we were going to have, in order to get money for the fruit for the growers, we were going to have to enter into participating contracts in processing this fruit, not with one, but several of these. So I wanted to be fair to Mr. Winckler, I wanted to be fair to Mr. Swayne and Paramount, for that matter, so I knew that Case-Swayne had no facilities except straight canned juice, so the first contract we entered into was with Case-Swayne for single-strength juice, orange juice.

"Q. That was early in the season?

"A. Early in the year. That was the first reason I gave him that part of it.

"The second reason was that if I gave single strength to Winckler and single strength to Case-Swayne, we [fol. 3965] would have our oranges out in the market competing in canned juice form, competing against each other.

"Then in order to be fair again with Winckler, I gave him the concentrate deal. Even though he wanted some single strength, I did not give it to him for that reason."

Winckler & Smith had been organized in 1946. The amounts of by-product oranges it had purchased primarily from Sunkist and thereafter from others up to and including 1950 had been as follows:

1946—$1,000,000 worth
1947—Substantially less
1948—$200,000 worth
1949— 3,500 tons from Sunkist
10,500 tons from Morgan Ward
4,300 tons from other sources
1950— 1,300 tons from Sunkist
11,500 tons from Morgan Ward
4,100 tons from other sources

During this same time, the tons of by-product oranges it had purchased from other sources, including Morgan Ward, had been increasing. Thus it is not entirely accurate to state, as appellees do, that "appellee [Winckler & Smith] had been a regular customer of Sunkist in the purchase of by-product oranges since its organization in 1946," up to 1951.

In 1951 Sunkist started out the year with plans for pooling and disposing of all its by-product oranges. The plan was to have EOP process the fruit, or to sell to other processors. A schedule of prices was established at which fruit was to be sold at a separate price per ton for each pound of soluble solids per ton, ranging from sixty to one hundred and fifty pounds.

The price set on by-product Valencia oranges for 1951 ranged from $17.00 per ton for fruit having sixty pounds of soluble solids to $51.50 per ton for fruit having one hundred and fifty pounds of soluble solids. Fruit having one hundred and twenty pounds of soluble solids was priced at $40.00 per ton, f.o.b. packing house. This price was set by Sam H. Kelly, general manager of Sunkist's Los Angeles District Office. The "independent Association" followed the "lead" of Sunkist as to price.

[fol. 3966] Sunkist sold 46,000 tons of by-product oranges at this price to independent processors in 1951. Apparently these oranges went into hot or frozen concentrate, as there was testimony such a price could be paid for such oranges so used in 1951 and produce a profit.

All other tonnage of Sunkist growers in 1951 was turned over to EOP for disposal. This was the largest by-product Valencia orange crop ever handled by EOP. It received 318,000 tons, processed 164,000 tons, and turned over 31,200 tons to ELP for processing at cost.

Exchange Orange thus had 122,800 additional tons of by-product oranges on hand. It sold 19,747 tons to General Foods; 14,842 tons to Hyland-Stanford; 6,773 tons to Mission Dry; and 3,730 tons to Hart's for processing, or a total of 45,092 tons, under "custom packing" contracts,[3] into hot and frozen orange concentrate, but not for single strength juice. It contracted with TreeSweet to process 24,148 tons into single strength juice, and Silzle to process 6,675 tons into single strength juice. These were the contracts described as two of "six acts" which are the basis of appellees' complaint against Sunkist. Ten thousand six hundred and thirty tons were sold to Mission Dry and 817 tons to Hyland-Stanford under a "deferred payment plan."[4] This left 35,000 tons, approximately, which were [fol. 3967] unsuitable for processing into juice products.

---

[3] Under the true processing or "custom packing" contract, Exchange Orange furnished fruit to the independent processor for

---

processing into specified products. The processed products were sold under the Sunkist label by the Products Department of Sunkist. The processor was paid its costs plus an assured profit on the processing operations. In 1951, Exchange Orange made such contracts for the processing of hot and frozen concentrate with Hyland-Stanford, Mission Dry, General Foods and Hart's.

[4] Under the so-called "fruit purchasing" contract, the independent processor agreed to buy all of its by-product fruit requirements from EOP at the going Sunkist price for such fruit at the time of delivery. The processed product was sold by the independent processor under its own label or under the labels of its buyers. The independent was not required to pay for the fruit until such time as it had sold the processed products. In the event the independent stopped buying fruit for its own account, either because of the price of fruit or because its capacity exceeded its own requirements for fruit, its production facilities were to be made available to EOP upon request. If EOP used such production facilities, the independent was paid its costs of operation plus a guaranteed profit. This provision of the fruit purchasing contract ties in to the true processing or "custom packing" contract which EOP sometimes had with the same independent processor.

Finley characterized the so-called "fruit purchasing" contracts with Hyland-Stanford and Mission Dry as providing for a "deferred payment" or a "credit plan," since the independent processor was not required to pay for the fruit it purchased from EOP until the products processed therefrom were sold by the independent, even though the processed products were, at all times, the property of the independent. Finley said that the provision in such contracts which required the purchaser to buy its full requirements of by-product oranges from EOP assured the independent of a dependable source of supply of fruit. He stated further that the deferred payment privilege afforded the independent under such contracts was given in exchange for the privilege given EOP for "first call" on the independent's processing facilities.

The years immediately before 1951 had seen a change in the use of by-product oranges. In 1950 EOP processed eleven per cent of all frozen orange juice in the California-Arizona market. In 1951 it processed fifty-eight per cent. There was an increasing market for frozen orange juice. Nevertheless, it was advisable and necessary to maintain the market in canned single strength juice.

There were four principal independent processors of canned single strength orange juice in the California-Arizona area, namely, TreeSweet, Silzle, Case-Swayne and appellee. TreeSweet sold in the national market under its own label. Silzle sold in the national market to private label buyers. Case-Swayne sold largely in the California market under its own label "Case-Swayne." Appellee sold in the national market under its "Anagold" label. These four canners were in competition with each other, and each of them competed with Sunkist, in the sale of canned single strength orange juice in interstate commerce.

5. *Contracts in the 1951 Season*

Under the 1951 contract between Exchange Orange and TreeSweet, Exchange Orange made by-product oranges available to TreeSweet on a consignment basis in such quantities as Exchange Orange determined. Exchange Orange agreed to pay TreeSweet its processing costs at [fol. 3968] specified rates and to pay the trucking costs of the fruit to TreeSweet's plant. TreeSweet agreed to purchase the resultant juice at the Sunkist published selling price as of the date of purchase, less discounts and allowances of fifteen per cent plus an advertising allowance of seven cents per case. TreeSweet was not required to pay for the juice until it was sold. The oil and peel were to be the property of Exchange Orange.

Under this contract TreeSweet processed 24,148 tons of by-product oranges into canned single strength orange juice, and sold it in the same interstate markets under the TreeSweet label in competition with similar juice sold by Sunkist and Silzle.

Finley (general manager of Exchange Orange) admitted that the Exchange Orange-TreeSweet contract guaranteed

TreeSweet against any inventory losses and protected it against any reductions in the market price for canned juice during both the selling and carry-over seasons. He admitted further that TreeSweet was guaranteed a profit under such contract. He stated that the TreeSweet contract provided, in effect, that Exchange Orange was to be paid for its by-product oranges on the basis of the difference between the amount credited to TreeSweet for processing such fruit and the price which TreeSweet paid Exchange Orange for the processed juice.

The amount credited to TreeSweet for processing the 24,148 tons was $859,004.00, and the amount payable by TreeSweet for the juice processed therefrom was $1,204,031.41. The difference between these two figures, to wit: $345,027.41, was the amount TreeSweet actually paid Exchange Orange for the 24,148 tons without the peel and oil by-products, or at the rate of almost $14.29 per ton.

Under this contract, EOP was to get the oil and peel or the proceeds therefrom. The net return from the oil and peel was $10.81 per ton. Therefore, the total amount EOP received for the by-product oranges processed under the TreeSweet contract was $25.10 per ton, namely, $14.29 actually paid by TreeSweet plus $10.81 for the oil and peel, or a price which was $19.12 less than the price for which the same quality of oranges were available for sale by Sunkist to other independent processors, including appellees.

[fol. 3969] Substantially the entire production of single strength orange juice under this contract was marketed under the TreeSweet label, and none of it was sold under the Sunkist label. TreeSweet received an advertising allowance of seven cents per case. The usual purpose of an advertising allowance was to advertise the brand name of the concern granting such allowance, but in this case TreeSweet was permitted to make any use it saw fit of this advertising allowance.

The contract with TreeSweet was justified on the ground that TreeSweet had the facilities to process the juice and the sales organization to move the merchandise, and on the ground that it was important that some California single strength juice be on the market in 1951. Sunkist had never mentioned to any independent processor until 1951 that this kind of arrangement was being made available to TreeSweet during the years 1947 to 1950, inclusive.

Silzle was engaged primarily in the business of processing and selling canned single strength orange juice. It sold such juice primarily to private label buyers who sold to the same class of customers and in direct competition with canned single strength juice sold by Sunkist, TreeSweet and appellees. Silzle had secured through the Bauer Fruit Company, a partnership composed of certain stockholders of Silzle, its fruit requirements.

Early in 1951, Kelly of Sunkist called Finley of EOP to secure the latter's approval to sell seventy-two tons of byproduct oranges to Silzle at $27.00 per ton, including the oil and peel, in order to permit Silzle to meet a competitive situation then existing with Case-Swayne. Finley approved the sale. These oranges ranged from one hundred twenty-three to one hundred thirty-six pounds of soluble solids per ton which, under the Sunkist published selling price, were priced from $41.15 to $46.13 per ton. A little later, under an oral arrangement, Finley let Silzle have five hundred and twenty-seven tons at $22.50 per ton, with Silzle keeping the oil and peel.

About the middle of June 1951, Finley contacted Thelma Silzle, president of Silzle, and offered her a contract similar to the TreeSweet contract, "and she was willing and wanted a contract." The parties operated on an oral basis for most of the season. The written contract was not signed until September 10, 1951, but by its terms it was to be [fol. 3970] effective from July 15, 1951 until the end of the season.

Under this contract Silzle processed 6,675 tons of byproduct oranges into canned single strength orange juice, in addition to the seventy-two tons and five hundred and twenty-seven tons purchased earlier. Silzle purchased the canned juice from EOP at the published Sunkist selling price at the time of purchase, less a discount of twelve and one-half per cent, plus an advertising allowance of seven cents per case. Silzle was credited with $215,602.10

for processing, and it paid EOP the difference between $215,602.10 and $306,263.65, Sunkist's selling price for the resultant juice. Silzle thus paid $90,661.55 for the 6,675 tons of oranges exclusive of oil and peel, or at the rate of $13.58 per ton for by-product oranges. The average soluble solids content of the oranges processed by Silzle under the 1951 contract was one hundred and twenty pounds of soluble solids per ton. The Sunkist published selling price in 1951 for by-product oranges containing one hundred and twenty pounds of soluble solids per ton was $40.00 per ton. Silzle thus acquired oranges from EOP, exclusive of the peel and oil content, at a price which was $26.42 per ton less than Sunkist's published selling price for oranges of the same quality.

Under this contract EOP was to get the value of the oil and peel, which amounted to $4.08 per ton. Thus, the total amount EOP received for the by-product oranges processed under the Silzle contract was $17.66 per ton, namely, $13.58 per ton paid by Silzle, plus $4.08 per ton received for the oil and peel; or a price which was $22.34 per ton less than the price for which the same quality of oranges was available for sale by Sunkist to other independent processors, including appellees. Unlike TreeSweet, Silzle was to pack juice only for current sales, not for inventory.

The terms of the various contracts are definite. The contracts themselves are in evidence, and their execution is admitted by the pleadings.

The question permitted to go to the jury for determination was why Sunkist, in 1951, sold to one processor of "single strength Valencia orange juice" at one price, and failed to sell to another at any price. If there *was* a refusal, was it a valid exercise of business judgment? If so, it was lawful. If it was a contract made to restrain com- [fol. 3971] petition or to fix prices, or, from a position of legal monopoly, was used illegally to monopolize or to attempt to monopolize, then appellees were entitled to recover damages proximately resulting from appellants' illegal acts. Such questions obviously would ordinarily be questions of fact.

6. *The Alleged Refusal to Sell*

We have observed above, with respect to the "sixth act" of the "six acts" mentioned hereinbefore (II(f), *supra*), that Sunkist denied any refusal to sell to appellees, but admitted no contract had been made with them.

The right to offer to sell or buy with perfect freedom, and to refuse to sell or buy with the same freedom, is supposedly a fundamental right sought to be protected by our competitive free enterprise system, and by the antitrust laws.

Its legality has been primarily established by what has been described as one of the ten leading cases in antitrust enforcement during its seventy year history: *United States* v. *Colgate*, 1919, 250 U.S. 300. Speaking for a unanimous Court, Mr. Justice McReynolds there referred to the long recognized right of a manufacturer to exercise his independent discretion as to parties with whom he would deal.[5] But like so many generalizations, the "right" to exercise independent discretion cannot be taken as an absolute.[6]

[fol. 3972] Mr. Justice Burton so stated in *Lorain Journal* v. *United States*, 1951, 342 U.S. 143, 155.[7] As Mr. Justice Holmes said: "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion."[8]

---

[5] "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U.S. 300, at 307.

[6] We discuss the problem without considering the immunities defendant allegedly acquired under both the Capper-Volstead and Clayton Acts. We also note that the general statement in *Colgate* has reference to a right as it exists under the Sherman Act. More than that was originally plead in this case, but the Robinson-Patman Act violations were dismissed and were not before the jury.

[7] *Cf.* Rifkind, Division of Territories, in Van Cise and Dunn, How to Comply With the Antitrust Laws, 127, 136 (1954).

We speak here only of decisions arrived at unilaterally, *i.e.*, the decisions of the single trader. Any notion that such a right to select customers by joint action exists has been laid to rest.[9] *Klor's* has reduced this prospect to a mirage.[10]

Confining our attention, then, to the decision made by a single trader, irrespective of any statutory immunities, we ask whether the seller may select with whom he may deal. Whether we label it a right or a privilege, both common law[11] and statute[12] have consistently adhered to the general theory expressed in *Colgate*. Late Supreme Court cases confirm its existence,[13] but with certain definite limitations.

Text writers tell us this general "right" of choice of dealing may be violative of antitrust laws when it is "misused or abused," *i.e.*, "when there is proof of any one of a number of plus elements of liability that may taint the otherwise lawful individual refusal to sell."[14] "These plus elements," says Professor Oppenheim of Michigan,

---

[8] *Amer. Bank & Trust Co.* v. *Federal Bank*, 1921, 256 U.S. 350, 358.

[9] *Klor's* v. *Broadway-Hale Stores*, 1959, 359 U.S. 207.

[10] Oppenheim, Selected Antitrust Developments, 15 A.B.A. Section of Antitrust Law 37, 54 (1959).

[11] 4 Restatement, Torts § 762.

[12] 15 U.S.C. § 13(a) (1958).

"Section 2(a) of the Robinson-Patman Act, 15 U.S.C. Section 13(a), contains a proviso 'That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.' In *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55 at 64 (1959), the Court stated that this proviso codifies the rule of *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919) . . ." Oppenheim, *op. cit. supra* note 10, at 43.

[13] Handler, Recent Antitrust Developments, 14 Record of the Bar Association of the Bar of the City of New York 318 (1959).

[14] Oppenheim, *op. cit. supra* note 10, at 43.

[fol. 3973] "include, among others, the following major species of illegality: (1) tortious conduct constituting unfair competition or unfair trade practice at common law; (2) violation of a civil rights statute or other type of constitutionally valid statute limiting refusals to deal; and (3) conduct otherwise in violation of the Sherman Act, Clayton, Section 5 of the Federal Trade Commission Act or any applicable state antitrust statute." [15]

But the decisions in past years,[16] as well as recent dicta by the Supreme Court,[17] warrant the generalization made by a writer with which this Court agrees: "[*An*] *individ-* [fol. 3974] *ual refusal to deal is preserved wherever it is reasonably ancillary to the effectuation of lawful marketing objectives.*"[18] (Emphasis added.)

---

[15] Oppenheim, *op. cit. supra* note 10, at 43-4.

[16] Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847 (1955); Saulnier, Achieving Price Stability as a Basis for Economic Growth in a Free Society, 15 Bus. Law 83 (1959).

United States v. *Parke, Davis & Co.*, 1950, 362 U.S. 29, emphasized the narrowness of the path of legality a seller must follow in utilizing the doctrine of *United States* v. *Colgate* in suggesting resale prices to customers. Relying on *U. S.* v. *Bausch & Lomb Co.*, 1944, 321 U.S. 707, *Federal Trade Comm.* v. *Beech-Nut Co.*, 1922, 257 U.S. 441, and *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 1911, 220 U.S. 373, the Court ruled there were two types of action prohibited by *Colgate:* (1) agreements or contractual arrangements on a vertical plane, and (2) a concerted plan of action on a horizontal plane.

> "In other words, an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." *United States* v. *Parke, Davis & Co.*, *supra* at 43.

The unilateral right to set prices, without "other means" of implementation, leaving the person affected the right to accept or reject the fixed price, is maintained from *Colgate*, and approved. *Cf.* also *George W. Warner & Co.* v. *Black & Decker Mfg. Co.*, 2 Cir. 1960, 277 F.2d 787.

[17] Justice Black in *Klor's* specifically said: "This is not the case of a single trader refusing to deal with another. . . ." (citing *United States* v. *Colgate, supra; United States* v. *Schrader's Son, Inc.*, 1920, 252 U.S. 85; *U.S.* v. *Bausch & Lomb Co., supra; Lorain Journal* v. *United States, supra*). *Klor's* v. *Broadway-Hale Stores, supra* at 312.

Entirely apart from a unilateral refusal to sell or deal, we have, charged herein as a conspiracy, the joint or concerted refusal. "Concerted refusals by traders to deal with other traders" are equated to "group boycotts" by the most recent Supreme Court decision on the subject.[19] They "have long been held to be in the forbidden category."[20] The Court goes on:

> "They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468. Cf. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 213, 'such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' Cf. *United*

---

[18] Oppenheim, *op. cit. supra* note 10, at 44. See *Associated Press* v. *United States*, 1945, 326 U.S. 1. Professor Oppenheim goes further: "Indeed, the cases support an even broader generalization. In the absence of one of the plus illegal elements previously summarized, a seller acting alone is not required by law to justify his refusal to deal. His motive is immaterial unless it is relevant to one of the plus elements mentioned." *Cf. Times-Picayune* v. *United States*, 1953, 345 U.S. 594, 625; Timberg, Selection of Customers, in Van Cise and Dunn, How to Comply With the Antitrust Laws, 117, 119 (1954), citing *Fed. Trade Comm.* v. *Raymond Co.*, 1924, 263 U.S. 565.

Also *cf*. Oppenheim, Developments in Antitrust Law During the Past Year, pp. 29-33, American Bar Association Section of Antitrust Law (1960).

[19] *Klor's* v. *Broadway-Hale Stores, supra* at 212.

[20] *Klor's* v. *Broadway-Hale Stores, supra* at 212.

States v. *Patten*, 226 U.S. 525, 542." *Klor's* v. *Broadway-Hale Stores*, 1959, 359 U.S. 207 at 212.

Thus, in this case, we conclude the question as to whether there had been a concerted refusal to sell, as alleged by [fol. 3975] appellees, or an illegal unilateral refusal to sell, were questions of fact for the jury's determination. The jury's verdict could have been based on either (1) the alleged illegal conspiracy and agreement to make contracts constituting a restraint of trade, or " . . . (2) the alleged illegal sole trader decision not to sell, made *when such refusal would, as a natural consequence,* illegally restrain trade or commerce, and implemented by other illegal means beyond the bare refusal, or (3) a similar unilateral decision not to sell, except at a fixed price, made from a monopoly position, *and resulting, as a natural consequence, in the elimination of a competitor.*" We cannot know which one or more of the theories stated were adopted by the jury in determining liability. With this in mind, we must consider the evidence and the instructions given on this phase of the case. If there exists in the record sufficient evidence to justify the action going to the jury on all three of these theories, and there were no errors in the instructions nor in the introduction of evidence, then we are bound by the jury's verdict on questions of fact.

We conclude that this was the theory under which the trial court permitted the case to go to the jury, as disclosed by the instructions themselves and the trial court's and counsel's comments, and discussion of them, at the trial. We further conclude such submission to the jury was, in theory, correct.

B. *Was there error in instructing or refusing to instruct the jury?*

This was not an easy case in which to instruct the jury, and the instructions were necessarily many and involved.

In the instructions, the jury was first advised that a parent corporation and its wholly owned subsidiary (Sunkist and EOP, respectively) "can be guilty of combining or conspiring together to violate the antitrust laws," *i.e.*, on the theory of an intracorporate conspiracy (*e.g.*, *Kiefer*

Stewart Co. v. *Seagram & Sons*, 1951, 340 U.S. 211); that acts lawful in themselves can become unlawful "when part of an illegal scheme or plan, or when used to accomplish an illegal purpose" (*e.g., Direct Sales Co.* v. *U.S.*, 1943, 319 U.S. 671); that the acts charged against appellants under the first or restraint of trade cause of action need not have been shown to have been done with specific intent of elimination of competition in the juice market, if those [fol. 3976] acts "actually and necessarily resulted in the elimination of such competition," since everyone is presumed to intend the natural and probable results or consequences of his conduct. *People* v. *Renozo*, 1952, 109 Cal. App.2d 793, 241 P.2d 628; *King* v. *Commonwealth*, 1941, 285 Ky. 654, 148 S.W.2d 1044.

The court then referred to the "six acts" complained of which were claimed to be the proximate cause of appellees' damage (see II(a) to (f), *supra*), and added:

> "The other contracts entered into evidence between Exchange Orange and Hyland Stanford, Harts, Case-Swayne, Mission Dry and General Foods, also referred to as Bireley's, were offered and received for the general purpose of showing the operations of Exchange Orange and such bearing as they may have in general, but are not claimed or alleged by the plaintiffs, to be any cause of their claimed damage."

The court explained the defendants' defenses.[21]

---

[21] "It is defendants' position, first of all, that they did not have a monopoly of products oranges or a monopoly of the business of processing the oranges and selling the juice in interstate commerce. Defendants contend that such monopolies could have been lawful, if they had existed, because of the statutes relating to marketing associations, but they deny that there were such monopolies.

"With respect to lemons, it is defendants' position that whether Exchange Lemon had a monopoly of products lemons or of the business of processing and selling lemon juice, is immaterial in this case, since, defendants claim, the plaintiff was not in the lemon juice business except in a very minor way.

"In any event, defendants deny that they misused any power that they may have had with respect to products oranges or lemons.

"Defendants also deny that they violated the antitrust laws in any way. They deny they combined or conspired with Exchange [fol. 3977] The court then instructed on monopoly power:

> "The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful.
>
> "The defendant Sunkist is permitted under the law to acquire a legal monopoly over product Valencia oranges that are available for processing into citrus juice products, including single-strength Valencia juice. Sunkist or Exchange Orange could in 1951 have legally processed all of such oranges in their own plants into citrus juice products and not made any of them available to independent processors, such as the

---

Lemon, TreeSweet and Silzle, or any of them, to restrain trade and commerce in single-strength Valencia orange juice or and (sic) other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to suppress or eliminate the competition of the plaintiff.

"Defendants also deny that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to monopolize the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to exclude the competition of the plaintiff from such market.

"The defendants also deny that they and Exchange Lemon and TreeSweet and Silzle, or any of them, actually monopolized the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce.

"With respect to the six acts complained of as causing plaintiff's damage, defendants contend that such acts were lawful and that they were not performed pursuant to any combination or conspiracy or for the purpose of restraining or monopolizing trade and commerce or for the purpose of injuring the plaintiff.

"It is also defendants' contention that they were under no legal obligation to do business with the plaintiff, and that even if defendants had had some obligation to do business with independent processors generally, there was ample justification for not doing business with the plaintiff.

"Defendants contend, finally, that what happened to the plaintiff in 1951 was caused, not by any act of the defendants, but by the general economic conditions in the citrus fruit industry and by plaintiff's lack of capital and the mismanagement of its business."

plaintiff, TreeSweet or Silzle, if they had been able to, and cared to do so. Defendant Exchange Orange, as the processing company for the grower members of Sunkist, could also enter into lawful processing contracts with independent processors to have the oranges of the grower members of Sunkist processed into citrus juices to be thereafter sold by Sunkist as the citrus juice products of its grower members to prospective buyers thereof, including independent processors. However, such contracts must be lawful processing contracts and not devices which are resorted to [fol. 3978] pursuant to the conspiracy charged to illegally restrain trade, or to illegally monopolize that part of the citrus juice market which is represented by such citrus juices as are processed in California and thereafter sold in interstate commerce. It is for you to decide whether the contracts which Exchange Orange entered into in 1951 with TreeSweet and Silzle, when coupled with any refusal of the defendant Sunkist or Exchange Orange, to make oranges available to the plaintiff under comparable arrangements pursuant to the combination or conspiracy charged, were lawful processing contracts, or whether they were contracts which were made pursuant to the combination or conspiracy charged and had the purpose and effect of restraining and/or monopolizing interstate trade and commerce in the citrus juices and particularly single-strength Valencia orange juice processed in California and sold in interstate commerce, by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts."

And the court reinstructed on the same subject.[22]

---

[22] "Now, so that you will not be confused, let's back up. Here are co-operatives which are permitted to combine together to produce and market their fruit. The antitrust laws say that they may lawfully do that, and the antitrust laws say that they shall not be in violation of any—are you sleepy down there?

"Juror Daiker: No.

(footnote continued)

[fol. 3979] The court next instructed on the power to determine prices, or to exclude a competitor, and the law-
[fol. 3980] ful as well as the unlawful exercise of that power,

---

"The Court (Continuing): —shall not be in violation of any antitrust law in so doing.

"The plaintiffs claim that the defendants did actually have a monopoly of product fruit through their co-operatives. The defendants say, 'We didn't have it. But, if we did, it was legal.' And the court has told you that it was legal. So there is no dispute about that.

"As the court has told you, the defendants Sunkist, Orange, and co-conspirator Lemon, could have had 100 per cent monopoly of all oranges and lemons grown in Southern California, so that isn't our problem. It is what you find happened or did not happen from there on out.

"If they had this monopoly control of products oranges, then they could not use it illegally. They could use it legally. Likewise, the plaintiff contends that the defendants conspired and combined to restrain trade and commerce, and conspired and combined to monopolize the citrus fruit market, which is something different from the product fruit.

"The question that is being left to you as jurors is not the question as to whether these co-operatives could have legally had a monopoly of all the oranges or lemons in California; there is no argument about that; the question on that phase of the case is whether or not, if plaintiff proves they did have such monopoly, did they use it legally or illegally. That is a question of fact. You are the sole judges of the facts.

"Sections 1 and 2 of the Sherman Act have both the geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of the things forming a part of interstate commerce. If you find that either or both of the defendants combined with TreeSweet or Sizzle to eliminate the competition of the plaintiff in the market for citrus fruit juices, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that any of the acts charged to have been performed by such defendants were performed in furtherance of such combination or conspiracy, and that the performance of any such acts was the proximate cause of any damage to the plaintiff, you should find that there was a violation of the antitrust laws and proximate causation, and you should proceed to the question of damage.

"Any combination effectively excluding outsiders from the business altogether is a monopoly and is unconditionally unlawful.

and referred specifically to the processing contracts with TreeSweet and Silzle.[23]

After advising the jury that direct evidence of a refusal to deal with Winckler on terms comparable to those offered to TreeSweet and Silzle was not necessary, and that EOP had a legal right to refuse to contract with Winckler unless such refusal was some part of a violation of antitrust laws, the court gave two instructions which he characterized as summing up "what is charged and what the plaintiff must prove." It is these instructions, originally requested by defendants but modified by the court, which appellants vigorously attack as error. They read:

"No claim or contention is made herein by the plaintiff that defendants, or either of them, attempted to monopolize.

"This may be a technical distinction. There is a charge that they conspired to monopolize. That is different from an attempt to monopolize, to go back to those instructions that I gave you on conspiracy. Attempt to monopolize is something different. For instance, one individual could attempt to monopolize, without any conspiracy. But there is no charge of attempt to monopolize.

"In considering the matter of monopoly power two ingredients are of outstanding significance: the power to fix prices and the power to exclude competition.

"The words 'to fix prices,' refer to price fixing activities which tamper with or affect price structures in interstate trade or commerce.

"Whether monopoly power existed in a defendant or defendants, and whether such power was illegally used or misused, is a question of fact for the jury."

[23] "I charge you that the defendant Exchange Orange may legally enter into a processing contract whereby Valencia oranges furnished by Sunkist or Exchange Orange may be processed into single-strength orange juice for Sunkist by an independent processor party to such contract. However, such processing contracts cannot be entered into by Exchange Orange as part of a combination or conspiracy which has the purpose or effect of fixing the prices at which single-strength Valencia juice processed by TreeSweet and Silzle for Exchange Orange may be sold or offered for sale by TreeSweet or Silzle in interstate commerce as such contracts would then be illegal contracts.

"In other words, you have got a question of fact there. Were these legal processing contracts or were they illegal? I am trying to present both sides of the problem to you."

"(a) Defendants' No. 7

"The first cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators, Exchange Lemon, TreeSweet and Silzle, combined and conspired with each other at a date unknown to the plaintiff, and entered into contracts and did certain other things in 1951 with the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juices, particularly single-strength Valencia orange juice produced in California and marketed throughout the United States, with the resultant injury and damage to the plaintiff, i.e., that Sunkist and Exchange Orange and the alleged co-conspirators combined and conspired to eliminate the competition of the plaintiff in the interstate market for canned citrus fruit juices and particularly [fol. 3981] single-strength Valencia orange juice in the year 1951, and performed certain acts pursuant to such combination and conspiracy which proximately caused damage to plaintiff.

"Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either TreeSweet, or Silzle, or ELP, and in 1951 did one or more of the specific acts charged—those are the six acts, one or more of the six acts—charged in the first cause of action, and that such act or acts had the purpose or necessary effect of damaging or eliminating the competition of plaintiffs in the interstate market for California canned citrus fruit juices or single-strength Valencia orange juice, your verdict must be for the defendants on the first cause of action.

* * * * *

"(b) Defendants' No. 17A

"The second cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators. Exchange Lemon, TreeSweet and Silzle combined and conspired together, and performed the same six acts alleged in the first cause of action, which

> are incorporated by reference into the second cause, in order to monopolize the production and interstate sale of California citrus fruit juices, especially single-strength Valencia orange juice, and that pursuant to such conspiracy they actually monopolized such production and interstate sale of California citrus fruit juices, and particularly single-strength Valencia orange juice, with resultant injury and damage to plaintiff. Unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange, or either of them, and one or more of the alleged co-conspirators, combined and conspired, and pursuant to such combination or conspiracy did one or more of the acts charged, and complained of, in order to acquire effective control of the interstate market for California citrus fruit juices, with the purpose or necessary effect of eliminating competition, including that of the plaintiff, from such market, your verdict must be for the defendants on the second cause of action."

[fol. 3982] Under that charge appellants urge the jury could have found that the conspiracy consisted of only Sunkist or EOP and ELP. Such a conspiracy, say appellants, involved only exempt cooperatives; that these instructions removed any exemption created by Capper-Volstead from the case entirely.

This error, say appellants, was compounded by the trial court in its attempt to clarify the charge after it had been given. In this regard the court said:

> "I also am told that I spoke about how the defendants had conspired on one occasion. The charge is not that the defendants conspired. The charge is that the defendants and co-conspirators conspired.
>
> "However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number less than the total conspired. It is your task to decide the facts."

Appellants' argument first presupposes that agricultural cooperatives can combine to fix prices or eliminate competitors with immunity, otherwise Capper-Volstead means nothing. With this position we do not agree.

First: We do not now understand (since the *Milk Producers* decision) that different agricultural cooperatives, combining together, are entitled to claim a total immunity for acts which they may lawfully do unilaterally, any more than individuals may claim for certain of their joint actions the same immunity under antitrust laws which would exist as to their several independent acts.

> "[A] group of farmers acting together *as a simple entity* in an association cannot be restrained 'from lawfully carrying out *the legitimate objects* thereof,' but the section [Section 6 of the Clayton Act] cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will." (Emphasis added.) *Milk Producers Assn.* v. *U.S., supra,* at 465-6.

> "The Capper-Volstead Act . . . extended § 6 of the Clayton Act exemption . . . [but] did not leave cooperatives free to engage in practices against other persons in [fol. 3983] order to monopolize trade, or restrain or suppress competition with the cooperative." *Id.* at 466-7.

Second: We point out that the error as allegedly compounded by the loose language ("You may find that nobody conspired, or . . . *that some number less than the total conspired."* (Emphasis added.)) was followed by a grudging approval of such instruction to the jury by both sides, just before the jury retired:

> "[The Court:] . . . Now, do you want to come back up again, or are you content? Is that satisfactory?
> "Mr. Fisher: I think we are content.
> "The Court: Satisfactory, Mr. Dixon?
> "Mr. Dixon: Satisfactory."

Third: We think there exists support in the law for such instructions. *United States* v. *Timken Roller Bearing Co.,* N.D. Ohio, 1949, 83 F.Supp.2d 84, *affirmed* 341 U.S. 593 (1951). "[C]ommon ownership and control does not liberate corporations from the impact of the antitrust laws." *Kiefer-Stewart Co.* v. *Seagram & Sons, supra* at 215. *But* *cf:* Report of the Attorney General's National Committee to Study the Antitrust Laws, pp. 30-36 (1955).

The entire instructions given cover fifty pages of the transcript. The first ten pages and the last five were "stock instructions," applicable in any private conspiracy antitrust case where plaintiffs seek damages. Ten pages of instructions cover the pleadings, the statutes involved, the appellants' denials and defenses, and an explanation of certain evidence received, to which no objection is made by appellants.

Appellants do however, in thirty-nine specifications object to almost every one of the remaining instructions, given at the request of appellees or on the court's own motion; and to four instructions which were requested by appellants but modified by the court. Additionally, twenty-seven instructions proposed by appellants and rejected by the court, are alleged as error. Thus, there are sixty-six alleged errors in the giving or refusing of instructions. We find it unnecessary to go into each instruction individually. Some are based on the theory of exemption which *Milk Producers* [fol. 3984] *Assn.* v. *U.S., supra,* laid at rest,[24] or the "public injury" concept, buried by *Klor's* v. *Broadway-Hale Stores, supra.*[25] Some have to do with definition of the relevant market hereinbefore discussed.[26] Some have to do with intra-corporate conspiracy.[27] Others were allegedly vague, ambiguous, or confusing,[28] or tended to "over-emphasize,"[29] or be unnecessary or needless repetition,[30] or were immaterial,[31] or focused attention unnecessarily.[32] All the foregoing objections not hereinafter touched upon we hold invalid, or of such slight consequence that they do not constitute substantial error, and are not prejudicial. Fed. R. Civ. P. 61.

---

[24] For example, alleged errors 2(a), 2(f), 2(g), 2(i), 2(k), 2(s), 2(z) and 2(dd).

[25] For example, alleged errors 2(z) (2d para); 3(a).

[26] For example, alleged errors 2(d) and 2(s).

[27] For example, alleged errors 2(b), 2(n) and 2(o).

[28] For example, alleged errors 2(d), 2(e), 2(h) and 2(i).

[29] For example, alleged errors 2(l), 2(m) and 2(u).

[30] For example, alleged errors 2(g) and 2(h).

[31] For example, alleged errors 2(k), 2(l), 2(m) and 2(p).

[32] For example, alleged errors 2(j).

Appellees, of course, urge that the instructions must be "viewed in their entirety, rather than in isolated segments"; that "even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a consideration of the entire charge," citing *Jesonis* v. *Oliver J. Olson and Co.*, 9 Cir. 1956, 238 F.2d 307, 309. We agree with that general principle, yet if a substantial and prejudicial error is made in the giving of but one instruction, the verdict cannot stand. We therefore consider in more detail certain other alleged errors which we feel merit discussion. We refer to the following:

(1) Was it error to instruct the jury as follows (alleged error 2(c)):

> "The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

The objection was because (a) it assumes monopoly power existed when its existence was a question of fact for the [fol. 3985] jury; (b) it is inapplicable to a conspiracy situation; (c) the only charge of misuse of monopoly power is by conspiracy; (d) it contains no reference to substantial restraint on interstate commerce; (e) it is silent on matter of intent.

This instruction is an exact quotation from *United States* v. *Griffith*, 1948, 334 U.S. 100, 107. It is difficult for this Court to see how a monopolist can make any business decision without its involving and using its monopoly power, nor how it can make any sale or purchase (for example) at an advantageous price, without gaining some competitive advantage. The statement is a broad one, but there were several other instructions given which modified and tempered its broadness, and which we must assume the jury understood and followed.

We find no merit to the objections urged, in view of the instructions taken as a whole and read together, as we are required to do on this appeal.

(2) Was it error to instruct the jury as follows (alleged error 2(r)):

> "Single strength orange juice . . . sold in interstate commerce may be the subject of restraint and monopoly under the Sherman Act."

The objection was because (a) this is a question of fact for the jury; (b) which was taken away from the jury.

The question of whether substantial interstate commerce exists is a question of fact for the jury. *Marks Food Corp.* v. *Barbara Ann Baking Co.,* No. 16095, decided December 28, 1959, as amended, 9 Cir., ... F.2d .... *Cf. Beacon Theatre* v. *Westover,* 1959, 359 U.S. 500. But such question as to whether single strength orange juice was or was not a subject of restraint or monopoly was not, in our opinion taken away from the jury when the instructions are again read as a whole. Even considered singly, the instruction stated the jury *might,* not that it *must,* find that single strength orange juice was the subject of restraint and monopoly in interstate commerce. We hold there was no prejudicial error in this instruction.

(3) Was it error for the court to comment to the jury on the legal effect of Exhibits 84-A (plaintiff's re-organiza- [fol. 3986] tion plan, alleged error 2(aa)) and particularly the last paragraph of said comment:

> "The loss of $169,000 or $170,000 resulting from the sale of the real estate and plant referred to in the evidence should not have been taken into account during Winckler & Smith's fiscal year ending January 31, 1950, and Mr. Lynch, the expert witness for the defendants, should not have so considered it, and the court was in error in permitting him to do so in his computations."

The objection was because (a) when the loss was to be taken was not a matter of law; (b) the comment discredited appellants' expert witness, Lynch.

In view of our position hereinafter taken as to damages, error or lack of it in this instruction is immaterial.

(4) Was it error to refuse appellants' six instructions, nine to fourteen, inclusive, instructing the jury the "six acts" complained of were not unlawful (alleged error 3(b))?[33]

---

[33] *"No. 9*

"You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Orange and Exchange Lemon whereby Exchange Lemon processed oranges into single strength orange juice for Exchange Orange at cost and without profit to Exchange Lemon. Unless you find, therefore, from the preponderance of the evidence, that such agreement or arrangement was part of the conspiracy charged in the first causes of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Orange and Exchange Lemon as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 10

"You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Lemon and Exchange Orange whereby Exchange Orange processed lemons for Exchange Lemon at cost and without profit to Exchange Orange. Unless you find, therefore, from the preponderanee of the evidence, that such agreement or arrangement was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Lemon and Exchange Orange as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 11

"You are instructed that there was nothing unlawful in Sunkist's setting its own price of by-product Valencia oranges available to independent processors at $40.00 per ton in 1951; and, unless you find, from the preponderance of the evidence, that the setting of such price was a part of the conspiracy charged in the first cause of action and was done for the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard Sunkist's setting of the $40.00 price as being [fol. 3987] Each of these instructions referred to one of the six acts as being "nothing unlawful." They then went on to say that unless the acts were "part of a conspiracy"

---

of no consequence in this case, so far as the first cause of action is concerned.

"*No. 12*

"You are instructed that there was nothing unlawful in the contract entered into between defendant Exchange Orange and alleged co-conspirator TreeSweet Products Company, effective as of July 23, 1951; and, unless you find, from the preponderance of the evidence, that such contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged co-conspirator TreeSweet Products Company, as being of no consequence in this case, so far as the first cause of action is concerned.

"*No. 13.*

"You are instructed that there was nothing unlawful in the contract between defendant Exchange Orange and alleged co-conspirator E. A. Silzle Corporation, effective June 26, 1951; and, unless you find, from the preponderance of the evidence, that this contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged co-conspirator E. A. Silzle Corporation, as being of no consequence in this case, so far as the first cause of action is concerned.

"*No. 14*

"You are instructed that there was nothing unlawful in the refusal of defendant Exchange Orange to enter into a processing agreement with plaintiff for processing Valencia oranges during the 1951 season comparable to the contracts entered into between defendant Exchange Orange and alleged co-conspirators TreeSweet Products Company and E. A. Silzle Corporation; and, unless you find, from the preponderance of the evidence, that such refusal was a part of the conspiracy charged in the first cause of action and was done with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard the refusal as being of no consequence in this case, so far as the first cause of action is concerned."

made with the purpose and effect "of eliminating competitors, you will disregard such agreement or arrangement as being of no consequence in the case." Thus, in effect, the act "X" was lawful, unless you find it was done in unlawful conspiracy. These instructions were confusing. In view of all instructions given, and the nature of the case, we cannot hold the failure to give them, just as requested by defendants and appellants, constituted prejudicial error.

[fol. 3988] (5) Was it error to give the court's own instruction E (alleged error 2(y))[34] because of the court's ruling excluding so-called "after-acquired" information with respect to appellees' alleged watering of juice?

This again can better be decided under a discussion of errors charged with respect to the introduction of evidence.

(6) Was it error to fail to instruct the jury as to necessity of "*specific intent*" to eliminate a competitor in the first cause of action, and to exclude appellee as a competitor in the second cause of action (alleged errors 3(m), 3(n))? Appellants rely on *United States* v. *Griffith*, *supra*, and *Times-Picayune* v. *United States*, 1953, 345 U.S. 594, in support of both of their proposed instructions (nos. 8, 18).

> "It is, however, not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. . . . Specific intent in the [fol. 3989] sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act. The classical statement is that of Mr. Justice Holmes speaking for the Court in *Swift & Co.* v. *United States*, 196 U.S. 375, 396:

---

[34] "The refusal of EOP, if such you find, to give a contract to plaintiff similar to the Silzle and TreeSweet Contracts must be judged on the basis of the evidence and instructions in this case and upon such knowledge and information as EOP and its officers, agents and employees had at the time of such refusal, if any, and not upon the basis of facts or information thereafter discovered or ascertained by EOP."

> 'Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee,* 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.'
>
> * * * * *
>
> "Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of [Sherman Act] § 2, provided it is coupled with the purpose or intent to exercise that power." *United States* v. *Griffith, supra* at 105-7.

Thus we find it not necessary to find a specific intent to restrain trade or eliminate a competitor or to create a monopoly. It is necessary to find that the restraint of trade or monopoly results as a consequence of the critical act, and that such act was done with the specific intent of accomplishing that act, when the actor acts from such a position that the natural result or necessary effect accomplishes the proscribed act. The actual result need not be the object of the specific intent.

We therefore rule that there was no error in refusing the appellants' proposed instructions 8 and 18 (alleged errors 3(m) and 3(n)). *Cf. Times-Picayune* v. *United States, supra* at 614, where the Court said:

> "The . . . contracts must be tested under the Sherman Act's general prohibition on unreasonable restraints of trade. For purposes of § 1 '[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to ac-[fol. 3990] complish a forbidden restraint, or because it falls within the class of restraints that are illegal

> *per se.*' *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 522 (1948).
>
> • • • • •
>
> "[I]t '[is] unreasonable *per se* to foreclose competitors from any substantial market.'" *Id.* at 608.

Mr. Justice Clarke in *Times-Picayune* then goes on:

> "Since the requisite intent is inferred whenever unlawful effects are found, *United States* v. *Griffith*, 334 U.S. 100, 105, 108 (1948); *United States* v. *Patten*, 226 U.S. 525, 543 (1913), and the [tying cases] rule of *International Salt* is out of the way, the contracts may yet be banned by § 1 if unreasonable restraint was either their object or effect." *Id.* at 614.

In conclusion, we find no reversible error in the instructions, other than error that need not be considered in view of our ruling as to damages, hereinafter to be discussed.

C. *Was there error in rulings on admission and rejection of evidence?*

1. *As to Liability*

Appellants urge that much evidence offered by them was wrongfully excluded by the trial court. They charge that this evidence went not only to the measure of damages, but to causation and liability. Motions for a directed verdict and for judgment *non obstante veredicto* were made, not only upon the grounds that plaintiffs had failed to prove (a) any conduct outside the agricultural cooperatives' exemptions; (b) any combination or conspiracy to restrain trade, or (c) any monopoly control or capacity or intent, but also upon the grounds (d) that plaintiffs had failed to prove injuries proximately resulting from any act of defendants, or (e) the amount of any damages claimed to have resulted to plaintiffs.

When Winckler asked in his second conversation with Finley for a contract similar to the TreeSweet and Silzle [fol. 3991] contracts, he was told he could not have the same type of contract. "I told him I . . . was having plenty of trouble . . . with those we did have contracts with wanting more fruit, rather than less fruit, so I just couldn't give him a contract and cut off our old customers."

Appellants sought to introduce evidence "heard from others in the industry" that Winckler & Smith's juice was regularly watered and adulterated, and was of poor and inferior quality, and that such facts were in defendants' corporate "mind" when it refused to deal with Winckler & Smith in 1951, and this excused its "refusal" to so deal. This, of course, was, if admissible, material not only on the issue of liability, but also on the nature and extent of damages that proximately resulted from any liability found.

The difficulty with appellants' position with respect to admissibility on the question of liability was that specific information as to such "watering" had not reached the appellants at the time of their "refusal" in 1951. They had suspected that such facts existed; there had been rumors thereof, but no substantiation amounting to proof. We take it if a person charged with making a decision (which may or may not be a violation of law, dependent upon the intent and purpose and effect which accompanies it) is willing to rest such decision on surmise, suspicion, conjecture, and intuition, he has that right, but so acts at his peril. He may be called upon to justify it. Subsequently discovered facts cannot be introduced to fortify the strength of the facts upon which such previous surmise, conjecture and suspicion was based, but subsequently discovered facts could be utilized as a defense to the amount of damages claimed to have proximately flowed as a result of defendants' actions, whether such facts were known or unknown at the time the decision was made.

Appellants offered to prove "a statement by a former sales manager of Winckler & Smith Company, who, when asked whether Winckler was watering his product, this fellow said, 'I don't know, because I was instructed never to go into the plant.'" If we assume that this alleged statement goes *beyond* the expressed lack of factual knowledge it discloses on its face, and if it does purport to express a fact, it was not offered to establish the truth of the facts it purportedly contained, but the condition or state of Finley's mind when he talked to Winckler.

[fol. 3992] Appellants' offer of proof went farther than to show a condition of mind. It was that Finley would testify that Charles Sisk, when asked if Winckler & Smith watered their products, said to Finley:

> "I couldn't prove it in court, but I am sure they do. Winckler, though, ordered me strictly never to go out in the plant, and I was never allowed in the plant while I was sales manager."

Again this expressed an unprovable opinion[35] in a third person that watering of the orange juice took place. But it was offered, not to prove watering, but that such a statement had been made to Finley—a statement that might affect his state of mind. In refusing the offer, the court ruled not that it was inadmissible to prove the state of mind, but was inadmissible as hearsay. The court stated:

> "Objection sustained as to conversation with Charles Sisk, the former sales manager. *If you want to bring Sisk in, we will cross that bridge at that time, as to what he can testify to.*" (Emphasis added.)

Part of the offer made was to show that at the price Winckler & Smith sold certain Arizona grapefruit juice, it could not make a profit. From this Finley concluded that water and sugar must have been added. As the trial court pointed out, another conclusion of equal validity would be that the sales were made by Winckler & Smith at a price which lost it money. Many factors, such as amount of stock on hand, finances of the company selling, or a dozen other factors might have brought about a sale at a losing price—and none of such reasons would be the basis for a conclusion that the juice was watered.

The trial judge concluded that the offer did "nothing but add and inject into the case other issues," and sustained

---

[35] Part of the offer of proof was not only that certain persons had the opinion the Winckler & Smith juice was watered, but that "there is no analytical method known by which it can be determined whether water, sugar, or acid have been added to natural juice in order to compare that with the finished product. It is only possible to determine whether adulterants of that sort have been used by comparing an analysis made before [adulteration] and an analysis made after." Appellees, apparently surprised at this offer of proof, did not dispute its accuracy, but its admissibility.

[fol. 3993] the objection. Additionally, the offer was refused because the same witness, Finley, had testified the reason for his refusal to sell to Winckler was that he was having trouble with his existing contracts, because of a shortage of fruit. Or, as the trial court stated it, "because of the capacity that was involved." Of course, if Finley had more than one reason for refusing to deal with Winckler, he had the right to detail it, or them, to the jury. That he rested on but one explanation under cross-examination by plaintiff-appellee is no reason he could not have enlarged his reasons on direct examination. This presents a serious question as to whether error was not committed by the trial court. However, the court gave a further reason why he would not admit such evidence. The court ruled as follows:

> "I have already sustained the objection to similar matters on the further ground it is an issue that was never called to the attention of the court, was not listed as an issue that you intended to produce at this trial, was raised for the first time during the trial, and my previous comments on objections will be incorporated here at this point."

An examination of the pre-trial proceedings contained in the transcript before us indicates the court's statement as to issues raised was correct. We are inclined to think the ruling made was within his general judicial discretion as to the method of trial of the case, at least on the issue of liability, particularly in view of what the court did permit counsel for appellants to introduce into evidence.

Counsel for appellants presented evidence mentioned in his offer of proof which had not been ruled out by the trial judge. Finley, to show his state of mind in 1951, testified (a) to his unsatisfactory experience with Winckler in 1947 (when Finley had helped Winckler with scarce cartons, only to have Winckler's promises unfulfilled, with a subsequent recovery to Sunkist of eleven cents on the dollar; (b) to his unsatisfactory experience with Winckler & Smith in 1947 on the purchase of hot concentrates—"high yeast and bacteria count—poor pasteurization"; (c) his dissatisfaction with the Citromats (orange squeezing machines) used by Winckler & Smith prior to 1951. The following question was then asked of Mr. Finley, still on direct examination, and he gave the following answer:

> [fol. 3994] "Q. Mr. Finley, at any time in 1951, assuming that you had had a surplus of fruit available for processing, would you have been willing to enter into any kind of a processing agreement with the Winckler-Smith Company?
>
> "A. I would never have entered into a processing agreement with the Winckler-Smith Company."

No additional offer of proof, nor any attempt to introduce evidence was made by appellants. We can find no ruling of the trial court on the issue of liability that constitutes error so prejudicial as to constitute reversible error.

2. *As to Damages*

This brings us to the matter of Exhibits I-1 to I-4, identified by witness Opal Smith (a laboratory technician employed by Winckler & Smith, as Opal Comstock, in 1949 until 1952, inclusive) as "Daily Laboratory Statistics" maintained by Winckler & Smith at their Anaheim plant, delivered to Mr. Winckler's desk.

As an example of her testimony, this witness testified that on one day the acid test in the raw juice was 1.54%; while in the canned product it was 1.27% acid. This change in acidity, said the witness, was accomplished by the addition of water.

Appellees took the position that the information disclosed by these records was not known to Sunkist when its Mr. Finley refused to contract with Winckler; that the fact of adulteration thus could not have entered into the refusal to contract, and was therefore immaterial. This position was taken by appellees, despite the testimony of the surmise or conjecture or conclusion of Sunkist's officer that the Winckler product was watered. If this evidence were offered solely for the purpose of explaining Sunkist's refusal, or adding a second reason for the refusal, it is conceivable that the records offered, at the then state of the record, would not be material, *i.e.*, were what counsel for appellees described as "after the fact evidence," a phrase adopted by the trial judge. For that reason, we are not prepared to rule that the exclusion was error, if the limited purpose of offering the evidence was to show Finley's state of mind.

But such evidence was offered additionally for two separate purposes—to impeach the plaintiff Winckler as to his [fol. 3995] knowledge as to whether or not his products were adulterated (as well as prove the fact of adulteration), and secondly, it was offered on the question of damages—to show the Winckler & Smith product was an inferior and not a "Grade A" product, as Winckler had testified.

And, of course, if admissible for any purpose, the documents should have been admitted, *Petroleum Carrier Corp. v. Snyder*, 5 Cir. 1947, 161 F.2d 323; *Estate of Clark*, 1949, 93 Cal.App.2d 110, 116, 208 P.2d 737, with necessary precautionary instructions requested and given to the jury.

The trial judge originally saw the admissibility of such evidence on the issue of damages. But he saw difficulties in any effort which defendants-appellants might make to show (a) complaints by dissatisfied users that the product was watered; (b) loss of sales due to adulteration.

Counsel for appellants stoutly maintained he could produce such testimony, and stated: "getting back to the causation question . . . whether his product was good or bad has a bearing on why he went out of business."

Counsel for appellants urged that in view of Mr. Winckler's previous testimony that "Fancy" and "Fancy California" were the equivalent of Department of Agriculture "Grade A Fancy," this evidence was admissible, for Mr. Winckler had testified that under the government definitions of orange juice, a citrus product that is sold as orange juice contains no ingredient other than the juice extracted from fresh fruit; and that sweetened orange juice contains no ingredient other than the juice with dry sugar added.

Counsel for appellants further offered to prove that Winckler & Smith added tap water to the juice, rather than "merely" condensate. Winckler had denied he had done this, and agreed that "introducing tap water" was not permissible.

Counsel for appellants further offered to prove that the records offered "were regularly shown to Mr. Winckler, they bear his initials showing he has seen them. By one witness I will show they discussed this practice of adding water to these products."

The trial judge then discussed the admissibility of these records at some length. He commented on the lack of ref- [fol. 3996] erence to the exhibits at the pre-trial; the "obvious purpose of this evidence is to bootleg into the record after-knowledge which the defendants did not have"; the possibility of using the records for impeachment, and if so, what his duty would be in that regard;[36] and further stated:

> "[T]his matter of taking an exhibit that might be admissible for one small purpose and tossing it in a case where it can have the effect of being used for a different purpose presents a problem. It presents a problem to the Court in its right to control the admissibility of evidence in a case.
>
> * * * * *
>
> "An offer that you made injects issues in this case where this case could go on forever."

The court then sustained the appellees' objections. On its admissibility on the question of damages, very little was said.[37]

We think the evidence was clearly admissible on the issue of damages, particularly in view of the specific terms of the offer with respect to causation, and specifically, dissatisfied users with resultant loss of sales. Such evidence was material, and we must assume the appellants were able to produce it, had they been allowed to do so. We find the exclusion of such evidence was error. While it remains a close question as to whether this error is not prejudicial to the issue of liability, we believe that its exclusion might come within the trial court's discretion as to the control of evidence as to collateral issues. We therefore do not hold it was prejudicial error on the issue of liability. On the other hand, we find it clearly was prejudicial on the issue of damages.

---

[36] "[B]ut if it does go into evidence as impeachment, the jury will certainly be told, and told in no uncertain terms what it will not be considered for, and when I get through telling them what it is not being considered for, I am afraid that the exhibit will not be as effective as the defendants think it might be."

[37] "As to the question of damages, that they would go to the question of damages, or causation, alleged inferior product, we are not trying a Food and Drug case.

"As far as we know, maybe people liked orange juice with water in it as well or better than orange juice without water in it assuming that you could prove that tap water was put in it."

[fol. 3997] The same conclusion applies to the proffer of proof by appellants of testimony by the witness William Rodgers, former plant superintendent of Winckler & Smith, that that witness had observed that single strength orange juice had been stretched by the addition of water and other additives to the extent of approximately twenty per cent—and that Mr. Winckler knew of this addition, and was satisfied to let it continue.

Appellants likewise claim error in restrictions placed upon them by the court's rulings preventing them from exploring Winckler & Smith's earlier business history—prior to 1951—or its alleged under-capitalization and inefficient operations; the court's position that losses reported for income tax purposes did not necessarily mean actual business losses; the court's refusal to admit Winckler's letters in 1951 explaining his inability to deliver juice due to other reasons, and the court's rulings respecting witness Hodge's mythical 12,000 tons theory of loss, and the appellants' attack thereon.

Appellants point out, as most important rulings against them, the following:

(1) Appellants sought to show that after the Chapter X reorganization, Mr. Winckler and other stockholders had withdrawn some $250,000 from the company in a two and one-half year period by way of salary, bonuses, debt forgiveness, and rentals. Appellees' objection was that this line of proof was "wholly irrelevant and immaterial . . . and not tending to prove or disprove any of the issues of this lawsuit." The objection was sustained, with the comment that appellants could prove the condition of the company in 1951. Later, the trial court relaxed this ruling somewhat to permit interrogation as to salary, allowances

and bonuses paid Mr. Winckler in 1949, 1950 and 1951, but not in other years; and he still excluded Exhibit BI which summarized the figures in the three years mentioned.

(2) While admitting evidence of the ultimate fact that Mr. Winckler had been forgiven a $38,000.00 indebtedness owing the corporation, the court excluded any breakdown of that figure. It was sought to show by this breakdown that substantial amounts of corporate funds were expended to enable Winckler to buy out one of the company's stockholders; and that the corporation, through its Chapter X [fol. 3998] receiver objected to the former's claim in this regard. The objection to this evidence was not clearly expressed, but seems to have been irrelevancy and "that the representation could not be supported by this witness [Mr. Lynch, appellants' accountant]." The objection, whatever it might have been, was sustained.

(3) Appellants were not permitted to show that in 1949 and 1950—the two years claimed by plaintiff to have been profitable ones—Winckler & Smith filed income tax returns showing a net loss, rather than a profit, in each of those years. The objection to this testimony stated no grounds —it was merely "I object to any inquiry along that line." That "objection" was sustained. Later appellees' counsel spoke of it being out of order, in the middle of the trial, to require plaintiff to produce further records, *i.e.*, the tax return for 1949; and the "objection" was again sustained on the ground the request came too late, and it would be going into extraneous issues. However, copies of state or federal returns for 1949, 1950 and 1951, with supporting schedules, had long since been identified by Mr. Winckler. And when those copies were offered in evidence they were excluded, the objection then being irrelevancy. Furthermore, when the court's attention was called to the fact that the 1949 return had been requested in appellants' pre-trial discovery long before the trial, he declined to change his ruling.

(4) It was appellants' theory that in calculating the loss or gain from the mythical 12,000 tons, as well as to arrive at the true cost of fruit under a TreeSweet type arrangement, it was necessary to take into consideration the re-

turns from oil and peel which, under such an arrangement, would have belonged to EOP. Accordingly, they prepared computations which took that factor into account and which showed that the cost of the fruit would be considerably more than Mr. Hodge's calculated figure and that the result, *vis-a-vis* processing of the 12,000 tons, would have been an additional loss. They also sought to have their accountant witness testify that this factor was omitted in Hodge's computations. The effort proved fruitless. The trial judge, largely on his own motion and for the reason that he thought appellants' theory to be illogical excluded the proffered evidence, both oral and documentary, on this subject. At first the trial judge indicated that he would [fol. 3999] exclude it only as direct rebuttal of or comparison with Plaintiffs' Exhibit 69-A in which the results of Hodge's theory were incorporated. Ultimately, however, he excluded the evidence entirely.

(5) A number of letters issued by Winckler & Smith were offered as containing statements, *i.e.*, admissions, showing that in 1951 its inability to furnish orange juice was due to the short California supply of fruit, heavy local bookings by Winckler & Smith, or excessive Florida inventory which had driven prices down. No objection was made as to foundation or authenticity; but it was objected that the person signing the letters had testified earlier. The objection was sustained.

Without going into precise details as to which portions of this evidence to which objections were sustained should have been admitted, we can say that we believe appellants were denied a fair opportunity to present their defense on the issue of damages to the jury. For example, income tax returns are frequently admissible, even though capable of being explained away, *Roche* v. *Commissioner*, 5 Cir. 1933, 63 F.2d 623; *United States* v. *Farrell*, D.Conn. 1929, 35 F.2d 38, and the business experience and operations and profits of previous years are not always, or necessarily, inadmissible.

The obligation is on a plaintiff in a Sherman Act case to prove damages recoverable in an action at law. *Locker* v. *American Tobacco Co.*, 2 Cir. 1914, 218 Fed. 447.

It cannot be said that the erroneous exclusion of evidence directly bearing on damages would not have affected the verdict. The error is therefore presumed to be prejudicial. "[A]n erroneous ruling which relates to the substantial rights of the party is ground for reversal unless it *affirmatively* appears from the whole record it was not prejudicial." *McCandless* v. *United States*, 1936, 298 U.S. 342, 347-8.

While a great deal of leeway is granted a jury in assessing damage once the fact of injury has been established, the damages alleged must be established as a direct and proximate result of defendant's violation of the Sherman Act with reasonable certainty. *Story Parchment Co.* v. *Patterson, etc. Paper Co.*, 1931, 282 U.S. 555, 562; *Flintkote Company* v. *Lysfjord*, 9 Cir. 1957, 246 F.2d 368; *Wolfe* v. *National Lead Co.*, 9 Cir. 1955, 225 F.2d 427, 431.

[fol. 4000] Plaintiffs-appellees introduced by means of the expert testimony of Mr. Hodge evidence of alleged loss of profits. This loss was based upon several presumptions:

First: That 12,000 tons of Valencia oranges were available to appellees;

Second: That the amount of juice taken therefrom would have produced a certain amount of canned juice, which would have been sold at a certain price, *i.e.*, the same price Sunkist charged TreeSweet *before* discount and allowances;

Third: That processing and other costs to Winckler in 1951 would be the same in 1951 as they were in 1949.

The evidence was that Winckler & Smith usually had received less for its orange juice than the price Sunkist usually received. There was evidence the equipment used by Winckler & Smith was not as efficient and modern as that of other canners. The demand for its juices was surely not as heavy as the demand for Sunkist brands or TreeSweet juice. The number of its single strength juice customers was known to have declined substantially in 1950 over 1949.

But beyond all the foregoing, if such difficulties as to proof of damages were overlooked, a further assumption would be required, that the lack of dealing by Sunkist with

Winckler & Smith was a proximate cause of the loss of Winckler & Smith's plant and business.

We need not go so far as to class this case with *Wolfe* v. *National Lead Co., supra,* where there was no proof of damage, and therefore dismiss the case. There this Court noted that the plaintiffs below

> "ask the court to disregard the apparent probative effect of their net profit figures [of their entire business] . . . and to consider only that portion of their business relating to titanium pigments, in this, they seek to have the court isolate the titanium pigment portion of their business and consider it separate and apart from their other operations. In this way, they attempt to establish the fact that they received a higher return on the titanium pigment . . . in 1949 than they were able to secure in 1947 and 1948." *Id.* at 430.

[fol. 4001] Here, if we substitute "Valencia oranges suitable for single strength juice" for "titanium pigments," the language is apt.

The record shows that in 1950, the year previous to the one here involved, the oranges sold to Winckler & Smith by Sunkist amounted to but 1.54% of the total used by Winckler & Smith. From 1948 on, Sunkist had never supplied more than 18%. The balance had been secured from other suppliers, principally Morgan Ward. In 1950, the number of oranges sold by Sunkist to Winckler & Smith was reduced to a mere trickle—1.54%. This was not claimed to be a proximate cause of the loss of the plant. Yet when Sunkist "refused" to sell 1.54% of the total to Winckler & Smith, and other producers refused to sell a larger percentage, appellees contend that *the sole* proximate cause of the damage suffered, including the loss of the plant, was the appellants' so-called "refusal."

At the time the plaintiffs below requested oranges from Sunkist the encumbrance on the Winckler & Smith property was in default. Thus the loss of the plant, on the evidence in the record before us, becomes collateral, remote and conjectural. *Savings Bk. of So. Cal.* v. *Asbury,* 1897, 117 Cal. 36, 48 Pac. 1081; *Hartman* v. *Rogers,* 1886, 69 Cal. 643, 11 Pac. 581; *De Liere v. Goldberg Bowen & Co.*, 1916, 30 Cal. App. 612, 159 Pac. 197. Whether it will remain so on a new trial of the issue of damages, we do not here pass upon.

Appellees' proof as to loss of the plant rested on the testimony of Robert Hodge. He just testified that from 1946 to 1949, the company apparently lost $224,000 plus. The net worth of the company was $30,000 on July 31, 1949. From February 1, 1949 to June 31, 1950, the company increased its net worth to $137,000. Operating from February 1, 1950 to January 31, 1951, there was an operating profit of $40,000. From February 1, 1951 to July 31, 1951, there was a loss of $152,000.

On April 16, 1951, the Winckler & Smith Company exercised its option to repurchase the plant which it had previously lost. The company issued 26,535 shares of its preferred stock, paid $17,325 in cash, assumed $50,499.04 on the mortgage, and listed its fixed assets at $721,000 plus, making a capital surplus of $343,000 plus. Exhibit 65 showed that for the year ending January 31, 1952, $156,000 [fol. 4002] in sales were from Florida processed products, and $528,735.91 from California operations, with a loss of $184,523.20 due to "less sales in 1952" and "continuing overhead."

Mr. Hodge, the expert witness, was a Certified Public Accountant. He was not familiar with the accounting of any juice processor other than Winckler & Smith. But he was allowed to testify that if 12,000 tons of fruit had been made available to Winckler & Smith by anyone on the same terms as was made available to TreeSweet, then *based on the 1949 and 1950 operations of Winckler & Smith*, it would have had a profit of $10,000 in the year ending January 31, 1952. This hypothetical question excluded any reference to conditions in the industry generally in any year, or even to operations of Winckler & Smith in 1951. In explaining his answer, the witness stated he *excluded* Winckler & Smith's processing costs for 1950, but used only 1949 costs. He used general administrative costs of 1949. He then deducted, not selling costs *per ton*, but "Winckler & Smith's actual selling cost *in the year 1952*, as shown in my report, of $87,652.40." (Emphasis added.)

Computed on the same basis, if 15,000 tons had been sold by Sunkist to Winckler & Smith, the profit would have increased from $10,231.45 to $54,026.45.

Without going into the credibility of such testimony, or the restrictions placed upon his cross-examination by the court's rulings on evidence, or any particular matters he testified to (as for example, the matter of deferred charges which though actually paid in one year were placed for bookkeeping reasons in another), we fail to find in the hypothetical statement of facts upon which the opinion of this expert was based that fair statement of all the facts in the case which is required as a basis of any hypothetical question. *Fort Worth & Denver Railway Company* v. *Janski,* 5 Cir. 1955, 223 F.2d 704; *Dairymen's Milk Co.* v. *McCormick Co.,* 3 Cir. 1940, 114 F.2d 736.

We are completely satisfied that the question of appellees' damages, as presented to the jury, rested upon surmise, conjecture, and guess work, and that the amount found as damages was not logically or legally inferrible from the facts in evidence before the jury. The expert opinion was a guess based on conditions contrary to fact. It was, in reply to the hypothetical question, too specula- [fol. 4003] tive to be admissible. *Baush Mach. Tool Co.* v. *Aluminum Co. of America,* 2 Cir. 1935, 79 F.2d 217, 227; *Carroll* v. *Magnolia Petroleum Company,* 5 Cir. 1955, 223 F.2d 657.

We are satisfied that the jury's determination of liability must be affirmed, and its determination of the amount of damages reversed.

D. *Was there error in affixing attorneys' fees of $195,000?*

While it is the duty of this Court "to protect against vicarious generosity in the matter of attorneys' fees" (*Twentieth Century-Fox F. Corp.* v. *Brookside Th. Corp.,* 8 Cir. 1952, 194 F.2d 846, 859), we cannot say as a matter of law that in a case like this, tried at great length below; argued twice on this appeal; and now to be reversed partially so that a new trial must be had below on the issue of damages, that before counsel for appellees obtain satisfaction of judgment for their client that $195,000 as attorneys' fees is too large a sum, or a figure that would shock the conscience. We do not know what amount will be recovered by appellees on a second partial trial below. When that is determined, finally, the sum heretofore awarded as attorneys' fees may be too large, or conceivably, too small. We cannot prognosticate, nor guess. We do not reach that issue. It can be raised below by either side, and if necessary, on subsequent appeal. We will not now disturb it, but assume that on remand the correct amount will be in issue below.

The judgment heretofore rendered on the jury's verdict is affirmed on the issue of liability, and reversed and remanded on the issue of the amount of damages.

(Endorsed) Opinion Filed Sept. 30, 1960. As amended by order of May 5, 1961.

Frank H. Schmid, Clerk.

[fol. 4004]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 15242

SUNKIST GROWERS, INC. A corporation, and THE EXCHANGE ORANGE PRODUCTS COMPANY, a corporation, Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO. a corporation, and RONALD WALKER, as trustee of WINCKLER & SMITH CITRUS PRODUCTS CO., Appellees.

JUDGMENT—Filed and entered September 30, 1960

Appeal from the United States District Court for the Southern District of California, Central Division

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause rendered on the jury's verdict be, and hereby is affirmed, on the issue of liability, and be, and hereby is reversed and remanded on the issue of the amount of damages, with each party to bear its own costs on appeal, except that the costs of the reporter's transcript and printing of the transcript of record on appeal are to be equally borne by the parties.

[fol. 4005] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,242

SUNKIST GROWERS, INC., a Corporation, and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation, Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation, and RONALD WALKER, Trustee, Appellees.

ORDER MODIFYING OPINION AND DENYING PETITIONS FOR REHEARING—May 5, 1961

Before: Stephens, Barnes and Merrill, Circuit Judges

Upon petitions for rehearing by both appellants and appellees, we modify the opinion heretofore filed as follows:

I. The balance of the first full sentence after the word "or", page 24, line 4,* of slip opinion, is stricken, and inserted in its place is the following:

---

* Now page 3975, line 7, first paragraph.

"... (2) the alleged illegal sole trader decision not to sell, made *when such refusal would, as a natural consequence,* illegally restrain trade or commerce, and implemented by other illegal means beyond the bare refusal, or (3) a similar unilateral decision not to sell, except at a fixed price, made from a monopoly position, *and resulting, as a natural consequence, in the elimination of a competitor.*"

II. On page 50, line 18* from top of slip opinion, the language "and a sale on account thereof already set." is deleted.

The petitions for rehearing are severally denied. The suggestion for a hearing en banc is rejected.

Albert Lee Stephens, Stanley N. Barnes, Charles M. Merrill, United States Circuit Judges.

[fol. 4006] Clerk's Certificate to foregoing transcript (omitted in printing).

---

* Now page 4002, 4th line from bottom of page.

[fol. 4007] [File endorsement omitted]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15242

Before: Stephens, Barnes and Merrill, Circuit Judges.

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation, Petitioners and respondents,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee, Respondents and petitioners.

MINUTE ENTRY OF ORDER ON PETITIONS FOR REHEARING—May 5, 1961

On consideration of the petitions, of (1) appellees, filed November 30, 1960, for a rehearing en banc, and of (2) appellants, filed December 1, 1960, for rehearing of above cause, filed within time allowed therefor by rule of court and valid extensions thereof, and pursuant to the order this day filed,

It Is Ordered that said petitions for rehearing be, and each of them hereby is denied; and the suggestion for a rehearing en banc is rejected.

Further Ordered that the opinion of this court heretofore rendered and filed on September 30, 1960 be amended pursuant to the order filed this date.

[fol 4008]

SUPREME COURT OF THE UNITED STATES

No. 241, October Term, 1961

SUNKIST GROWERS, INC., et al., Petitioners,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., et al.

ORDER ALLOWING CERTIORARI—October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to Question 1 presented by the petition which reads as follows:

"1. Where a group of citrus fruit growers form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act (7 U.S.C.A., sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act upon proof only that these growers, through the agency of these three cooperatives, agreed among only themselves with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?"

The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

EXHIBIT VOLUME

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Southern District of California, Central Division		
Plaintiffs' Exhibits:	A	
No. 1—1940 Exchange—District Exchange—Association Agreement (Form)	1	1
No. 2—Agreement between California Fruit Growers Exchange and The Exchange Orange Products Company and Exchange Lemon Products Company, dated April 6, 1949	18	28
No. 3A—Circular No. 3-51 to All Directors, et al., entitled, Plan for Pooling of By-Product and Juice Grade Oranges and Amendment to, dated January 5, 1951, effective beginning 1950-51 pools	20	31

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 12, 1962

Record from the United States District Court for the Southern District of California, Central Division—Continued

Plaintiffs' Exhibits—Continued

	Original	Print
No. 5—Valencia Price Schedule No. 1-51, effective April 9, 1951 and correction, dated April 12, 1951, To: All District Exchanges and Orange Associations Loose Fruit Salesmen	27	43
No. 6—E. A. Silzle Corporation, Anaheim, California—Delivery forms commencing June 27, 1951 and running through November 7, 1951, showing deliveries of fruit, Valencia orange products	29	45
No. 7—E. A. Silzle Corporation, Anaheim, California—Delivery forms commencing June 12, 1951 and running through June 15, 1951, showing deliveries of fruit, Valencia orange products	120	143
No. 8—TreeSweet Products—Delivery forms commencing July 30, 1951 and running through November 8, 1951, showing deliveries of fruit, Valencia orange products	123	149
No. 9—EOP Subpoena to produce documents No. 13788C, Par. No. 1—This exhibit contains the figures in cases and sizes of single-strength orange juice reported by Exchange Orange to the U.S. Department of Agriculture for the year commencing November 1, 1950 and ending October 31, 1951	208	282
No. 10—EOP Subpoena to produce documents No. 13788C, Par. No. 2—This exhibit shows the number of cases by cases and gallons of single-strength Valencia orange juice produced by TreeSweet, etc.	210	284
No. 11—EOP Subpoena to produce documents No. 13788C, Par. No. 6—This exhibit shows the total tons of Valencia oranges handled by TreeSweet & Silzle during the 1951 processing season, etc.	212	285

	Original	Print
Record from the United States District Court for the Southern District of California, Central Division—Continued		
Plaintiffs' Exhibits—Continued		
No. 12—EOP Subpoena to produce documents No. 13788C, Par. No. 7—This exhibit shows the total tonnage of Valencia oranges handled by Exchange Orange for Sunkist, etc.	217	292
No. 13—Paragraph 3—Exchange Lemon Products Company Subpoena—This exhibit sets forth the total tonnage of Valencia oranges, etc.	218	292
No. 14—Invoices dated November 30, 1951 submitted by Exchange Lemon to Exchange Orange, etc.	219	293
No. 15—Orange Concentrate Processing Contract—The Exchange Orange Products Company with Hyland-Stanford Company, dated June 19, 1951	223	297
No. 16—Fruit Purchasing Contract—The Exchange Orange Products Company with Hyland Stanford Corporation, dated June 29, 1951	229	303
No. 17—Orange Concentrate Processing Contract—Mission Dry Corporation with The Exchange Orange Products Company, dated August 9, 1951	233	308
No. 17A—Fruit Purchasing (Conditional Sales) Agreement—The Exchange Orange Products Company and Mission Dry Corporation, dated June 1, 1949	238	314
No. 18—Orange Products Processing Contract—The General Foods Corporation and The Exchange Orange Products Company, signed June 22, 1951 and July 2, 1951	243	319
No. 19—Frozen Orange Concentrate Processing Contract—Hart's Fruit Products Co. and The Exchange Orange Products Company, dated July 23, 1951	249	325

	Original	Print
Record from the United States District Court for the Southern District of California, Central Division—Continued		
Plaintiffs' Exhibits—Continued		
No. 20—The Exchange Orange Products Company transmittal letter to TreeSweet Products Company, dated September 11, 1951 with rewritten Fruit Processing Contract, effective July 23, 1951 and Schedules Nos. 1 & 2	257	332
No. 21—Correspondence between The Exchange Orange Products Company and TreeSweet Products Company, dated July 27, 1949, August 3, 1949 and August 16, 1949 (2) with schedule of Trucking Rates for Oranges and Lemons, effective July, 1949	265	342
No. 22—Fruit Processing Contract—The Exchange Orange Products Company and TreeSweet Products Company, effective July 20, 1950 with Schedule No. 1 and Supplement	271	349
No. 25—The Exchange Orange Products Company letter to E. A. Silzle Corporation dated August 1, 1951 with Purchasing Agreement, dated September 10, 1951, Supplement No. 1 and Amendment No. 1 to Supplement No. 1	276	356
No. 27—List of Sunkist price schedules on certain juice products (shelf products), January 1, 1949–February 1, 1952	286	369
No. 28—California Fruit Growers Exchange Bulletins—		
To our Brokers:		
No. 1—Sunkist California Valencia Orange Juice, dated August 3, 1951	359	443
No. 4—Withdrawal on Orange Juice, dated August 20, 1951	360	445
No. 5—Sunkist Unsweetened Valencia Orange Juice, dated September 4, 1951	361	446

Record from the United States District Court for the Southern District of California, Central Division—Continued

Plaintiffs' Exhibits—Continued

	Original	Print
No. 8—Withdrawal on exchange and private label orange juice, dated September 19, 1951	362	447
No. 12—Price Advance, Sunkist California Valencia Orange Juice, dated October 8, 1951	363	448
No. 13—Withdrawal on Sunkist Valencia Orange Juice, dated October 17, 1951	364	450
No. 15-A—New offering, Sunkist Valencia Orange Juice, dated November 30, 1951	365	451
No. 29—Excerpt re reference to the 1951 TreeSweet Agreement (Meeting, September 19, 1951)	366	452
No. 30—Articles of Incorporation and By-Laws of Exchange Lemon Products Company—Revised to comply with amendments to date, October 28, 1947 (excerpts)	367	453
No. 31—Letter from Exchange Lemon Products Company to TreeSweet Products Company, dated July 10, 1951	377	459
and Memorandum from D. F. McMillen to L. L. Hall, dated June 25, 1951	378	460
No. 36—TreeSweet Products Co. Bulletins—Opening Spot Prices, 1951 Pack, TreeSweet California Valencia Orange Juice, Unsweetened, August 3, 1951 (2)	379	461
August 20, 1951	381	463
September 4, 1951	382	464
October 8, 1951	383	465
No. 39—Prospectus—Winckler & Smith Citrus Products Co., Anaheim, California, dated May 1, 1951	384	467
No. 42—California Fruit Growers Exchange bulletin to "All District Exchanges and Orange Associations Loose Fruit Salesmen", subject, "Valencia Price Schedule No. 1-51, effective April 9, 1951," dated April 4, 1951	395	478

Record from the United States District Court for the Southern District of California, Central Division—Continued

Plaintiffs' Exhibits—Continued

	Original	Print
No. 46—Letter from Nicholas J. Winckler to Exchange Orange Products, dated July 16, 1951	396	479
No. 49—Check (copy) from Winckler & Smith Citrus Products Company to California Fruit Growers Exchange with attachments relative thereto	397	481
No. 50—Purchase Orders of TreeSweet Products Co., Nos. 6404, 6405 and 6406 to California Fruit Growers Exchange	406	491
No. 55 and Defendant's "Y"—Agreement between Independent Citrus Growers & Shippers Association and Winckler & Smith Citrus Products Company, Inc., dated August 6, 1951	409	497
Exhibit "A"—Frozen Concentrate Costs based on laboratory solids of 120 lbs.	415	502
No. 61-A and Defendant's "G"—Audited statement of Winckler & Smith Citrus Products Co. as of the close of business, January 31, 1950, with transmittal letter	418	504
No. 63-A—Financial Statement of Winckler & Smith Citrus Products Co., dated January 31, 1951, prepared by Hodge & Co., certified public accountant	424	510
No. 65—Winckler & Smith Citrus Products Co., year ended January 31, 1952—Income Account	430	517
Balance sheet	431	518
Liabilities	432	519
No. 66-A—Silzle "Purchasing Agreement"—Computations of Prices, Allowances and Costs under Silzle—Exchange Orange "Purchasing Agreement" "Date signed"—September 10, 1951	433	520

	Original	Print
Record from the United States District Court for the Southern District of California, Central Division—Continued		
Plaintiffs' Exhibits—Continued		
No. 67—TreeSweet Contract—Computations of Prices, Discount and Allowances under subd. 9 of TreeSweet—Exchange Orange "Processing Contract" "Effective date" (July 23, 1951)	436	525
No. 69-A—Hodge's Estimate of gain to Winckler & Smith from processing 12,000 tons of Valencia oranges on terms comparable to TreeSweet contract, in addition to its actual operations in 1951	439	529
No. 72—EOP Subpoena to produce documents No. 13788E, Par. No. 8—Excerpt from Minutes of the Regular Executive Committee Meeting of The Exchange Orange Products Company held in Los Angeles, California, January 2, 1951—Distribution of fruit—1950-51	440	531
No. 73—EOP Subpoena to produce documents No. 13788C, Par. No. 8—Excerpt from Minutes of the Regular Executive Committee Meeting of The Exchange Orange Products Company held in Los Angeles, California, May 1, 1951—General Foods Fruit and Processing Contracts	441	533
No. 74—EOP Subpoena to Produce Documents No. 13788C, Par. No. 8—Excerpt from Minutes of Special Executive Committee Meeting of The Exchange Orange Products Company held in Los Angeles, California, June 13, 1951—Cold Gold and Harts Processing Facilities	442	534
No. 75—EOP Subpoena to Produce Documents No. 13788C, Par. No. 3—Specific data reported in Table 23 of the 1955 Supplement on Statistical Information, etc.	443	535

Record from the United States District Court for the Southern District of California, Central Division—Continued

	Original	Print
Defendants' Exhibits:	444	536
No. AX—Letter from Winckler & Smith Citrus Products Company to Independent Citrus Growers & Shippers Association, dated August 17, 1951	444	536
No. BD—Winckler & Smith Citrus Products Co.—Comparative Statements of Income, years ended January 31, 1950, 1951 and 1952	446	539
No. BO—Winckler & Smith Citrus Products Company, Inc.—Sales of all products excluding Florida operations—Years ended 1/31/50, 1/31/51 and 1/31/52	447	540
No. BP—Winckler & Smith Citrus Products Company, Inc.—Purchases of Raw Fruit, tons, years ended January 31, 1950, January 31, 1951 and January 31, 1952	448	541
No. BQ—Winckler & Smith Citrus Products Company, Inc., Purchase of Raw Fruit according to source of supply, tons, year ended January 31, 1950	449	542
No. CF—Statement showing Sunkist percentage of total California-Arizona tonnage of Valencia Products oranges	450	543
No. CI—Statement showing Frozen concentrate orange juice production	451	544
No. FC—Statement showing Exchange Orange Products Company—Valencia Orange Utilization, 1951 (Weekly to nearest ton)	452	545
No. FD—Chart showing Exchange Orange Products Company, Weekly fruit receipts (Valencia oranges) 1947-1951	453	546
No. FE—Statements showing Exchange Orange Products Company, Valencia Orange Utilization (Weekly to nearest ton) 1951	454	547
1950	455	548
1949	456	549
1948	457	550
1947	458	551

	Original	Print
Record from the United States District Court for the Southern District of California, Central Division—Continued		
Defendants' Exhibits—Continued		
No. FJ—New code of By-laws of The Exchange Orange Products Company, adopted May 20, 1931, and incorporating all amendments through November 19, 1952	459	552
Assent of shareholders to adoption of new code of by-laws of The Exchange Orange Products Company	468	564
Summary of amendments to the by-laws	469	566
Excerpt from the minutes of a meeting of the Board of Directors of The Exchange Orange Products Company held November 27, 1935, Los Angeles, California	470	567

[fol. 1]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 1

Executed Copy for
Association

1940
EXCHANGE
DISTRICT EXCHANGE
ASSOCIATION
AGREEMENT

This copy executed by:

CALIFORNIA FRUIT GROWERS EXCHANGE

....
(District Exchange)

....
(Association)

Effective date: ...., 19........

[fol. 1A]

ATTACHMENT "A"

AMENDMENTS TO THE 1940 EXCHANGE-DISTRICT EXCHANGE-ASSOCIATION AGREEMENT

(Approved for District Exchange ratification
by Board resolution June 16, 1954)

For clarification, these amendments may be grouped into two general classifications:

Group A: Amendments made for technical or legal reasons.

Group B: Amendments which have the general purpose of strengthening the Agreement in regard to release of growers.

GROUP A

Throughout the entire agreement wherever “California Fruit Growers Exchange” appears the words “Sunkist” Growers, Inc.” will be substituted. Wherever “Exchange” appears the word “Sunkist” will be substituted.

Wherever “grower members” appears “growers” will be substituted. Wherever “grower member” appears “grower” will be substituted.

Section 4 shall be amended by the addition of the following paragraph:

> *“All parties to this agreement recognize that the strength of the organization and its effectiveness are largely dependent upon complete conformance to the provisions and principles of the contract by all parties. This is in effect a mutual agreement on the part of all to work for the common good of all.”*

Section 7, first paragraph, first sentence, shall be amended by the addition of the underlined words.

> “Each District Exchange and Association hereby designates Sunkist as its agent and agent of its growers in all matters concerning the marketing of fruit and products hereunder and in all matters deemed by Sunkist to be for the general good of the parties hereto.”

Section 24 shall be amended to read as follows:

> “Associations handling lemons agree to execute the Exchange Lemon Products Company Membership Contract.”

[fol. 1B]

ATTACHMENT “A”

GROUP B

Section 2, last paragraph, shall be amended by the addition of the underlined words:

> “ASSOCIATIONS are certain nonprofit cooperative associations, corporations, partnerships and individuals,

parties to this agreement, each of which is affiliated with one of the District Exchanges and through it with Sunkist, which harvest and/or receive and prepare for market their own fruit or the fruit of their growers and deliver the same for marketing under this agreement. They are herein collectively called "ASSOCIATIONS" and individually "ASSOCIATION."

Section 3 shall be amended by the addition of the following paragraphs:

"*CONTROL OF FRUIT. Fruit shall be deemed to be under the control of an Association when covered by an agreement or harvested for and/or received by the Association.*"

"*GROWER is an individual, a partnership, a corporation, or any other entity whose fruit is handled as provided in the paragraph defining control of fruit.*"

Section 23, first paragraph, shall be amended to read as follows:

"Each Association agrees that it will at all times maintain in force appropriate agreements between itself and its growers which will provide for the delivery to Association of all of the fruit covered by such agreements. Each Association agrees to furnish, *upon request,* to Sunkist and/or to District Exchange a list of *growers then affiliated with said Association and a copy of its agreement with growers.*"

Section 23, second paragraph, shall be amended to read as follows:

"Each Association agrees not to release any of its growers from such grower agreement (except upon termination of the same by giving of appropriate notice of termination under the terms of said agreement during the regular withdrawal period) without giving to Sunkist and to the District Exchange with which such Association is affiliated ten days' notice of such proposed release. *At any time within the varietal season that such releases individually or collectively shall total more than five (5) percent of the volume of the Association by variety, any further releases must be approved by the District Exchange with which said Association is affiliated."*

Section 26 shall be amended to increase the amount recoverable for liquidated damages resulting from violation of this agreement from twenty-five cents (25¢) per box to fifty cents (50¢) per box.

Section 29, subsection C, shall be amended by the addition of the following paragraph:

> *"In the event termination is judged to be to the best interests of the other District Exchanges and/or Associations, Sunkist may at any time by a two-thirds (⅔) vote of the entire board of directors terminate this agreement by giving written notice of such termination. Such termination shall be effective immediately."*

6-23-54

[fol. 2]

TABLE OF CONTENTS

Sections of Agreement — Side Folios

1 Short Title 3
2 Description of Parties 3
3 Definitions of Terms 4
4 Purpose of Agreement 4
5 Effective Date and Term of Agreement 4
6 Agreement to Market Fruit 4
7 Exchange as Agent 4
8 Power Conferred on Exchange by Legislative Acts 5
9 Reserved Rights 5
10 Rights Conferred on Exchange 5
11 Charges and Expenses 5
12 Losses 6
13 Customers' Claims 6
14 Pooling of Fruit 6
15 Routing of Shipments and Determining Transportation Facility 7
16 Pooling of Transportation Expenses 7
17 Methods of Marketing 8
18 Establishment and Use of Grades 8
19 Establishment and Use of Trade-marks, etc. 8
20 Contact with Buyers 8
21 Warranty 8
22 Indemnity 8
23 Agreements of Associations with Growers 9
24 Exchange Lemon Products Company 9
25 Direct Marketing by Associations 9
26 Remedies 9
27 Board of Representatives 10
28 Amendment of Agreement 12
29 Termination of Agreement 12
30 Execution of Agreement 14
Signatures of Parties and Dates of Signing 15
Resolutions Authorizing Parties to Execute Agreement 17

[fol. 3]

1940
EXCHANGE-DISTRICT EXCHANGE-ASSOCIATION AGREEMENT

This Agreement, made on the date subscribed hereto, between California Fruit Growers Exchange, a California nonprofit cooperative marketing association (herein called "Exchange"), certain nonprofit cooperative marketing associations affiliated with Exchange which execute this agreement (herein collectively called "District Exchanges" and individually called "District Exchange"), and certain nonprofit cooperative associations and others affiliated with Exchange through District Exchanges which execute this agreement (herein collectively called "Associations" and individually called "Association"),

Witnesseth:

Whereas, it has been deemed desirable by the parties hereto to cooperate in the matter of developing the citrus industry and marketing its fruit and products and to associate themselves together for any and all of the purposes permitted by law for nonprofit cooperative marketing associations;

Therefore, in consideration of the foregoing and of the mutual covenants and agreements herein contained, and for other valuable consideration,

The Parties Hereto Agree As Follows:

1. Short Title

This agreement may be referred to as "1940 Exchange-District Exchange-Association Agreement".

2. Description of Parties

California Fruit Growers Exchange is a nonprofit cooperative marketing association organized and existing under the laws of the State of California. It is herein called "Exchange".

District Exchanges are nonprofit cooperative marketing associations, parties to this agreement, marketing the fruit of their affiliated associations through the facilities provided by Exchange. They are herein collectively called "District Exchanges" and individually "District Exchange".

Associations are certain nonprofit cooperative associations, corporations, partnerships and individuals, parties to this agreement, each of which is affiliated with one of the District Exchanges and through it with Exchange, which receive and prepare for market their own fruit or the fruit of their grower members and deliver the same for marketing under this agreement. They are herein collectively called "Associations" and individually "Association".

[fol. 4]

3. Definitions of Terms

As used in this agreement the following terms have the following meanings:

Fruit means the citrus fruit of every size, grade and quality, including culls, under the control of the parties to this agreement.

Box means an amount of the particular fruit involved which is contained in the standard packed box in common use as determined from time to time by the board of directors of Exchange.

To Market or Marketing means sale or shipment for purposes of sale as fresh fruit, utilization for products, or other disposition.

4. Purpose of Agreement

This agreement is entered into for the purpose of carrying out the aims and purposes of Associations and their members and of District Exchanges in connection with the marketing of their fruit, and to continue the cooperative marketing system generally referred to as California Fruit

Growers Exchange. To effect said purposes, the parties hereto desire to maintain instrumentalities to act for said parties in maintaining, extending and making more efficient the marketing of said fruit.

5. Effective Date and Term of Agreement

This agreement shall become effective on September 1, 1940 as to all parties executing the same on or before said date, and shall be effective as to other parties when executed by them as hereinafter provided. It shall continue in effect until terminated as hereinafter provided, but in no event for a longer period of time than is now or may hereafter be permitted by law.

6. Agreement to Market Fruit

Each Association agrees to market hereunder all of the citrus fruit subject to its control through the District Exchange with which it is affiliated.

Each District Exchange agrees to market hereunder through Exchange all of the citrus fruit subject to its control.

Exchange agrees to market all of said fruit.

7. Exchange as Agent

Each District Exchange and Association hereby designates Exchange as its agent in all matters concerning the marketing of fruit and products hereunder and in all matters deemed by Exchange to be for the general good of the parties hereto. Subject to the terms and conditions of this agreement, full power and authority is hereby conferred upon Exchange as such agent to conduct said activities in such manner as it in its sole discretion determines is for the best interests collectively of the District Exchanges and Associations, parties hereto.

District Exchanges and Associations authorize Exchange to carry on said activities through such officers, agents and employees and such departments or other facilities as the board of directors of Exchange may from time to time determine.

[fol. 5]

8. Power Conferred on Exchange by Legislative Acts

District Exchanges and Associations agree that Exchange shall have and in its discretion may exercise on an equitable basis on behalf of District Exchanges and Associations any and all powers relating to the marketing of fruit hereunder that Exchange, District Exchanges and Associations are or may be hereafter authorized by legislative act or by order or regulations based thereon to exercise. Any Association or District Exchange may as to it at any time and from time to time (by resolution of its board of directors, if a corporation) terminate the authority conferred upon Exchange by this section or again give such authority to Exchange. Exchange shall be notified immediately in writing of any such termination of said authority, and unless so notified Exchange may exercise any of the powers referred to in this section.

9. Reserved Rights

Each Association reserves to itself the right to determine to what markets it shall ship, where its fruit shall be sold, and, except at auction points, the price it is willing to receive.

Each Association hereby delegates said reserved right to the District Exchange with which it is affiliated; provided, however, that any Association may at any time and from time to time (by resolution of its board of directors, if a corporation) terminate such delegation and itself exercise said reserved right for such period of time as to it may seem proper, or redelegate said reserved right to such District Exchange.

10. Rights Conferred on Exchange

In order properly to supply the market, District Exchanges and Associations authorize Exchange by a majority vote of its board of directors to determine the maximum amount of fruit to be marketed currently and to allocate the opportunity to ship equitably among Associations; provided, however, that said majority includes directors representing eighty-five percent (85%) by volume of shipments as determined by the board of directors of the species or variety under consideration. Said parties agree not to exceed said allocation.

11. Charges and Expenses

(a) Of Exchange

Amendment to Section 11(a) of 1940 Exchange-District Exchange-Association Agreement approved by the Board of Directors of California Fruit Growers Exchange, ratified in writing by more than two-thirds (⅔) in number of district exchanges and declared effective as of May 4, 1949:

> All charges and expenses of Exchange, including deductions for such reasonable reserves as may from time to time be prescribed by the board of directors of Exchange and including a subscription to "The California Citrograph," shall be met by assessments upon District Exchanges and upon any Association which may be marketing directly through Exchange pursuant to this agreement.

All charges and expenses of Exchange, including deductions for such reasonable reserves as may from time to time be prescribed by the board of directors of Exchange, shall be met by assessments upon District Exchanges and upon any Association which may be marketing directly through Exchange pursuant to this agreement. The method, amount, manner and time of assessment shall be fixed and determined from time to time by the board of directors of Exchange.

Each District Exchange agrees to pay to Exchange when due the amount of any assessments hereunder and authorizes Exchange to deduct from the proceeds of sale of fruit [fol. 8] marketed for it hereunder the amount of any such assessment and any other amounts due Exchange from District Exchange or from any Association affiliated with it.

(b) Of District Exchanges

All charges and expenses of District Exchanges, including Exchange assessments and deductions for such reasonable reserves as may from time to time be prescribed by their respective boards of directors, shall be met by assessments upon Associations. The method, amount, manner and time of assessment shall be fixed and determined from time to time by the board of directors of each District Exchange.

Each Association agrees to pay to the District Exchange with which it is affiliated when due the amount of any assessments hereunder and authorizes Exchange or District Exchange to deduct from the proceeds of sale of fruit marketed hereunder the amount of any such assessment and any other amounts due District Exchange or Exchange from Association.

12. Losses

The only losses in connection with the sale of fruit or otherwise under this agreement for which Exchange shall be responsible to District Exchanges or Associations are losses arising from the financial failure or default of purchasers after having positively accepted the fruit, which default is not due to complaint of the buyer concerning the quality, condition or grade of the fruit. Such losses shall be paid by assessments upon fruit marketed through Exchange in the method, amount and manner determined by the board of directors of Exchange.

13. Customers' Claims

In case of any controversies with customers wherein in the judgment of the board of directors of Exchange the collective interest of Exchange shippers is involved, the judgment of said board of directors as to settlement of such dispute shall be final and binding upon the Association which furnished the fruit.

14. Pooling of Fruit

(a) Pooling in General

Pools may be established by the board of directors of Exchange for the handling, marketing or disposal of any one or more species or varieties of fruit, or fruit produced in or destined for any particular geographical section, or fruit conforming or not conforming to specified standards of quality and/or size. Except in the case of those types of pools mentioned in subsection (b) hereof, the inclusion of fruit in such pools shall not be mandatory, but each Association shall have the right to determine whether it shall participate in such pools.

The conditions of eligibility of fruit for such pools, the methods of operating the same and all rules and regulations in connection with such pools shall be prescribed by the board of directors of Exchange.

In the event such pool or pools shall thus be established, the rights reserved elsewhere in this agreement to Asso- [fol. 7] ciations to determine to what markets they shall ship, where their fruit shall be sold and, except at auction points, the price they are willing to receive shall be exercised solely by Exchange as to all fruit included in said pool or pools.

(b) Pooling of Fruit Intended for Export or for Use Other Than as Fresh Fruit

---

Amendment to Section 14(b) of 1940 Exchange-District Exchange-Association Agreement ratified in writing by more than two-thirds (⅔) in number of district exchanges and declared effective by the Board of Directors of California Fruit Growers Exchange as of May 21, 1941:

> Pools may be established as hereinafter provided for the handling, marketing or disposal of fruit intended for export or for Government use or for use other than as fresh fruit.

Pools may be established as hereinafter provided for the handling, marketing or disposal of fruit intended for export or for use other than as fresh fruit.

A pool established under this subsection (b) may include all fruit falling within one of these classifications or may be limited to such fruit produced in or destined for any particular geographical section. A pool under this subsection (b) must be established by a majority vote of the board of directors of Exchange; provided, however, that said majority includes directors representing seventy-five percent (75%) by volume of shipments as determined by the board of directors of the species or variety or varieties in the district under consideration.

The conditions of eligibility of fruit for such pools, the methods of operating the same and all rules and regulations in connection with such pools shall be prescribed by the board of directors of Exchange.

Notwithstanding any other provision of this agreement, the inclusion of fruit in such pool or pools when thus established shall be mandatory and the rights reserved elsewhere in this agreement to Associations to determine to what markets they shall ship, where their fruit shall be sold and, except at auction points, the price they are willing to receive shall be exercised solely by Exchange as to all fruit included in said pool or pools.

15. Routing of Shipments and Determining Transportation Facility

Exchange shall have authority to specify the route of all shipments of fruit. Any Association may at any time and from time to time (by resolution of its board of directors, if a corporation) terminate such authority as to it or again give Exchange such authority. Exchange shall be notified immediately in writing through the District Exchange with which such Association is affiliated of any such termination of such authority, and unless so notified Exchange may exercise the same.

Exchange shall have authority by the vote of three-fourths (¾) of the entire number of its board of directors to determine the transportation facility—whether by rail, by water or otherwise.

16. Pooling of Transportation Expenses

Transportation costs, including but not restricted to costs of refrigeration and other protective services, incurred in connection with the movement of fruit destined for points outside the state of origin and of fruit intended for use other than as fresh fruit destined for points either within or without the state of origin, may in the manner and to the extent determined by a three-fourths (¾) vote of the [fol. 8] entire number of the board of directors of Exchange be pooled equitably in relation to the different types of refrigeration and other protective services and paid by charges or assessments levied and apportioned as the board of directors of Exchange may determine.

17. Methods of Marketing

All fruit must be marketed through the facilities provided by Exchange. The board of directors of Exchange shall determine the methods of marketing to be adopted in any or all markets and the types of containers and method of packaging to be used.

18. Establishment and Use of Grades

Exchange shall have authority to establish grades for fruit and products, and to establish and from time to time change rules and regulations pertaining thereto, and to prescribe the standards of quality of fruit and products to be marketed under such grades, and to permit Associations to market their fruit under such grades upon compliance with such prescribed standards and with all rules and regulations established by Exchange pursuant hereto.

19. Establishment and Use of Trade-marks, etc.

Exchange shall have authority to acquire, own and use one or more trade-marks, trade names, brands, patents and copyrights and to prescribe all rules and regulations in connection with the use thereof, which may be changed from time to time in the sole discretion of Exchange.

20. Contact with Buyers

District Exchanges and Associations shall not solicit business from the trade or employ any solicitor or agents, or correspond or communicate with any buyer for the purpose of promoting the sale of their fruit. District Exchanges and Associations further agree that all prices, quotations and allowances shall be issued and distributed solely by Exchange. Copies of correspondence with district managers in the markets by any District Exchange must be sent to Exchange; and by any Association, to Exchange and to the District Exchange with which it is affiliated.

21. Warranty

Each Association warrants to the District Exchange with which it is affiliated and each District Exchange and Association warrants to Exchange that it has the right to receive, pack and deliver for marketing and to market through Exchange all of the fruit which it may deliver under this agreement. Each of said parties further warrants that said fruit and the disposition thereof shall comply with all state and federal statutes and regulations applicable thereto.

22. Indemnity

District Exchange and Association severally agree to indemnify and save harmless Exchange against all loss, [fol. 9] damage, injury, liability, cost and/or expense of whatsoever nature suffered or to be suffered by Exchange by reason of any claim or claims asserted or made to or against Exchange or any of its agents, customers, vendees or anyone to whom any such fruit or product is delivered, or by whom the same is handled, and/or by reason of Exchange's agreement to defend or its defense of any action at law or any suit in equity brought or to be brought against Exchange, or any customer or vendee of Exchange, or anyone to whom any such fruit or product is delivered, or by whom the same is handled, specifically including but not restricted to any and all claims asserted by anyone by reason of District Exchange's or Association's having made use of any patented device or machinery or process in infringement of letters patent, or having produced any patented product or products whatsoever in infringement of letters patent, or having used in connection with such fruit or products any label, trade-mark or copyright in infringement of the rights of others, or constituting unfair competition or growing out of or connected with the receipt, distribution or marketing of such fruit or products by Exchange.

23. Agreements of Associations With Growers

Each Association agrees that it will at all times maintain in force appropriate agreements between itself and its grower members which will provide for the delivery to Association of all of the fruit covered by such agreements. Each Association agrees to furnish from time to time to Exchange and to the District Exchange with which it is affiliated a list of its grower members.

Each Association agrees not to release any of its grower members from such grower agreement (except upon termination of the same by giving of appropriate notice of termination under the terms of said agreement during the regular withdrawal period) without giving to Exchange and to the District Exchange with which such Association is affiliated ten days' notice of such proposed release.

24. Exchange Lemon Products Company

Associations handling lemons agree to execute the Exchange Lemon Products Company "Agreement Subscribing for Stock and Creating 'Exchange By-Products Company Revolving Fund' ", and amendments thereto.

25. Direct Marketing by Associations

Where District Exchange affiliation is not available or is impracticable, and when deemed necessary by the board of directors of Exchange in its sole discretion, Associations may market directly through Exchange on such terms and conditions as said board of directors shall prescribe.

26. Remedies

Each District Exchange and Association understands and agrees that the execution of this agreement by it and like agreements by other District Exchanges and Associations [fol. 10] creates for all and makes available to all the cooperative marketing system generally known as California Fruit Growers Exchange; that the operation of said cooperative marketing system and the equitable distribution among all District Exchanges and Associations of its benefits and its burdens require the strict performance by each District Exchange and Association of this agreement; that by reason of the foregoing and of the preparation made by all parts of said cooperative marketing system to receive, handle and market fruit hereunder, and for other reasons, it is and would be impracticable or extremely difficult to fix the actual damage to Exchange if the District Exchanges or Associations or any one of them should fail to deliver all of said fruit in accordance with the terms of this agreement.

In view of the foregoing, each District Exchange agrees to pay to Exchange as liquidated damages for all fruit withheld, delivered, sold, consigned, marketed or otherwise disposed of by or for such District Exchange other than in accordance with the terms hereof, and each Association agrees to pay to Exchange as liquidated damages for all fruit withheld, delivered, sold, consigned, marketed or otherwise disposed of by or for such Association other than in accordance with the terms hereof, the sum of twenty-five cents (25¢) per box. In the event of any such violation of this agreement, Exchange shall be entitled to recover liquidated damages from either District Exchange or Association but not from both as to the same transaction.

All of the parties hereto agree that the successful operation of this agreement requires that each District Exchange and Association observe and conform to all of the provisions hereof. Each of the parties hereto agrees that in the event of a breach or threatened breach by it of any of the provisions hereof regarding delivery of fruit each of the other parties hereto shall be entitled to an injunction to prevent breach or further breach hereof and to a decree of specific performance hereof.

If Exchange brings and successfully maintains any action whatever by reason of a breach or threatened breach hereof or otherwise against a District Exchange or Association, said District Exchange or Association agrees to pay to Exchange all costs of court, premiums for bonds, expenses and fees arising out of or caused by the litigation and reasonable attorneys' fees expended or incurred by Exchange in such proceedings. All such costs and expenses shall be included in any judgment obtained in any such action.

Exchange is hereby authorized to exercise all of the remedies or any of them particularly provided for or to be provided for by the Agricultural Code or the Civil Code of California as well as any other remedies now or hereafter permitted by law, and said remedies shall be deemed cumulative and not exclusive.

27. Board of Representatives

(a) Powers, Membership and Organization

To aid in carrying out the provisions of this agreement, a board of representatives is hereby created which, when its authority is invoked as herein provided, shall have su- [fol. 11] pervision over all matters pertaining to the carrying out of the provisions of this agreement as advisory to the board of directors of Exchange; provided, however, that its authority shall not be construed to extend to the determination of the maximum amount of fruit to be marketed currently or the allocation of the opportunity to ship under Section 10 hereof, or to the establishment or operation of pools under Section 14 hereof, or to any other matters in this agreement which are subject to approval by volume or percentage of fruit handled.

Said board of representatives shall consist of one representative of each District Exchange, such representative to hold office at the pleasure of such appointing District Exchange. Each District Exchange shall appoint one representative on said board of representatives and shall certify such appointment in writing to Exchange, and such appointment shall take effect when so certified; provided, the organization and powers of said board shall not be affected by the failure of any District Exchange to make or certify its appointment of a representative.

Said board shall have a chairman and a secretary. The president of Exchange shall be ex officio chairman of said board, but in case of his absence or failure for any reason to perform his duties as such chairman the board shall elect a chairman for the time being. The board shall elect its own secretary who shall keep a record of its proceedings.

(b) Meetings

A meeting of said board of representatives shall be held upon request by two or more members of the board of directors of Exchange. Such request may be oral if made at any meeting of the board of directors but must be in writing and delivered to the then acting secretary of Exchange if made at any other time. Upon such request, said secretary shall immediately call said meeting and give notice thereof as hereinafter provided within twenty-four (24) hours after the receipt of said request. Said meeting shall be held not less than seven (7) nor more than fourteen (14) days from the date of the request for said meeting. All meetings of said board of representatives shall be held at the principal office of Exchange. Written notice of the time and place of holding said meetings shall be given by depositing in the United States mail, postage fully prepaid, a registered letter containing a copy of such notice addressed to each member of the board of representatives in care of the District Exchange by which he was appointed.

Any action of the board of representatives which shall have the effect of modifying or rescinding action theretofore taken by the board of directors of Exchange must be taken at a meeting of said board of representatives which was called within ten (10) days after such action of the board of directors. All acts done or performed pursuant to action of the board of directors of Exchange taken prior to the request for said meeting of the board of representatives shall be valid.

(c) Voting

At all meetings of the board of representatives voting shall be upon a volume basis; that is, each representative shall be entitled to one vote for each box of fruit marketed [fol. 12] in accordance with this agreement by the District Exchange which he represents during the preceding fiscal year of Exchange. Votes representing a majority of the total amount of fruit marketed during the preceding fiscal year of Exchange by all District Exchanges shall be necessary for any action by said board of representatives.

(d) Effect of Action

When said board of representatives has taken action upon any matter pertaining to the carrying out of any provision of this agreement, the secretary of the board of representatives shall forward a copy of the resolution embodying such action to the board of directors of Exchange, certified to by him; whereupon the board of directors of Exchange shall take notice of such action as instructions from said board of representatives and shall act accordingly, subject to the provisions of the second paragraph of subsection (b) of this Section 27.

28. Amendment of Agreement

Except as hereinafter provided, any provision of this agreement may be amended upon resolution of a majority of the entire board of directors of Exchange ratified in writing by two-thirds (⅔) in number of the District Exchanges then parties hereto. Without the affirmative vote of a majority of the entire board of directors of Exchange ratified in writing by ninety percent (90%) in number of the District Exchanges and by ninety percent (90%) in number of the Associations then parties hereto, no amendment shall be made of Section 9 hereof entitled "Reserved Rights", or of subsection (a) entitled "Pooling in General" of Section 14 hereof entitled "Pooling of Fruit", or of Section 27 hereof entitled "Board of Representatives", or of this Section 28 entitled "Amendment of Agreement". No amendment shall be made of any portion of this agreement which shall operate to deprive any party hereto of the right of annual withdrawal herefrom.

Any amendment made pursuant to this section shall become effective upon the delivery to Exchange of such written ratification by the requisite number of District Exchanges and Associations, unless a subsequent effective date shall have been fixed by the board of directors in proposing the amendment.

All of the parties hereto shall be bound by any amendment so made whether or not they ratified the same.

29. Termination of Agreement

(a) By Association

Any Association may terminate this agreement as to it on the 31st day of October of any year by giving notice of such termination to the District Exchange with which it is affiliated and to Exchange, at the time and in the manner provided in subsections (d) and (e) hereof.

(b) By District Exchange

(1) With Association

Any District Exchange may terminate this agreement as between it and any Association on the 31st day of October [fol. 13] of any year by giving written notice of such termination to such Association at the time and in the manner provided in subsections (d) and (e) hereof. District Exchange shall within two days after the giving of any such notice of termination to an Association notify Exchange by registered mail of the giving of such notice.

In the event of such termination by a District Exchange as to any Association, this agreement shall remain in full force and effect as between such Association and Exchange. However, either of said remaining parties may terminate this agreement by giving notice of termination in the manner provided in subsection (e) hereof within ten (10) days after receipt by Association of notice of termination by District Exchange or receipt by Exchange of notification from District Exchange, whichever shall be later. In the event the agreement thus remains in effect between an Association and Exchange, such Association shall be affiliated with and market its fruit through another District Exchange or in the sole discretion of Exchange may market its fruit directly through Exchange as elsewhere in this agreement provided.

(2) With Exchange

Any District Exchange may terminate this agreement as between it and Exchange on the 31st day of October of any year by giving notice of such termination to Exchange at the time and in the manner provided in subsections (d) and (e) hereof.

If a District Exchange shall give notice of termination to Exchange as herein provided, such notice of termination shall not be deemed to constitute notice of termination by the Associations affiliated with such District Exchange, and unless such Associations shall give notice as provided in subsection (a) hereof this agreement shall remain in full force and effect as to them, and such Associations shall be affiliated with and market their fruit through another District Exchange or in the sole discretion of Exchange may market their fruit directly through Exchange as elsewhere in this agreement provided.

(c) By Exchange

Exchange may terminate this agreement on the 31st day of October of any year as to any one or more District Exchanges or Associations by giving written notice of such termination to such District Exchange or Association at the time and in the manner provided in subsections (d) and (e) hereof.

In the event of the breach of this agreement by any District Exchange or Association, Exchange may at its option terminate this agreement as to such District Exchange or Association at any time by giving such District Exchange or Association written notice of said breach and the election of Exchange to terminate the agreement. Such termination shall be effective immediately.

If this agreement is terminated by Exchange as to one or more District Exchanges and/or Associations, notice need be given only to such District Exchange or District Exchanges or Association or Associations and need not be given to other District Exchanges or Associations, except [fol. 14] that in case of termination by Exchange as to an Association, notice shall be given to the District Exchange with which such Association is affiliated.

(d) Time of Giving Notice

All notices of termination, except as otherwise specifically provided, shall be mailed during the last fifteen days of September prior to October 31 of the year in which the agreement is to be terminated.

(e) Manner of Giving Notice

All notices of termination shall ~~be~~ given by depositing in the United States mail, postage fully prepaid, a registered letter containing a notice of such termination addressed to the party for whom intended.

(f) Time and Effect of Termination

When any such notice of termination is given, this agreement shall be terminated as to the party or parties affected at 11:59 P.M. on October 31 of the year in which said notice is given, except that when notice is given by Exchange upon breach of the agreement, said termination shall be effective immediately.

The termination of this agreement as to any party or parties shall not affect rights which have accrued hereunder prior to termination. Any such termination shall not affect this agreement as to those remaining parties hereto.

30. Execution of Agreement

It is contemplated that this agreement will be executed in numerous copies identical except as to the names of the executing District Exchanges and Associations and as to date of execution. All such copies taken together shall constitute one agreement among all of the executing parties.

This agreement shall become effective as between Exchange and any District Exchange when both of such parties execute one or more copies hereof, without regard to execution of the same by any Association or Associations.

This agreement shall become effective as to an Association when it and the District Exchange with which it desires to affiliate execute the agreement and when Exchange has signified its approval of said Asociation's becoming a party hereto by likewise executing the same copy or copies of such agreement. An Association shall be deemed to be affiliated with the District Exchange which executes the same copy or copies of this agreement as are executed by such Association.

A sufficient number of copies of this agreement shall be executed to provide Exchange with a copy hereof executed by each signing Association as well as by each signing District Exchange.

[fol. 15] WITNESS the signatures of the parties hereto, the actual date of signing appearing opposite the signature of each party.

CALIFORNIA FRUIT GROWERS EXCHANGE

By ....
President

....
Secretary

(seal)

Actual date of signing by
California Fruit Growers Exchange:

...., 19........

....

(District Exchange)

By ....

President

....

Secretary

(seal)

Actual date of signing by
District Exchange:

...., 19........

....

(Association)

By ....

President

....

Secretary

(seal)

Actual date of signing by
Association:

...., 19........

RESOLUTION AUTHORIZING CALIFORNIA FRUIT GROWERS EXCHANGE TO EXECUTE AGREEMENT

RESOLVED, that California Fruit Growers Exchange execute the 1940 Exchange-District Exchange-Association Agreement, and that the president or any vice president and the secretary or any assistant secretary of Exchange be and they are hereby authorized to subscribe said Agreement in the name and on behalf of Exchange, and to attach its seal thereto, and to deliver executed copies of the same to District Exchanges and Associations, parties thereto.

Attest: A true copy of resolution adopted July 10, 1940 by board of directors of California Fruit Growers Exchange.

....

Secretary of California Fruit Growers Exchange

(seal)

RESOLUTION AUTHORIZING DISTRICT EXCHANGE TO EXECUTE AGREEMENT

RESOLVED, that this District Exchange execute the 1940 Exchange-District Exchange-Association Agreement, and that the president or any vice president and the secretary or any assistant secretary of this District Exchange be and they are hereby authorized to subscribe said Agreement in the name and on behalf of this District Exchange, and to attach its seal thereto, and to deliver executed copies of the same to Exchange and to each Association affiliated with this District Exchange.

Attest: A true copy of resolution adopted

........................, 19...... by board of directors

of ....

(District Exchange)

....

Secretary of said District Exchange

(seal)

RESOLUTION AUTHORIZING ASSOCIATION TO EXECUTE AGREEMENT

RESOLVED, that this Association execute the 1940 Exchange-District Exchange-Association Agreement, and that the president or any vice president and the secretary or any assistant secretary of this Association be and they are hereby authorized to subscribe said Agreement in the name and on behalf of this Association, and to attach its seal thereto, and to deliver executed copies of the same to Exchange and to the District Exchange with which this Association is affiliated.

Attest: A true copy of resolution adopted

........................, 19.... by board of directors

of ....

(Association)

....

Secretary of said Association

(seal)

[fol. 18]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 2

THIS AGREEMENT, made this 6th day of April, 1949, between CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, herein referred to as the "Exchange", THE EXCHANGE ORANGE PRODUCTS COMPANY and EXCHANGE LEMON PRODUCTS COMPANY, both corporations, herein referred to as "Products Companies", WITNESSETH:

Exchange is incorporated for the purpose of providing the facilities through which its members may market their citrus fruits and the products thereof. In an agreement entitled "1940 Exchange-District Exchange-Association Agreement" the responsibility of marketing all of the citrus fruits and products of its members rests with Exchange. Products Companies are corporations incorporated for the purpose of developing and manufacturing products of citrus fruits; the only stockholder of The Exchange Orange Products Company is Exchange, and the stockholders of Exchange Lemon Products Company, under the terms of the aforementioned "1940 Exchange-District Exchange-Association Agreement", are all associations shipping lemons, affiliated with Exchange.

Exchange, in observation of its responsibility to market all the fruit and products therefrom of all its members, by resolution of its board of directors dated September 4, 1940, designated Products Companies as agencies for the utilization and disposal of oranges and lemons not sold for consumption as fresh fruit. In further recognition of the obligation to market all of the fruit of its members, Exchange has established a department for distribution and sale of citrus fruits in by-product or processed form known as "Products Department, California Fruit Growers Exchange".

It is the desire of the parties hereto to establish certain principles for the most effective use, as a joint sales agency, of Products Department. In consideration of the foregoing it is agreed by and between the parties hereto as follows:

1. Exchange hereby delegates to a Joint Executive Committee the management of Products Department in all of its operations with authority to execute contracts for the sale of products marketed under its jurisdiction; provided, however, that in respect to any operations of Products Department in which the fresh fruit interest of Exchange is directly involved, the nature of which interest Exchange shall be the judge, Exchange may approve or disapprove any policy or course of action of Products Department.

2. Said Joint Executive Committee shall consist of sixteen members, eight appointed by and from the Board of Directors of The Exchange Orange Products Company and eight by and from the Board of Directors of Exchange Lemon Products Company.

3. It is understood and agreed that nothing in this delegation by Exchange shall constitute the transfer of any rights to the trade-mark "Sunkist" or any other trademarks, copyrights or patents owned by Exchange.

4. Costs of operating Products Department shall be borne entirely by Products Companies in a manner to be determined by Joint Executive Committee.

5. Exchange shall not be liable for the collection of amounts due to it from the sale of products nor for any act or omission of its agents or employees in carrying out this agreement, but all of such losses shall be borne by and are hereby assumed by Products Companies.

6. This agreement may be amended, at any time, upon unanimous agreement of the parties hereto.

[fol. 19] 7. This agreement shall become effective April 6th, 1949, and shall continue in effect until terminated as hereinafter provided, but in no event for a longer period of time than is now or may hereafter be permitted by law.

8. This agreement may be terminated as to either of the parties hereto at any time in the following manner.

a. By Exchange. Upon 60 days' written notice from it to Products Companies. Upon such termination Exchange shall assign to Products Companies any unfilled contracts and make other appropriate readjustments hereunder.

b. By either Products Company. Upon 60 days' written notice from them to Exchange and upon making payment to it of all amounts due or to become due hereunder from them to Exchange.

IN WITNESS WHEREOF, each of the parties hereto has hereunto subscribed its corporate name and affixed its corporate seal by its officers thereunto duly authorized.

California Fruit Growers Exchange
(seal) By (s) C. C. Teague
President
By (s) James O. Cook
Secretary

The Exchange Orange Products Company
(seal) By (s) C. C. Teague
President
By (s) J. A. Finley
Secretary

Exchange Lemon Products Company
(seal) By (s) Joy G. Jameson
President
By (s) H. W. Hall
Secretary

[fol. 20]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 3-A

Effective with the start of the 1950-51 pools

OFFICE OF

CALIFORNIA FRUIT GROWERS EXCHANGE

Los Angeles, California

January 5, 1951

TO ALL DIRECTORS,
DISTRICT EXCHANGES,
AND ORANGE ASSOCIATIONS

Gentlemen:

Amendment to Plan for Pooling of By-Product and Juice Grade Oranges

The Board of Directors at its regular meeting on January 3, 1951 approved three amendments to the Orange Pooling Plan, to become *effective with the beginning of the 1950-51 pools.* The amendments are as follows:

(1) The first amendment is incorporated as 15-C in the attached Plan and replaces the old paragraph 14. The amendment provides greater flexibility in connection with the pricing of services performed by shippers covering sales of oranges to processors in loose or packed boxes.

(2) The second amendment is a new paragraph, numbered 14, and provides for roadside or grove pick-up of fruit at the discretion of The Exchange Orange Products Company.

(3) The third amendment is numbered 15-B(2) and 15-B(4) and replaces the previous 14-B(2) and 14-B(4). This amendment is purely for clarification of accounting procedures and makes no change in the distribution of pool proceeds.

A copy of the Plan for Pooling of By-Product and Juice Grade Oranges, as amended, is attached.

Yours very truly,

D. M. ANDERSON
Secretary

DMA:ml
attach

Circular No. 3-51

PLAN FOR POOLING OF BY-PRODUCT AND JUICE GRADE ORANGES EFFECTIVE BEGINNING 1950-51 POOLS

POOLS:

1. This plan, set up under authority of the 1940 Exchange-District Exchange-Association Agreement, provides for the pooling of all oranges not sold for fresh consumption.

2. This plan is to be known as "Plan for Pooling of By-Product and Juice Grade Oranges" and the credits to shippers shall be divided into two groups as follows:

   A. "Credits for Juice Products."

   B. "Credits for Peel Products."

3. In establishing credits for juice and peel products, fruit shall be classified according to standards contained herein as Juice Grade or Product Grade.

4. Credits for juice products shall be kept separately by varieties of oranges as follows, except as provided in paragraph 15.

   A. Navel Oranges.

   B. Valencia and Miscellaneous Oranges (Excluding Bloods).

Credits for juice products shall be kept on a weight basis in terms of tons of fruit. Credits for juice products shall also be kept on the basis of soluble solids according to a method prescribed by Exchange.

A. Any lot of fruit delivered which exceeds 150 pounds of soluble solids per ton shall be credited with 150 pounds of soluble solids per ton only.

Because of the difficulty of separating returns from products made while fruit of both varieties is being processed at the same time, Exchange is authorized to use an accounting method by which values may be determined with reasonable accuracy when such conditions exist.

Pools for the different varieties shall extend from the start of each variety until the close of the variety or until the end of the fiscal year, as determined by Exchange, irrespective of districts.

TANDARDS:

Since fruit when processed for juice must be free from decay and other defects in order to comply with the sanitation requirements of food authorities and because it is impractical to grade out excessive amounts of such defects at the processing plants, the following standards are established for fruit at the time of delivery to processing plant.

Standards for Juice Grade. All fruit credited for juice products as Juice Grade fruit shall conform to the following specifications:

A. Free from decay. Lots containing not over 5% decayed fruit will be credited; but if the amount of decayed fruit present exceeds 1% by weight, the total weight of decayed fruit will be deducted from the weight of the lot and a charge according to schedule in paragraph 13 will be assessed against the entire lot, including the weight of decayed fruit, to cover the cost of hauling, regrading and disposal of decayed fruit. Soluble solids will be determined on the basis of fruit remaining after adjustments for decay and other defects as set forth in C of this paragraph.

[fol. 22] B. Satisfactory flavor. The juice extracted from a sample of the lot after removing all fruit showing decay and other defects must be satisfactory in flavor for concentrated juice.

C. All fruit shall be clean and free from any other defects making it unsatisfactory for concentrated juice. Lots containing not over 10% of such defective fruit will be credited; but if the amount of such defective fruit present exceeds 1% by weight, the entire weight of defective fruit will be deducted from the weight of the lot and a charge according to the schedule in paragraph 13 will be assessed against the entire lot, including the weight of defective fruit, to cover the cost of hauling, regarding and disposal of defective fruit. Soluble solids will be determined on the basis of fruit remaining after adjustments for decay and all other defects.

D. The total amount of decayed and other defective fruit present shall not exceed 10%.

E. The yield of soluble solids shall not be less than 60 pounds per ton of oranges as determined by the use of a method authorized by Exchange.

F. Ratio of soluble solids to acid shall not be less than 7.5 to 1.

10. Standards for Product Grade. All lots of fruit not eligible for credit as Juice Grade fruit shall be credited as Product Grade fruit except:

A. Decay. Lots containing not more than 25% decayed fruit will be credited; but if the amount of decayed fruit present exceeds 1%, the total weight of decayed fruit will be deducted from the weight of the lot and a charge according to the schedule in paragraph 13 will be assessed against the entire lot, including the weight of decayed fruit, to cover the cost of hauling, regrading and disposal of decayed fruit.

Fruit with defects other than decay which is a portion of a lot otherwise credited as Juice Grade fruit and which is deducted from that lot as defects is to be considered as Product Grade fruit so as to receive a share of the peel product returns. This provision shall not be construed to include decayed fruit deducted from lots otherwise credited.

The following regulations apply to all fruit credited in Juice Grade.

A. In order to maintain flexibility and utilize properly plant capacities, Exchange with the approval of the Board of Directors is authorized to require sizing of all such fruit offered to the pool into two size groups by the shipper before being so offered and to invoke, suspend and vary the sizing requirements when in its judgment such action is necessary. The size groups shall be:

(1) 392's and larger.

(2) Smaller than 392's.

Fruit smaller than 392's shall be that fruit which will drop through a pony sizer set with an opening of 2.15 inches.

B. Sizing requirements for A (1) above shall be considered to be complied with when not more than 5%, determined by a method provided by Exchange, will drop through a pony sizer set with an opening of 2.05 inches. Sizing requirements for A (2) above shall be considered to be complied with when not more than 5%, determined by a method provided by Exchange, will fail to drop through a pony sizer set with an opening of 2.25 inches.

.23] C. Lots which do not comply with the provisions of B and either A (1) or A (2) above will be credited, but the gross weight of the lot after adjus ments for defects are made will be reduced by 15 Soluble solids will be determined on the basis fruit remaining after adjustments for decay an all other defects and the adjustment of 15% pro vided in this sub-paragraph.

12. The following regulations apply to all fruit:

A. All fruit shall be free from trash. Lots from which trash has not been removed by the shipper will be credited but the gross weight and pounds of soluble solids of the fruit in the lot, excluding the weight of the trash, will be reduced by 30% in addition to and in the same manner as any deductions which might be made for improper sizing.

B. Fruit is to be measured on a weight basis, either by actual weighing, or if this is not possible, by weighing a representative number of boxes to get the average weight for determining the weight of the lot. Certified public weight or certificate of estimate shall accompany report on each lot of fruit. The time, places and methods of determining weights to be determined by Exchange.

C. Fruit is also to be analyzed to determine the quantity of soluble solids in each lot. The time, places and methods of determining soluble solids to be determined by Exchange.

D. Sorting to conform to grade requirements to be done by shipper.

E. Inspecting of fruit to determine eligibility for pool credit shall be the responsibility of Exchange, whose determination shall be final.

F. Credits for lots of fruit delivered without sampling shall be based upon the average inspection results obtained from all lots of similar classification credited to the same shipper that were sampled during a given period, such period to be established by Exchange.

13. Charges for hauling, regrading and dumping of defective fruit. The following schedule of charges shall be made on the weight of the entire lot, including weight of defective fruit and before any deductions for improper sizing or trash are made, where the allowed tolerances are exceeded, provided that only one charge shall be made on any one lot, computed on the total amount of defective fruit:

Percent Defective Fruit

Over 1% to and including 5%	$0.25 per ton
Over 5% to and including 10%	$0.50 per ton
Over 10% to and including 15%	$0.75 per ton
Over 15% to and including 20%	$1.00 per ton
Over 20% to and including 25%	$1.25 per ton

Lots containing over 25% to bear the entire actual cost of handling the fruit by The Exchange Orange Products Company, provided that the minimum charge on such lots shall be $3.50 per ton.

ROADSIDE PICK-UP:

14. Where at the discretion of the Exchange Orange Products Company fruit is hauled directly from grove or point other than a packinghouse, any additional costs to the Exchange Orange Products Company of loading and hauling or of processing over and above the cost incurred in the ordinary manner of handling shall be determined by the Exchange Orange Products Company, and shall be charged against the shipper. When such fruit is sold to an outside processor appropriate allowances shall be made to the processor for such additional costs incurred as determined by Exchange and shall be charged against the shipper.

[fol. 24] 15. The following procedure shall be followed:

A. Any fruit received by Exchange as Juice Grade fruit may be sold to processors other than The Exchange Orange Products Company and under this section shall be kept separately by variety of oranges as follows:

(1) Navel oranges.

(2) Valencia oranges.

(3) Miscellaneous oranges (excluding Bloods).

B. The following conditions shall apply to Juice Grade fruit by these varieties:

(1) Exchange shall establish a schedule of prices at which fruit is to be sold which will reflect a separate price per ton for each pound of soluble solids per ton ranging from 60 pounds to 150 pounds.

(2) Shipper's equity in proceeds of sale of fru each month shall be determined as follows:

(a) Each shipper shall be credited with his proportion of the total tons of Juice Grade fruit sold and of the total pounds of soluble solids sold.

(b) Total net returns for Juice Grade fruit sold plus total estimated cost of trucking, grading, sorting, and juice extraction of such Juice Grade fruit by the processing plants shall be credited at a uniform rate per pound of soluble solids to each shipper.

(c) The total estimated cost of trucking, grading, sorting, and juice extractio as set forth in (b) above shall be charged at a uniform rate per ton of Juice Grade fruit to each shipper.

(d) The difference between the gross credit as determined in (b) above and the charge as determined in (c) above for each shipper shall be the shipper's net equity in the monthly sales pool.

(3) Disbursement of funds received in payment for fruit sold shall be made by Exchange at the close of each month in accordance with shippers equity as set forth in (2) above.

(4) The difference for each shipper between total deliveries of tons of fruit, adjusted for defects, and the tons of fruit credited in the monthly sales pools as determined in paragraph (2) above shall be credited to each shipper in the Exchange Orange Products pool. The difference for each shipper between total deliveries of pounds of solids, adjusted for defects, and the pounds of solids credited in the monthly sales pools as determined in (2) above shall be credited to each shipper in the Exchange Orange Products pool. Only those credits remaining after this adjustment for the monthly sales pools shall participate in the distribution of pool funds from the Exchange Orange Products Company.

C. In those cases where processors require that oranges purchased by them be delivered in loose boxes or packed boxes, the Exchange will collect in addition to the value of the fruit an allowance for the special service rendered by the Association. This allowance collected from the processor will be remitted direct to the shipper.

[fol. 25] 16. Any fruit received by Exchange as Product Grade fruit may be sold to processors other than The Exchange Orange Products Company. The weight of peel so sold and the proceeds from its sale shall be added to the weight of peel and the peel product returns from The Exchange Orange Products Company credited to Product Grade fruit so that all deliveries of Product Grade fruit shall share alike in the returns from peel products.

17. Any Bloods received by Exchange may be sold to processors other than The Exchange Orange Products Company. The proceeds from such sales shall be distributed proportionately to all shippers delivering Bloods.

DETERMINING VALUE:

18. Exchange shall accept on consignment all oranges offered to it by Exchange shippers for the purpose of pooling in accordance with the above specifications, the income to be distributed on all credits in the varietal pools after adjusting for sales as provided in paragraphs 15, 16, and 17 in accordance with the following provisions:

A. Juice Credits.

(1) Juice Grade fruit, after all adjustments, shall receive credit for 100% of the net tons delivered.

(2) Juice Grade fruit, after all adjustments, shall receive credit for 100% of the net pounds of soluble solids delivered.

In the calculation of all yields of soluble solids, figures shall be rounded to the nearest pound.

(3) Product Grade fruit shall not participate in the returns for juice products.

B. Peel Credits.

(1) Fruit shall receive credits based upon tons of peel delivered to be determined in accordance with the following table:

Grade	Percent of Net Weight of Fruit Credited Determining Weight of Peel Credited
Juice Grade	50
Product Grade	100
Bloods	50

19. Total net returns for juice products from each variety as set forth in paragraph 4 handled by The Exchange Orange Products Company shall be distributed as follows:

A. Total net returns for juice products plus total cost of trucking Juice Grade fruit to the Plant and the cost of grading, sorting and juice extraction shall be credited at a uniform rate per pound of soluble solids to each shipper.

B. Total cost of trucking Juice Grade fruit to the Plant and the cost of grading, sorting and juice extraction shall be charged at a uniform rate per ton of Juice Grade fruit credited to each shipper.

C. Returns for Juice Grade fruit in the Exchange Orange Product Company pool for a shipper of a given variety for the pool period shall not be less than the returns of an equivalent amount of fruit of Product Grade.

20. Total net returns from peel products handled by The Exchange Orange Products Company shall be distributed at a uniform rate per ton of peel credited pursuant to paragraph 18, sub-section B above, without regard to variety. The share of these returns so distributed to Product Grade fruit is the credit referred to in paragraph 16.

[fol. 26] 21. In the event that returns from fruit in any varietal pool do not equal costs of operation of said pool, The Exchange Orange Products Company shall be reimbursed by Exchange for the difference. Exchange shall assess such differences as an expense against all shippers parties to the pool in proportion to the fruit of the variety handled by such shippers in fresh and by-products channels.

CALIFORNIA FRUIT GROWERS EXCHANGE
780 South Alameda Street
Los Angeles 31, California

April 12, 1951

TO: ALL DISTRICT EXCHANGES
& ORANGE ASSOCIATIONS
LOOSE FRUIT SALESMEN

SUBJECT: CORRECTION ON VALENCIA PRICE SCHEDULE NO. 1-51.

Gentlemen:

Please correct cirular C.D.P. 7-51 dated April 4, 1951 as follows:

	Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse
Reads	140	$46.67
Should read	140	$47.67

Yours very truly,

S. H. KELLY
District Manager

FIB:jmw
Circ. C.D.P. 9-51

& ORANGE ASSOCIATIONS
LOOSE FRUIT SALESMEN

SUBJECT: CORRECTION ON VALENCIA PRICE SCHEDULE NO. 1-51.

Gentlemen:

Please correct cirular C.D.P. 7-51 dated April 4, 1951 as follows:

	Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse
Reads	140	$46.67
Should read	140	$47.67

Yours very truly,

S. H. KELLY
District Manager

FIB:jmw
Circ. C.D.P. 9-51

[fol. 27]

PLAINTIFFS' EXHIBIT 5

EXHIBIT "L"
(Interrogatory No. 20)

27

CALIFORNIA FRUIT GROWERS EXCHANGE
780 South Alameda Street
Los Angeles 21, California

April 4, 1951

TO: ALL DISTRICT EXCHANGES
& ORANGE ASSOCIATIONS
LOOSE FRUIT SALESMEN

SUBJECT: VALENCIA PRICE SCHEDULE NO. 1-51, EFFECTIVE APRIL 9, 1951

Gentlemen:

Effective Monday, April 9, 1951, the following schedule of prices per ton will apply on sales of Valencia oranges to outside processors.

Yours very truly,

S. H. KELLY
District Manager

FIB:lm
Circ. C.D.P. 7-51

Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse	Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse	Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse
150	$51.50	120	$40.00	90	$28.50
149	51.12	119	39.62	89	28.12
148	50.73	118	39.23	88	27.73
147	50.35	117	38.85	87	27.35
146	49.97	116	38.47	86	26.97
145	49.58	115	38.08	85	26.58
144	49.20	114	37.70	84	26.20
143	48.82	113	37.32	83	25.82
142	48.43	112	36.93	82	25.43
141	48.05	111	36.55	81	25.05
140	46.67	110	36.17	80	24.67
139	47.28	109	35.78	79	24.28
138	46.90	108	35.40	78	23.90
137	6.52	107	35.02	77	23.52
136	46.13	106	34.63	76	23.13
135	45.75	105	34.25	75	22.75
134	45.37	104	33.87	74	22.37
133	44.98	103	33.48	73	21.98
132	44.60	102	33.10	72	21.60
131	44.22	101	32.72	71	21.22
130	43.83	100	32.33	70	20.83

SUBJECT: VALENCIA PRICE SCHEDULE NO. 1-51, EFFECTIVE APRIL 9, 1951

Gentlemen:

Effective Monday, April 9, 1951, the following schedule of prices per ton will apply on sales of Valencia oranges to outside processors.

Yours very truly,

S. H. KELLY
District Manager

FIB:lm
Circ. C.D.P. 7-51

Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse	Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse	Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse
150	$51.50	120	$40.00	90	$28.50
149	51.12	119	39.62	89	28.12
148	50.73	118	39.23	88	27.73
147	50.35	117	38.85	87	27.35
146	49.97	116	38.47	86	26.97
145	49.58	115	38.08	85	26.58
144	49.20	114	37.70	84	26.20
143	48.82	113	37.32	83	25.82
142	48.43	112	36.93	82	25.43
141	48.05	111	36.55	81	25.05
140	46.67	110	36.17	80	24.67
139	47.28	109	35.78	79	24.28
138	46.90	108	35.40	78	23.90
137	6.52	107	35.02	77	23.52
136	46.13	106	34.63	76	23.13
135	45.75	105	34.25	75	22.75
134	45.37	104	33.87	74	22.37
133	44.98	103	33.48	73	21.98
132	44.60	102	33.10	72	21.60
131	44.22	101	32.72	71	21.22
130	43.83	100	32.33	70	20.83
129	43.45	99	31.95	69	20.45
128	43.07	98	31.57	68	20.07
127	42.68	97	31.18	67	19.68
126	42.30	96	30.80	65	19.30
125	41.92	95	30.42	65	18.92
124	41.53	94	30.03	64	18.53
123	41.15	93	29.65	63	18.15
122	40.77	92	29.27	62	17.77
121	40.38	91	28.88	61	17.38

Plaintiffs' Exhibit 6

E. A. SILZLE CORPORATION
ANAHEIM, CALIFORNIA
PROCESSOR

11-7-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15763	Orgn.	44600	3087		Mansfield	10/6	Santiago Orange	A 48708	/	1.33	125	
15764	–	48780	2648		–	11/6	Euclid Hills	A 71584	/	–	135	
15766	–	41920	2040		–	11/6	Consolidated Orng.	A 49899	/	–	119	
15767	–	46120	3093		–	11/7	Santiago Orng.	A 48709	/	–	124	
		181420	So.	Utes								

④ N/7

20

[fol. 30]

6-3

E. A. SILZLE CORPORATION
ANAHEIM, CALIFORNIA
PROCESSOR

11-[illegible]-51
UNLOA[illegible] DATE

...DO NOT USE THIS SPACE...

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15759	Orgs	42020	1641		Mansfield	11/5	Tustin Hills A	71577	✓	—	137	
15760	—	45500	1642		—	11/6	Tustin Hills A	71578	✓	—	137	
15761	—	45180	3085		—	11/6	Santiago Org. A	48700	✓	1.33	136	
15762		46220	2037		—	11/6	Cons. Orange A	49877	✓	—	129	
		178920	So VALS									

④ 11/5

CDP-11-6

E. A. SILZLE CORPORATION
PROCESSOR ANAHEIM, CALIFORNIA

11-5-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	C.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15755	Orng	47620	3071	Mansfield		11/3-	Santiago Orng.	A 48684	✓	—	138	
15756	-	46600	3072	Mansfield		11/3	Santiago Orng-	A 48685	✓	—	137	
		94220										
15757	—	45400	3078	—		11/5	Santiago Orng.	A 48692	✓	—	142	
15758	—	44800	3079	—		11/5	Santiago Org-	A 48693	✓	—	128	
		90200										

(4) 11/5

~~////~~

11/3 — 94220 Sol Wnrs

11/5 — 90200 So Wnrs 1

CSP-11-9

[fol. 32]

E A Silzle Cor
PROCESSOR E. A. SILZLE CORPORATION
ANAHEIM, CALIFORNIA

11-3-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15752	Orange	50480	1634		Mumford	11-2	Tustin Hills	A 71570	✓	–	145	
15753	-	42820	3069		-	11-2	Santiago Orange	A ~~4868~~ 48681	✓	–	130	
15754	-	44020	3070		-	11-3	Santiago Orange	N 48682	✓	–	141	
		137320	5 o.	Vns								

③ 11/3

[fol. 33]

EAS[illegible] Co
PROCESSOR

11-2-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15746	Orgs	42980	243655-8		Manfuli	11-1	Olin Hughes	A48158	✓	–	138	
15747	–	43380	3063			11-1	Santiago Orange	A48673	✓	–	134	
15748	–	43620	3065			11-1	Santiago Orange	A48677	✓	–	124	
15749	–	43200	1629		–	11-2	Tustin Hills Citrus	A71566	✓	–	131	✓
15750	–	41640	24330-1		–	11-8	Irvin Valencia	A47993	✓	–	129	
15751	–	43220	24377-8		–	11-2	Irvin Valencia	A47997	✓	–	133	
		258040 So Vlncs ✓										

⑥ 1/4

E A Silzle Co
PROCESSOR

11/1- 51
UNLOADING DATE

L-9

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15740	Orang.	43080	24337	-	Mumford	10/30	Santiago Orange	A 48657	✓	—	128	
15741	Orang.	46520	3054		-	10/30	Santiago Orange	A 48665	✓	—	123	
15742	-	41840	1682		-	10/31	Tustin Hills	A 71560	✓	—	132	
15743	-	45960	3050		-	10/31	Santiago Orange	A 48660	✓	—	143	
15744	-	42960	10468		-	10/31	Olive Heights	A 48154	✓	—	117	
15745	-	44360	3057		-	11/1	Santiago Orange	A 48668	✓	—	141	
		264720	So. Vals									
			⑥ 11/1									

10/31 - 220360
11/1 - 44360 So. Vals
264720

CDP-U-9

Wm. Selzle Co

10/31-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15738	Burger	43546	1617	[illegible]		10/30	[illegible]	B 71557	✓	–	127	
15839	–	46020	21/3447.5	–		10/30	[illegible] Vol-	B 47557	✓	–	134	
		89560	So	[illegible]-5	✓							
~~[illegible]~~	–			–		[redacted]	[redacted]	[redacted]				
			②	10/31								

PROCESSOR

10-30-51
UNLOADING DATE

...DO NOT USE THIS SPACE...

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15730	Orange	46040	3036	Mansfield		10/26	Santiago Orange	A48646	/	—	122	
15733	-	45300	1612	-		10/30	[illegible] Hills [illegible]	A71550	/	—	135	
15734	-	35840	74331	-		10/29	Olive Heights	A48145	/	—	127	
15736	-	45260	3042	-		10/3	Santiago Orange	A48651	/	—	128	
15737	-	35660	3044	-	✓	10/30	Santiago Orange	A48653	/	—	120	
		[illegible]00	56	[illegible]	✓							

⑤ 10/30

So. Slope Coop
PROCESSOR

10-29-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15728	Orange	46800	10369	Manfield		10/29	Olin Haight	A48141	/	–	120	
15729	–	42700 89500	8026	Manfield		10/27	Santiago Orng	A48637	/	–	118	
5730	–	44340	3034	–		10/29	Santiago Coop	A45644	/	–	129	
5731		50360 94700	24329.30		–	10/29	Olin Haight	A48144	/	1.78	144	

④ 10/29

0/27 – 89500 So Vns
/29 – 94700 So Vns

37

[fol. 38]

[illegible] Co
PROCESSOR

10-27-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15726	Orange	42320	1604		Mansfield	10/26	Tustin Hills Cit	A11542	✓	—	140	
15727	-	41580	3034		-	10/26	Santiago Orange	A48635	✓	—	120	
		83900	So	Uses	✓							
			(2)	10/27								

G. O. Solzli
OCESSOR

[illegible]
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15721	Orange	43700	1599		Mansfield	10/25	Tustin Hills Citrus	A71538	✓	–	129	
5722	–	45180	3020		Mansfield	10/26	Santiago Orange	A ~~[illegible]~~ 48628	✓	–	128	
5723	–	37710	3021		–	10/26	Santiago Orange	A 48629	✓	–	143	
5724		39900	3022		–	10/26	Santiago Orange	A 48630	✓	–	130	
		166520	So Vals									

④ 10/26

6-13

E.A. Silzzo Co.
PROCESSOR

10-25-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15714	Orange	47140	3011	Manifest		10/24	Santiago Orange	A 48618	✓	—	137	
15715	-	39160	3013	-		10/24	Santiago Orang.	A 48620	✓	—	133	
15716	-	36580	1594	-		10/25	Tustin Hills Citrus	A 71533	✓	1.33	125	
15717	-	34960	3015	-		10/25	Santiago Orange	A 48622	✓	—	139	
15718	-	41500	3016	-		10/25	Santiago Orang.	A 48623	✓	—	141	
15719	-	46660	637	-		10/25	Villa Park Orch	A 49499	✓	—	128	
15720	-	43480	633	-		10.24	Villa Park Orchards	A 49495	✓	1.33	123	
		289480	So	Oaks	✓							

⑦ 10/25

~~OJW~~

✓

E A Scholfe Co
PROCESSOR

10-24-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15709	Orange	44780	1587		Manfield	10/23	Tustin Hillcrest	A 71527	✓		104	
15710	Orange	35840	3007		Manfield	10/23	Santiago Orange -	A 48613	✓		130	
15711	-	42800	24287-S	-	-	10/23	Olive Heights	A 48123	✓		136	
15712	-	43340	3009		-	10/24	Santiago Orange	A 48615	✓	-	129	
15713	-	47040	1966	-		10/23	Consolidated Orange -	A 49670	✓		133	
		213800	So Vals									

② 10/24

FN: [illegible] & Co
PROCESSOR

10-23-5
UNLOADING DATE

51-9

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15704	[illegible]	49930	1581	[illegible]		10/22	Trestlin Hill [illegible] A	71522	✓	–	132	
15705	Oranges	46220	24754 58	–		10/22	Garden Grove A	45890 46422	—	–	143	
15706	–	41380	24[illegible]	–		10/22	Grove Valencia A	47929	✓	–	133	
15707	–	42020	3003			10/23	Santiago Orange A	48608	✓	–	130	
15708	–	47640	3005	–		10/23	Santiago Orange A	48611	✓	1.56	134	

226580 So VALS ✓

(5) 10/23

[fol. 43]

[illegible] Co
PROCESSOR

[illegible]
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15697	Orange	42260	2991		Mumford	10/20	Santiago Orange	A ~~[illegible]~~ 48548	✓	—	127	
15698	—	35580	2992		—	10/20	— —	A 48590	✓	—	124	
15699	—	40700	[illegible]		—	10/20	Irvine Val Gro	A 47723	✓	—	141	
15700	—	51940	[illegible]		—	10/20	[illegible] Co.	A 71515	✓	—	133	
15701	—	43500	2996		—	10/20	Santiago Orange	A 48601	✓	—	120	
15702	—	43880	2998		—	10/22	Santiago Orange	A 48603	✓	—	124	
15703	—	44620	3000		—	10/22	Santiago Orange	A 48605	✓	—	123	

⑦ 10/22

10/20 – 213,980 Sa [illegible] ✓
10/22 – 88,500 Sa [illegible] ✓

[fol. 44]

[illegible] Co
PROCESSOR

10-20-51
UNLOADING DATE

...DO NOT USE THIS SPACE...

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15693	[illegible]	37880	2989		Merrifield	10/19	Santiago Orang	A 48593		—	123	
15694	-	44220	24234		—	10/19	Garden Grove Cit	A 45363		—	127	
15695	-	42320	24239		—	10/19	Garden Grove	A 45364		—	130	
15696	-	45240	2990		—	10/19	Santiago Orang	A 48593		—	128	
		169660	So [illegible] SL									

(4) 10/20

[illegible]
PROCESSOR

10-19-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15687	[illegible]	47780	1524		Mansfield	10/18	Tustin Holly	A 71507	✓	-	125	
15688	-	44200	2983		-	10/18	Santiago Orange	A 48586	✓	-	128	
15689	-	32400	2984		Mansfield	10/19	Santiago Orang.	A48557	✓	-	125	
15690	-	40920	61		-	10/19	Villa Park Orchard	A 49470	✓	1.78	140	
15691	-	35070	25486		-	10/19	Irvin Valencia	A47914	✓	-	129	
15692	-	41620	1570		-	10/19	Tustin Holly.	A 71512	✓	-	127	
		241390	See UACS ✓									

© 10/19

✓

61-9

PROCESSOR

10/18-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15282	Orge.	31900	C5428		Mansfield	10/17	Irvin Valencia A	47900	/	-	139	
15283	-	45440	2977		-	10/17	Santiago Orange A	48579	/	-	127	
15283	-	43430	2979		-	10/18	Santiago Orange A	48581	/	-	126	
15281	-	42050	C5458		-	10/18	Irvin Valencia A	47907	/	-	143	
		162810	D 10/18									

F A Sizzle Co
PROCESSOR

UNLOADING DATE

									---DO NOT USE THIS SPACE---			
LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15679	Orange	43820	1331		Mumford	10/16	Tustin Hills	17044	—	—	14.3	
15681	Orange	47060	2973			10/17	Santiago Orange	B 48574	—	—	12.9	
		90880 ✓										
			② 10/17									

✓

[fol. 48]

12-9

[illegible]
PROCESSOR

10-16-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15676	Orange	46640	2962		Manford	10/15	Santiago Orange	A~~48568~~ 48561		—	123	
15677	-	40520	2963		Manford	10/16	Santiago Orange	A48565		—	124	
15670	-	45120	2961		-	10/15	Santiago Orange	A48560		—	121	
			③	10/16								
		132280		Arvalo								

Ka Schuyler Co
CESSOR

10-13-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
5668	Orange	34640	24138	-	Manfield	10/12	Bolla Wood	A75051	✓	-	138	
5669	-	42860	2944		Mayfield	10/12	Santiago Orange	A48541	✓	-	138	
5670	-	39240	1534		-	10/12	Tustin Hills Citrus	17027	✓	2.00	118	
5671	-	41360	2950		-	10/13	Santiago Orange	A48541	✓	-	129	
5672	-	47880	2951		-	10/13	Santiago Orange	A48544	✓	-	132	

205980 ✓

(E) 10/13

116740 L Vale 10-12-51 ✓
89240 — 10-13-51 ✓
205980

[fol. 50]

E.A. Silgza Co.
PROCESSOR

10-12-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15664	[illegible]	44900	1578	Mansfield		10/11	[illegible]	A70322	–	–	118	
15665	"	45520	24111	–		10/11	[illegible]	A51975	–	–	131	
15666		41660	556		–	10/10	Valley Park Orchards	A49446	–	–	139	
15667		34700	25761		–	10/11	Irwin Johnson	A47867	–	–	140	
		166780										

(4) 10/17

[fol. 51]

E. A. SILZLE CORPORATION
PROCESSOR ANAHEIM, CALIFORNIA

OCT 1 1 1951
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15659	Orange	45620	582		Munfield	10/10	Villa Park Orchards	A49442	—	—	131	
15660	-	52780	584		-	10/10	Villa Park Orchards	A49442	—	—	138	
15661	-	42780	24093-6		-	10/10	Francis Citrus	A53607	—	—	136	
15662	-	48200	2936		-	10/11	Santiago Orange	A48532	—	—	129	
15663	-	42580	2939		-	10/11	Santiago Orange -	A48535	—	—	133	
		231960										

10/11

✓

[fol. 52]

EA Sizzle Co.
PROCESSOR
E. A. SIZZLE CORPORATION
ANAHEIM, CALIFORNIA

10-10-61
UNLOADING DAT

---DO NOT USE THIS SPACE--

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15656	Orange	46580	1516		Manfield	10/9	Tustin Hills Clr	17011	✓	—	127	
15657	Orange	44760	2930		Manfield	10/10	Santiago Orange	A4652	✓	—	126	
15658	Orange	46820	1573		Manfield	10/10	Tustin Hills Clr	17017	✓	—	128	
				③ 10/10								
		138160	✓	Lo Vale								

✓

[illegible]
PROCESSOR

10-9-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15654	Orngs	48640	1510		Mansfield	10/8	Tustin Hills	17005	—	—	139	
15655	Orngs	49840 ~~49840~~	1924		—	10/8	Santiago Orange	A48518	—	—	139	
		98,480 ✓	So Vale									

② 10/9

✓

[fol. 54]

6-27

G. L. Sexton Co.
PROCESSOR

10-8-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15648	Val	45340	2907	-	Mayfield	10/5	Santiago Orang-	A 48501	✓	—	143	
15649	Val	44680	24015	-	Mayfield	10/6	Irvin Val -	A ~~48480~~ 47838	✓	—	131	
15650	"	46480	2915		-	10/6	Santiago Orang -	A 48507	✓	1.78	136	
651	-	48400	24020-1		-	10/6	Garden Grove Ctr	A75300	✓	—	134	
15652		47680	24033		-	10/6	Olive Heights Ctr	A48070	✓	—	124	
15653		47140	C5117		-	10/8	Irvin Valen -	A 47847	✓	—	124	

⑥ 10/8

232480 Val 10-6-51 ✓
47140 — 10-8-51 ✓

279620

✓

La Valley Co
PROCESSOR

10/6-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15643	Orange	47880		Manfield		10/5/51	Santiago Orange	A75047	/	—	137	
15646	-	45580		-		10/5	Santiago Orange	A75049	/	—	141	
15647	-	45760		-		10/5	Santiago Orange	A75048	/	3.11	132	
		139,220	La Valley (B) 10/6 JHK									

[illegible]
PROCESSOR

10-5-51
UNLOADING DAT

6-29

---DO NOT USE THIS SPACE-

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15643	[illegible]	40730	24493		Mansfield	10/5	[illegible]	A5 1457	—	-	104	
15642	-	40510	C saw		—	10/5	Irwin Valeriam	A47832	—	-	127	
		81230	So Val									
			⑦ 10/5									

[illegible] PROCESSOR

E. A. SILZLE CORPORATION
ANAHEIM, CALIFORNIA

10-2-51 UNLOADING DATE
OCT 2 - 19

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15628	Orange	41480	4855	—	Manfield	10/2	Irvine Valencia	A44811	✓	—	134	
15629	Orange	45400	1480	—		10/2	Tustin Hills	A52477	✓	—	126	
15630	·	47520	2888	—		10/2	Santiago Orange	A75029	✓	—	136	
15631	-	49400	2887	—		10/2	Santiago Orange	A75027	✓	—	130	
		183800	So. Vals									

④ 10/3

15-9

EAsizzle Corp
PROCESSOR

…SIZZLE CORPORATION
ANAHEIM, CALIFORNIA

10-2-51
UNLOADING DATE

OCT 2-1951

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15623	Orange	40830	12450		[illegible]	10/1	Irvine Valencia A	47804	/	1.56	139	
15624	–	53000	1475		–	10/1	Tustin Hills Citrus A	52475	/	–	121	
15625	–	45080	16339-40		–	10/1	Olive Heights A	48049	/	–	128	
15626	–	46560	2888		–	10/1	Santiago Orange – A	75023	/	1.33	125	
		185470 So Vals										

R 10/2

[fol. 60]

[illegible] Co
PROCESSOR

9-29-51
UNLOADING DAT

...DO NOT USE THIS SPACE..

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15607	[illegible]	45440	C4632		Mansfield	9/27	Baltimore Citrus	C-53559	/	–	139	
	1	45440	S3	VA								
				① 9/29 JWM								

[illegible]
PROCESSOR

Oct 1-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15616	Orange	48220 ~~[illegible]~~	1471	[illegible]		9-29	Tustin Hills Citr.	A57469	✓	–	117	
15617	"	35720	1467		–	9/28	Tustin Hills Cit	A57465	✓		142	
15618	–	47560	7875		–	9/29	Santiago [illegible]	A 75014 ~~[illegible]~~	✓	–	143	
15619	–	49080	09359		–	9/29	Olive Heights –	A48042	✓	–	104	
15622	–	38520 ~~38500~~	[illegible]		–	10/1	Olive Heights	A 48047	✓	–	102	
15615	–	9660	16325		–	9·29	[illegible]	40441	✓	–	152	

(6) 10/1

9/29 – 191240
10/1 – 38520
229760

[illegible]
PROCESSOR

[illegible] 25 . 81
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15601	45040	Oranges	1454	Mansfield		9/26	Tustin Hills	G 52452		—	130	
15602	31880	"	16291	Mansfield		9/26	Garden Grove	G 25285		1.33	136	
[illegible]	42700	—	16306	Mansfield		9/27	Irvine Valencia	A 47782		—	142	
~~[illegible]~~	~~[illegible]~~	~~[illegible]~~	~~[illegible]~~	—		~~9/27~~	~~[illegible]~~	~~G 58509~~				
15605	45860	—	16310		—	9/27	Irvine Valencia	A 47782		—	144	
15606	51860	—	1461			9/27	Tustin Hills	A 52459		—	132	
	215860	So	[illegible]									

5

9/28

[illegible] Co
PROCESSOR

9-27-51
UNLOADING DATE

55-9

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15598	Orange	34900	C4596	Mansfield		9/25	Goldman & Cohen	A53556		–	137	
15599	Orange	34980	21911	Mansfield		9/25	Irvin Valencia	A 47774		–	141	
15600	-	46240	C4629	-		9/26	Irvin Valencia	A ~~[illegible]~~ 47779		–	144	
15601	-	38140	C4639	–		9/26	Goldman & Cohen	A 53556		–	140	
		154260										

④ 9/27

CBP-M-9

[fol. 63]

[illegible]
PROCESSOR

9-26-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15598	Orng-	46740	14445		Mansfield	9/25	Tustin Hills	A28493		—	119	
15593	-	45830	24555	-	-	9/25	Bollman Citrus	A52[illegible]		—	132	
15594	-	41780	25449		-	9/25	Tustin Hills	28498		—	145	
		134350	So Vault									

a 195
a 197
a 196

③ 9/26

68

[fol. 64]

[illegible]
PROCESSOR

9/25-51
UNLOADING DATE

6-37

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15590	Argy	45680	5343		[illegible]	9/24	Villa Park Orchards	A4994		—	141	
15391	Argy	45920	8405			9/24	Santa Ana Tustin [illegible]	A5195			130	
		91600	5.	[illegible]								
		②	9/25									

[illegible] Co
PROCESSOR

9-24-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15580	Orang.	37160	1638/39 40	— Mayfield		9/22	Garden Grove A	75271	✓	—	124	
15581	—	53520	1437	—		9/21	Tustin Hills Citrus A	28985	✓		130	
15582	—	44180	539	—		9/21	Villa Park A	49956	✓		99	
15583	—	39370	B4474	—		9/21	Glenwood's Citrus A	53543	✓		136	
15584	—	48240	1625-2 ✓	—		9/22	Garden Grove A	75293 ~~49???~~	✓		138	
15585	—	47920	541	—		9/22	Villa Park Orchards A	49395	✓	1.56	147	
15586	—	37500	1442			9/22	Tustin Hills A	28490	✓	—	132	
		307890	SO	Vals ✓								

⑦ 9/24

69

[illegible] Co
PROCESSOR

9-22-51
UNLOADING DATE

6-39

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
5575	Any	48540	1431		Mansfield	9/20 51	Fenton Hill Citr	A28478	/	–	131	
15576	–	45300	1222[illegible]1			9/20	Hardin Bros Citr	A 75265	/	–	135	
5579	–	27700	14131		–	9/20	Magie Citrus	A 36327	/	–	142	
		121540	50.	Vac S								

③ 9/22

CDP-M-9

[fol. 67]

PROCESSOR

9/21. 5:1
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15573	[illegible]	46940	08942	Mansfield	-	9/19	Fullerton Mut	A-7811	/	-	124	
15574	-	47720	16211 212	-		9/20	Garden Grove	A75266	/	-	144	
		94660	So. Vals									
			④ 9/21									

67

14-7

EA Sizzle Corp
PROCESSOR E. A. SILZLE CORPORATION
ANAHEIM, CALIFORNIA

9-20-5
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15566	Orange	46660	1424		[illegible]	9/19	Tustin Hills Citrus	A 28472	✓	–	141	
15567	–	50720	1816		–	9/19	Consolidated Orange	A 52772	✓	–	113	
15568	–	43900	16798-9		–	9/19	[illegible]	A 75264	✓	–	136	
15569	–	45160	536		–	9/19	Villa Park Orchard	A 49325	✓	–	132	
		186440	So [illegible]									

[illegible] PROCESSOR

UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15558	Reg	46720	1419		Thomfeldt	9/18/81	[illegible] Hall	A 8467	✓	-	132	
15559	-	45320	1813		-	9/18	Consolidated [illegible]	A [illegible]	✓	-	130	
[illegible]560	-	45780	96788-7		-	9/18	[illegible] Celery	A 53536	✓	-	130	
15561	-	40000	531		-	9/18	Valley Ranch Oakland	A 19388	✓	2 cc	109	
15562	-	44350	C4325		-	9/18	[illegible] Celery	A 53535	✓	-	141	
155[illegible]		[illegible]	C4[illegible]			9/19	[illegible] Celery	A 5[illegible]7	✓	-	148	

260160 Sq Tons

⑥ 9/17

PROCESSOR

UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.G. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15554	[illegible]	41620	[illegible]	—	[illegible]	9/17	[illegible]	A53533	/	1.33	127	
15555	-	48740	1414		-	9/17	[illegible]	H 28462	/	178	141	
		90360	②	Vails 9/18								

EASI [illegible] Corp
PROCESSOR

9-15-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15549	Pineap.	34930	1804		Manifest	9/14/51	Consolidated Citrus	A 52710				
		40										
15555	-	40060	1408		Manifest	9/15	[illegible] Hills	A 28457				
551	-	38100	~~[illegible]~~ 1425		—	9/15	[illegible]	A 75250				
15550		49360	1411		—	9/17	[illegible] Hills	A 28460				
15553	-	46360	1807		—	9/17	Consolidated	A ~~[illegible]~~ 53713				

5

9/17

9/15 — 113080 VS. Vans

9/17 — 95720

208800

[fol. 72]

6-45

E A Sizzle Co

PROCESSOR

E. A. SIZZLE CORPORATION
ANAHEIM, CALIFORNIA

9-15-51

UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15546	Orang.	44740	214889		Mumford	9/14	Goldenwest Citrus	A53526	/			
15547	-	38860.	16741		–	9/14	Garden Grove	A75253	/			
15548		45000.	1405	-	-	9/14	Tustin Hills -	A28454	/			
		128600	So Vans									

③ 9/15

CDP-M-9

[fol. 73]

E A Silzle Corp
PROCESSOR

E. A. SILZLE CORPORATION
ANAHEIM, CALIFORNIA

9-14-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15540	Orange	47520	1400		[illegible]	9/13	Tustin Hills	A52449	✓	–	120	
15541	–	44040	16721-2		[illegible]	9/13	Barker Bros	A42449	✓	–	119	
15542	–	38760	1401		[illegible]	9/13	Tustin Hills A	52450	✓	–	125	
15543	–	48140	16717-8		–	9/13	[illegible] A	[illegible]	✓	–	125	
15544	–	46920	1403		[illegible]	9/14	Tustin Hills Citrus A	28457 ~~[illegible]~~	✓	1.33	111	
15545	–	46200	1801		–	9/14	Consolidated Orang.	A52708	✓	–	142	
		271580	[illegible]									

⑥ 9/14

E A Silzle Corp

PROCESSOR

E. A. SILZLE CORPORATION
ANAHEIM, CALIFORNIA

9-13-51

UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15534	Orange	25580	1796		Mansfield	9/12	Consolidated Orang	A52705	✓	—	141	
15535	Orange	27500	1395		Mansfield	9/12	Bollinger Colonie	A53522	✓	—	143	
536	-	19720	1396		-	9/12	Tustin Hills	A52445	✓	—	122	
15537	-	34360	16711	12	-	9/12	Durban Bros	A14246	✓	—	145	
15538	-	38960	1798		-	9/12	Consolidated Orang	A52706	✓	—	136	
15539	-	35880	1399		-	9/12	Tustin Hills	A52445	✓	—	111	
		182000	50	Vals								

(6) 9/13

COP-M-9

E A Sizzle Corp
PROCESSOR

E. A. SIZZLE CORPORATION
ANAHEIM, CALIFORNIA

9-11-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15529	Orange	26900	1790		Mansfield	9/11	Consolidated Orange	A52703	✓	–	125	
15530	–	36300	16695		–	9/11	Garden Grove Cit	14243	✓	–	118	
15531	–	46350	C4063		–	9/11	Golden West Citrus	A53517	✓	–	124	
15532	–	47120	1387			9/11	Tustin Hills Cit	A52438	✓	–	115	
15533	–	41540	1389		–	9/11	Tustin Hills Cit	A52410	✓	–	108	
		197610	So.	Vaud								
				⑤ 9/12								

CWD-3

[fol. 76]

~~Chapman Sales Co~~
PROCESSOR

E. A. SILZLE CORPORATION
ANAHEIM, CALIFORNIA

9-11-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15523	Orange	46140	1787		Munfield	9/10	Consolidated Orang	A52698	✓	—	143	
15524	Orang	42860	16615		—	9/10	Borden Grove Ltd	14299	✓	—	122	
15525	Org	44780	1788		—	9/10	Consolidated Orang	A52698	✓	—	129	
15526	—	24400	1789		—	9/10	Consolidated Orang	A52700	✓	—	130	
15527	—	20940	2764			9/11	Santiago Orang	A49140	✓	—		
15528	—	15840	1791		Munfield	9/11	Consolidated Orang	A52700	✓	[illegible]	[illegible]	
		194960	So. Cal									

⑥ 9/11

[fol. 77]

[illegible] Co
PROCESSOR

9-10-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
1						9-7-						
15514	Valencia	41680	8291	[illegible]	f. Co		Irvine Valencia	A8440	✓	—	128	
15515	-	39780	16664		-	9/7	Garden Grove	14732	✓	1.78	117	
516	-	44460	8266			9/8	Frances Citrus	A36555	✓	—	119	
15517	-	46180	1379	-		9/8	Tustin Hills	A52431	✓	—	118	
15518		49050	C3961	-		9/8	Goldenwest Citrus	A53510	✓	—	129	
15519		39030	506			9/8	Villa Park Orchards	A49362	✓	-	145	
15520	[illegible]	42640	16673-6	-		9/8	Garden Grove	14736	✓	1.75	124	
15521		52200	C.3951	-		9/8	Goldenwest Citrus	A53509	✓	—	132	
15522		4[illegible]	C3993			9/10	Irvine Valencia	A8447	✓	—	13[illegible]	

9/8 – 354570 ✓
9/10 – 41280 ✓
395850

9 9/10

11

15-7

[illegible]
PROCESSOR

9-8-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15509	Valencia	48100	1775		Mansfield	9/6	Consolidated Citrus	B52691	✓	–	137	
15510	-	34340	16650		-	9/6	Garden Grove	14228	✓	–	132	
15511	-	47660	502		-	9/7	Villa Park Orchards	49358	✓	–	142	
15512	-	38740	1779		-	9/7	Consolidated Orange	B52693	✓	–	129	
15514	.	45200	503		✓	9/7	Villa Park	B49359	✓	–	117	
		214040	So. Vals. ✓									

5) 9/8

[illegible] Co
PROCESSOR

9-7-51
UNLOADING DATE

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	---DO NOT USE THIS SPACE--- RATIO	DECAY	SOLIDS	RATE PER TON
15503	Valencia	44180	500	[illegible]		9-6	Villa Park	A 49356	/	—	137	
15504	Val-	45000	499	-		9-6	Villa Park	A 49354	/	—	128	
15505	-	45120	1366	~		9-6	Tustin Hills Citrus	A 52416	/	—	112	
15508	-	44020	1774	-		9-6	Consolidated Orange	A 52690	/	—	132	
~~[illegible]~~		~~[illegible]~~	~~1775~~			~~9-6~~	~~Consolidated Orange~~	~~A 526[illegible]~~				

178320 – 4 Loads ✓

④ Val

9/7

79

[fol. 80]

[illegible] Co
PROCESSOR

9 - 6 - 51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15495	Val-	42420	C3760		[illegible]	9-5-51	Irvine Valencia	A8420	/	1.33	130	
15[illegible]	Val	[illegible]	C37[illegible]		[illegible]	9-5-	[illegible]	A52246	/	–	128	
[illegible]	[illegible]	44200	1763	–		9-5	Consolidated [illegible] Corp	A52686	/	–	124	
15[illegible]	–	36[illegible]	1771		–	9-5	Consolidated [illegible] Corp	A52685	/	–	125	
15499	–	46460	495		–	9/5	Villa Park	A49351	/	–	134	
15500	–	38000	16644.5		–	9/5	Garden Grove Citrus	14224	/	–	128	
		245450	So. Votaw ✓									

⑥ 9/6

~~JHM~~

CS-9

CDP-M-9

L. A. Seley Co. Co.
PROCESSOR

9-5-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15491	Valencia	48350	C 3721		Mansfield	9/4	Francis Citrus	A26549		2.67	129	
15492	Valencia	42520	1765		-	9/4	Consolidated Orang.	A52684		-	132	
15493	-	45480	21099		-	9/4	Olive Heights	13194		-	123	
15494	-	42440	494		-	9/5	Villa Park Orchards	A55750		-	121	
		178790	5 @ Vals									
		(4)	9/5									

[fol. 82]

H. A. Selz
PROCESSOR

9/4-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15486	Val.	48980	07984	–	Mansfield	9/3	Fullerton Mut.	7874 A787[illegible]	✓	–	130	
15487	–	52340	07982		–	9/3	Fullerton Mut.	A787[illegible]	✓	–	138	
488	–	39260	07991		–	9/3	Fullerton Mut.	A7876	✓	–	131	
15489	–	49260	1354		Mansfield	9/4	Tustin Hills	A52406	✓	–	125	
15490	–	45700	492		–	9/4	Villa Park	A 55748	✓	–	111	
		235500	So.	Van S								

(5) 9/4

CDP-M-9

[fol. 83]

[illegible]
PROCESSOR

9-1-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15V84	Val	4446[illegible]	1527	[illegible]		8/31	[illegible]	A55743		-	135	
15V85	-	45260	1345		-	8/31	[illegible]	A5239[illegible]			115	
		53960 [illegible]										
			④	9/1								

83

[fol. 84]

Basciano
PROCESSOR

8/31/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15480	Valencia	37960	[illegible]		[illegible]	8/30	[illegible]	14208	✓	–	138	
15481	Val.	47100	1341		– –	8/30	[illegible]	B52393	✓	–	125	
15482	Val.	49560	1186		–	8/31	[illegible] Richards	A55742	✓		111	
15483	–	41300	1750		–	8/31	[illegible] Brown	A52647	✓	–	142	
		175920	So.	[illegible]	✓							

8/31

CDP-U-6

[fol. 85]

[illegible]
PROCESSOR

8-30-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15476	Valencia	45800	482		Munfull	8/29	Villa Park Orchards	A55738	✓	—	131	
15477	Val	36420	2094		Munfull	8/28	Goldman's Citrus	A52231	✓	—	141	
478	-	46080	1748		Munfull	8/29	Consolidated	A52068	✓	—	13[illegible]	
15479	-	51120	16196.7		Munfull	8/29	Goldman's Citrus	A52233	✓		137	
		179420	So Vals.									

4) 8/30

AS-9

E A Stringer Corp.
PROCESSOR

8-28-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15471	Valencia	42120	1737		Manfield	8/28	Villa Park Orchards	A55733	✓	—	12.3	
15472	Valencia	44840	1738		Manfield	8/28	Villa Park Orchards	A55734	✓	1.33	119	
15473	Val.	47980	1739		Manfield	8/28	Consolidated Orange	A52665	✓	—	142	
15474	Val	35440	1740		Hammond	8/29	Consolidated Orange	A52666	✓	—	145	
15475	Val.	40240	[illegible]		Manfield	8/28	Garden Grove Citrus	14204	✓	—	124	
		210620										

⑤ 8/29

E A Sizzie Corp
[illegible]

8 28 51
UNLOADING DATE

									---DO NOT USE THIS SPACE---			
LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15468	Valencia	44580	16158		Mansfield	8/27	Goldencoast Citrus	A52228	/	—	128	
15469	Valencia	49280	474		Mansfield	8/27	Villa Park Orchards	A55731	/	—	143	
470	Valencia	25640	1774		Mansfield	8/27	Consolidated Orang.	A52662	/	—	138	
		119500	So	VALS.								

3) 8/28

19-9

[illegible]
PROCESSOR

8/23-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
154[illegible]	Valencia	48890	03414		Munford	8/24	Hollingsworth Citrus	A52221	✓	–	145	
15463	Val –	41680	470		Munford	8/24	Vista Pack, Orchards	A55[illegible]	✓	–	127	
[illegible]	Val.	48860	16109		Munford	8/24	[illegible]	14192	✓	–	142	
15465	Val	30060	477		Hammond	8/27	Vista Pack	A553[illegible]	✓	–	141	
154[illegible]	Val	33840	16151		Hammond	8/27	Hollingsworth Citrus	A52227	✓	–	136	
15467	Val	33740	465		Munford	8/24	Vista Pack Orchard	A5572[illegible]	✓	[illegible]	132	
		236010	[illegible]									

(C) 8/27

8/24 – 172110
8/27 – 63900
236010

FA [illegible] Corp
PROCESSOR

8-29-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
1594	Val.	49560	[illegible]	Manford		8/24	Villa [illegible]	A557[illegible]	/	—	131	
		49580	5a	Wa[illegible]								
~~[illegible]~~	~~Val~~	~~[illegible]~~	~~[illegible]~~	~~[illegible]~~		~~8/24~~	~~[illegible]~~	~~[illegible]~~				

① 8/25

[illegible] Co.
PROCESSOR

5/24-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15455	Valen	45240		Manfield		5/23	[illegible]	14183	✓	–	149	
15456	–	36760		–		5/23	Consolidated Org.	AS265	✓	–	154	
15458		41080		–		5/23	[illegible]	AS1894	✓	–	133	
15459		41680		Manfield		5/23	[illegible] Citrus	AS[illegible]	✓	–	148	
15460		35780		Manfield		5/23	[illegible] Packer	AS5727	✓	–	134	
		[illegible]	So. [illegible]		✓							

⑤ 8/29

CSP-11-9

[fol. 91]

EA Sizzre Corp
PROCESSOR

8-23-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15449	Valencia	44460	1713		Manfull	8/22	Consolidated Orange	B52646	/	—	120	
15450	Valencia	49440	1304		Manfull	8/23	Tustin Hills Citrus	A52358	/	—	125	
15451	-	46040	16590		Manfull	8/25	Garden Grove Citrus	14185	/	—	137	
		139940	So Val									

③ 8/23

[fol. 92]

[illegible]
PROCESSOR

8-21-[illegible]
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15438	Valencia	44400	439	Mansfield		8/21	Villa Park Orchards	A55715	✓	–	133	
15439	Val	45860	1706	-		8/21	Consolidated Citrus	A52641	✓	–	129	
15440	"	48450	C3205	-		8/21	Francis Citrus	A2653	✓	–	130	
15441	"	10180	~~[illegible]~~ 7301	Holyfield		8/22	Fullerton Mut.	A8[illegible]	✓	–	134	
15445	"	47900	7292	Mansfield		8/22	Fullerton Mut.	A8045	✓	–	146	
		196790	So. 4 Acs									

⑤ 8/27

EA Sizzle Corp

8-21-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
[illegible]	Valley	50100	457		Mansfield	8/20	Villa Park Orchards	55713 A[illegible]13		–	129	
[illegible]	[illegible]	50560	1700	–		8/20	Consol. Org. Grow	A#2635		–	128	
		100660	50	VALS								

8/21

[fol. 94]

69-9

PROCESSOR

UNLOADING DATE
-19-20

--DO NOT USE THIS SPACE--

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15420	[illegible]	45730	C3078		Manfield	8/16-57	[illegible]	A51820	✓	–	127	
[illegible]	[illegible]	41[illegible]	1278		Manfield	[illegible]	Tuscan Hills	A 52334	✓	–	119	
15424	Val	48580	433		Manfield	8/17	Valta Park	A55708	✓	–	137	
15425	Val	51820 ~~[illegible]~~	7117		Manfield	8/17	Francis Citrus	A 26524	✓	–	135	
15426	Val	47680	1694		Manfield	8/17	Consolidated Orange	A52632	✓	–	130	
15427	Val	31760	7089		Manfield	8/18	Francis Citrus	A 26526	✓	–	119	
15429	Val	38820	1696		Manfield	8/18	Consolidated Citrus	A52632	✓	–	133	
15430	Val	49410	C3148		Manfield	8/20	Golden West	A52209	✓	–	117	
		354920	So Vans									

⑧ 8/20

8/18 - 305510 So Vans ✓
8/20 - 49410 So Vans ✓
354920 So Vans

[illegible] Co
PROCESSOR

8-17-51

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15468	Valencias	35420	7673	Mansfield		8/15	Santiago Orange	A51429		—	129	
15414	Val.	43100	C-3026	—		8/15	Irvine Valencias	A8310			130	
		78520	So Orange									

8/17

[fol. 96]

69-9

L. G. [illegible]
PROCESSOR

-15-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15405	Valencia	43480	445	Manifest		8/14	Villa Park Orchards	A55699		–	134	
15406	Val.	42600	C2983			8/15	Santa Ana Tustin Mut.	A51813		1.56	125	
407	Val	47860	448			8/15	Villa Park Orchards	A55703		–	142	
		133940	50	Vals								

③ 8/16
~~JWH~~

CDP-M-9

E. A. Silz Co.
PROCESSOR

8·14·51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15399	[illegible]	42340	1680	Mansfield		8/14	Consolidated Orang	A5262	/	—	115	
15400	Vli. ..	48500	16550 16257	Mansfield		8/14	Francis Cit...	A26500	/	—	131	
		90840	So Vals									

② 8/15

EH Single Corp
PROCESSOR

6 · / 51
UNLOADING DATE

12-9

									---DO NOT USE THIS SPACE---			
LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15398	Val -	~~51360~~	1262		Mansfield	6/13	~~Austin Hills Citrus~~	A5232		-	131	
		51360	50	Vale								
~~[illegible]~~	~~Val~~	~~42910~~	~~1680~~		~~Mansfield~~	~~7/13~~	~~Consolidated~~	~~A52082~~				

① 8/14

[illegible] Co.
PROCESSOR

8/9-10
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15382	Valencia	43550	C2869		Mansfield	8/9-	[illegible] Mc	A51806	/	—	129	
15387	Val.	47560	X6627		Mansfield	8/10	[illegible] Citrus	A-5[illegible]	/	—	125	
		91110	50 Vans									

② 8/10
[illegible]

[fol. 101]

E H Sizzgic Co.
PROCESSOR

8-9-1951
UNLOADING DAT

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15379	Valencia	37420	1607		Minfeld	8/8	Francis Citrus Assn	A2651		1.33	125	
15380	Valencia	36720	1244		Minfeld	8/8	Tustin Hills Citrus	A31303		–	127	
		74140	So Vays									
			② 8/9									

E G. Sel[illegible] Co
PROCESSOR

8-1-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15368	Valencia	45900.	B2716	Mansfield		8/7	Irvine Valencia	A8255		1.33	130	
15369	Val	46980	422	Mansfield		8/7	Villa Park Orchard	A5675		—	128	
15370	"	46200	C4752	"		8/7	Santa Ana Tustin Mut	A51802		—	119	
		139080	No	VALS								

③
8/8
~~T.M.~~

[fol. 103]

Gen. Citrus Co -
PROCESSOR

8-6-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15355	Valencia	39940	16022		Manfield	8/4-51	Irvine Valencia	A51391	/	-	120	
15356	-	43000	C2653		Manfield	8/3-51	Irvine Valencia	A51390	/	-	119	
15358	-	45780	1230		Manfield	8/4-51	Tustin Hills Citrus	A52291	/	-	112	
15367	-	47080	11[illegible]		Man[illegible]	8/6	Frances Citrus Assn.	A26518	/	-	130	
		175800	So Vars									

4/8/1

8/4 - 128720. So Vars
8/6 - 47080
175800

CDP-M-8

[illegible]

[illegible]
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD ID.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
1535	[illegible]	48690	[illegible]		[illegible]	[illegible]	[illegible]	A51584		-	1.22	~~[illegible]~~
~~[illegible]~~	~~[illegible]~~	~~[illegible]~~	~~[illegible]~~		~~[illegible]~~	~~[illegible]~~	[redacted]	[redacted]				

48690 So [illegible]

0 1/4

[illegible]

PROCESSOR E A Silzle Corp

8-2-51
UNLOADING DATE

6-77

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
												---DO NOT USE THIS SPACE---
15338	Val.	41970	[illegible]		Mansfield	8/2	Irvine Valencia	A51578		–	122	~~[illegible]~~
15399	Val	43320	[illegible]		Mansfield	8/2	Santa Ana Tustin Mut	A2919		–	122	~~[illegible]~~
		85290	2	loads								

9 8/3

CDP-M-9

EASiLzze Corp
PROCESSOR

8-2-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15327	Valen.	39500	410		Mansfield	8/1-51	Villa Park Orchards	A55663		—	137	~~[illegible]~~
15328	Val.	47700	2530		Mansfield	8/1-51	Santiago Org. Inc	A51327		—	130	~~42.83~~
329	Val	47120	413		Mansfield	8/1	Villa Park Orchards	A55666		—	143	~~45.87~~
15337	Val	33680	16000 ~~7090~~		Hammond	1	Golden Citrus	A-52157		—	138	~~[illegible]~~
		168000	Jo	VAC S								

④ 8/2

CSP-H-5

106

6-29

EASiLzLe Carp
PROCESSOR

7-31-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15311✓	Val.	46960	406		Manfield	7/30	Villa Park Orchards	S-5-659	✓	—	122	
15303	Val	43220	121✓		Manfield	7/31	Tustin Hills	A52274	✓	—	112	
15305	val	4548.	C2578		Manfield	8/1	Goldenwest Citrus	A52154	✓	—	135	
		135060	So	Vals								
				③ 8/1								
				~~J.H.~~								

7/31 – 89580 So Vals
8/1 – 45480 " "
135060

CDP-M-9

8

Fasiaze Co.

7-25-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15288	Val	52960	391		Mansfield	7-24-	Villa Park Orchard,	AS 3643		—	128	~~43.07~~
15289	Val-	52080	1190		Mansfield	7-24	Tustin Hills Citrus	AS 2251		—	124	~~41.53~~
152[illegible]	Val-	53450	22499		Mansfield	7-22	Golden West Citrus	AS 2132		—	144	~~42.20~~
		158490	50	VAC5								

③ 1/25

~~1/11~~

108

18-9

F A Silzze Corp
PROCESSOR

7-24-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15282	Val-	45460	46603		Manford-	7-23	Goldmund Citrus	52128	/	-	120	~~[illegible]~~
15283	Val-	46620	0589		Manford	7-23	Goldmund Citrus	52129	/		116	~~[illegible]~~
15284	Val-	30980	02489		Manford	7-24	Goldmund Citrus	52130	/	-	120	~~[illegible]~~
		123060	50 V.A.S									

CDP-M-8

[fol. 110]

H. Schuyler Co
PROCESSOR

7-19-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15343	Valencia	30000	16445 16433		Thomas	7/18	Bolleman Citrus	A52117			131	~~[illegible]~~
15344	Valencia	32160	16141		Thomas	7/18	–	A52116			131	~~[illegible]~~
15345	Valencia	22180	16449		Thomas	7/18	–	A52118			128	~~[illegible]~~
		84340	3o	Vals								

110

Ex Lykes Co
PROCESSOR

7-16-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15251	Val	47460	2404		Manfredi	7/16	Santiago Ocampo	A51198		-	11.9	~~39.00~~
		47450	50	VA25								

[illegible] Co

7-12-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
~~[illegible]~~	~~[illegible]~~	~~[illegible]~~	~~[illegible]~~		~~[illegible]~~	~~7-10-51~~	~~[illegible]~~	[illegible] 1916				
1338	Val.	39520	1549		Mansfield	7-11-51	Santiago Orange Gro	AS1168		—	11.7	~~[illegible]~~
1339	Val	41700	1557		Mansfield	7-12	Santiago Orange Grow	AS1171		—	12.6	~~[illegible]~~
		81220	So Kist [illegible]									

[illegible]
PROCESSOR

July 11-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15734	Val-	37960	2381	[illegible]	Mumford	7/10	Sarinaga Orange Growers	A51157	/	—	95	~~[illegible]~~
		37960	So VA&S									

113

CSP-2-8

E A Silzle Corp
PROCESSOR

7-10-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
~~15327~~	~~[illegible]~~	~~40480~~	~~16858~~		~~Mumfeld~~	~~7/10-51~~	~~[illegible]~~	1915				
15328	Val.	30260	16860		Mumfeld	7/10-51	Santa Ana Tomato Ind	A29150	/	—	116	~~38.44~~
15330	Val.	37150	16865		Mumfeld	7/10-51	Olsen Hgts. [illegible]	13869	/	—	121	~~40.58~~
15331	Val	41060	16866-67		Mumfeld	7/10-51	[illegible]	14047	/	—	122	~~40.77~~
15332	Val	36680	15594		Mumfeld	7/10-51	Com. [illegible] Grow.	A52-560	/		136	~~46.15~~
		145180	So Val 5									

E.A. Silzle Corp
PROCESSOR

7-5-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15316	Valencia	35420	16831	-	Hammett	7/3	Santa Ana-Tustin Mut	A29142			116	~~38.44~~ 32
15219	Val-	22900	16832	-	Hanna	7/3	Goldenwest Citrus	A52069			127	~~[illegible].08~~ 3
		58320	So	Vocs.								

[fol. 116]

98-7

E. A Silzle Corp
PROCESSOR

7-3-51
UNLOADING

---DO NOT USE THIS SPAC

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS
13214	Vals	46660	05244	13145-275	Hereford	7/2	Goldenwest Ck	A52066		—	140

46660 So Vals ✓

[illegible] Co
PURCHASER

7-2-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
[illegible]	Val.	44820#	1125	12318	[illegible]	7-2-51	Tustin Hills -	A26485		–	12.6	~~42.50~~
[illegible]	Val.	41280#	335	12317	–	7-2-51	Villa Park Orchards	A5539[illegible]		–	13.6	~~44.[illegible]~~
		86100	So Vals									

.17

E.A. Silzle Corp
PROCESSOR

6-28-1951
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15301	Val.	39080.	05095	12274	Mansfield.	6-27	Walnut Fruit Grow.	A1608		—	124	~~44.53~~
15303	Val	49260.	05100	163-291	Mansfield	6-27	Rowhelton Heights	~~K3328~~ ~~11808~~		—	123	~~44.53~~
304	Val	23670.	8344	12259	Mansfield	6-28	Golden West Citrus	A52035		—	124	~~44.53~~
15305	Val.	37020.	8113	12258	Mansfield	6-28	Franklin Hills Citrus	A2647	7		119	~~39.40~~
		149030	So	Haas								

118

Cal. Cyl. Co. [illegible]
PLANT

6-27-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
15201	Val.	35000	10505	1946	[illegible]	6/25-	[illegible]	A 39256	/		12.3	~~[illegible]~~
		38000	So. [illegible]									

Plaintiffs' Exhibit 7

F A Silzer Corp
PROCESSOR

6-15-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	BRIX ~~RATIO~~	DECAY	SOLIDS	~~RATE PER TON~~
												1268 gal ✓
15199	Val	21040	18190		Manfield	6/15	Anaheim Val	A39480	11.7	–	123	342.36
		21040	5 Vans ✓									

E A Sizzle Corp
PROCESSOR

6-14-1957
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	BRIX ~~RATIO~~	DECAY	SOLIDS	~~RATE PER TON~~
									17.1			2136 gal
1514	Val.	34400	04609	11989	[illegible]	6-14	Fullerton Mut. [illegible]	A2775		-	131	$576.72 ✓
		34400	So Vales ✓									

121

[illegible] Co
CESSOR

6-12-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

OAD .C.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	BRIX ~~RATIO~~	DECAY	SOLIDS	~~RATE PER TON~~
19	Val	46560	41623	H 978	Mumfield	6-12	Fullerton Mut. Org.	A27947	~~12.7~~	—	136	2843 gal ✓
												$ 767.61
191	Val	41700	41631	11962	Mumfield	6-12	Fullerton Mut. Org.	A27948	~~12.3~~	—	1.2 ✓	2841 gal ✓
												$ 650.97
		88260	So Vacs									

12

[fol. 123]

Plaintiffs' Exhibit 8

[illegible] Reds
PROCESSOR

11/3/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
1171	V.C.	29760	6085	T. 36/[illegible]	T.S.	11/2	Cavalcante & Bro	49190		–	117	
		29760	So	[illegible]								

Treesweet Prods
PROCESSOR

11/6/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
1173	Vals	44800	5991	56-57	T S	11/6	F M O A	39397	✓	2.22	139	
74	"	50970	5996	34-35	T S	11	Golden State Or	75178	✓	—	150	
76	"	48800	5999	3	Walcom	11	No Whittier HA	46862	✓	—	140	
77	"	46650	6003	9	Tilley	"	Fullmore # 2	23450	✓	—	152	
78	"	46360	6004	56-57	T S	"	Villa Park Orch	55778	✓	2.22	132	
1180	"	51400	6009	34-35	T S	"	S O G A	48703	✓	1.33	132	
81	"	51190	6010	56-57	"	"	Olive HA	48173	✓	—	121	
82	"	17650	6013	2	Walcom	"	No Whittier HA	46864	✓	—	128	
83	"	40050	6014	3	"	"	" " "	46863	✓	—	128	
86	"	46600	6018	57-56	T/S	"	Walnut Fr. Gr	47403	✓	—	129	
87	"	17150	6019	2	Walcom	"	No Whittier HA	46865	✓	—	139	
89	"	40140	6022	34-35	"	11/7	Villa Park Orch	55779	✓	—	143	
		460710	50 Vals									

134

CO-12-8

Treesweet
PROCESSOR

11/5/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
4160	Vale	45920	5973	56-57	T.S.	11/5	F.M.O.A.	39394		—	115	
61	"	17580	5976	✓	Wilson	"	Covina Citrus	45617		—	126	
62	"	43640	5977	25-50	T.S.	"	C.O.G.	49872		—	144	
63	"	51560	5978	56-57	"	"	Villa Park Orchs	55776		—	146	
64	"	53840	5979	34-35	W.B.	"	S.O.G.A.	48694		—	119	
65	"	79060	5980	3	Wilson	"	No Whittier Hts	46860		—	128	
66	"	57850	5981	34-35	TS	"	Olive Hts	48169		1.78	128	
67	"	13650	5982	2	Wilson	"	Covina O. Gro	15019		—	138	
68	"	50960	5984	34-35	T/S	"	Villa Park Orchs	55777		—	149	
69	"	49950	5985	57-56	"	"	Walnut Fr. Ass.	47407		—	119	
70	"	46250	5987	10	Finley	"	Perez Citrus	34559		—	151	
71	"	12770	5988	2	Wilson	"	Covina O. Gro	15019		—	107	
72	"	22840	5989	3	"	"	No Whittier Hts	46861		—	130	
		488710	So	Vacas								

Treesweet Prods
PROCESSOR

11-3-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
4153	Vals	27700	5956	3	Watson	11/2	No Whittier Hts	46858		–	131	
4154	"	17650	5955	2	"	"	Corona Or Gro	15087		–	126	
4155	"	34750	5960	56-57	T/S	"	Olive Hts Cit	48164		–	116	
4156	"	46960	5962	56-57	"	"	Villa Park Orchs	55773		–	153	
'58	"	35960	5968	7-23	Finley	"	Villa Park Orchs	55774		–	137	
	"	157520	So	[illegible]								

[fol. 127]

Treesweet Prods
PROCESSOR

11/2/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
4136	Vals	28800	5912	3	Wilson	11/1	No Whittier Ht.	46855		—	135	
4138	"	12450	5920	2	"	"	Corona Or Gro	15085		—	121	
4139	"	52200	5921	34-35	TS	11/2	SOGA	48678		—	131	
4140	"	44620	5925	19	Merrifill	11/1	FMOA	39380		—	139	
4141	"	28950	5926	3	Wilson	11/2	No Whittier Ht.	46856		—	118	
4142	"	52000	5925	34-35	TS	11/2	Villa Park Orch	55771		—	162	
4143	"	49660	5929	56-57	"	"	FMOA	39384		—	128	
4144	"	12940	5936	2	Wilson	"	Corona Or Gro	15086		—	128	
4145	"	52030	5939	12	Finley	"	Olive Hts	48162			118	
4146	"	52080	5943	57-56	T/S	"	Villa Park Orchs	55772		—	145	
4147	"	29100	5944	#3	Wilson	"	No. Whittier Ht.	46857		—	121	
4148	"	48550	5946	43-44	Finley	"	San Fernando Ht.	56527		—	112	
4149	"	51260	5949	34-35	T/S	"	Yorba Linda Ct.	39694		—	139	
4150	"	42700	5950	11-30	Finley	"	Olive Ht. Ct.	48163		—	124	
4151	"	52620	5951	22-25	"	"	Consolidated O.C.	49865		—	134	
4152	"	49950	5952	57-56	T/S	"	Goldenwest Ct.	75171		—	140	
		659150 So. Vals										

Treesweet Prods
PROCESSOR

11/1/51
UNLOADING DATE

--DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
4116	Vals	47240	5868	14-29	Finley	11/1	S.O.G.A.	48667		–	133	
4118	"	12790	5872	2	Wilson	"	Covina Or. Gr.	15083		–	120	
4119	"	37120	5880	27430	[illegible]	"	Irvine Val. Gro	47991		–	138	
4121	"	34600	5884	12-22	Finley	"	Yorba Linda Cit	39691		1,33	133	
4122	"	39850	5885	11-23	"	"	Irvine Val	47989		–	147	
4123	"	52360	5876	56-57	T.S.	"	Yorba Linda Cit	39692		–	143	
4124	"	38460	5889	2-27	Finley	"	Irvine Val. Gr.	47992		–	129	
4125	"	53980	5893	29-21	"	"	Villa Park Orch.	55768		–	131	
4127	"	31250	5896	34-35	T/S	"	Walnut Fr. Gr.	18849		–	146	
4128	"	12820	5898	#2	Wilson	"	Covina Or. Gr.	15084		–	121	
4129	"	29350	5899	#3	"	"	No. Whittier H.t.	46854		–	122	
4130	"	45950 ~~45750~~	5900	41-42	Finley	"	Piru Cit. Assn.	24499		–	147	
4131	"	48460	5902	11-32	"	"	Villa Park Orch.	55769		–	147	
4132	"	31620	5903	54-55	T/S	"	Consolidated O.G.	49858		–	136	
4133	"	52850	5905	34-35	"	"	Olive Hts. Cit.	48159		–	132	
4134	"	52030	5906	17-24	Finley	"	Yorba Linda Cit.	39693		–	136	
		620730	So	Vals								

128

[illegible]
PROCESSOR

10/31
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
4094	Val	45250	5816	9	Finley	10/30	Perea Citrus	24495	✓	—	152	
4096	"	30400	5825	3	Welcher	10/31	Corrica Co Gr.	15081	✓	—	123	
4097	"	51300	5827	56-57	T S	"	Irvine Val Gro	47981	✓	1.33	146	
4095	"	12560	5830	1 2	Wilson	"	D & A	12231	✓	—	133	
99	"	52300	5835	34-35	T/S	"	Olive Hts. Cit.	48153	✓	—	133	
100	"	40240	5836	7-23	Finley	"	Villa Park Orch.	55765	✓	—	122	
01	"	45600	5837	11	"	"	Yorba Linda Cit.	39690	✓	—	136	
02	"	43850	5839	41-42	"	"	Perea Cit Assn	24496	✓	—	138	
03	"	34960	5841	7-45	"	"	Placentia M.O.A.	76620	✓	—	133	
04	"	40000	5843	#2	"	"	Consolidated O.G.	49851	✓	—	124	
05	"	33740	5824	36-55	"	"	Irvine Val. Gr.	47983	✓	—	142	
06	"	45650	5844	28-25	"	"	Irvine Val. Gr.	47985	✓	—	144	
07	"	37780	5845	54-50	T/S	"	Fullerton Mut. O.A.	39374	✓	1.33	125	
08	"	28600	5849	#3	Wilson	"	No. Whittier Hts.	46852	✓	—	131	
09	"	53530	5852	17-24	Finley	"	Olive Hts. Cit.	48155	✓	—	127	
10	"	51270	5854	34-35	T/S	"	Santiago O.G.	48666	✓	1.78	140	
11	"	49240	5855	57-56	"	"	Placentia M.O.A.	76624	✓	—	133	
12	"	38280	5853	GMC	Knapp	"	Walnut Gr. Assn	18848	✓	—	131	
13	"	50180	5856	41-42	Finley	"	Villa Park Orch.	55766	✓	—	126	
14	"	12750	5862	2	Wilson	"	Pomona Fruit Gro	46280	✓	1.33	124	
15	"	29400	5863	3	"	"	No Whittier Ht	46853	✓	—	138	
		829890	So	VALS	✓							

CBP-11-8

129

Treesweet Prods
PROCESSOR

12/30/'51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
4071	Vals	25500	5766	3	Wilson	12/29	D. & G.	18229		—	111	
4073	"	53260	5777	56-57	TS	12/30	F. M. C. A.	[illegible]		1.33	151	
4074	"	51000	5778	34-35	"	"	Irvine Val Gro	47974		—	133	
4075	"	51350	5780	56-57	"	"	" "	47975		—	138	
76	"	12260	5784	2	Wilson	"	D & G	18229		—	117	
4077	"	29070	5785	3	"	"	No Whittier Hts	46849		—	149	
78	"	49900	5787	56-57	T/S	"	Goldenwest Cit	75161		—	137	
79	"	49920	5788	34-35	"	"	Placentia O.G.A.	54395		—	137	
80	"	37750	5790	4-45	Finley	"	Consolidated O.G.	49697		—	124	
81	"	43550	5792	12	"	"	Santiago O.G.A.	48655		1.56	119	
82	"	53950	5794	4-45	"	"	Olive Hts.	48151		—	134	
83	"	50680	5795	34-35	T/S	"	Villa Park Orchs	55763		—	123	
84	"	49000	5798	3	Wilson	"	No. Whittier Hts	46810		—	133	
85	"	51840	5800	28-25	Finley	"	Consolidated O.G.	49698		—	134	
86	"	37300	5803	4-45	"	"	Placentia O.M.A.	76613		—	147	
87	"	48750	5806	43-44	"	"	San Fernando Hts	56581		—	139	
88	"	39180	5808	22-27	"	"	Fullerton M. O. A.	39370		—	147	
89	"	49150	5809	57-56	T/S	"	Walnut Fr. Gr.	18846			125	
90	"	53050	5810	25-25	Finley	"	Anaheim Val. A.	09454		—	129	
91	"	47950	5811	35-34	T/S	"	Yorba Linda Cit	31659		—	127	
93	"	29340	5812	3	Wilson	"	No Whittier Hts	46551		—	136	
		897940 So Vals										

COP-M-9

[fol. 131]

TREESWEET PRODS. CO.
PROCESSOR

10/29/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
4660	Vals.	51700	5746	34-35	T/S	10/29	Irvine Val. Gr.	47967	✓	—	140	
61	"	50160	5748	57-56	"	"	Villa Park Orch.	55759	✓	—	134	
62	"	51250	5750	34-35	"	"	Irvine Val. Gr.	47969	✓	—	146	
63	"	12650	5751	#2	Wilson	"	Damerel & Allison	18226	✓	—	117	
64	"	53550	5754	57-56	T/S	"	Irvine Val. Gr.	47970	✓	1.56	137	
65	"	27900	5755	#3	Wilson	"	N. Whittier Hts.	46848	✓	—	128	
66	"	50280	5759	34-35	T/S	"	Villa Park Orch.	55760	✓	—	135	
67	"	13000	5761	#2	Wilson	"	Damerel & Allison	18227	✓	—	125	
68	"	45650	5762	Finley	41-42	"	River. Cit. Assn	24490	✓	—	158	
69	"	50700	5764	57-56	T/S	"	Walnut Fr. Gr.	18845	✓	—	138	
70	"	50180	5765	34-35	"	"	Fullerton Mut. O.C.	39366	✓	—	135	
		457020	So	VALS ✓								

TREESWEET PRODS. CO.
PROCESSOR

10/27/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
4055	VAL'S	51350	5732	56-57	9/5 10/27	10/27	Irvine Val. Gr.	47961	/	—	142	
56	"	51460	5736	56-57	T/S	"	Irvine Val. Gr.	47963	/	2.22	135	
57	"	49060	5737	34-35	"	"	Villa Park Orch.	55755	/	—	120	
59	"	49120	5742	57-56	"	"	Villa Park Orch.	55756	/	—	122	
		200990	50	VALS	✓							

CP-R-9

[fol. 133]

Treesweet Prods
PROCESSOR

10/26/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
4029	Vals	11900	5685	2	Wilson	10/25	D & A	15225		—	131	
30	"	29340	86	3	"	"	Covina Citrus	47091		—	117	
32	"	35350	89	~~34-35~~	TS	10/25	Walnut Fruit Gro	18543		—	131	
34	"	34730	5693	7-23	Farley	10/26	Olive Hts	48135		1.33	121	
35	"	52170	5695	34-35	TS	"	Irvine Val Gro	47953		1.33	150	
36	"	11850	5699	2	Wilson	"	No Whittier Hts	46846		—	139	
37	"	42700	5700	56-57	TS	"	Redlands Coop	13919		—	136	
38	"	52150	5702	18	Farley	10/26	Irvine Val Gro	47955		—	134	
39	"	29030	5701	3	Wilson	"	Covina Citrus	47093		—	110	
40	"	32980	5706	2-23	Farley	"	O.O.G.	49683		—	126	
41	"	51540	5708	10	"	"	Villa Park Orch	55753		—	141	
42	"	49550	5709	34-35	TS	"	Irvine Val Gro	47957		—	134	
43	"	49830	5710	56-57	"	"	Garden Grove Ost	75394		—	135	
44	"	48540	5712	18	Farley	"	F.M.C.A.	39359		2.67	125	
45	"	52150	5715	14	"	"	Olive Hts	48137		—	123	
46	"	12390	5717	2	Wilson	"	Covina Cit.	47094		—	114	
47	"	35700	5718	11-32	Farley	"	Goldenwest Cit.	75099		—	137	
48	"	48500	5720	48-49	"	"	San Fernando Hts	56516		—	129	
50	"	46120	5722	36-35	T/S	"	Villa Park Orch.	55754		—	132	
51	"	50100	5723	34-35	"	"	Goldenwest Cit.	75100		—	131	
52	"	47100	5725	57-56	"	"	Walnut F. Gr.	18544		—	131	
53	"	12900	5726	2	Wilson	"	Covina Citrus	47096		—	118	
54	"	29790	5727	3	"	"	" "	47095		—	117	
		866410	50	Vals								

133

Treesweet Prods
PROCESSOR

10/25/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
1013	Vale	52180	5651	34-35	TS	10/25	Irvine Val Gro	47947	✓	–	135	
14	"	12750	5655	2	Walcom	"	D + A	18222	✓	–	129	
15	"	50580	5657	8	Finley	"	F.M.O.A.	39357	✓	133	144	
16	"	52060	5658	56-57	TS	"	Golden West Cit	75095	✓	–	125	
17	"	50000	5659	34-35	"	"	Irvine Val Gro	47949	✓	–	146	
18	"	53000	5661	56-57	"	"	Olive Ht	48132	✓	–	114	
19	"	25520	5662	3	Walcond	"	McWhittier Ht	46845	✓	–	136	
20	"	12400	5664	2	"	"	D + A	18223	✓	–	126	
21	"	50750	5665	34-35	T.S.	"	Irvine Val	47950	✓	–	142	
22	"	40600	5667	56-57	"	"	Olive Ht	48133	✓	–	117	
23	"	38880	5671	54-50	T/S	"	Tustin Hills	71539	✓	–	131	
24	"	30640	5673	14-29	Finley	"	McDermont Fr.	17440	✓	–	133	
25	"	10750	5674	14-21	"	"	Gavilan Cit.	46708	✓	–	143	
26	"	46950	5675	43-44	"	"	San Fernando Ht	56515	✓	–	119	
27	"	11260	5684	#4	"	"	Irvine Val Gr.	47952	✓	–	138	
28	"	51350	5680	31-39	"	"	Francis Cit.	53627	✓	–	129	
		593010	50	Vales	✓							

✓

Treesweet Prods
PROCESSOR

10/24/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3988	Val	31130	5606	3	Wilson	10/23	Pomona Fruit Gro	46271		—	111	
89	"	45230	5609	11-32	Finley	10/24	Golden Orange Ot	75375		—	129	
90	"	51750	5612	56-57	T S	"	Irvine Val Gro	47941		—	130	
91	"	46400	5613	34-35	"	"	Walnut Fruit Gro	18842		—	127	
92	"	51500	5615	12	Finley	"	Irvine Val Gro	47943		—	140	
93	"	36400	5616	11	"	"	" " "	47944		—	134	
95	"	44080	5619	8	"	"	Olive Hts Cit	48128		—	146	
96	"	29200	5621	3	Wilson	"	No Whittier Hts	46542		—	116	
98	"	51890	5625	56-57	T/S	"	Irvine Val. Gr.	47945		1.78	138	
99	"	50400	5628	34-35	"	"	Villa Park Orch.	49497		—	127	
4000	"	46500	5630	9	Finley	"	Piru Cit Assn	24478		—	149	
01	"	46170	5631	29-21	"	"	Olive Hts Cit.	48129		—	132	
02	"	39350	5633	11-32	"	"	Irvine Val. Gr.	47946		—	136	
03	"	12810	5635	2	Wilson	"	Dapmeal & Allison	18220		—	131	
04	"	46160	5636	8	Finley	"	Yorba [illegible]	18285		—	128	
05	"	47550	5637	41-42	"	"	San Fernando Hts	56573		—	112	
06	"	50680	5638	57-56	T/S	"	Fullerton Mut. Or.	39354		—	134	
07	"	26200	5640	34-35	T/S	"	Villa Park Orch.	49498		—	132	
08	"	28550	5641	#2	Wilson	"	No. Whittier Ht.	46543		—	131	
09	"	25800	5642	6-20	Finley	"	Bryn Mawr Fr. G.	13543		—	136	
10	"	15890	5643	#33	"	"	Redlands Co-op	13918		—	139	
12	"	[illegible]	[illegible]	[illegible]	[illegible]	"	No [illegible]	46544		—	124	
		852960	So	VALS								

CP-R-9

Treesweet Prod.
PROCESSOR

10/23/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3971	Val's.	51580	5572	56-57	T/S	10/23	Irvine Val. Ag.	47935		—	132	
72	"	48420	5575	34-35	"	"	Walnut Fr. Ag.	18841		—	131	
73	"	38140	5576	7-23	Finley	"	Consolidated Or.	49447		1.33	133	
74	"	12700	5583	2	Wilson	"	Ramona Fr. Gr.	46270		—	115	
75	"	29120	5584	3	"	"	No. Whittier Ht.	46840		—	137	
76	"	50850	5585	56-57	T/S	"	Irvine Val. Ag.	47937		—	137	
77	"	48350	5589	22-27	Finley	"	Irvine Val. Ag.	47938		—	145	
78	"	39160	5590	7-23	"	"	Villa Park Orch.	49192		1.33	127	
79	"	12840	5592	#2	Wilson	"	Damerel & Allison	18219		—	123	
80	"	48000	5593	22-27	Finley	"	Goldenwest Cit.	75090		—	127	
81	"	28780	5594	#2	Wilson	"	No. Whittier Ht.	46841		—	126	
82	"	51610	5597	34-34	Finley	"	Anaheim V.O.	09441		—	115	
83	"	49760	5598	57-56	T/S	"	Villa Park Orch.	49193		—	119	
85	"	49860	5600	30-34	Finley	"	River. Cit. Assn.	24475		1.33	151	
86	"	46300	5602	29-21	"	"	Yerba Or. Gr.	68284		—	138	
		605470	50	VALS	✓							

COP-18-9

[fol. 137]

TREESWEET PRODS. CO.
PROCESSOR

10/22/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3956	Val's.	52570	5542	56-57	T/S	10/22	Irvine Val. Gr.	47928		1.78	142	
57	"	51280	5549	56-57	"	"	Irvine Val. Gr.	47930		—	121	
59	"	17150	5550	2	Wilson	"	No. Whittier Ht.	46838		—	125	
60	"	28040	5552	3	"	"	No. Whittier Hts.	46837		—	125	
61	"	39020	5554	25-50	T/S	"	Goldenwest Cit.	75085		—	121	
62	"	52800	5556	54-54	"	"	Irvine Val. Gr.	47933		—	133	
63	"	50560	5559	34-35	"	"	The Villa Park Orch.	49188		—	130	
64	"	47800	5558	41-42	Finley	"	Pepper Cit. Assoc.	24472		—	151	
65	"	17140	5560	#2	Willson	"	Valencia Hts.	46185		—	134	
67	"	50680.	5562	57-56	T/S	"	Fullerton Mut. Or.	7649		1.33	138	
68	"	50640	5563	34-35	"	"	Villa Park Orch.	49189		—	12.	
70	"	[illegible]	5565	3	Wilson	"	No. Whittier H.S.	46839		—	131	
		474730	-So	Vals								

137

[fol. 138]

[illegible]
PROCESSOR

[illegible] 20 [illegible]
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
49	Val.	[illegible]	[illegible]	56-57	T.S.	[illegible]	[illegible]	[illegible]	✓	.44	138	
50	"	51580	5574	58-57	"	"	Irvine Val. Gr.	4794	✓	–	131	
51	"	50440	5578	34-35	"	"	Villa Park Orch.	4981	✓	–	143	
52	"	51680	5531	56-57	"	"	Irvine Val. Gr.	4794	✓	70	141	
54	"	51960	5534	86-34	"	"	Santiago O.G.	4899	✓	–	128	
		258640	50 VALS									

Treesweet Prods
PROCESSOR

[illegible]
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
[illegible]	Valy	51550	5489	53-57	T S	10/19	[illegible]	45712		—	136	
39	"	17050	5489	3	[illegible]	"	Mc Whitten Hs	46595		—	138	
[illegible]	"	[illegible]	5491	2	"	"	D + A	15816		—	120	
35	"	51220	5498	56-57	T S	"	[illegible]	47916		—	131	
[illegible]	"	51950	5499	"	"	"	" "	47916		—	137	
[illegible]	"	46650	5500	9	Finley	"	[illegible] Citrus	24466		—	160	
[illegible]	"	51520	5504	25-34-35	T S	"	Villa Park Cr	49475		—	133	
50	"	28660	5506	3	Malcom	"	Corrigan Citrus	47051		—	106	
51	"	30500	5508	25-55	T/S	"	Goldencoast C.[illegible]	[illegible]		—	134	
52	"	17140	5509	7	[illegible]	"	Pomona Fr. Ex.	[illegible]		—	122	
53	"	32270	5512	17-22	Finley	"	Francis [illegible]	53617		—	121	
54	"	32490	5515	25-55	T/S	"	Goldencoast Cit.	75079		—	128	
55	"	51500	5517	54-57-56	"	"	[illegible]	[illegible]39		—	132	
56	"	50300	5518	30-34-35	"	"	Fullerton Mut. [illegible]	[illegible]		—	137	
		[illegible]	So	[illegible]								

8-14

Treesweet Prods
PROCESSOR

10/15/51
UNLOADING

---DO NOT USE THIS SPAC

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RA PE TO
3714	Vals	45750	5455	56-57	T S	10/15	Irvine Val	47905		–	132	
15	"	12 [illegible]	5456	2	Wilson	"	Mc Whittier Hts	46831		–	131	
16		27710	5461	3	"	"	Mc Whittier Hts	46838		–	127	
19	"	50550	5466	34-35	T S	"	Irvine Val	47908		–	131	
20	"	12710	5467	2	Wilson	"	D & A	18212		–	152	
21	"	50540	5468	56-57	T S	"	Villa Park Orch	49472		–	143	
22	"	46570	5469	9	Finley	"	Pure Citrus	24463		–	166	
23	"	52670	5471	34-35	T.S.	"	Irvine Val	47910		1.33	132	
24	"	28390	5473	3	Wilson	"	Mc Whittier Hts	46833		–	129	
25	"	48600	5476	54-57-56	T/S	"	The Goldenwest Ct	75074		–	132	
27	"	36250	5477	36-50	"	"	Garden Grove Ct	75360		–	136	
29	"	30750	5481	54-57-56	"	"	The Goldenwest Ct.	75075		–	131	
30	"	12520	5482	2	Wilson	"	D & A	18213		–	134	
31	"	[illegible]	5483	3	"	"	Mc Whittier Hts	46834		–	143	
		488700	50	VALS								

Fremont Kids
CESSOR

10/17/51
UNLOADING DATE

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	---DO NOT USE THIS SPACE--- RATIO	DECAY	SOLIDS	RATE PER TON
[illegible]	″	31700	5411	34-35	T S	10/16	[illegible]	15600	✓	—	137	
97	″	19650	5413	″	″	″	[illegible]	17427	✓	—	131	
98	″	38710	5414	25-50	″	10/17	Walnut Fruit Gro	18837	✓	—	146	
99	″	13050	5416	2	Wilson	″	D & A	18808	✓	—	141	
900	″	50000	5419	56-57	T S	″	Irvine Val	47897	✓	—	137	
01	″	27470	5422	3	Wilson	″	D & A	18809	✓	—	117	
02	″	51380	5422	56-57	T S	″	Irvine Val	47898	✓	—	130	
03	″	[illegible]	5425	34-35	T S	″	″ ″	47899	✓	—	139	
05	″	45470	5429	19	Finley	″	Perco Centra	24460	✓	—	144	
06	″	51570	5435	34-35	T S	″	Villa Park Orch	49467	✓	1.56	134	
07	″	78860	5440	3	Wilson	″	No. Whittier Hts. Cit	46829	✓	—	129	
08	″	51150	5442	54-57-56	T/S	″	Irvine Val. Gr.	47902	✓	—	130	
09	″	17900	5443	2	Wilson	″	Damerel Allison	18810	✓	—	138	
10	″	51100	5447	34-35-35	T/S	″	Walnut Fr. Gr.	18838	✓	—	150	
11	″	49900	5448	54-57-56	″	″	Fullerton Mut Co	7636	✓	—	144	
13	″	27730	5451	3	Wilson	″	No Whittier Hts	46830	✓	—	121	
		602510 ✓										

141

[fol. 142]

Treesweet Prod.
PROCESSOR

10/16
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3478	Vals	32000	5373	56-57	T. S.	10/15	Corona Citrus	19871	✓	—	147	
79	"	12450	5374	"	"	"	Orange Ht Co	15599	✓	—	122	
80	"	45380	5375	7	Finley	"	Pierce Citrus	24455	✓	—	144	
81	"	29510	5380	3	Mitchell	10/16	Walnut Fruit Gro	18535	✓	—	139	
82	"	51250	5379	56-57	T.S.	"	[illegible]	47891	✓	—	134	
83	"	17700	5382	2	Wilson	"	No Whittier Ht	46825	✓		138	
84	"	51600	5385	34-35	T. S.	"	East Whittier Citrus	54728	✓	—	144	
85	"	47520	5388	56-57	"	"	[illegible] Val	47893	✓	—	129	
86	"	29020	5392	3	Wilson	"	No Whittier Ht	46826	✓	—	127	
87	"	52880	5393	34-35	T S	"	Q.O.G.	49542	✓	—	131	
89	"	12680	5394	2	Wilson	"	No Whittier Ht	46827	✓	—	148	
90	"	30630	5402	3	"	"	Walnut Fr. Gr.	18836	✓	—	142	
91	"	52000	5405	52-57-56	T/S	"	The Villa Park Or.	49464	✓	—	136	
92	"	34000	5407	7-23	Finley	"	Olive Hts. Ct.	48102	✓	—	143	
93	"	47500	5408	10	"	"	Pierce Citrus	24456	✓	—	158	
95	"	27250	5410	3	Wilson	"	No Whittier Ht	46828	✓	—	136	

575280 ✓ No Vals

142

Treesweet Prod.
PROCESSOR

10/15
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
[illegible]	Val	51150	5349	56-57	T.S.	10/15	Irvine Val	47885	✓	–	135	
67	"	12560	5350	–	Walcow	"	Placentia Mutual	18434	✓	–	117	
69	"	29400	5357	3	"	"	No Whittier Ht	46523	✓	–	131	
70	"	51490	5360	56-57	T S	"	Irvine Val	47557	✓	–	127	
71	"	51700	[illegible]	34-35	"	"	Villa Park Citrus	49460	✓	–	141	
73	"	[illegible]	5363	2	Walcow	"	Placentia Mutual	18435	✓	–	107	
75	"	46580	5369	34-35	T S	"	F M C A	7629	✓	–	127	
77	"	23430	5372	3	Walcow	"	No Whittier Ht	46824	✓	–	131	
		282210 ✓ totals										

✓

[fol. 144]

[illegible] Prods Co
PROCESSOR

10/13/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
[illegible]	Vale	17750	5319	54-57	TS	10/12	Orange Ht Co	15597	—	-	136	
53	"	20700	5320	54-56	"	'	O C A	[illegible]	—	-	147	
57	"	49050	5327	34-35	"	10/13	[illegible] Co	47877	—	-	12.8	
54	"	12520	5321	-2	Wilson	10/12	Mutual Fruit Co	18834 [illegible]	—	-	133	
58	"	49400	5333	34-35	TS	10/13	[illegible] Val	47577	—	-	141	
63	"	50300	5338	"	"	"	Villa Park Orch	49455	—	-	140	
		201750 ✓										

✓

CIP-8.9

Treesweet Prod
PROCESSOR

Oct 12th 58
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3838	Vals	28870	5279	3	Wilson	10/11	No Whittier Ht	46519	—	—	131	
39	"	53580	5282	56-57	T. S.	10/12	Santiago O G	47560	—	—	148	
40	"	49570	5289	34-35	"	"	Irvine Val	47571	—	—	129	
41	"	4000	5288	25-50	"	"	[illegible] Citrus	42788	—	—	101	
42	"	20050	5291	4	"	"	[illegible] Citrus	46706	—	—	144	
43	"	24560	5290	3	Wilson	"	No Whittier Ht	46520	—	—	136	
44	"	12360	5293	2	"	"	D & G	18203	—	—	127	
45	"	29570	5300	3	Wilson	"	Valencia Mut Gro	18532	—	—	134	
46	"	47150	5301	9	Dudley	"	Pure Citrus	35900	—	—	154	
47	"	52880	5302	56-57	TS	"	Irvine Val	47573	—	2.67	134	
48	"	51260	5305	34-35	"	"	F.M.O.A.	7624	—	1.33	137	
49	"	12400	5307	2	Wilson	"	D & R	18204	—	—	144	
		38650										

[illegible] [illegible]
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
[illegible]	V.	12510	5245	2	Wilson	10/11	Covina Citrus	47062	✓	-	115	
3319	"	51180	5240	34-35	TS	"	Yorba Linda Cit	39657	✓	-	142	
3320	"	50800	5242	56-57	"	"	Irvine Val	47863	✓	-	142	
21	"	22500	5246	25-50	"	"	Corona Citrus	19868	✓	-	141	
22	"	17650	5249	2	Wilson	"	D & R	18199	✓	-	116	
23	"	51700	5251	34-35	TS	"	Villa Park Cit	49445	✓	-	133	
24	"	22500	5250	2	Wilson	"	No Whittier Ht	46517	✓	-	132	
25	"	51160	5253	56-57	TS	"	Irvine Val	47864	✓	-	123	
26	"	39700	5255	34-35	"	"	Santa Ana Tustin M.	51974	✓	-	127	
27	"	34900	5256	25-22	"	"	Santiago C G	48533	✓	-	140	
28	"	12260	5259	2	Wilson	"	No Colton Ht	46318	✓	-	149	
29	"	30600	5262	3	"	"	Walnut Fruit Gro	15831	✓	-	139	
30	"	46950	5260	4	Pauley	"	[illegible] Citrus	35897	✓	-	156	
31	"	51160	5265	56-57	TS	"	Irvine Val	47866	✓	-	137	
32	"	52700	5263	34-35	"	"	Santiago C G	48536	✓	-	125	
33	"	27150	5266	25-50	"	"	Orange Ht Co	15596	✓	-	109	
34	"	39760	5270	10-36-35	Pauley	"	Crafton Ex. Ass	12580	✓	-	135	
35	"	13300	5275	10-36-25	"	"	Bryn Mawr Fr. Ass	13540	✓	-	121	
36	"	17150	5276	2	Wilson	"	Pomona Fr. Ex	46262	✓	-	121	
		653220	L Pal ✓							✓		

CP-2-5

126

Treesweet
PROCESSOR

10/10/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3800	Vals	12400	5194	2	Wilson	10/9	D & A	78196	—	—	123	
01	"	28650	5195	3	"	"	No Whittier Hts	46815	—	—	142	
02	"	23950	5199	3	"	10/10	Pomona Fruit Gr	46259	—	—	122	
03	"	12850	5202	2	"	"	D & A	18177	—	2.89	142	
04	"	36600	5203	25-50	TS	"	Glendora Mutual	18477	—	—	114	
05	"	51990	5206	56-57	"	"	Irvine Val	47858	—	—	135	
07	"	45750	5210	19	Findley	"	Pure Citrus	35894	—	—	147	
08	"	51980	5214	56-57	TS	"	Irvine Val	47860	—	—	133	
09	"	28660	5215	3	Wilson	"	No Whittier Hts	46816	—	—	129	
10	"	39980	5218	34-35	TS	"	Francis Citrus	53606	—	—	126	
11	"	13140	5220	2	Wilson	"	College Hts Ex	16800	—	—	131	
12	"	52240	5227	T/S	54-57-56	"	Fullerton Mut Ex	7615	—	—	150	
13	"	35930	5228	36-34-35	T/S	"	Irvine Val. Ex	47862	—	—	133	
14	"	50160	5229	14-29-21	Finley	"	Bradford Bros	09896	—	—	134	
15	"	43520	5230	25-50	T/S	"	Santiago O.G.	48531	—	—	128	
16	"	53850	5231	10-22-27	Finley	"	Garden Grove C	75333	—	—	125	
		581680	✓ All Vals									

✓

PM-M-8

Treesweet
PROCESSOR

10/9/51
UNLOADING DATE

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
									DO NOT USE THIS SPACE			
3783	Vals	42940	5159	25-50	T.S.	10/9	Irvine Val	47852	✓	–	136	
84	"	52720	5156	34-35	"	"	I.M.O.A.	7608	✓	1.33	144	
85	"	29940	5159	3	Wilson	"	Placentia Mutual	18422	✓		115	
86	"	12650	5160	2	"	"	Pomona Ft Grwd	46258	✓	–	123	
87	"	38360	5166	8235	Finley	"	Villa Park Orcd	49436	✓	–	147	
88	"	17770	5164	56-57	T.S.	"	Bryn Mawr Fruit	13539	✓	–	161	
89	"	16920	5165	"	"	"	Rialto Orange Co	14841	✓	1.35	147	
90	"	29610	5172	3	Wilson	"	Walnut Fruit Gro	18828	✓	–	123	
91	"	12810	5178	2	"	"	D & A	19195	✓	–	133	
92	"	46870	5177	19	Finley	"	Fillmore #2	23285	✓	–	146	
93	"	51760	5181	56-57	T/S	"	Irvine Val. Gr.	47854	✓	–	137	
94	"	37410 ~~38410~~	5183	25-50	"	"	Redlands Hts G.	48876	✓	1.33	126	
95	"	26180	5184	36-34/35	"	"	Orange H.S. Ov	15594	✓	–	114	
96	"	14750	5185	36-34	"	"	Corona Cit. Ass	19867	✓	–	155	
97	"	33380	5187	36-33	"	"	Walnut Fr. Ass	18879	✓	–	128	
98	"	28390	5190	#5	Wilson	"	No. Whittier Hts.	46814	✓	–	126	
		492460	✓	16 Vals								

✓

TREESWEET PROD. CO.
PROCESSOR

10/8/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3768	Val's.	53740	5119	34-35	T/S	10/8/51	Santiago O. G.	48512	—	—	134	
69	"	24000	5122	54-57	"	"	Orange Ht. Cy.	15592	—	—	95	
70	"	16750	5127	54-57	"	"	Orange Hts. Or.	15593	—	—	124	
71	"	6800	5128	54-57	"	"	Corona Cit.	19866	—	—	139	
72	"	12170	5129	2	Wilson	"	Damerel & Allin	18193	—	—	121	
73	"	49360	5131	34-35	T/S	"	Irvine Val. Gr.	47849	—	—	140	
74	"	29160	5133	3	Wilson	"	No. Whittier Hts.	46812	—	—	131	
75	"	27050	5138	36-34	T/S	"	The Goldenwest Co.	53589	—	—	130	
76	"	27320	5139	36-34-35	"	"	Irvine Val. Gr.	47850	—	—	131	
77	"	42100	5140	54-57-56	"	"	E. Whittier Cit.	54725	—	—	150	
78	"	11310	5143	2	Wilson	"	Damerel & Allin	18194	—	—	128	
79	"	28550	5150	3	"	"	No. Whittier Ht.	46813	—	1.78	127	
		328310	✓	So Vals								

Treesweet
PROCESSOR

10/6/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3757	Vals	27720	5061	3	Watson	10/5	No Whittier Hts	46809	✓	—	119	
58	"	52300	5070	56-57	T.S.	10/6	S.O.G.A.	48503	✓	—	126	
59	"	24540	5072	9	Furley	"	Rancho Sespe	35807	✓	—	127	
60	"	21550	5073	"	"	"	Piru Citrus	35885	✓	—	145	
61	"	37680	5078	14	"	"	Gold Buckle	27042	✓	—	145	
62	"	49130	5081	34-35	T.S.	"	Irvine Val	47839	✓	—	139	
63	"	39460	5082	36-50	"	"	Santiago	48504	✓	—	128	
65	"	49320	5087	56-57	"	"	Irvine Val	47841	✓	—	136	
66	"	22300	5092	36-33	"	"	Corona Citrus	19864	✓	—	118	
67	"	49700	5094	56-57	"	"	Irvine Val	47843	✓	—	138	
		373700	✓ 10 Vals									

✓

[fol 151]

Treesweet 1
PROCESSOR

10/5/51
UNLOADING DATE

...DO NOT USE THIS SPACE..

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3733	Vals	10900	4993	# 1	Wilson	10/4	Pomona Fruit Gr	[illegible]	✓	–	115	
34	"	51580	4996	56-57	T.S.	10/5	Sentinel	75044	✓	–	133	
35	"	27400	5004	2	Wilson	"	Placentia Mutual	18422	✓	–	122	
36	"	52000	5003	56-57	TS	"	L C G A	75046	✓	–	142	
37	"	12760	5007	2	Wilson	"	D & A	18128	✓	–	125	
38	"	46710	5015	32-35	TS	"	Irvine Val	47833	✓	–	136	
39	"	30090	5020	3	Wilson	"	Walnut Fruit Gr	18825	✓	–	146	
41	"	34700	5022	12	Finley	"	[illegible] Hts	48065	✓	–	124	
42	"	14220	5027	10	"	"	Redlands O. G.	10693	✓	–	139	
43	"	34800	5025	10	"	"	So. Citrus Ass..	42758	✓	–	110	
44	"	52000	5030	8	"	"	R. C. G. Fullerton	41780	✓	–	141	
45	"	12770	5029	2 ✓	Wilson	"	Damerel & Allison	18190	✓	–	120	
46	"	45080	5033	9	Finley	"	[illegible] Cit. Assn	35883	✓	–	156	
47	"	46760	5034	56-57	T/S	"	Irvine Val. Gr.	47887	✓	–	134	
48	"	54160	5035	36-56-57	"	"	Irvine Val. Gr.	47835	✓	–	135	
50	"	51050	5042	10	Finley	"	Garden Grove Cit	75314	✓	–	132	
51	"	38420	5051	36-50	T/S	"	E. Whittier Cit.	54719	✓	–	139	
52	"	48580	5053	54-35-36	"	"	Irvine Val. Gr.	47836	✓	–	134	
53	"	53550	5052	Finley	10-35-36	"	Olive Hts. Cit.	48066	✓	–	115	
54	"	33570	5057	8-29	Finley	"	Corona Cit. Assn	19863	✓	–	141	
55	"	16980	5058	8-21	"	"	Orange Hts. Assn	15590	✓	–	120	
		[illegible]	✓							✓		

Tremont

107

UNLOADING DATE

---DO NOT USE THIS SPACE---

NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
12	Val	29290	4944	3	Walcard	10/3	Mc Whittier HC	46808	✓	—	1.7	
13	"	52800	4945	24-35	T S	10/4	L C G A	75036	✓	—	1	
14	"	12450	4949	2	Walcard	"	D & A	15154	✓	—	[illegible]	
15	"	29820	4951	3	"	"	Glendora Mutual	18421	✓	—	[illegible]	
16	"	52960	4955	24-35	T S	"	Irvine Val	47523	✓	—	12	
17	"	49710	4956	56-57	"	"	Monte Vista Co.	47429	✓			
18	"	45920	4959	17-24	Fancy	"	F. M. C. A.	7546	✓			
19	"	20760	4960	11-32	"	"	Nye Crescent	13521	✓	3.	[illegible]	
20	"	15560	4961	"	"	"	Nyg County Corp	13920	✓		[illegible]	
21	"	48050	4965	9	"	"	Vieja Citrus	35850	✓	—	1.0	
23	"	45290	4964	12	"	"	Covina Citrus	19362	✓		12	
24	"	17650	4971	"	Walcard	"	D & A	15187	—	—		
25	"	29280	4975	3	"	"	Walnut Fruit Co	18524	✓		12	
26	"	50520	4976	24-35	T S	"	Irvine Val	47525	✓	—	1.4	
27	"	38310	4977	26-50	"	"	" "	47526	✓	—	1.4	
28	"	54100	4980	56-57	"	"	L C G A	75041	✓	—	1	
29	"	45470	4955	17-24	Fancy	"	E. Whittier Co	50710	✓	—	1	
30	"	35140	4987	[illegible]	T S		Irvine Val	475[illegible]	✓	—	1	
		674,560	So	Val								

[illegible] Pack
PROCESSOR

10/3/57
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3693	Vals	29190	4851	3	Wilson	10/2	McWhitter Ht	46804	✓	-	128	
94	"	31500	4859	56-57	TS	10/3	Santiago C.G.A.	75030	✓	-	126	
95	"	29550	4892	3	Wilson	"	Walnut [illegible] Gr.	18873	✓	-	138	
96	"	13010	4897	2	"	"	D & G	15182	✓	-	134	
97	"	36640	4900	56-57	T.S.	"	[illegible] Val	47817	✓	-	143	
98	"	21810	4907	170-724	Farley	"	Redlands Ht	45974	✓	-	118	
99	"	14640	4908	"	"	"	[illegible] Manor Fruit	13597	✓	-	158	
3700	"	29250	4911	#3	Wilson	"	McWhitter Ht	46805	✓	-	129	
01	"	12560	4912	2	"	"	" "	46806	✓	-	137	
02	"	19670	4914	11	Farley	"	Victoria Ave	19622	✓	-	145	
03	"	20110	4915	32	"	"	[illegible] Fruit	17421	✓	-	132	
[illegible]	"	[illegible]	4919	56-57	TS	"	[illegible] Valencia	47819	✓	-	132	
06	"	46020	[illegible]	[illegible]	Farley	"	[illegible]	35507	✓	-	150	
07	"	13810	4924	[illegible]	[illegible]	"	Redlands Or. Assn.	12642	✓	-	125	
08	"	13180	4926	36-34	T/S	"	Corona Cit Assn	19861	✓	-	130	
09	"	35010	4937	36-34-55	"	"	Orange Hts C.A.	15588	✓	-	127	
10	"	54220	4938	54-56-57	"	"	Fullerton Mut.	7843	✓	-	124	
		302360		20 Loads								

[fol. 154]

Treesweet Prods
PROCESSOR

10/2/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
73	Vals	46840	4879	18	Finley	10/1	Fullmer #1 ✓	24432		-	136	-
74	"	29660	4834	3	Webster	10/2	D & A ✓	18181		-	129	
75	"	50900	4837	56-57	TS	"	SOGA ✓	75024		-	122	
76	"	51220	4838	34-35	"	"	Walnut Fruit Gr ✓	18822		-	131	
77	"	17680	4839	2	Watson	"	Valencia Ht ✓	46159		-	131	
78	"	22440 ~~25?50~~	4845	4-45	Finley	"	Rialto Orange ✓	14887		-	128	
79	"	9520	4846	"	"	"	Red-Orange Cal ✓	18820		-	116	
80	"	53350	4850	34-35	TS	"	Irvine Val ✓	47810		-	138	
81	"	46260	4853	16	Finley	"	Polk Orchard Co. ✓	27040		1.56	138	
82	"	28620	4854	3	Webster	"	Ho Whitten Hts ✓	46803		-	131	
83	"	12310	4856	2	"	"	Valencia HG ✓	46161		-	144	
84	"	24020	4857	56-57	TS	"	Orange Hts Gr ✓	15587		1.33	109	
85	"	26440	4858	"	"	"	Oakway Citrus ✓	19860		-	144	
86	"	52740	4862	34-35	"	"	Villa Park Orch ✓	49417		-	133	
87	"	45150	4867	9-48-49	Finley	"	Pierce Citrus ✓	35874		-	152	
88	"	39830	4872	34-50	T/S	"	Francis Citrus ✓	76595		-	128	
89	"	50970	4877	54-57-56	"	"	Fullerton Mut C H ✓	7839		1.33	132	
91	"	33480	4878	25-33	"	"	Pla. Mut. Or. Assn ✓	55032		-	125	
		636380 So Vals										

CSP-9

[fol. 155]

[illegible]
PROCESSOR

[illegible] '51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3661	Vals	50780	4791	56-57	TS	10/1	Olive Hts ✓	48046		—	98	
62	"	53020	4795	34-35	"	"	Santiago O.A. ✓	75016		—	131	
63	"	12810	4801	2	Wilson	"	Covina Citrus ✓	46786		—	127	
64	"	52040	4804	34-35	TS	"	Irvine Val. ✓	47803		—	134	
65	"	35330	4812	56-57	"	"	Orange Hts Orch ✓	15586		—	124	
66	"	11750	4811	"	"	"	OCA ✓	19859		—	133	
67	"	50000	4814	34-35	"	"	Villa Park Orch ✓	49413		-	143	
68	"	13010	4819	2	Wilson	"	Covina Citrus ✓	46787		—	119	
69	"	27850	4820	3	"	"	No. Whittier Hts ✓	46802		—	120	
70	"	54540	4826	T/S	54-57-56	"	Fullerton Mut ✓	7836		—	143	
		359130	So VALS ✓									

CP-8-9

[fol. 156]

Treesweet Pride
PROCESSOR

9-29-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3655	Vals	36500	4763	56-57	T. S.	9/25	Orange Hts Ov	15584		—	127	
56	"	7700	4764	"	"	"	Corona Citrus	19857		—	141	
57	"	52050	4771	"	"	9/29	Santiago O.G.	75000		—	143	
59	"	46570	4773	"	"	"	Irvine Co	47798 ~~[illegible]~~		-	124	
		143150	So Vals									

[fol. 157]

[illegible] Bros
PROCESSOR

9-28-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3638	Val'a	29530	4715	3	Walcourt	9/28	No Whittier H.C.	16547		—	138	
39	"	54460	4721	34-35	T.S	"	Santiago O.G.	75002		—	132	
40	"	17680	4725	2	Walcourt	"	[illegible]	18175		—	125	
41	"	46490	4731	34-35	T.S	"	[illegible]	[illegible]		—	141	
42	"	29800	4732	3	Walcourt	"	No Whittier H.C.	16548		—	129	
43	"	15550	4734	56-57	T.S	"	[illegible] Orange	13909		—	140	
44	"	11770	4736	"	"	"	[illegible]	12751		3.3	141	
45	"	11570	4733	"	"	"	[illegible] C.G.	14490		3.3	138	
46	"	29530	4744	3	Wilson	"	[illegible]	18817		—	138	
47	"	40460	4743	45-50	T/S	"	[illegible]	47795		—	133	
48	"	14770	4745	2	Wilson	"	[illegible]	18177		—	139	
49	"	47750	4746	9	Bailey	"	[illegible]	35965		—	142	
50	"	54540	4749	9	"	"	[illegible]	75006		—	129	
51	"	40360	4753	45-50	T/S	"	[illegible]	[illegible]		—	135	
53	"	54700	4752	42-36-35	Bailey	"	[illegible]	48039		—	134	
54	"	53000	4756	2-4 R-59	"	"	[illegible]	47797		—	135	
		539290 [illegible]										

157

[illegible] Prods
PROCESSOR

9/27/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
318	Vals	29740	4664	3	Wilson	9/26	No. Whittier Hts	16545	✓	-	135	
19	"	29680	4665	56-57	T S	"	Orange Hts Co	15583	✓	-	127	
20	"	10850	4666	9	"	"	Corona Citrus	19856	✓	-	139	
21	"	51200	4670	56-57	"	"	Santiago O.G.	49246	✓	-	120	
22	"	17520	4676	2	Wilson	"	Corona Citrus	46776	✓	-	130	
23	"	39430	4677	24-35	T S	"	John Quelle	27037	✓	-	135	
24	"	10800	4678	"	"	"	Red. Orangedale	13817	✓	-	124	
25	"	49690	4679	56-57	T S	"	Irvine Val	47759	✓	-	144	
26	"	29420	4684	3	Wilson	"	Walnut Fruit Co	18816	✓	-	143	
27	"	52250	4685	16	Finley.	"	La Habra Cit Growers	7944	✓	-	130	
28	"	47230	4691	9	"	"	Pyne Citrus.	35862	✓	-	142	
29	"	12270	4694	2	Wilson	"	Corona Cit	46777	✓	-	151	
30	"	49740	4696	56-57	T S	"	Villa Park Orch	49407 49470	✓	-	125	
31	"	26950	4695	16-43	Finley	"	S.A. Tustin Mut.	51941	✓	-	124	
32	"	35710	4700	36-50	T.S.	"	No. Whittier Hts	16546	✓	-	132	
34	"	38960	4711	36-50	"	"	Bradford Bros.	09874	✓	-	139	
35	"	45810	4712	18-30-34	Finley	"	Placentia Cit Assn	35863	✓	-	145	
36	"	29470	4713	12-22	"	"	Monte Vista Cit	57423	✓	-	141	
		601720	50	Vals								

[fol. 159]

[illegible] 9-26-51

UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
[illegible]	Val	28890	4615	3	Walcord	9/25	[illegible] Whittier	16563	/	—	130	
01	"	31430	4622	17-24	Farley	"	United Citrus	14777	/	—	155	
02	"	16630	4622	"	"	"	Rialto Orange	14836	/	—	141	
03	"	12810	4624	~~[illegible]~~ 2	Walcord	9/26	D & G	18172	/	—	136	
04	"	51668	4625	56-57	T.S.	"	[illegible]	49239	/	—	135	
05	"	28850	4634	3	Walcord	"	D & G.	18173	/	—	106	
06	"	40280	4637	36-50	T.S.	"	L.A. Whittier Mutual	51982	/	—	116	
07	"	12660	4638	2	Walcord	"	[illegible] Whittier [illegible]	16544	/	—	140	
08	"	[illegible]	4640	3	"	"	Walnut [illegible]	18517	/	—	141	
09	"	51100	4641	56-57	T.S.	"	La Habra Citrus	7942	/	—	145	
10	"	[illegible]	[illegible]	17-24	Farley	"	[illegible]	47780	/	—	147	
11	"	[illegible]	4649	1	Walcord	"	Pomona Fr. [illegible]	43598	/	—	115	
13	"	37710	4653	34-35	T/S	"	Gold Buckle Assn	27036	/	—	137	
14	"	17500	4654	34-35	"	"	Redlands Select	13712	/	—	126	
15	"	[illegible]	4656	9-48-49	Farley	"	Fillmore Cit. #2	23757	/	—	120	
16	"	27700	4661	34-34-35	T/S	"	[illegible] Cit.	39286	/	633	134	
17	"	[illegible]	4660	8-34-34	Farley	"	[illegible] Hts. Cit.	48034	/	—	128	
[illegible]												

[fol. 160]

Treesweet Prod.
PROCESSOR

9-25-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3579	Vals	29200	4569	[illegible]	Walton	9/24	No Whittier Hts	16539	/	—	130	
80	"	13380	4553	2	"	9/24	[illegible] C.A.	47268	/	—	146	
81	"	51340	4575	19	Farley	9/24	Fullerton C.A. #1	23252	/	—	130	
82	"	10040	4577	14-27	"	"	Southern Calif	14650	/	—	90	
83	"	13200	4580	"	"	"	Redlands C.G.	14684 NONE	/	—	163	
84	"	18160	4581	"-21	"	"	Bryn Mawr Fruit	13535	/	—	156	
85	"	28600	4576	3	Walton	9/25	Walnut Fruit G.	18815	/	—	137	
86	"	50880	4586	56-57	TS	"	Santiago O.G.	49230	/	—	134	
88	"	51240	4555	34-35	"	"	Santiago "	49231	/	—	136	
89	"	12990	4592	2	Walton	"	No Whittier Ht	16540	/	—	127	
90	"	41900	4593	12	Farley	"	[illegible] Est.	47256	/	—	147	
91	"	29000	4598	3	Walton	"	No Whittier Hts	16541	/	—	138	
92	"	51350	4599	19	Farley	"	La Habra Citrus	7940	/	—	137	
93	"	45740	4602	9	"	"	Piru Citrus	35858	/	—	145	
94	"	40650	4605	36-50	T.S.	"	P.M.C.A.	8736	/	—	145	
95	"	17200	4606	2	Wilson	"	No Whittier Hts.	16542	/	—	127	
96	"	30250	4610	3	"	"	Walnut Fr. Gr.	18816	/	—	141	
97	"	53300	4611	36-34-35	T/S	"	[illegible] Hts C.A.	48029	/	—	124	
98	"	22500	4615	54-57	"	"	Orange Ht. Co.	15582	/	—	117	
99	"	5540	4616	56	"	"	Corona Cit.	19555	/	—	142	
		621290 50 VALS										

[fol. 161]

TREESWEET PRODS. CO.
PROCESSOR

9-2[illegible]
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3569	Val's.	53410	4542	31-35	T/S	9/24	Santiago O.H.	[illegible]7723		—	124	
70	"	[illegible]	[illegible]	#3	Wilson	"	Corona Cit. As.	[illegible]		—	123	
71	"	13150	[illegible]	#4	"	"	[illegible] Alliance	[illegible]		—	137	
72	"	[illegible]	[illegible]	[illegible]	T/S	"	Santiago C. [illegible]	[illegible]		—	122	
73	"	[illegible]	[illegible]	#16	Henley	"	Corona Cit.	[illegible]553		—	156	
74	"	17[illegible]	1558	39	"	"	Orange [illegible]	855EJ		—	131	
75	"	[illegible]	[illegible]50	4	Wilson	"	Valencia Ht.	[illegible]		—	123	
76	"	[illegible]	[illegible]	3	"	"	No. [illegible]	[illegible]58		—	131	
78	"	41100	4548	36-57-56	T/S	"	Olive Hts. Cit.	48075		-	121	
		280910	50	VALS.								

V-H-8

111

[fol. 162]

Treesweet
PROCESSOR

9-22-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
559	Vals	47550	4507	17	Finley	9/21	Rancho Sespe	23738	/	–	126	
560	"	13250	4511	18-48	"	"	Ref. Orangedale Co.	13816	/	–	118	
61	"	27100	4512	49	"	"	[illegible] Coop	13906	/		138	
62	"	50280	4515	56-57	"	9/22	Santiago O.G.	49214	/	–	124	
64	"	55180	4521	19	Finley	"	Santiago O.G.	49216	/	–	124	
66	"	30630	4527	54-57	T/S	"	McDermont F.A.	17427	/	–	107	
67	"	12750	4528	54-56	"	"	Orange Ht. Or. A.	15578	/	–	119	
		230970	So. Vals									

✓

[fol. 163]

8-42

Treesweet Prods
PROCESSOR

9-21-51
UNLOADING DA

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3540	Val.	25890	4455	3	Wilson	9/20	No Whittier Ht	16534	/	—	133	
41	"	49340	4456	19	Finley	"	Rancho Sespe	23736	/	—	134	
42	"	11600	4458	1	Wilson	9-21	Valencia Ht	46931	/	—	116	
43	"	29720	4462	14	Finley	9-20	Redlands O.G.	14687	/	—	138	
44	"	[illegible]	4463	14	"	"	Bryn Mawr Fruit	13534	/	—	124	
45	"	25520	4464	3	Wilson	9-21	Walnut Frut	18809	/	—	125	
46	"	17800	4465	2	"	"	Valencia Hts	46939	/	—	117	
47	"	51880	4467	56-57	T.S.	"	S.C.G.A.	49207	/	1.33	137	
48	"	51280	4478	56-57	"	"	Santiago Or. Gr.	49209	/	—	143	
49	"	57370	4480	56-57	"	"	La Habra Cit.	7934	/	—	142	
50	"	29510	4486	3	Wilson	"	No. Whittier Hts.	16535	/	—	140	
51	"	11910	4487	2	"	"	La Verne Or.	17897	/	—	129	
53	"	50420	4493	36-34-35	T/S	"	Walnut Fr. Gr.	18810	/	—	132	
54	"	25000	4496	54-57	"	"	Corona Cit Ass	19851	/	—	154	
55	"	23920	4497	56	"	"	Orange Hts. Or.	15577	/	—	129	
56	"	36360	4500	5-37	Finley	"	Pla. Mut. Or. Ass	8715	/	-	146	
57	"	52410	4503	36-34-35	T/S	"	Olive Hts. Cit	48015	/	-	118	
		562770 SO VALS										

CDP-M-9

1:3

Treesweet

9-20-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2519	Vals	29580	4410	3	Wilson	9/19	No Whittier Ht	16531	✓	–	137	
20	"	11100	4411	1	"	"	Indian Hill Cit	47264	✓	–	122	
21	"	50080	4412	19	Finley	"	Rancho Sespe	23735	✓	–	126	
22	"	52480	4414	56-57	T S	9/20	F M O A	7810	✓	1.33	121	
25	"	28270	4419	3	Wilson	"	Walnut Fruit G	18808	✓	–	127	
26	"	12670	4420	2	"	"	No Whittier Hts	16532	✓	–	123	
27	"	54000	4424	56-57	T.S.	"	Santiago O.G.	49201	✓	–	126	
28	"	42180	4425	25-50	"	"	" "	49202	✓	–	140	
29	"	24790	4428	34	"	"	Allen Bruin's Grov	13753	✓	–	125	
30	"	16230	4429	35	"	"	Redlands Coop	~~16230~~ 13905	✓	–	151	
31	"	11630	4432	1	Wilson	"	Indian Hill Cit	47265	✓	–	119	
32	"	36040	4431	25-33	T S	"	Olive Hts	48007	✓	–	142	
33	"	13000	4435	2	Wilson	"	No Whittier Hts	16533	✓	–	142	
34	"	18310	4444	57	T/S	"	Orange Hts Ov.	15576	✓	678	122	
35	"	9850	4445	56	"	"	Corona Cit	27850	✓	–	154	X
36	"	29370	4446	2	Wilson	"	Glendora Mut Or.	18403	✓	–	133	
37	"	40160	4447	25-50	T/S	"	Bradford Bros	09865	✓	–	137	
38	"	52400	4450	36-34-35	"	"	Olive Hts. Cit	48011	✓	–	106	
		530090	50	VALS								

CF-8-9

[fol. 165]

Treesweet Prod
PROCESSOR

9-19-51
UNLOADING

DO NOT USE THIS SPAC

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RAT PER TO
3499	Vals	10500	4354	1	Wilson	9/18	Pomona Fruit Gro	43589		—	131	
3500	"	28420	4353	3	"	"	[illegible] Hts	16530		—	139	
3501	"	52660	4366	34-35	T.S.	9/19	Santiago O.G.	49193		—	128	
02	"	48160	4360	9	Finley	9/18	[illegible] #2	36936		—	136	
04	"	28200	4365	31	Wilson	9/19	Walnut Fruit Gr	18807		—	128	
05	"	52580	4371	56-57	T.S.	"	F.M.O.A.	7808		1.33	138	
06	"	12440	4370	2	Wilson	"	D & A	18159		—	133	
07	"	52680	4377	34-35	T S	"	Santiago	49175		1.56	137	
08	"	38200	4380	25-50	"	"	Garden Gr Growers	39973		—	145	
09	"	24560	4384	3	Wilson	"	Glendora Mutual	18401		—	139	
10	"	17450	4387	2	"	"	Durand & Allen	18161		—	141	
11	"	40940	4396	25-50	T/S	"	Olive Hts. Cit.	48004		—	117	
12	"	5010	4399	36-34	"	"	Corona Cit.	42849		—	149	
13	"	45500	4400	36-34-35	"	"	Victoria Ave.	19618		3.11	135	
14	"	16800	4402	25-50	"	"	Olive Hts Cit.	48004		—	108	
15	"	22470	4404	10-36	Finley	"	National Or. Co.	17764		1.33	141	
16	"	19110	4403	35	"	"	Mont Vista Cit.	47419		—	149	
17	"	34170	4407	54-57-56	T/S	"	Gold Buckle Ass	27033		—	151	
18	"	11880	4408	54-56	"	"	Redlands Hts	48869		—	135	
		561790	50	[illegible]								

Treesweet Prods

9/15 -

UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3188	Vals	28170	4310	3	Wilson	9/17	No Whittier Ht	16528	✓	—	126	
3189	"	12800	4313	2	"	9/18	D & A	18156	✓	—	142	
90	"	51020	4315	56-57	T.S.	"	Santiago O.G.	49186	✓	—	128	
91	"	28970	4323	3	Wilson	"	No Whittier Hts	16529	✓	—	140	
92	"	31580	4326	6	Finley	"	Gold Buckle	27032	✓	—	146	
93	"	10350	4327	"	"	"	Bryn Mawr H	13533	✓	—	141	
94	"	17900	4328	Y 2	Wilson	"	D & A	18157	✓	—	139	
95	"	51900	4331	56-57	T.S.	"	La Habra Citrus	7976	✓	—	146	
96	"	51460	4332	34-35	"	"	Santiago O G	49188	✓	—	125	
97	"	57920	4336	54-57-58	"	"	Olive Hts. Cit.	13750	✓	—	114	
		332070	50 VANS									

Treesweet Prods
PROCESSOR

9/17/51
UNLOADING DAT

---DO NOT USE THIS SPACE--

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3476	Vals	12610	4289	2	Watson	9/17	Ko Whittier Hts	16526		—	131	
77	"	29690	4290	3	"	"	" " "	16525		—	130	
78	"	50190	4293	56-57	T.S.	"	Ivories Inc	8485		—	141	
79	"	51520	4294	34-35	"	"	Santiago O.G.	49182		—	139	
80	"	45950	4296	11-32	Finley	"	La Habra Citrus	7974		133	144	
81	"	12830	4297	2	Watson	"	D & A	18155		—	142	
82	"	49450	4300	56-57	T.S.	"	Ivories Inc	8486		—	131	
83	"	28500	4301	3	Watson	"	Glendora Mutual	18397		—	117	
84	"	51300	4304	56-57	T.S.	"	S A Tustin Mutual	51972		—	123	
85	"	51400	4308	34-35	"	"	Corona Citrus	42847		—	141	
86	"	49430	4309	18	Finley	"	Hayes Citrus	36314		—	120	
		432870	So. VALS									

Treesweet Prod Co

9-15-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. -DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3468	Vals	30580	4767	34-35	T S	9/14	[illegible]	1557	✓	—	109	
3469	"	19550	4766	"	"	"	[illegible] Citrus	42545	✓	—	140	
70	"	[illegible]	4770	4-45	Finley	"	Francis Citrus	26565	✓	—	123	
71	"	29000	4772	10	"	"	Victoria Ave	19616	✓	—	139	
72	"	11950	4773	10-35	"	"	Gavilan Citrus	46701	✓	—	134	
73	"	51200	4775	34-35	T.S.	9/15	Santiago O. S.	49173	✓	1.33	125	
74	"	56610	4777	16-29-21	Finley	"	Santa Ana Tus. Mut.	51918	✓	—	122	
75	"	50100	4278	54-57-56	T/S	"	Santiago Or. Grs.	49176	✓	—	129	
		287560 So Vals										

Treesweet Prods
PROCESSOR

9-14-51
UNLOADING DAT

--DO NOT USE THIS SPACE--

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
~~43~~	~~Vala~~	~~29360~~	~~4207~~	~~3~~	~~Wilson~~	~~9/13~~	~~[illegible]~~	~~18893~~		Duplication		
44	"	29200	4208	18	Finley	"	Gold Buckle	27030	✓	—	151	
45	"	14060	4209	"	"	"	Redlands Or Gro	14682	✓	—	159	
46	"	48920	4212	56-57	T S	9/14	F M O A	7898	✓	—	124	
47	"	12740	4211	2	Wilson	"	Valencia Ht	46930	✓	—	122	
48	"	52240	4218	17	Finley	"	Santiago O.G.	49166	✓	1.56	115	
49	"	22710	4223	3	Wilson	"	No Whittier Ht	16522	✓	—	137	
50	"	24100	4227	35	T S	"	Orange Ht Or	15571	✓	1.56	109	
51	"	2530	4226	34	"	"	Gavilan Cit	46700	✓	—	130	
52	"	35150	4228	56-57	"	"	La Habra Cit	7920	✓	—	115	
53	"	52850	4229	17	Finley	"	Irvine Val	8473	✓	—	138	
54	"	12800	4230	2	Wilson	"	Covina Or Gro	15039	✓	—	128	
55	"	38480	4231	25-50	T S	"	Santiago O.G.	49168	✓	—	140	
56	"	29200	4233	3	Wilson	"	Walnut Fruit Gro	18802	✓	—	128	
57	"	46230	4236	18	Finley	"	Mupu Cit.	36303	✓	—	123	
58	"	51860	4237	56-57	T.S.	"	Yorba Orange Gr	39966	✓	—	136	
59	"	49900	4238	34-35	"	"	Murphy Ranch	53495	✓	—	133	
60	"	53280	4239	17	Finley	"	Santiago Or. Gr.	49169	✓	—	136	
61	"	12560	4244	2	Wilson	"	Covina Or. Gr.	15040	✓	—	128	
62	"	48240	4249	54-57-56	T/S	"	Bradford Bros.	07858	✓	—	130	
63	"	28890	4250	3	Wilson	"	No. Whittier Hts.	16523	✓	—	143	
64	"	53750	4252	17-24	Finley	"	Yorba Linda Ct.	39571	✓	—	140	
65	"	26870	4256	14-22	"	"	Olive Hts. Cit.	13741	✓	—	126	
66	"	52640	4257	18-41-42	"	"	Irvine Val. Gr.	8476	✓	—	139	
67	"	29410	4262	3	Wilson	"	Walnut Fruit Gro	18803	✓	—	129	
		~~886740~~	So Val									

CDP-14-9

857.380

[illegible] Park
PROCESSOR

9/13
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3420	Vals	12640	4154	2	Wilson	9/12	Damuth & Allison	15199		–	133	
21	"	13650	4155	11	Finley	9/12	Redlands Hts	48866		–	123	
22	"	20350	4156	32	"	"	" Select Groves	13706		–	142	
23	"	47440	4159	34-35	T S	9/13	F M G G	7896		.78	133	
24	"	49440	4162	56-57	"	"	Santiago O. G.	49157		–	127	
25	"	12230	4167	2	Wilson	"	D & G	15700		–	129	
26	"	29170	4168	3	"	"	So Whittier Hts	16520		–	135	
27	"	34350	4169	36-33	T S	"	Olive Hts	13234		.33	124	
28	"	51320	4176	36-34-35	"	"	Irvine Valencia	8468		.33	145	
29	"	49980	4175	56-57	"	"	[illegible] Orange	39965		–	131	
30	"	53570 ~~[illegible]~~	4177	10	Finley	"	La Habra Citrus	7917		–	142	
31	"	39260	4179	2	"	"	Santiago O. G.	49160		–	130	
32	"	40280	4180	8	"	"	Murphy Ranch	53492		–	134	
33	"	12640	4185	2	Wilson	"	Orbrita Citrus	17836		–	139	
34	"	28860	4186	3	"	"	So Whittier Hts	16521		–	121	
35	"	49520	4190	34-35	T/S	"	Bradford Bros.	09856		–	123	
36	"	49700	4192	10-35-36	FINLEY	"	Villa Park O. A	49374		–	140	
37	"	50900	4197	54-57-56	T/S	"	Murphy Ranch	53493			127	
38	"	52640	4198	10-35-36	Finley	"	Santiago Or. Gr.	49164		–	118	
39	"	11080	4200	34	T/S	"	Yorba Linda Cit	39570		–	130	
40	"	34160	4201	34-35	"	"	Bradford Bros.	09857		–	140	
41	"	41250	4203	56-57	"	"	Olive Hts	13237		–	106	
42	"	45500	4204	18	Finley	"	Mupu Cit.	36299		–	139	
43	"	29360	4207	3	Wilson	"	Glendora Mutual	18393		–	117	
44		858290	So	Vals								

170

Treesweet Prod
PROCESSOR

9-12-51
UNLOADING

907720 So VALS

---DO NOT USE THIS SPACE

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RAT PER TO
3393	Vals	42580	4098	18	Finley	9/11	Perm Citrus	35229	/	—	154	
94	"	37900	4099	25-50	T.S.	9/12	F H O A	7893	/	—	102	
95	"	50900	4100	34-35	"	"	S O G A	49147	/	—	142	
96	"	11470	4104	1	Wilson	"	D + A	15196	/	—	136	
97	"	25750	4106	3	"	"	Indian Hill Cit	47289	/	—	116	
98	"	13130	4108	2	"	"	D + A	15197	/	—	140	
99	"	39380	4109	25-50	T S	"	S O G A	49149	/	—	133	
3400	"	51000	4111	34-35	"	"	Irvine Val	8462	/	1.78	132	
01	"	37150	4113	25-50	"	"	Anaheim Val	9334	/	—	131	
02	"	28750	4115	8	Finley	"	Gold Buckle Assn	27029	/	—	153	
03	"	18770	4116	8	"	"	Crafton Orange	12572	/	—	127	
04	"	16400 ~~17250~~	4118	56-57	T.S.	"	Bedrow Est	47753	/	—	144	
05	"	24850	4119	"	"	"	Monte Vista C.A.	47417	/	—	143	
06	"	29060	4121	3	Wilson	"	No Whittier Ht	16519	/	—	138	
07	"	50760	4122	34-35	T.S.	"	S O G A	49151	/	—	126	
08	"	12410	4125	2	Wilson	"	D + A	15198	/	—	134	
09	"	41440	4127	4-45	Finley	"	Yorba Or Gro	39963	/	—	138	
10	"	49480	4129	12	Finley	"	P O G A Fullerton	37576	/	—	122	
11	"	48960	4130	56-57	T.S.	"	S O G A	49152	/	—	122	
12	"	24880	4133	25-50	"	"	Villa Park Orch	49372	/	—	130	
13	"	51070	4137	36-34-35	"	"	Irvine Val. Gr.	8465	/	—	135	
14	"	43170	4144	4-45	Finley	"	La Habra Cit	7916	/	—	146	
15	"	41470	4145	25-50	T/S	"	Olive Hts. Cit.	13730	/	—	134	
16	"	51070	4147	54-57-56	"	"	Yorba Linda Cit	39668	/	—	139	
17	"	23690	4149	12-28	Finley	"	Corona City	17844	/	—	143	
18	"	12580	4150	25	"	"	McDermont Fruit	17427	/	—	137	
CDP 19	"	29720	4153	3	Wilson	"	Covina Cit	17835 ~~17875~~	/	—	127	

[illegible] Bros

9-11-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
Vals	51340	4046	56-57	T S	9/11	J M O A	7891		–	133	
"	50080	4049	34-35	"	"	S O G A.	49139		–	131	
"	20000	4054	3	Nelson	"	[illegible]	16518		–	130	
"	11870	4057	1	"	"	[illegible] Citrus	17828		–	124	
"	[illegible]	4059	34-35	T S	"	[illegible]	8456		–	124	
"	13140	4060	2	Nelson	"	[illegible] Citrus	17849		–	132	
"	27850	4064	3	"	"	Walnut Fruit [illegible]	18800		–	126	
"	37860	4065	56-57	T S	"	La Habra Cit	7913		1.33	126	
"	49500	4066	34-35	"	"	Santiago O.G.	49144		–	114	
"	11300	4068	1	Nelson	"	D & G	15196		–	121	
"	48530	4070	6-22-27	Finley	"	[illegible]	8456		–	128	
"	[illegible]	4071	8	"	"	[illegible]	27828		–	150	
"	[illegible]	4074	25-50	T.S.	"	Bradford Bros	09853		–	126	
"	12780	4076	2	Nelson	"	Covina Cit. Assn	17880		–	124	
"	48920	4079	56-57	T/S	"	Pla. O.G.A. Pla.	37108		–	124	
"	22180	4078	36-33	"	"	Bradford Bros	09854		–	126	
"	47300	4081	17-28-25	Finley	"	Santiago Or. Co.	49145		–	108	
"	49170	4084	36-34-35	T/S	"	[illegible] C.T. Assn	53578		–	119	
"	43020	4087	8-30-34	Finley	"	Anaheim Val. Or	9855		–	146	
"	29490	4089	6-22	"	"	Orange Hts. Co. A	15569		.33	133	
"	13940	4090	4 27	"	"	Call Ranch	17481		–	111	
"	43330	4091	12-28-25	"	"	Olive Hts. C.T. As	13776		–	117	
"	49150	4092	54-57-56	T/S	"	Yorba Linda C.T.	39566		–	136	
"	11150	4096	1	Nelson	"	[illegible]	43584		–	116	
"	29580	4097	3	"	"	[illegible] Citrus	17831		–	125	
	858680	50	Vals								

Treesweet (Hoke)
PROCESSOR

9/10/51
UNLOADING D

---DO NOT USE THIS SPACE

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RAT PER TON
33[illegible]	Vals	[illegible]	3981	34-35	TS	9/10	F.M.O.A.	7888	/	–	124	
43	"	50500	3982	56-57	"	"	L.O.G.A.	49132	/	–	125	
44	"	29100	3986	8	Wilson	"	No Whittier Hts	16514	/	–	124	
45	"	[illegible]	3990	34-35	TS	"	Irvine Val	8446	/	–	137	
46	"	[illegible]	[illegible]	25-50	"	"	La Habra Citrus	7909	/	–	133	
47	"	[illegible]	3997	56-57	"	"	P.M.O.A.	8650	/	–	134	
48	"	13140	3998	2	Wilson	"	[illegible]	[illegible]	/	–	141	
49	"	[illegible]	[illegible]	3	"	"	No Whittier Hts	16516	/	–	137	
50	"	[illegible]	[illegible]	1	"	"	D & A	15192	/	–	128	
51	"	[illegible]	4008	19	Finley	"	[illegible]	36916	/	–	134	
52	"	[illegible]	4009	56-57	TS	"	[illegible]	53615	/	–	135	
53	"	[illegible]	4010	34-35	"	"	Santiago O.A.	49135	/	–	128	
54	"	41000	4015	[illegible]	MOORE	"	IRVINE VAL. CO.	8450	/	–	124	
55	"	[illegible]	4016	25-50	T/S	"	THE VILLA PARK ASS	49367	/	–	140	
56	"	28910	4017	#3	WILSON	"	WALNUT FRUIT CO.	18799	/	–	125	
57	"	13400	4018	#2	"	"	COVINA CIT. ASSN.	17876	/	–	125	
58	"	[illegible]	4025	56-57-58	T/S	"	YORBA ORANGE CO.	39961	/	–	125	
59	"	[illegible]	4026	8-30-34	FINLEY	"	SANTIAGO OR. CO.	49138	/	–	123	
60	"	[illegible]	4027	14-20-33	"	"	ANAHEIM VAL. OR.	9330	/	–	137	
61	"	[illegible]	4030	36-34-35	T/S	"	YORBA LINDA CIT.	39564	/	–	137	
62	"	[illegible]	4031	4-45	FINLEY	"	CORONA CIT. ASSN	42843	/	–	139	
63	"	12710	4033	#27	"	"	CALL RANCH	17480	/	–	122	
64	"	28110	4036	6-22	"	"	VICTORIA AVE.	19614	/	–	127	
65	"	46380	4038	11-32	"	"	OLIVE HTS. CIT.	13221	/	–	115	
66	"	11290	4044	1	Wilson	"	Pomona Fruit Gro	43582	/	–	128	
67	"	29150	4042	2	"	"	No Whittier Hts	16517	/	–	135	

919360 50 Vans

[fol. 174]

Treesweet Prods
PROCESSOR

9/7 - 9/8
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3320	Vals	11430	3940	1	Walsen	9/7	D & A ✓	15188		-	131	
21	"	27950	3941	3	"	"	No. Whittier H.G. ✓	16512		-	138	
23	"	12420	3944	2	"	"	Covina Citrus ✓	17819			132	
24	"	27600	3946	24-35	TS	"	Brown Est	47752		-	152	
25	"	12340	3949	"	"	"	[illegible] Citrus	46699		-	151	
26	"	37850	3950	25-50	"	9/8	La Habra Citrus	7906		1.33	137	
27	"	49400	3951	56-59	"	"	Santiago O.G.	49124		-	130	
31	"	38460	3963	25-50	"	"	" "	49178		1.56	136	
32	"	32540	3965	25-33	"	"	Villa Park Orch.	49363		-	136	
33	"	25950	3967	35	"	"	McDermont & Hunt	17470		-	126	
34	"	25900	3966	34	"	"	Arlington H.G.	32746		-	133	
35	"	37090	3969	56-57	"	"	Redlands Coop	25799		-	142	
36	"	23800	3970	4-45	Farley	"	Gold Buckle Assn	27027		-	149	
		362730	50	VALS.								

[fol. 175]

Treesweet Prod — 9/6 - 9/7

PROCESSOR — UNLOADING

45-8

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	PER TON
3294	Vals	12120	3882	2	Watson	9/6	La Verne Orange	17888		133	125	
95	"	12020	3884	1	"	"	Covina Citrus ✓	17815		—	121	
96	"	26650	3883	3	"	"	Indian Hill Cit	47256		—	132	
97	"	37680	3856	25-50	TS	9/7	Santiago	49116		—	120	
98	"	23470	3887	3	Watson	"	Walnut Fruit Gr ✓	18796		—	115	
99	"	24060	3889	18-41	Finley	9/7	Fillmore # 2	36910		—	138	
3300	"	24560	3891	42	"	"	" # 1	23308		—	122	
01	"	11510	3892	1	Watson	"	D & G ✓	15187		—	124	
02	"	24930	3893	34	T S	"	Or Hts Orange	15565		—	124	
03	"	14040	3895	35	"	"	Glendora Citrus	46698		—	141	
04	"	28010	3896	50	"	"	Covina Val	8435		—	120	
05	"	52470	3898	8	Finley	"	La Habra Citrus	7903		—	130	
06	"	12970	3901	2	Watson	"	Valencia Hts ✓	46922		—	123	
07	"	37200	3902	50	T S	"	Santiago	49119		—	123	
08	"	44920	3904	34-35	"	"	"	49118		—	135	
09	"	50560	3907	56-57	"	"	Jack Lucke Cit	39560		—	134	
10	"	37750	3910	54-50	"	"	ANAHEIM VAL.	9374		—	149	
11	"	50000	3916	6-20-33	FINLEY	"	SAN FERNANDO HTS. OR.	30909		—	126	
12	"	32440	3917	25-33	T/S	"	TUSTIN HILLS	52427		—	127	
13	"	36520	3929	25-50	"	"	F. M. O. A.	7885		—	138	
14	"	50180	3930	54-57-56	"	"	YORBA OR. GR.	39955		—	136	
15	"	20050	3923	14-29	FINLEY	"	CORONA CIT. ASSN	47841		—	145	
16	"	15000	3927	21	"	"	ORANGE HTS. OR.	15566		—	125	
17	"	46540	3932	6	"	"	YORBA LINDA CIT.	39561		—	147	
18	"	23540	3933	12-28-25	"	"	VICTORIA AVE CIT.	19612		—	151	
19	"	17340	3934	12-25	"	"	McDERMONT FRUIT	17419		—	127	

CDP-M-9 776530 50 VALS ✓

Increment Pick

9/6/51

UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
767	Vals	12760	3518	2	Wilson	9/6	Valencia Hts ✓	46919	/	–	127	
68	"	53140	3821	34-35	T.S.	"	Santiago	49109	/	–	137	
69	"	41970	3824	25-50	"	"	F M A G	7880	/	1.56	121	
70	"	25670	3825	3	Wilson	"	Murphy Ranch ✓	53476	/	–	119	
71	"	10910	3826	1	"	"	Pomona Fruit Gr	43580	/	–	140	
72	"	50100	3830	34-35	T/S	"	SANTIAGO OR. GR.	49110	/	–	128	
73	"	35200	3831	8	FINLEY	"	GOLD BUCKLE ASSN.	27025	/	–	149	
74	"	51920	3833	16	"	"	IRVINE VAL. GR.	8426	/	–	134	
75	"	46900	3837	12-28-25	"	"	FRANCIS CIT.	26554	/	1.33	115	
76	"	46160	3841	17	"	"	YORBA LINDA CIT.	39559	/	–	135	
77	"	49900	3844	12-22-27	"	"	LA HABRA CIT.	7600	/	–	133	
78	"	29840	3845	56-57	T/S	"	ARLINGTON HTS.	32744	/	–	128	
79	"	15680	3849	56-57	"	"	MONTE VISTA CIT.	47113	/	–	142	
80	"	50300	3850	34-35	"	"	SANTIAGO OR. GR.	49111	/	–	137	
81	"	11750	3848	1	WILSON	"	DAMEREL ALLISON ✓	5526	/	–	121	
82	"	30750	3846	3	"	"	GLENDORA MUT. O.A. ✓	18350	/	–	127	
83	"	50900	3854	16	FINLEY	"	P.M.O.A. PLA.	8679	/	–	122	
84	"	37700	3858	36-34-35	T/S	"	GOLDENCREST CIT. A.	53504	/	–	128	
85	"	33960	3861	25-33	"	"	TUSTIN HILL CIT. A.	53470	/	–	121	
86	"	50860	3866	17-24	FINLEY	"	ANAHEIM VAL. [illegible]	[illegible]	/	–	138	
87	"	46780	3869	12-28-25	"	"	No. WHITTIER HTS. ✓	16511	/	–	144	
88	"	50260	3870	36-34-35	T/S	"	OLIVE HTS. CIT.	13206	/	–	122	
89	"	51620	3871	#16	FINLEY	"	P.M.O.A. PLA.	8631	/	–	118	
90	"	4790	3872	54-57-56	T/S	"	MONTE VISTA CIT.	47114	/	–	158	
91	"	31520	3873	" " "	"	"	McDERMONT FRUIT	17118	/	–	123	
92	"	14890	3847	25-50	"	"	CORONA CIT. ASS'N	47840	/	–	140	
93	"	19820	3867	25-50	"	"	ORANGE HTS. GR.	15564	/	–	125	

965160 5a Vals

176

Treesweet
PROCESSOR

4-5-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3243	Vale	42140	3756	25-50	T.S.	9/5	Yorba Orange	39748		L	149	
44	"	17770	3758	2	Nelson	"	Covina Citrus ✓	17809		-	115	
45	"	52520	3759	34-35	T.S.	"	Santiago O.G.	49100		-	138	
46	"	49980	3761	56-57	"	"	FMOA	7575		2.67	116	
47	"	11510	3762	1	Nelson	"	Valencia Hts ✓	46917		-	148	
48	"	52380	3768	34-35	T S	"	[illegible]	8415		-	125	
49	"	28510	3773	3	Nelson	"	Covina Citrus ✓	17510		-	124	
50	"	49680	3776	56-57	T S	"	Santiago	49103		-	131	
51	"	17770	3775	2	Nelson	"	D & G ✓	15184		-	136	
52	"	51930	3779	34-35	T S	"	Golden West	52247		-	134	
53	"	52900	3782	16	Finley	"	La Habra Citrus	7598		-	124	
54	"	40620	3793	54-50	T/S	"	TUSTIN HILLS C.T.	52412		-	119	
55	"	25320	3786	10-25-28	FINLEY	"	No. WHITTER HTS. ✓	16510		-	136	
56	"	52080	3794	36-34-35	T/S	"	SANTIAGO OR. GR.	49105		-	119	
57	"	39420	3796	10-36-35	FINLEY	"	P.O.G.A. Full.	37507		-	115	
58	"	51900	3800	8-30-34	"	"	SANTA ANA TUS. MUT.	51901		-	112	
59	"	25650	3801	36-34	T/S	"	OLIVE HTS. CIT. ASS'N	18201		-	126	
60	"	25550	3802	35	"	"	THE GOLDENWEST CIT.	52249		-	128	
61	"	56100	3804	16	FINLEY	"	P.O.G.A. PLA.	37695		-	133	
62	"	29170	3805	54-57	T/S	"	CORONA CIT. ASS'N	42837		-	150	
63	"	19980	3806	56	"	"	ORANGE HTS. OR. A.	15562		1.33	134	
64	"	54060	3807	10	FINLEY	"	P.O.G.A. Full.	37538		-	130	
65	"	29650	3812	3	Nelson	"	[illegible] ✓	47258		-	114	
66	"	11320	3813	1	"	"	[illegible] Mutual ✓	18378			129	
		887910	[illegible]									

CSP-11-9

177

TREESWEET PRODS. CO.
PROCESSOR

9-4-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
32-36	VAL'S	48710	3738	54-57-56	T/S	9-4	SANTA ANA T. MKT.	51850		—	115	
37	"	51870	3735	54-35-34	"	"	SANTIAGO OR. GR.	49099		—	132	
38	"	19510	3742	16-31	FINLEY	"	MONTE VISTA C.T.	47412			145	
39	"	24700	3743	31-39	"	"	McDERMONT FRUIT	17417		—	118	
40	"	28610	3745	10-76	"	"	Pratt, Fontella C. 1	14862		133	126	
41	"	11180	3749	1	Malone	"	D + A	15182		—	112	
42	"	28990	3750	3.	"	"	Dorrien Estates	17808		—	116	
		213020 So. VALS										

[fol. 179]

85-8

Treesweet
PROCESSOR

9-4-51

UNLOADING

1085090 So. Vals

DO NOT USE THIS SPACE

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS
3210	Vals	50400	3681	34-35	TS	9/3	Santiago O.G.	49087		—	123
11	✓	51480	3682	34-35	"	"	" "	49089		—	136
12	✓	52120	3683	"	"	"	" "	49090		—	131
13	✓	49760	3685	56-57	"	"	" "	49092		—	141
14	✓	51900	3686	34-35	"	"	" "	49091		—	132
15	"	51280	3697	34-35	"	9/4	P.O.G.A. Full.	37504		—	144
16	"	53800	3699	6	FINLEY	"	SANTIAGO OR. GR.	4909[illegible]		—	113
17	"	47400	3704	12	"	"	IRVINE VAL. GR.	8407		—	136
18	"	19590	3703	54-33	T/S	"	ORANGE HTS. OR.	15562		—	124
19	"	52700	3705	34-35	"	"	GOLDENWEST CIT. ASS'N	52744		—	131
20	"	50760	3707	16	FINLEY	"	LA HABRA CIT.	7596		—	136
21	"	11780	3710	2	WILSON	"	AZUSA CIT. ASS'N.	19152		—	129
22	"	28850	3709	3	"	"	COVINA CIT. ASS'N	17807		—	120
23	"	12300	3711	2	"	"	DAMEREL ALLISON	15181		—	113
24	"	48000	3713	12	FINLEY	"	IRVINE VAL. GR.	8409		—	118
25	"	52020	3715	34-35	T/S	"	SANTIAGO OR. GR.	49095		—	133
26	"	51540	3717	34-35	"	"	TUSTIN HILLS CIT.	52407		—	118
27	"	51380	3720	6	FINLEY	"	YORBA ORANGE GR.	39747		—	140
28	"	35100	3723	36-33	T/S	"	IRVINE VAL. GR.	8412		—	117
29	"	[illegible] ~~52390~~	3726	54-52-56	"	"	OLIVE HTS. CIT. ASS'N	13196		1.33	122
30	"	42280	3729	25-50	"	"	FULLERTON MUT. O.A.	7877		—	123
31	"	42280	3731	6-20-33	FINLEY	"	ANAHEIM VAL. OR.	9318		—	137
32	"	39210	3734	11-32	"	"	NO WHITTIER HTS.	16509		—	126
33	"	51600	3739	8-41-42	"	"	MURPHY RANCH C.	53474		1.78	122
34	"	26250	3736	12-28	"	"	VICTORIA AVE. CIT.	19611		—	135
35	"	18370	3737	25	"	"	CORONA CIT. ASS'N	42838		—	143

fol. 189

Treesweet
CESSOR

9-1-51
UNLOADING DATE

--DO NOT USE THIS SPACE--

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
93	Vals	41080	3651	56-57	TS	9/1	F M C A	7872		-	134	
94	"	49760	3652	34-35	"	"	Yorba Linda Cit	39550		1.33	135	
95	"	17620	3654	2	Watson	"	Corona Citr	17803		-	130	
96	"	50280	3659	56-57	T.S.	"	Santiago	[illegible]		-	118	
97	"	12070	3658	1	Watson	"	Corona City	17804		-	120	
98	"	51100	3660	34-35	TS	"	[illegible]	8378		-	138	
99	"	29330	3662	3	Watson	"	[illegible] & Allison	15178		-	133	
200	"	49780	3663	34-35	T.S.	"	Santiago O.G.	[illegible]		-	127	
1	"	46300	3666	56-57	"	"	Olive Ht	12155		-	122	
2	"	17930	3665	2	Watson	"	Corona Citrus	17805		-	123	
3	"	21450	3668	7-23	Finley	"	No. Whittier Hts	16508		-	131	
4	"	11900	3670	34-35	T/S	"	P.C.G.A. Pla.	37687		-	126	
5	"	[illegible]	3672	34-35	"	"	YORBA LINDA C.T.	39551		-	136	
6	"	38180	3671	7-23	FINLEY	"	SANTIAGO O. GR.	49084		-	127	
7	"	47000	3674	12-22-27	"	"	YORBA OR. GR.	39745		-	141	
8	"	47160	3677	36-34-35	T/S	"	YORBA LINDA C.T.	39553		-	138	
9	"	39740	3679	54-57-56	"	"	L.V.W. BROWN EST.	47751		-	145	
		585420	50	V aas								

[fol. 181]

Bressmert Prods
PROCESSOR

8-31-51
UNLOADING DATE

988260 So Vals

8-60

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3166	Vals	42800	3580	56-57	T/S	8/31	Fullerton Mut. O.A.	7870	/	—	142	
67	"	29550	3584	3	Wilson	"	Walnut Fruit Gr. A.	18789	/	—	140	
68	"	12700	3585	2	"	"	Covina Cit. Ass'n.	17597	/	—	128	
69	"	51040	3587	34-35	T/S	"	Pla. O. Gr. Ass'n	14495	/	1.33	134	
70	"	11340	3591	1	Wilson	"	Valencia Hts.	46912	/	—	128	
71	"	50620	3594	56-57	T/S	"	Santiago O. Gr.	49071	/	—	130	
72	"	49250	3599	56-57	"	"	Irvine Val. Gr.	8392	/	1.33	136	
73	"	41620	3600	34-35	"	"	La Habra Cit.	7591	/	—	134	
74	"	29180	3603	3	Wilson	"	Pamfral Alinson	15175	/	—	137	
75	"	41150	3606	8	Finley	"	No. Whittier Hts.	16506	/	—	125	
76	"	12640	3607	2	Wilson	"	Covina Cit. Ass'n	17599	/	—	116	
77	"	40340	3608	54-50	T/S	"	Tustin Hills Cit.	52398	/	—	125	
78	"	54480	3610	16	Finley	"	Santiago O. Gr.	49073	/	-	137	
79	"	50240	3617	56-57	T/S	"	Santiago O. Gr.	49075	/	—	127	
80	"	37080	3623	34-35	"	"	Yorba O. Gr.	39744	/	1.33	137	
81	"	12780	3624	35	"	"	Bradford Bro. Inc.	38837	/	-	115	
82	"	23000	3628	7-23	Finley	"	Gavalin Cit. Ass'n	46696	/	1.78	130	
83	"	41500	3633	25-50	T/S	"	Bradford Bro Inc	38838	/	—	126	
84	"	48970	3634	54-57-56	"	"	Olive Hts. Cit. Ass'n	1315[illegible]	/	-	122	
85	"	32250	3636	14-22	Finley	"	Gavalin Cit. Ass'n	46695	/	1.33	132	
86	"	49350	3638	36-34-35	T/S	"	S.A. Tustin Mut Cit.	51846	/	—	108	
87	"	39070	3641	4-45	Finley	"	McDermont Fruit	17416	/	-	128	
88	"	48266	3640	54-57-56	T/S	"	Irvine Val. Gr.	8396	/	-	134	
89	"	52300	3642	9-30-34	Finley	"	Gold Buckle Ass'n	27022	/	-	135	
90	"	47170	3646	9-28-25	"	"	Anaheim Val. O.	9311	/	2.00	140	
91	"	11970	3648	1	Wilson	"	Dowd & Allison	15177	/	—	138	
92	"	28580	3649	3	"	"	Covina Orchard	17802	/	—	129	

COPY

Treesweet
PROCESSOR

8/30/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3160	Velv	13400	3567	#2	Wilson	8/30	Covina C.T. Ass'n	17596		—	127	
61	"	28910	3568	#3	"	"	Covina Cit. Ass'n	17595		—	122	
62	"	52960	3570	36-34-35	T/S	"	P.O.G.A. Full.	14494		1.33	132	
63	"	53310	3572	54-57-56	"	"	Olive Hts. Cit. Ass'n	13175		—	119	
64	"	52760	3577	36-34-35	"	"	Santiago O.G.A.	49070		—	128	
65	"	29280	3579	3	Wilson	"	Covina Cit.	17598		—	121	
		230620	So	Vacs								

[fol 183]

8-62

Treesweet Prods
PROCESSOR

8/27/51
UNLOADING

--DO NOT USE THIS SPACE--

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3137	Vals	12640	3500	2	Watson	8/29	Desmond's Alliance	15172		—	127	
38	"	11000	3501	5	"	"	Walnut Fruit Gr	18787		—	147	
39	"	29760	3502	3	"	"	" "	13756		—	132	
40	"	51320	3504	56-57	TS	"	Santiago	49065		—	134	
41	"	39930	3505	34-35	"	"	Monte Vista Cit	47411		—	140	
42	"	40900	3507	4	Finley	"	Gold Buckle Assn	27021		—	157	
43	"	32020	3509	12-25	"	"	Placentia Ht Grow..	48860		—	142	
44	"	53220	3510	56-57	TS	"	Irvine Val	8385		—	134	
45	"	48850	3512	10	Finley	"	La Habra Citrus	7587		—	130	
46	"	51120	3514	34-35	TS	"	Olive Ht	13173		—	105	
47	"	24060	3515	11-32	Finley	"	PCGA Plac	37673		—	117	
48	"	11760	3517	2	Watson	"	D & A	15173		—	121	
49	"	36850	3519	25-50	TS	"	Mc Whittier Ht	16503		—	140	
50	"	50760	3521	56-57	"	"	Santiago	49067		—	140	
51	"	35400	3524	#6	Finley	"	E Whittier Citrus	54681		—	138	
52	"	22030	3525	3	Watson	"	Orcina Citrus	17592		—	119	
53	"	54410	3527	34-34	T/S	"	IRVINE VAL. CO.	8387		—	136	
54	"	45160	3528	17	FINLEY	"	CORONA CIT. ASSN	42835		—	146	
55	"	27520	3530	25-50	T/S	"	TUSTIN HILLS CIT.	52392		—	115	
56	"	34300	3536	54-57-56	"	"	ANAHEIM VAL. &	9305		—	145	
57	"	52750	3537	8-30-34	FINLEY	"	GOLDENWEST CIT.	54232		—	142	
58	"	50550	3538	36-34-35	T/S	"	S.A.T. Mut. Cit.	51844		—	118	
59	"	11660	3543	1	Watson	"	Orcina Citrus	17593		2.00	132	
		838370	So	VALS.								

COP-M-9

[fol. 184]

[illegible]

[illegible] So. Vals

8/28/51

UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3110	Vals	47720	3446	56-57	TS	8/28	Santiago	49058	/	–	127	
11	"	29050	3444	3	Wilson	"	Dennison Allison	15168	/	–	122	
12	"	17650	3447	2	"	"	Corona Citrus	17586	/	–	125	
13	"	50560	3450	34-35	T.S.	"	F.M.O.A.	7362	/	–	137	
14	"	17100	3449	1	Wilson	"	Dennison Allison	15169	/	–	128	
15	"	37850	3454	4	Finley	"	Corona Citrus	4283K	/	–	163	
16	"	50300	3455	6	"	"	No. Whittier Ht	16501	/	–	150	
17	"	31680	3457	25-50	TS	"	PCGA	37676	/	–	136	
18	"	51380	3458	56-57	"	"	La Habra Citrus	7585	/	1.33	153	
19	"	51820	3461	34-35	"	"	PMCA	5579	/	–	146	
20	"	1275	3463	2	Wilson	"	Dennison Allison	15170	/	–	129	
21	"	49780	3465	16	Finley	"	Santiago C.G.	49060	/	1.56	120	
22	"	50820	3468	6	"	"	Santiago C.G.	49061	/	–	117	
23	"	30200	3467	3	Wilson	"	Corona Citrus	17585	/	–	130	
24	"	11540	3469	1	"	"	" "	17589	/	–	128	
25	"	42240	34466	25-50	TS	"	Golden West Cit	52229	/	–	130	
26	"	36270	3473	22-32	"	"	" " "	52230	/	–	144	
27	"	50560	3475	51-57-56	"	"	Tustin Hills C.T.	52356	/	–	109	
28	"	51760	3477	34-35	"	"	P.O.G.A. Fuller	14491	/	–	1.39	
29	"	36600	3478	4-16	FINLEY	"	McDERMONT FRUIT	17414	/	–	142	
30	"	51560	3481	6-20-33	"	"	ELILE HTS. CIT. ASSN	13171	/	–	117	
31	"	46370	3483	16-22-27	"	"	ANHHEIM VAL. E	9302	/	–	139	
32	"	40490	3485	25-50	T/S	"	IRVINE VAL. EXC.	8383	/	–	129	
33	"	37970	3487	7-23	FINLEY	"	S.A.T. MUT. CIT. ASSN	51842	/	–	98	
34	"	55140	3491	8-31-39	"	"	IRVINE VAL. EXC.	[illegible]	/	–	133	
35	"	28630	3495	3	Wilson	"	Corona Cit	17590	/	–	137	
36	"	10720	3496	1	"	"	" "	17591	/	–	125	

184

[illegible]
PROCESSOR

8/27
UNLOADING D

---DO NOT USE THIS SPACE

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RAT PER TON
3092	Vala	50440	3407	34-35	TS	8/27	F M O A	7859		1.33	137	
93	"	41840	3409	25-50	"	"	P.O.G.A.	37672		-	127	
94	"	55240	3411	18	Finley	"	S.O.G.A.	49052		-	139	
95	"	50750	3413	56-57	T S	"	La Habra Citrus	7582		-	147	
96	"	47340	3414	34-35	"	"	Irvine Val.	8373		-	136	
97	"	29750	3415	3	Wilson	"	Covina Citrus	17582		-	125	
98	"	11710	3417	1	"	"	No Whittier Hts	43498		-	150	
99	"	12770	3418	7	"	"	" "	43497		-	153	
3100	"	49360	3423	56-57	TS	"	S.O.G.A.	49052		-	138	
1	"	33550	3424	25-50	"	"	No Whittier Hts	43499		-	141	
2	"	50740	3426	16	FINLEY	"	IRVINE VAL. GA.	8374		3.11	136	
3	"	29950	3430	3	WILSON	"	COVINA CIT. ASSN.	17583		-	131	
4	"	13570	3433	7	"	"	COVINA CIT. ASS'N.	17585		-	136	
5	"	11500	3432	1	"	"	COVINA CIT. ASS'N.	17584		-	140	
6	"	39570	[illegible]	25-50	T/S	"	YORBA LINDA CIT.	37541		-	138	
7	"	51600	3437	34-35-36	"	"	OLIVE HTS. CIT. ASSN	13167		-	138	
8	"	41650	3439	[illegible]	"	"	VICTORIA AVE CIT.	19607		-	143	
9	"	[illegible]	[illegible]	16	Finley	"	[illegible]	27070		-	138	
		658510	So Vals									

[fol. 186]

Treesweet Prod.
ROCESSOR

8/24 - 9/5
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3085	Val	17670	3386	[illegible]	Nelson	8/24	Arizona Citrus	17595	/	—	127	
86	"	50580	3355	34-35	TS	8/25	Santiago C.G.	49001	/	—	101	
87	"	33760	3389	54-33	TS	"	[illegible]	[illegible]	/	—	138	
88	"	52400	3394	34-35	"	"	Santiago Or. Co.	49016	/	—	141	
89	"	19740	3393	25-50	"	8/24	Victoria Ave. C.T.	19605	/	—	127	
90	"	17370	3396	75-50	"	8/24	Gavilan Cit. Assn.	16694	/	—	141	
91	"	38720	3397	75-50	"	8/25	Santiago Or. Co.	49049	/	—	129	
		219690	Sd. Vals.									

Treesweet
PROCESSOR

8/24
UNLOADING DA

---DO NOT USE THIS SPACE

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
5060	Val	52640	3323	56-57	TS	8/24	F.M.O.A.	7852		—	152	
61	"	51660	3325	19	Finley	8/22	Oliver Ht	13152		—	133	
62	"	51200	3326	34-35	T.S.	8-24	Santiago O.G.	49036		—	137	
63	"	11100	332[illegible]	1	Wilson	"	Valencia Ht	46901		—	138	
64	"	12410	3330	2	"	"	" "	46902		—	145	
65	"	22840	3333	3	"	"	Orange Co. Gro	15019		—	134	
66	"	49220	3335	8	Finley	"	Anaheim Val	9292		1.56	151	
67	"	36000	3337	~~56~~-59	TS	"	Plac O.G. Fullerton	14482		—	151	
68	"	34250	3331	10-36	Finley	8/22	Yorba Linda Cit	39537		1.93	137	
69	"	18800	3332	10-35	"	"	P.M.O.A.	8554		—	142	
70	"	45990	3341	34-35	TS	8/24	Sunrise Val	8962		—	139	
71	"	41030	3345	4	Finley	"	Olive Hts	13154		—	108	
72	"	50040	3350	17	"	"	Santiago O.G.	49039		—	137	
73	"	54160	3354	8-30-34	"	"	" " "	49041		—	126	
74	"	4[illegible]860	3358	54-57-58	T/S	"	Yorba Linda C.T.	39531		—	155	
75	"	[illegible]	3360	6	FINLEY	"	No. Whittier Hts.	43494		—	132	
76	"	[illegible]	3361	36-34	T/S	"	Corona Cit. Assn.	47832		—	134	
77	"	[illegible]	3362	35	"	"	Call Ranch	17477		—	117	
78	"	[illegible]	3365	11-32	FINLEY	"	Tustin Hills Cit. A.	58371		—	123	
79	"	53530	3368	17-24	"	"	La Habra Cit Assn	8577		—	130	
80	"	49660	3373	6-30-33	"	"	P.O.G.A. Full.	14484		—	131	
81	"	53650	3372	8-30-34	"	"	S.A.T. Mut. Cit Assn	51835		—	115	
82	"	32580	3367	54-33	T/S	"	Santiago Or. Co.	49042		—	118	
83	"	12180	3381	1	Wilson	"	Corona Citrus	17594		—	116	
84	"	29190	3380	3	"	"	Daniels & Allison	15166		—	140	
		254920	50	Val								

Treesweet
CESSOR

8/23
UNLOADING DATE

---DO NOT USE THIS SPACE---

OAD O.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
35	VALS	52360	3271	56-57	T.S.	8/23	F.M.O.A.	8049		–	136	
36	"	13070	3274	2	Wilson	"	Valencia Ht	19300		–	139	
37	"	50860	3276	8	Finley	"	S.O.G.A	49032		–	139	
38	"	49600	3279	12	"	"	P MOA	8546		1.56	123	
39	"	38490	3280	4	"	"	Irvine Val	8354		–	132	
40	"	29820	3282	3	Wilson	"	Covina Or Gr	15016		–	124	
41	"	20050	3288	34-35	TS	"	Escalon Citrus	46693		–	135	
42	"	15350	3284	35	TS	"	Highgrove Fruit	19769		1.56	122	
43	"	14350	3287	34	"	"	Dyson Estat.	42998		–	152	
44	"	51640	3291	8	Finley	"	Santiago	49032		–	125	
45	"	41300	3293	56-57	TS	"	La Habra Cit	7574		–	123	
46	"	49900	3294	12	Finley	"	Francis Citrus	26533		–	120	
47	"	37880	3295	4-45	"	"	Tustin Hills	52364		–	119	
48	"	12930	3290	Wilson	7	"	Covina Citrus	17572		–	118	
49	"	48520	3298	17-24	Finley	"	No Whittier Ht	43500		–	127	
50	"	11660	3289	1	Wilson	"	Covina Citrus	17571		–	131	
51	"	27370	3296	3	Wilson	"	Walnut Fruit Gr	18783		–	127	
52	"	52340	3302	8-30-34	FINLEY	"	SANTIAGO O.G.	49033		1.33	141	
53	"	14840	3307	54-57-56	T/S	"	P.M.O.A. PLA.	8552		–	145	
54	"	52250	3308	12-28-27	FINLEY	"	OLIVE HTS. CIT. ASSN	13151		–	120	
55	"	25860	3309	36-34	T/S	"	MC DERMONT FRUIT	17412		–	137	
56	"	[illegible]470	3310	35.	"	"	CONCHA CIT. ASSN	47831		–	143	
57	"	51880	3312	17-24	FINLEY	"	FULLERTON MUT O.	7851		–	146	
58	"	28330	3320	3	Wilson	"	Dunnell's Alliance	15163		–	133	
59	"	11340	3321	1	"	"	Covina Or Gro	15018		1.78	134	
		857160	So.	Vals								

Treesweet
PROCESSOR

8/22/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
3009	Vals	49360	3225	56-57	T.S	8/22	Santiago O.G.	49022	/	—	139	
10	"	12950	3224	2	Watson	"	Valencia Ht	19298	/	—	117	
11	"	30270	3226	3	"	"	Dannel & Allison	15158	/	—	141	
12	"	14280	3232	34	TS	"	Jameson Fruit	15707	/	—	129	
13	"	34250	3234	34-35	"	"	McDermont	17411	/	—	143	
14	"	48760	3233	56-57	"	"	Irvine Val	8344	/	—	139	
15	"	40650	3236	8	Finley	"	Gold Buckle	27017	/	—	149	
16	"	35530	3235	7	"	"	La Habra Citrus	7524 ~~7517~~	/	—	144	
17	"	17320	3239	2	Watson	"	Dannel & Allison	15159	/	—	133	
18	"	51920	3240	34-35	TS	"	Santiago	49024	/	—	113	
19	"	37210	3237	25-50	"	"	No Whittier Ht	43492	/	1.56	130	
20	"	31100	3241	3	Watson	"	Valencia Ht	19299	/	—	125	
21	"	35720	3246	2	Finley	"	Villa Park Orch	55718	/	—	121	
22	"	50420	3247	56-57	TS	"	East Whittier Cit	54673	/	—	128	
23	"	48820	3250	17	Finley	"	Orange Citrus	37313	/	—	138	
24	"	52850 ~~[illegible]~~	3251	34-35	TS	"	Santiago	49027	/	—	128	
25	"	27900	3252	25-33	TS	"	Victoria Ave Citrus	19604	/	2.22	127	
26	"	52280	3253	17-24	Finley	"	Olive Ht	13148	/	—	124	
27	"	34180	3255	8	"	"	PMCA	8543	/	—	120	
28	"	19440	3256	8	"	"	PCGA	37652	/	—	131	
29	"	15660	3257	7	"	"	PCGA Full	14476	/	—	122	
30	"	22700	3258	7	"	"	PCGA Plac	37654	/	—	141	
31	"	45800	3260	34-35	TS	"	Golden West	52216	/	—	127	
32	"	48220	3263	54-56	"	"	PCGA Full	14477	/	—	135	
33	"	11090	3269	1	Watson	"	Dannel & Allison	15160	/	—	127	
34	"	29130	3270	3	"	"	" "	15161	/	—	129	

CP-11-9

[illegible] Vals

TICESHEET
PROCESSOR

5/21/51
UNLOADING DA

69-8

---DO NOT USE THIS SPACE-

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2992	Vals	52640	3178	2	Wilson	5/21	Valencia Ht	19296		–	118	
93	"	48560	3184	56-57	"	"	Santiago	49016		–	122	
94	"	44400	3187	11-32	Finlay	"	P M O A	8532		–	141	
95	"	52750	3189	19	"	"	La Habra Citrus	7568		–	147	
96	"	49450	3190	56-57	T S	"	Irvine Val	8336		–	124	
97	"	29560	3193	3	Wilson	"	Damerel & Allison	15155		–	137	
98	"	12160	3194	2	"	"	" "	15156			128	
99	"	34920	3196	54-33	T.S.	"	Placentia Citrus	26529		–	121	
3000	"	49250	3201	35-36	T S	"	No Whittier Hts	43491		–	132	
01	"	22780	3202 ~~[illegible]~~	54-55	"	"	P.M.O.A.	8536		–	129	
02	"	51320	3206	8	Finley	"	Upland Citrus	16156		–	134	
03	"	28650	3207	3	Wilson	"	Glendora Mutual	18360		–	113	
04	"	45040	3211	34-35	T S		Villa Park Orch	55716		–	133	
05	"	33130	3210	25-50	"	"	Orange Ht Ci	15552		–	113	
06	"	46820	3212	11-32	Finley	"	Gold Buckle Assn	27016		2.22	141	
07	"	53050	3214	56-57	T/S	"	Olive Hts.	13144		–	133	
08	"	38060	3217	4-45	FINLEY		UPLAND CIT.	16157		–	127	
		657581	So	VAL 51								

CDP-M-9

Th

CESSOR

2 '51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2	VAN'S	41580	3145	25-50	T/S	8/10	SANTIAGO O.G.	49069		—	129	
74	"	51300	3149	56-57	"	"	IRVINE VA. SA.	8327		—	144	
75	"	[illegible]	3152	3	WILSON	"	COVINA CIT. ASSN	17562		—	123	
76	"	18150	3155	2	"	"	" " "	17563		—	120	
78	"	10590	3154	[illegible]	T/S	"	NO. WHITTIER HTS. CIT	4349		—	123	
79	"	53070	3156	8	FINLEY	"	LA HABRA C. [illegible]	7564		—	132	
80	"	[illegible]380	3157	1	WILSON	"	[illegible]	15154		—	127	
81	"	[illegible]	3160	34-35	T/S	"	SANTIAGO O.G.	49012		178	123	
82	"	44370	3161	56-57	"		COVINA CIT. ASSN	[illegible]		—	131	
83	"	12890	3165	25-50	"		[illegible]	37645		5	125	
84	"	21780	3166	25-50	"	"	[illegible]	[illegible]		—	124	
85	"	[illegible]170	3168	34-35	"	"	SANTIAGO O.G.	49015		—	131	
86	"	19100	3169	34-35	"	"	THE VILLA PARK [illegible]	55714		—	136	
87	"	17980	3167	38	WILSON	"	COVINA CIT. ASSN	17564		—	134	
88	"	30380	3170	#3	"	"	" " "	17565		—	129	
89	"	9050	3174	4	Finley	"	Crafton [illegible]	17564		—	147	
90	"	12750	3175	8	[illegible]	"	[illegible]	17566		—	129	
91	"	29700	3176	3	"		" "	17567		—	120	
		503710	So.	Vans								

8-11

Treesweet!
PROCESSOR

8/17
UNLOADING DA

---DO NOT USE THIS SPACE.

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2953	Vals	11750	3086	1	Wilson	8/16	Orocia Citrus	17559	✓	—	125	
54	"	30750	3087	3	"	"	Valencia Ht	19791	✓	1.33	128	
55	"	51080	3091	56-57	TS	8/17	La Habra Citrus	7558	✓	—	146	
56	"	41500	3094	25-50	"	"	Santiago O.G.	51442	✓	—	138	
57	"	49450	3097	56-57	"	"	Irvine Val	8314	✓	—	125	
58	"	41530	3099	25-50	"	"	Olive Hts	13128	✓	—	120	
59	"	29350	3103	3	Wilson	"	Orocia Citrus	17560	✓	—	125	
2960	"	20250	3101	16	Finley	"	Crafton Circle	18563	✓	—	127	
61	"	27700	3106	16	"	"	Red-Orange Dale	13806	✓	—	137	
62	"	17560	3107	2	Wilson	"	Valencia Ht	19794	✓	—	120	
63	"	46450	3108	34-35	TS	"	Mc Whittier Ht	43487	✓	—	132	
64	"	43040	3110	25-50	TS	"	POGA Plac	37660	✓	—	130	
65	"	53480	3113	34/35-36	"	"	The Goldenwest Cit. Assn	[illegible]	✓	—	126	
66	"	11170	3118	56	"	"	Victoria Ave Cit Assn	19602	✓	—	128	
67	"	36300	3117	54-57	"	"	Corona Cit. Assn	47878	✓	—	144	
68	"	29300	3121	3	Wilson	"	Orocia Citrus	17561	✓	—	130	
69	"	49900	3123	34-35	T.S.	8/18	Santiago C. Gr	51450	✓	—	137	
70	"	16580	3125	36-37	"	"	Irvine Valencia	8378	✓	—	132	
		601900	50 VALS.									

[illegible]-N-9

[fol. 193]

Prospect Prods

8/15 – 8/16
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
[illegible]	Vale	[illegible]	[illegible]	7-77	[illegible]	8/15	Irvine Val. Gro	8304	/	1.33	138	
35	"	[illegible]	[illegible]	75-33	T/S	"	P.O.G. [illegible]	[illegible]	/	—	136	
37	"	[illegible]	3035	54-57	"	"	[illegible]	[illegible]	/	—	132	
38	"	[illegible]	3036	56	"	"	[illegible] Cit. [illegible]	[illegible]	/	—	148	
39	"	[illegible]	[illegible]	34	"	"	[illegible]	15704	/	—	133	
40	"	[illegible]	3041	3	Malcom	"	[illegible]	[illegible]	/	—	142	
41	"	[illegible]	[illegible]	34-35	TS	"	[illegible]	[illegible]	/	—	136	
42	"	[illegible]	[illegible]	7	Malcom	"	[illegible]	[illegible]	/	—	120	
[illegible]	"	[illegible]	[illegible]	34-35	TS	"	[illegible]	[illegible]	/	—	137	
[illegible]	"	[illegible]	[illegible]	56-57	"	"	[illegible]	[illegible]	/	—	138	
[illegible]	"	[illegible]	[illegible]	34-35	"	"	[illegible]	8307	/	—	129	
[illegible]	"	[illegible]	[illegible]	25-50	"	"	[illegible]	[illegible]	/	—	130	
[illegible]	"	[illegible]	[illegible]	3	Malcom	"	[illegible]	17556	/	—	128	
[illegible]	"	[illegible]	[illegible]	1	"	"	" "	[illegible]	/	—	127	
[illegible]	"	[illegible]	[illegible]	56-57	T.S.	"	POGA [illegible]	[illegible]	/	—	124	
[illegible]	"	[illegible]	[illegible]	34	"	"	[illegible] Cit. Assn	[illegible]	/	—	135	
[illegible]	"	[illegible]	[illegible]	34-35	"	"	[illegible]	[illegible]	/	—	112	
[illegible]	"	[illegible]	[illegible]	56-57	"	"	[illegible]	[illegible]	/	—	117	
		[illegible]	[illegible]	[illegible]	✓							

[fol. 194]

Treesweet Prods

8/14 - 8/15
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
13	Vals	47210	7981	54-50	TS	8/14	Golden West	52191		-	142	
14	"	50080	7982	12	Finley	"	Irvine Val	8293		-	132	
15	"	47950	7986	56-57	T/S	"	" "	8295		-	117	
16	"	40920	7988	54-50	"	"	THE GOLDENWEST CIT.	52193		-	137	
17	"	50930	7992	8-30-32	FINLEY	"	GOLD BUCKLE CIT.	27012		-	138	
18	"	51020	7994	36-57-[illegible]	T/S	"	SANTA ANA TUS. MUT. ASS	51816		-	122	
19	"	45840	7998	12-28-27	FINLEY	"	IRVINE VAL. EXR.	8297		-	137	
21	"	50920	2996	10-43-44	"	"	FRANCIS CIT. ASS'N	26522		-	127	
22	"	38360	3001	4-45	"	"	TUSTIN HILLS CIT. A.	52375		-	124	
23	"	7270	3002	12	"	"	McDERMONT FRUIT	17409		-	120	
24	"	30000	3007	3	Nelson	"	Cypress Or Gro	15010		-	127	
25	"	48740	3010	56-57	TS	8/15	Santiago O. Gr.	51427		-	139	
26	"	34350	3014	25-33	"	"	La Habra Citrus	7552		-	131	
27	"	49730	3019	56-57	"	"	Irvine Val	8300		2.22	127	
28	"	29520	3021	3	Nelson	"	Dorrance & Allison	15146		-	134	
29	"	45350	2929	34-35	TS	"	No Whittier Ht	13485		-	123	
30	"	51300	3025	56-57	"	"	Irvine Val	8302		-	130	
31	"	11000	3027	1	Nelson	"	San Dimas Or	35850		-	121	
32	"	17350	3028	2	"	"	" " "	35849		-	131	
33	"	34020	3029	25-33	TS	"	Olive Hts	13117		-	137	
		775140	So Vals.									

8-14

Treesweet Prod
PROCESSOR

8-13-14
UNLOADING

---DO NOT USE THIS SPA

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS
2886	Vals	48640	2934	8	Finley	8/13	Irvine Val	8286		–	127
87	"	22950	2935	1	Shermer	"	No Whittier Ht	43480		–	124
88	"	12020	2936	2	Wilson	"	Dennicl & Allison	15140		–	140
89	"	50930	2939	56-57	TS	"	La Habra Citrus	39247		–	150
90	"	30950	2940	3	Wilson	"	Covina Citrus	19447		–	130
91	"	49560	2941	16	Finley	"	P.M.O.A.	54293		–	147
92	"	26320	2942	2	Shermer	"	Murphy Ranch	53423		222	129
93	"	10800	2943	1	Wilson	"	La Verne Orange	17868		–	121
94	"	50850	2946	56-57	T/S	"	IRVINE VAL. GRO.	8288		–	121
95	"	24920	2947	1	SHERMER	"	No. WHITTER HTS.	43481		–	132
96	"	51060	2949	54-56-57	T/S	"	IRVINE VAL. GRO.	8290		–	127
98	"	12990	2956	2	Wilson	"	Valencia Ht	19285		–	120
99	"	10870	2952	1	"	"	" "	19286		–	127
2900	"	30280	2955	3	"	"	Dennicl & Allison	15141		–	125
1	"	22650	2957	1	Shermer	"	No Whittier Ht	43482		–	134
2	"	21980	2961	2	"	"	" " "	43483		–	123
3	"	12940	2962	36-35	TS	"	Geralin Citrus	46659		–	136
4	"	33930	2964	"	"	"	McDermont Fruit	17408		–	112
5	"	52760	2966	8	Finley	"	St Justin Mutual	51814		–	126
6	"	49040	2968	6	"	8/14	SOGA	51418		–	126
7	"	11000	2970	1	Wilson	"	Valencia Ht	19289		–	120
8	"	11870	2973	2	"	"	Dennel & Allison	15142			[illegible]
9	"	18600	2976	54-50	T.S.	"	POGA - Fall	14458		–	[illegible]
10	"	51950	2978	56-57	"	"	La Habra Citrus	39250		–	128
11	"	25290	2980	1	Shermer	"	No Whittier Ht	43484		–	126
12	"	34210	2995	25-33	TS	"	Oliver Ht	13109		–	134

770100 [illegible]

[illegible] Prods Co
OCESSOR

5/10-
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
880	Vals	12400	2912	2	Nelson	5/10	Valencia Ht	19281		–	126	
81	"	10110	2910	4	Finley	"	Grafton Orange	17559		–	122	
82	"	Void		—	—	–				–	–	
83	"	25450	2914	1	Sherman	"	[illegible] Whittier Ht	43477		–	141	
84	"	38800	2919	544 50	T. S.	"	Irvine Val	8278		1.33	136	
		86760	50	[illegible]								

Treesweet
PROCESSOR

9-10
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2854	Vals	49590	2867	12-28	Finley	8/9	Irvine Val.	8770		—	129	
55	"	37650	2866	54-50	T.S.	"	La Habra Citrus	39241		—	145	
56	"	8950	2870	#2	WILSON	8/9	SAN DEMAS OR.	35846		—	131	
57	"	29130	2872	3	"	"	LA VERNE OR. ASS'N	17865		—	122	
58	"	11050	2871	1	"	"	SAN DEMAS OR	35845		—	136	
59	"	40840	2873	4-45	FINLEY	"	S.O.G.A.	51388 ~~2873~~		2.56	134	
60	"	47360	2874	57-56	T/S	"	PLA. OR. GR. ASS'N	37618		—	111	
61	"	34600	2877	36-33	"	"	S.O.G.A.	51389		—	136	
62	"	38910	2878	54-50	"	"	SANTA ANA TU. MU ASS'N	51807		—	120	
63	"	51740	2880	12-22-25	FINLEY	"	LA HABRA CIT ASS'N	39242		—	144	
64	"	33920	2884	33	T/S	"	S.O.G.A.	51390		—	125	
65	"	15370	2851	8-30	FINLEY	"	CRAFTON OR. G. ASS'N	12558		1.33	138	
66	"	19110	2852	34	"	"	GOLD BUCKLE ASS'N	27009		2.67	150	
67	"	33390	2887	6-20	"	"	REDLANDS HTS. GRO.	48854		—	136	
68	"	11700	2890	1	Holmes	"	Corona Or. Gro.	15004		—	130	
69	"	30750 ~~30700~~	2891	3	"	"	La Verne Or	17866		1.33	132	
70	"	17350	2892	2	"	"	Corona Or. Gro.	15005		—	125	
71	"	49460	2895	56-57	T.S.	8/10	P O G A Fall	14446		[illegible]	[illegible]	
72	"	11480	2897	1	Wilson	"	Damerel Allison	15135		—	132	
73	"	23460	2898	1	Sherwood	"	No Whittier Ht	43476		—	125	
74	"	24080	2899	2	"	"	" " "	43475		1.56	128	
75	"	39180	2901	54-50	T S	"	S.O.G.A.	51392		—	122	
76	"	17900	2902	2	Wilson	"	Corona Or. Gro.	15008		—	122	
77	"	30230	2903	3	"	"	Damerel Allison	15136		—	132	
78	"	49900	2907	12-22-28	Finley	"	Irvine Val. Gro.	8775		—	128	
79	"	38950	2908	54-50	T.S.	"	La Habra Citrus	39243		—	127	

T 232

786030 ~~785980~~ So Vals.

[fol. 197a]

[illegible]

TREESWEET PRODUCTS CO.

INTER-PLANT CORRESPONDENCE

TO: Citrus Distributing Plant

DATE: 8/15/51

FROM:

8/10/51

LaVerne Orange Assn Load No. 2869 Wt. No. 2891; the net wt. is 30750# instead of 30700 as listed. OAC No. 17866

✓ 8/16/51

8-77 197a

TREESWEET
PROCESSOR

8/9
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2828	VAL'S.	11340	2800	#1	WILSON	8/8	COVINA CITRUS	19438	/	–	122	
29	"	52780	2811	57-56	T/S	8/8	SANTIAGO C. G. A.	51376	/	–	130	
30	"	51400	2813	34-35	"	"	LA HABRA CIT. ASS	39238	/	–	138	
31	"	53460	2814	6-20-33	FINLEY	"	SANTA ANA TUS. MU. ASN	51804	/	1.78	124	
32	"	39920	2808	7-23	"	"	IRVINE VAL. GRO.	8764	/	–	117	
33	"	53350	2816	8-20-34	"	"	OLIVE HTS. CIT. ASSN	13982	/	–	137	
34	"	50870	2817	12-22-25	"	"	" " " "	13981	/	–	136	
35	"	48340	2821	12-28-27	"	"	YORBA LINDA CIT. ASSN	39511	/	1.33	135	
36	"	40720	2819	54-50	T/S	"	ANAHEIM V. C. ASSN.	9755	/	–	126	
37	"	29240	2829	3	Wilson	"	[illegible] Orange Co	15002	/	–	118	
38	"	11100	2830	1	"	"	" " "	15003	/	2.00	114	
39	"	12750	2831	2	"	"	Glendora Mutual	15495	/	–	135	
40	"	33600	2839	4	Finley	8/9	[illegible]	47475	/	–	124	
41	"	8400	2840	4	"	"	Orange Ht Co	15543	/	–	121	
42	"	23730	2837	1	Sheridan	"	No Whittier Ht	43473	/	–	128	
43	"	25090	2838	2	"	"	" "	43472	/	–	131	
44	"	30900	2843	3	Wilson	"	Valencia Ht	19278	/	–	132	
45	"	49200	2845	34-35	T S	"	S. O. G. A.	51383	/	–	122	
46	"	46700	2847	56-57	"	"	Irvine Val	8267	/	~~–~~	124	
47	"	46940	2850	11	Finley	"	POGA	37617	/	–	119	
48	"	11600	2844	1	Wilson	"	Glendora Citrus	16334	/		122	
49	"	12280	2846	2	"	"	Valencia Ht	19279	/	–	117	
50	"	51250	2854	12-28	Finley	"	La Habra Citrus	39240	/	–	131	
51	"	49700	2858	56-57	T.S.	"	Olive Ht	13986	/	–	121	
52	"	42200	2859	4	Finley	"	POGA - Fullerton	14444	/	–	131	
53	"	22830	2864	1	Sheridan	"	No Whittier Ht	43474	/	–	131	

909100 lbs VALS ✓

[fol. 199]

8-9

Treesweet Prods
PROCESSOR

8/9
UNLOADING

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2802	Vals	11300	2745	1	Wilson	8/9	Irvine Citrus	19433	/	-	128	
03	"	12400	2752	2	"	"	" "	19435	/	-	131	
04	"	29900	2753	3	"	"	" "	19434	/	1.56	132	
05	"	50000	2758	34-35	T/S	"	LA HABRA CIT. ASS'N	39235	/	-	135	
06	"	40840	2759	25-50	T/S	"	PLA. OR. GRO. ASS'N	37612	/	-	126	
07	"	32120	2760	12-28	FINLEY	"	OLIVE HTS. CIT. ASS'N	3977	/	-	126	
08	"	11590	2763	#1	WILSON	"	VAL. HTS.	19276	/	-	134	
09	"	30600	2766	7-23	FINLEY	"	YORBA LINDA CIT. A	39510	/	-	139	
10	"	49760	2769	54-34-35	T/S	"	LA HABRA CIT. ASS'N	39236	/	-	140	
11	"	47520	2762	12-22-25	FINLEY	"	IRVINE VAL. GRO.	8257	/	-	123	
12	"	11100	2776	1	Wilson	"	San Dimas Or	35842	/	-	139	
13	"	12850	2777	2	"	"	Valencia Ht	19277	/	1.56	134	
14	"	28730	2778	3	"	"	Durrell & Allison	15130	/	13.3	132	
15	"	47720	2782	12-22-25	Finley	"	Yorba Orange	39705	/	-	124	
16	"	25050	2783	1	Sherman	"	Walnut Fruit Gr	18770	/	-	134	
17	"	40680	2756	25-50	TS	"	ACGA	51373	/	-	137	
18	"	10970	2787	1	Wilson	"	Durrell & Allison	15131	/	-	126	
19	"	25240	2788	2	Sherman	"	No Whittier Ht	43470	/	-	126	
20	"	29490	2789	3	Wilson	"	Glendora Mutual	15496	/	-	134	
21	"	12450	2790	2	Wilson	"	Durrell & Allison	15132	/	-	120	
22	"	25080	2798	1	Sherman	"	No Whittier Ht	43471	/	-	129	
23	"	51450	2794	8	Finley	"	La Habra Citrus	39237	/	-	136	
24	"	38550	2792	#11	"	"	P M O A	[illegible]	/	-	127	
25	"	39950	2805	7	"	"	Orange Ht Or	15542	/	-	115	
26	"	36950	2826	25-33	TS	"	Golden West	52174	/	-	125	
27	"	50100	2806	6	Finley	"	Irvine Val	8760	/	-	119	

CDP-M-9

802430 So. VALS

Treesweet Prods

PROCESSOR

8-7

UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2776	Vals	22410	2695	1	Sherman	8/6	No Whittier Ht	43467		–	129	
2777	"	22440	2696	2	"	"	"	43468		–	137	
78	"	34980	2708	25-33	TS	"	SOGA	51361		–	117	
79	"	51480	2709	56-57	"	"	POGA	37608		–	135	
2780	"	47860	2705	2-34	Farley	"	Irvine Val	51600		–	117	
81	"	19040	2714	25	"	"	Corona Citrus	42820		–	130	
82	"	29510	2715	16-22	"	"	McDermont	17405		–	135	
83	"	25700	2719	3	Wilson	"	Orange Citrus	19430		–	132	
84	"	9890	2720	1	"	"	La Verne Orange	17862		1.56	131	
85	"	22690	2712	1	Sherman	"	Murphy Ranch	53409		–	120	
86	"	11350	2721	2	Wilson	"	Orange Citrus	19431		–	106	
87	"	38950	2722	7-23	Farley	"	Redlands Ht	48852		–	140	
88	"	40720	2725	25-50	TS	"	SOGA	51362		1.33	119	
89	"	11350	2729	1	Wilson	"	Dennel & Allison	15127		–	141	
2790	"	30500	2730	3	"	"	"	15128			132	
91	"	27780	2731	1	Sherman	"	Walnut Fruit Gro	18769		–	140	
92	"	49700	2732	56-57	TS	"	La Habra Citrus	39234		–	148	
93	"	13050	2734	2	Wilson	"	Valencia Ht	19475		–	139	
94	"	40500	2735	25-50	TS	"	SOGA	51365		–	129	
95	"	26390	2735	2	Sherman	"	No Whittier Ht	43469		1.78	129	
96	"	52250	2744	35-34	TS	"	Olive Ht	13976		–	125	
97	"	35420	2742	25-33	T.S.	"	Plac O.G. Fall	14438		–	137	
98	"	30150	2743	12	Farley	"	Redlands O.G.	14663		–	143	
99	"	44050	2747	2	"	"	Irvine Val Gr	8454		–	119	
2800	"	24480	2748	1	Sherman	"	Murphy Ranch	53410		–	139	
2801	"	37700	2749	7	Farley	"	S.O.G.A.	51366		–	131	

805370 So VAL'S

OSP-11-9

200

[fol. 201]

Treesweet
PROCESSOR

8/6
UNLOADING

---DO NOT USE THIS SPACE

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2763	Vals	32820	2675	2	Finley	8/4	R.M.O.A	[illegible]		–	124	
2764	"	53000	2676	12	"	4	Irvine Val	51592		–	111	
65	"	37920	2678	56-57	T S	8/4	E.M.O.A	[illegible]		–	127	
66	"	28200	2682	2	Nelson	~~4~~	Covina Or G	[illegible]		–	127	
67	"	11800	2683	2	"	"	Covina Citrus	[illegible]		–	127	
68	"	50340	2684	17	Finley	"	SOGA	51355		–	122	
69	"	27650	2686	57-56	T.S.	8/4	Orange Ht Orange	15540		–	117	
2770	"	46200	2687	11	Finley	8/6	Irvine Val	31597 ~~51599~~		–	117	
71	"	49850	2689	34-35	TS	"	Olive Ht	13969		–	138	
72	"	47300	2691	16	Finley	"	La Habra Citrus	39231		1.33	131	
73	"	10800	2692	1	Nelson	"	San Dimas Or	35841		–	124	
74	"	40300	2697	25-50	T.S.	"	S O Tustin Mutual	29200		–	117	
75	"	48660	2699	16-22-25	FINLEY	"	BRADFORD BROS.	38801		–	138	
		484840	So VALS									

8/4 - 113470
8/6 - 371370
484840

Treesweet Prods
PROCESSOR

8-4-51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2744	Val	40500	2647	25-50	TS	8-3	Yucaipa Garden Cit	39505	✓	–	142	
45	"	10920	2643	1	Wilson	8-4	No Whittier Ht	43463	✓	–	129	
46	"	12650	2649	2	"	8-4	Dennis & Allison	15123	✓	–	121	
47	"	33350	2650	2	Finley	8-3	[illegible]	[illegible]86	✓	–	114	
48	"	43050	2654	4	"	8-4	Olive Ht	13963	✓	–	127	
49	"	10050	2656	2	Wilson	8-4	No Whittier Ht	43464	✓	–	123	
2750	"	9600	2657	1	"	"	Dennis & Allison	15124	✓	–	122	
51	"	54250	2658	12	Finley	"	Anaheim Val	24593	✓	–	134	
52	"	33140	2659	2	"	"	Bradford Bros	38898	✓	–	131	
53	"	49540	2661	17	"	"	SOGA	[illegible]		2	123	
54	"	36850	2663	4	"	"	Anaheim Val	24594	✓	–	134	
55	"	11300	2665	2	Wilson	"	Orange Citrus	19476	✓	–	119	
56	"	28950	2666	3	"	"	No Whittier Ht	43465	✓	–	129	
57	"	47500	2668	34-35	TS	"	Walnut Fruit Co	18768	✓	–	127	
58	"	48860	2670	56-57	TS	"	Calif. Mutual	39442	✓	–	136	
59	"	34000	2671	25-33	"	"	P.M.G.A.	54246	✓	–	131	
2760	"	14100	2669	25-55	"	"	Anaheim Val	24595	✓	–	135	
61	"	19000	2662	25-50	"	"	Gold Buckle	27006	✓	–	143	
62	"	9100	2673	25-50	"	"	Redlands Select	25344	✓	–	127	
		547040	So.	VALS								

202

[fol. 203]

Treesweet Prods
PROCESSOR

8/3
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2725	Vals	15170	2611	35	TS	8/2	Corona Citrus	42817		—	133	
26	"	26050	2610	34	"	"	Deer Ranch	17473		—	135	
27	"	12670	2614	2	Wilson	8/3	Damerel & Allison	15170		—	144	
28	"	41900	2615	25-50	TS	"	Placentia O G	22400		—	132	
29	"	49920	2617	34-35	"	"	L O G A	51338		—	133	
2730	"	11050	2618	1	Wilson	"	D & Allison	15171		—	134	
31	"	15700	2616	11	Finley	"	McDermont Fruit	17463		—	133	
32	"	27500	2622	11	"	"	Orange Ht Or	15538		—	122	
33	"	52200	2627	8	"	"	Golden Heart Ort	52161		—	112	
34	"	11820	2628	2	Wilson	"	Irvine Citrus	19423		—	135	
35	"	49090	2632	34-35	TS	"	Olive Ht	[illegible]396		—	127	
[illegible]	"	10570	2636	17	Finley	"	Jamison Fruit	44000		—	146	
36	"	10100	2631	1	Wilson	"	Irvine Citrus	19424		—	133	
38	"	[illegible]	26[illegible]	17	Finley	"	Corona Citrus	42810		—	135	
39	"	[illegible]	2637	17	"	"	Orange Ht O	15539		—	118	
[illegible]	"	[illegible]	[illegible]	4	"	"	La Habra Citrus	39228		—	145	
41	"	[illegible]	[illegible]	34-35	T.S.	"	Irvine Valencia	51586		—	123	
[illegible]	"	[illegible]	[illegible]	2	Wilson	"	Irvine Citrus	19425		—	131	
[illegible]	"	[illegible]	[illegible]	1	"	"	Damerel & Allison	15122		—	133	
		[illegible]		Vals								

T.L.

Dresweet Prods
PROCESSOR

8/2/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON	
2715	Vals	47980	2591	56-57	T S	8-1	S.A. Tustin Mutual	29190	+	—	123		30
16	"	41950	2593	16	Farley	8-1	Monte Vista Cit	47398	+	—	136		31
17	"	29150	2587	3	Walden	8-1	Azusa Citrus	16574	+	—	118		32
18	"	11980	2592	2	"	8-2	Glendora Mutual	15489	+	—	127		33
19	"	9380	2594	16	Farley	8-1	Garland Citrus	46684	+	—	149		34
2720	"	39240	2598	25-50	T.S.	8-2	Plac. O. G. Assn	22398	+	—	136		35
21	"	41820	2601	"	"	"	S.O.G.A.	51332	+	—	141		36
22	"	41350	2605	"	"	"	Olive Hts	13957	+	—	118		37
23	"	12150	2608	2	Watson	"	Pomona Fruit G.	43559	+	—	114		38
24	"	25000	2609	3	"	"	Walnut Fruit G.	18766	+	—	135		39
	300000	50	Vals										

53-8

[illegible] Prods Co
PROCESSOR

8-1-51
UNLOADING DA

---DO NOT USE THIS SPACE-

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
[illegible]	Vals	11750	2563	1	Wieland	7-31	Glendora Citrus	16377	✓	–	133	
[illegible]	"	17050	2564	2	"	"	Glendora Mutual	15456	✓	–	128	
[illegible]	"	[illegible]	2565	3	"	"	Indian Hill Citrus	[illegible]	✓	–	117	
2707	"	33050	2569	54-33	TS	8-1	La Habra Citrus	39220	X ✓	–	142	
08	"	46650	2573	56-57	TS	7-31	Olive Hts	13945	✓	–	105	
09	"	35920	2574	2	Farley	8-1	POGA	22394	X ✓	–	141	
10	"	50280	2575	35-36	T.S.	[illegible]	LOGA	57317	✓	–	126	
11	"	29900	2577	3	Wieland	8/1	Lo Whittier Hts	43459	X ✓	–	130	
12	"	17050	2576	2	"	"	Glendora Mutual	15488	X ✓	–	131	
13	"	45970	2581	56-57	TS	"	La Habra Citrus	39821	X ✓	–	131	
2714	"	48600	2588	34-35	"	"	Covina Cal	51591	X ✓	–	130	
		357630 So. Vals										

2.

7/31 – 152140 So. Vals ✓
8/1 – 205490 " " ✓
357630

FORM [illegible]

TREESWEET PRODUCTS CO.

INTER-PLANT CORRESPONDENCE

DATE: 8/2/51

TO: Citrus Distributing Plant

FROM: Vera Brad

7/31/51 Gold Buckle O.A.C. No. 27002, the correct Weight is 17650 lbs.

8/1/51 No. Whittier Heights Citrus the correct O.A.C. No. is 43459.

205a

8-86

Sunsweet Prods
PROCESSOR

7-31
UNLOADING DATE

8-87

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
2691	Vals	12030	2545	2	Wilson	7/30	Corona Orange Gr.	44442		1.78	140	
92	"	11000	2546	1	"	"	" "	44442		–	135	
93	"	49590	2547	19	Finley	7/30	Anaheim Val	24579		1.33	141	
94	"	49420	2548	56-57	T.S.I.	7-31	S.C.G.A.	51312		–	120	
95	"	51040	2550	"	"	"	Anaheim Valencia	24580		–	140	
96	"	9510	2552	2	Wilson	"	Corona Orange Gr.	44444		–	120	
97	"	11280	2553	1	"	"	[illegible]	15113		–	117	
98	"	45350	2557	11	Finley	"	Placentia C.G.	22390		–	131	
99	"	17650 ~~17350~~	2555	18235	"	"	Gold Buckle Assn	27002		–	143	
2700	"	14550	2556	"	"	"	Crafton Orange	12554		–	131	
2701	"	25240	2559	18225	"	"	Riverside Citrus	30743		–	130	
2702	"	8500	2560	16-31	"	"	Orange H.G.	15537		–	149	
2703	"	28150	2561	3	Wilson	"	Corona Citrus	19443		–	130	
		~~333010~~	50	VALS								
		333310	"	"								

Treesweet Products Co.
CESSOR

/30/51
UNLOADING DATE

---DO NOT USE THIS SPACE---

LOAD NO.	VARIETY	ACTUAL NET WEIGHT	WEIGHT TICKET NUMBER	TRUCK LICENSE NUMBER	DRIVER	O.A.C. DATE	SHIPPER	O.A.C. NUMBER	RATIO	DECAY	SOLIDS	RATE PER TON
686	Vals	40870	2538	25-50	T.S.	7/30	Santa Ana-Tustin Mutual	29185	/	–	118	
687	"	40650	2539	7-23	Finly	"	Frances Citrus	26504	/	–	119	
688	"	10800	2541	1	Wilson	"	Damerel-Allison	15112	/	2.22	126	
689	"	12610	2542	2	"	"	" "	15111	/	–	114	
690	"	38690	2543	25-50	T.S.	"	Irvine Valencia Growers	5155	/	–	129	
		143620	So Vals									

[fol. 208]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 9

EOP SUBPOENA TO PRODUCE DOCUMENTS NO. 13788 C

Par. No. 1

Specific Data reported in Tables 21 and 24 of the 1955 Supplement on Statistical Information was obtained from official records of the U.S.D.A. by SUNKIST Growers. A copy of the Supplement is attached. Inside each copy of the 1955 Supplement are photo copies of the information supplied by the U.S.D.A.

The EOP does not know the composition of the figures reported by the U.S.D.A. The EOP reported these figures to the U.S.D.A. for canned orange juices for the period of November 1 to October 31 as requested by the U.S.D.A.

November 1, 1950 to October 31, 1951

48/6-oz. Tins	6,843	Cases
24/#2's	68,671	
12/46-oz. Tins	254,844	
6/#12's	3,116	

Production by Treesweet and Silzle under the processing contracts were not reported.

November 1, 1949 to October 31, 1950

24/12-oz. Tins	4,082
24/#2's	30,792
12/46-oz. Tins	131,692
6/#12's	3,024

Production by Treesweet under a processing contract was not reported.

[fol. 209]

PLAINTIFFS' EXHIBIT 9

This exhibit contains the figures in cases and sizes of single-strength orange juice reported by EXCHANGE ORANGE to the United States Department of Agriculture for the year commencing November 1, 1950, and ending October 31, 1951. The case figures reported ~~to~~ do not include the cases produced by TREESWEET and SILZLE under the 1951 processing contracts between EXCHANGE ORANGE and TREESWEET and SILZLE. (Plaintiffs' Exhibits 20 and 25)

LCF
McD

The case figures reported by EXCHANGE ORANGE for the year commencing November 1, 1949 and ending October 31, 1950, do not contain the cases processed by TREESWEET under the processing contract with EXCHANGE ORANGE for that processing year (plaintiffs' Exhibit 22). The total number of cases of canned single-strength orange juice reported by the United States Department of Agriculture as having been processed in California and Arizona is reported in 24/2's cases. 3.375 gallons of single-strength juice are contained in a case of 24/2's.

[fol. 210]

In United States District Court

Plaintiffs' Exhibit 10

EOP SUBPOENA TO PRODUCE DOCUMENTS NO. 13788 C

Par. No. 2 The tables shown below show the production of canned single strength orange juice for EOP Co. by processors for the periods indicated.

Canned Valencia Single Strength Orange Juice 1950-51 Season—12/1/50 to 11/30/51

	SILZL. CASES	TREE-SWEET CASES	ELP CASES	TOTAL CASES	GALLONS
48/5-1/2-oz.	1,000	8,073	—	9,073	18,713
48/6-oz.	—	65,509	—	65,509	147,386
24/12-oz.	3,450	60,927	—	64,377	144,848
24/2's	35,550	139,074	—	174,624	589,356
12/46-oz.	123,326	373,852	129,877	627,055	2,704,175
6/#12 Tins	—	—	—	—	—
Total	163,326	647,435	129,877	940,638	3,604,48[illegible]

Canned Valencia Single Strength Orange Juice 1949-50 Season—12/1/49 to 11/30/50

	TREESWEET CASES	GALLONS
48/5-1/2-oz.	86,039	177,455
48/6-oz.	8,639	19,436
24/12-oz.	67,007	150,766
24/2's	116,343	392,658
12/46-oz.	250,155	1,078,793
Total	528,183	1,819,11[illegible]

[fol. 211]

PLAINTIFFS' EXHIBIT 10

This exhibit shows the number of cases by cases and gallons of single-strength Valencia orange juice produced by TREESWEET, SILZLE, and EXCHANGE LEMON during the season commencing December 1, 1950 and ending November 30, 1951, under Plaintiffs' Exhibits 20 and 5 and the oral agreement between EOP and ELP.

This exhibit also shows the number of cases of canned Valencia single-strength orange juice, as well as the size of the cases, produced by TREESWEET during the season commencing December 1, 1949, and ending November 30, 1950, under its agreement (Plaintiffs' Exhibit 20) with EXCHANGE ORANGE. It has been stipulated that the report of the Department of Agriculture for the processing year ending October 30, 1951, shows a California-Arizona production of 5,400,000 gallons of single-strength orange juice and a total California-Arizona production of 1,600,000 cases of 24/2's of single-strength orange juice during said season.

[fol. 212]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 11

EOP SUBPOENA TO PRODUCE DOCUMENTS NO. 13788 C

Par. No. 6 The compilations and tables included here set forth the answers requested.

Net Tons Processed by Treesweet and Silzle

(a) TreeSweet (9/11/51 Contract)	24,148.190
Silzle (9/10/51 Contract)	7,203.195 (Total including 527.95 tons)

(b)

	TREESWEET		SILZLE	
	Cases	Gallons	Cases	Gallons
48/5½-oz.	8,073	16,651	1,000	2,063
48/6-oz.	65,509	147,395	—	—
24/12-oz.	60,927	137,086	3,450	7,763
24/#2's	139,074	469,375	35,550	119,981
12/46-oz.	373,852	1,612,237	123,326	531,843
	647,435	2,382,744	163,326	661,650

(c) Gallonage and Cases Purchased by TreeSweet and Silzle Under Said Contracts

	TREESWEET		SILZLE	
	Cases	Gallons	Cases	Gallons
48/5½-oz.	8,073	16,651	1,000	2,063
48/6-oz.	65,509	147,395	—	—
24/12-oz.	60,927	137,086	3,450	7,763
24/#2's	139,074	469,375	35,550	119,981
12/46-oz.	373,852	1,612,237	123,326	531,843
	647,435	2,382,744	163,326	661,650

(d) Amount Paid TreeSweet and Silzle for Processing Juice

	TREESWEET	SILZLE
48/5½-oz.	$ 9,960.95	$ 1,190.00
48/6-oz.	91,807.58	—
24/12-oz.	64,061.69	3,484.50
24/#2's	179,011.88	44,437.50
12/46-oz.	514,162.39	166,490.10
	859,004.49	215,602.10[*]

---

[*] This amount was not paid to Silzle but was computed from production based on rates for processing set forth in contract.

[fol. 213]

(e) TreeSweet Oil

105,297 lbs. produced @ $.225 = $23,691.83 paid to TreeSweet

This oil was not sold as such and we are unable to develop the amount received for the sale of this oil. It could have been sold separately or blended with other EOP oils, or it could have been used in manufacturing other EOP products. No separate account was kept.

The sales price of Orange Oil during this period was as follows:

From 6/15/51 to 10/13/52 $2.75 per lb. New York, N. Y.

Brokerage cost — 12½%

(f) Silzle Oil

9,347.52 lbs. produced @ $.25 = $2,336.88 paid to Silzle

This oil was not sold as such and we are unable to develop the amount received from the sale of this oil. It could have been sold separately or blended with other EOP oils or it could have been used in manufacturing other EOP products. No separate account was kept.

The sales price of Orange Oil during this period was as follows:

From 6/15/51 to 10/13/52 $2.75 per lb. New York, N. Y.

Brokerage Cost — 12½%

(g) There was paid by TreeSweet in actual dollars the amount of $1,204,031.41 for the orange juice it processed and purchased.

There was paid by Silzle in actual dollars the amount of $90,661.55 for the orange juice it processed and purchased.

(h) Income from sale of orange peel:

TreeSweet — $31,293.89
Silzle — $ 6,955.37

(i) The juice produced by TreeSweet was sold completely to TreeSweet.

The juice produced by Silzle was sold completely to Silzle.

[fol. 214]

(j) TreeSweet purchases and prices paid per case by these two purchase orders which fit as closely as we could get to the period 9/25/51 to 10/5/51

	TREESWEET P.O. 6405		TREESWEET P.O. 64	
	Week Ending 9/30/51		Week Ending 10/6/51	
	Cases	Sales Price	Cases	Sales Price
48/5½-oz.	25	$2.20	300	$2.20
	—	2.40	500	2.40
48/6-oz.	425	$2.00	150	$2.00
	301	2.20	251	2.20
24/12-oz.	484	$1.70	1,641	$1.70
	509	1.75	160	1.75
	1,858	1.85	416	1.85
	—	1.60	250	1.60
24/#2's	84	$1.95	1,270	$1.95
	1,312	2.05	4,795	2.05
	4,216	2.30	2,642	2.30
12/46-oz.	1,545	$2.20	2,980	$2.20
	4,366	2.35	10,121	2.35
	6,348	2.65	6,788	2.65

Silzle purchases and prices paid per case during the period 9/25/51 to 10/5/51

	Cases	Sales Price
24/12-oz.	1,000	$1.74
24/#2's	750	$2.05
	3,122	2.20
12/46-oz.	985	$2.20
	9,485	2.35
	4,964	2.50

[fol. 215]
k)

DETAIL ON 1st — 527.95 TONS DELIVERED TO E. A. SILZLE UNDER THE 1951 PROCESSING CONTRACT

	OAC No.	Weight	Inspection No.
rden Grove	14047	41,060 lbs.	S–11
ldenwest Citrus	52058	23,670 "	S– 4
ldenwest Citrus	52066	46,600 "	6
ldenwest Citrus	52069	22,900 "	10
ldenwest Citrus	52116	32,160 "	19
ldenwest Citrus	52117	30,000 "	20
ldenwest Citrus	52118	22,180 "	21
ldenwest Citrus	52128	45,460 "	22
ldenwest Citrus	52129	46,620 "	23
ldenwest Citrus	52130	30,980 "	24
ldenwest Citrus	52132	53,450 "	26
ive Heights	13869	37,180 "	12
ntiago Orange Growers	51157	37,960 "	15
ntiago Orange Growers	51165	33,820 "	17
ntiago Orange Growers	51171	47,460 "	18
ntiago Orange Growers	51195	47,480 "	16
stin Hills	26477	37,020 "	5
stin Hills	26488	44,820 "	7
stin Hills	52251	52,080 "	25
illa Park Orchards	55590	41,280 "	8
illa Park Orchards	55643	52,960 "	27
nsolidated Orange Growers	52520	36,680 "	14
nta Ana Tustin	29142	35,420 "	9
nta Ana Tustin	29150	30,260 "	13
llerton Mutual	39256	38,000 "	1
alnut Fruit Growers	16087	39,080 "	2
orth Whittier Heights	43328	49,260 "	3
		1,055,900 lbs.	

or

527.95 tons

W/E	6/30/51	93.515 Net Ton
	7/ 7/51	95.540 " "
	7/14/51	132.210 " "
	7/21/51	65.910 " "
	7/28/51	140.775 " "
		527.950 Tons

Received from Silzle 8/27/51 — $11,878.87

[fol. 216]

PLAINTIFFS' EXHIBIT 11

Subsection (a) of this exhibit shows the total tons of Valencia oranges handled by TREESWEET and SILZLE during the 1951 processing season under the 1951 TREESWEET and SILZLE contracts (Plaintiffs' Exhibits 2 and 25).

Subsection (b) shows the total number of cases, case size and gallons of single-strength Valencia orange juice processed by TREESWEET and SILZLE under said contracts.

Subsection (c) shows the total number of cases, sizes and gallonage purchased by TREESWEET and SILZLE under said contracts.

Subsection (d) shows the total amount paid TREESWEET and SILZLE by EXCHANGE ORANGE for the processing operations by TREESWEET and EXCHANGE ORANGE under said contracts. The amount of $215,602.10 was, however, not paid to SILZLE by EXCHANGE ORANGE, but was computed from production based on rates for processing set forth in plaintiffs' Exhibit 25.

Subsection (e). This paragraph contains the amount of orange oil produced by TREESWEET under plaintiffs' Exhibit 20, the amount in pounds; the amount per pound paid TREESWEET by EXCHANGE ORANGE for the processing of oil, total per pound, and the total amount in dollars paid TREESWEET for such processing. This paragraph also contains the selling price of orange oil during the period in which the oil was processed and the brokerage costs payable by EXCHANGE ORANGE for selling said oil in the event it was sold.

Subsection (f) shows the pounds of oil produced by SILZLE under its contract with EXCHANGE ORANGE (Plaintiffs' Exhibit 25), the amount paid SILZLE per pound by EXCHANGE ORANGE for processing said oil, and the total amount paid SILZLE by EXCHANGE ORANGE for such processing. The selling price of orange oil during said period is also set forth in this paragraph, as well as the brokerage selling cost.

Subsection (g) shows the actual amount paid by TREESWEET to EXCHANGE ORANGE for the orange juice it processed and purchased under plaintiffs' Exhibit 20. This paragraph also shows the amount actually paid by SILZLE to EXCHANGE ORANGE for orange juice it processed and purchased, but does not show the amount actually allowed SILZLE by EXCHANGE ORANGE for such processing as this amount was determined on the basis of the amount allowed for processing against the purchase price of the Valencia orange juice processed by SILZLE under plaintiffs' Exhibit 25.

Subsection (h) shows the amount received by EXCHANGE ORANGE from TREESWEET and SILZLE from the sale of the orange peel as provided for in plaintiffs' Exhibits 20 and 25.

Subsection (i) and (j) are self-explanatory.

Subsection (k) shows the source and delivery dates of the 527.95 tons of Valencia oranges acquired by SILZLE under plaintiffs' Exhibit 25 and paid for by SILZLE to EXCHANGE ORANGE on the basis provided for in the SILZLE contract (Plaintiffs' Exhibit 25).

[fol. 217]

In United States District Court

Plaintiffs' Exhibit 12

EOP SUBPOENA TO PRODUCE DOCUMENTS
NO. 13788 C

Par. No. 7 Specific period of 11/1/50 to 11/1/51 for f
handled by EOP for SUNKIST.

		Net Tons Processed	
	Product	Juice	Tota
Valencias	49.42	281,465.95	281,51

Plaintiffs' Exhibit 12

This exhibit shows the total tonnage of Valencia oran handled by EXCHANGE ORANGE for SUNKIST dur the period commencing November 1, 1950 and ending vember 1, 1951, in the amount of 281,517.37 tons.

[fol. 218]

In United States District Court

Plaintiffs' Exhibit 13

Paragraph 3—EXCHANGE LEMON PRODUCTS COMPANY Subpoena

Total tonnage of oranges involved	9371
Rejected as unfit for juice	2587
Total processed to juice	6784

Amount paid by EOP to ELP — $96,108.98

Plaintiffs' Exhibit 13

This exhibit sets forth the total tonnage of Val oranges processed by EXCHANGE LEMON during year commencing November 1, 1950, and ending Nove 1, 1951, and the amount paid by EXCHANGE ORAN to EXCHANGE LEMON for such processing.

EXCHANGE LEMON PRODUCTS CO.
P. O. BOX 36, CORONA, CALIFORNIA

Exchange

Date	Your Order No.	Our Invoice No.	Terms	Shipped Via
11/30/51		11 - 79		

RECEIVED
[illegible]
DEC - 1951
[illegible]

Sold To The Exchange Orange Products Company
616 East Grove Street
Ontario, California

Form 206

Production of Orange Juice - #260 12/46 oz. for August, September and October

114,667 Cases	@ $ .74 Case	$ 84,853.58

121679

121679

~~Nov.~~

~~Oct.~~ DEC 1R

ORDER NO.	INV. NO.	DISTRIBUTION	AMOUNT	SUB. POSTED
		31.2	84,853.58	
DATE REG.	REG. NO.			
MATURITY 1-2	F.O.B.			
TERMS	DISCOUNT			
PRICES O.K.	EXTENSIONS OK	S.S.O.J.		
DIST. BY				
APPROVED FOR PAYMENT				
CHECK NO. 32996				

lmo

JV 10-331

84,853.58
80,552.03
4301.55

In United States District Court
Plaintiffs' Exhibit 14

Production of Orange Juice - #260 12/46 oz. for August, September and October

114,667 Cases @ $ .74 Case $ 84,853.58

121679

121679

~~Nov.~~

~~Oct.~~

DEC IR

ORDER NO.	INV. NO.
DATE REG.	REG. NO.
MATURITY 1-2	F. O. B.
TERMS	DISCOUNT
PRICES O. K.	EXTENSION OK
DISTR. BY	DISTR. OK
APPROVED FOR PAYMENT	
CHECK NO. 32996	

DISTRIBUTION	AMOUNT	SUB. POSTED
31.2	84,853.58	
S.S.O.J.		

lwc

JV 10-331

84,853.58
80,552.03
4301.55

3520 cs TGR
1147 cs TX
4667

4258.52
43.03
4301.55

[fol. 220]

Plaintiffs' Exhibit 14

This exhibit shows the total amount paid and the invoices submitted by EXCHANGE LEMON to EXCHANGE ORANGE for the tonnage of oranges referred to in plaintiffs' Exhibit 13.

EXCHANGE LEMON PRODUCTS CO.
P. O. BOX 30, CORONA, CALIFORNIA

Exchange

Date	Your Order No.	Our Invoice No.	Terms	Shipped Via
10-[illegible]-51 as of 11-30-51		11 - 108		

Sold To . [illegible] ORANGE PRODUCTS COMPANY
Ontario
California

June IR

Form 25

Your Portion of Expense:

	Product	Cases	Amount
Juice Production @ 74¢ per case	53 - 12/46	3133 ✓	$2318.42
	[illegible] - 12/46	12077 ✓	8936.98
			11,255.40
Storage	53 - 12/46		20.00
	[illegible] - 12/46		431.00
Transferring to Storage	[illegible] - 12/46		364.01
[illegible]	[illegible] - 12/46		347.19
			$12,417.60
			1162.20

62120

Storage above covered on other invoices see 11-108 "Memo Billing"

To:- Al Prince (Process thru June invoice I.R.)
OK to pay 11,255.40 only

fol. 221

Your Portion of Expense:

	Product	Cases	Amount
Juice Production @ 74¢ per case	53 - 12/46 260 - 12/46	3133 12077	$2318.42 8936.98
			11,255.40
Storage	53 - 12/46 260 - 12/46		20.00 431.00
Transferring to Storage	260 - 12/46		384.01
Shipping	260 - 12/46		327.19
			$12,417.60
			1162.20

62120

Storage above covered on other invoices see

11-108 Memo Billing

To - Al Price (Process thru June invoice I.R.)

OK to Pay 11,255.40 only

Charge A/c 25.13 — N. J.

Extensions, Prices, Etc all OK -

05150

2

[fol. 221]

62120 June I R

Order No.	Inv. No.	Rec. No.	Date Rec.	Maturity 6·27	F. O. B.	Terms net	Discount none
Prices O.K. ait	Ext. O.K. ait	Distr. By ait	Distr. O.K. ait	Approved for Paym't. ait		Check No. 38978	

Distribution	Amount	Sub. Posted
25.13	11,255.40	

RECEIVED
1951 DEC

RECEIVED
NOV 27 1961

RECEIVED
The EOP
NOV 4 - 1955

[fol. 223]

In United States District Court

Plaintiffs' Exhibit 15

ADS:MO(3)6/6/51

RANGE CONCENTRATE PROCESSING CONTRACT

The HYLAND-STANFORD COMPANY, which shall be known in this contract as PROCESSOR, hereby agrees to process oranges into orange concentrate and oil for the account of THE EXCHANGE ORANGE PRODUCTS COMPANY, 616 East Grove Street, Ontario, California, hereafter known as SUPPLIER, under the terms and conditions as are listed below.

1. *Fruit*

SUPPLIER will arrange for fruit to be made available to the PROCESSOR. The PROCESSOR will arrange for the trucking of the fruit to its plant. The actual cost of trucking the fruit shall be for the account of SUPPLIER. The PROCESSOR will make payment to trucker and in turn bill SUPPLIER for this cost.

SUPPLIER will do everything possible to insure an even flow of fruit to the PROCESSOR but does not make any guarantee that a certain tonpage will be delivered per day or week.

2. *Concentrate*

The PROCESSOR is to be paid sixty ($0.60) cents per gallon for producing 65° Brix Orange Concentrate. This rate per gallon is subject to renegotiation if fruit yields do not compare favorably with 1948 yields. The volume to be determined by the nominal volume content of filled containers. This rate includes all costs from the time of receiving fruit until the moment the juice is ready to be placed in cans or barrels, plus a first month cold storage charge. The principal costs generally are fruit receiving, juice extraction, concentration, pasteurization, refuse disposal, etc., overhead expenses of the PROCESSOR, a reasonable profit on the complete operation for the account of SUPPLIER and a first month cold storage charge of $.008 per gallon. This $.008 per gallon includes handling in and out of storage and cooling the product for a [fol. 224] period of one month.

The 65° Brix Orange Concentrate shall meet these specifications:

a. Product must be sterile.

b. Product must be free from specks.

c. Product must have cloud stability.

d. Raw Juice before being concentrated must have been passed over a 40 or 50 mesh shaker screen as specified by SUPPLIER.

e. Brix of finished concentrate shall be a minimum of 65° not corrected for acid.

3. *Cold Storage*

The PROCESSOR is to provide cold storage accommodations for a minimum period of ten (10) days and for a full month as specified in Item 2 if possible when requested by SUPPLIER.

Should any products remain in storage more than thirty (30) days, the PROCESSOR will be paid twenty ($.20) cents per barrel, and three ($.03) cents per 6 #12 or 6 #10 case for each additional monthly period. Cold storage shall mean a temperature of 35° F or below, but it does not mean the sharp freezer temperature of 0°-10° F.

4. *Failure of Product to Meet Specifications*

The ten (10) day cold storage period will permit SUPPLIER to completely analyze the product while in possession of the PROCESSOR. In the event the product does not meet SUPPLIER'S specifications, then any and all expenses necessary to bring the product up to specification shall be borne by the PROCESSOR and it is the PROCESSOR'S responsibility to bring such product up to specifications.

[fol. 225]

5. *Packaging*

The PROCESSOR will pack the concentrate in various containers and at various rates as are shown.

a. When packed in 50 gallon barrels, the PROCESSOR will be paid $.005 per gallon for barreling costs; SUPPLIER to furnish the barrels.

b. When packed in cans, SUPPLIER will furnish cans, labels, and cases, and PROCESSOR will be paid:

(1) $.25 per case when packed in 6 #10 cases.

(2) The rate paid in this section covers filling cans, labelling, and casing product.

(3) When lithographed lids are used instead of labels, the rate per case shall be reduced $.02 per case for labor saved.

6. *Shipping and Other Items*

In the event it becomes necessary to ship to SUPPLIER'S accounts from the PROCESSOR'S plant, the PROCESSOR will be reimbursed for actual shipping costs up to a maximum of $.12 cwt. Shipping expense is defined as those expenses occurring after juice has been removed from cooler until juice has been completely loaded for shipment; bracing, dunnage, and clerical expenses of routing are included. If strapping or extra curricular expense be incurred, the PROCESSOR will be paid actual cost plus 10%. The cost of loading the products into trucks bound for SUPPLIER'S plant shall have been included in Item 2, as truck drivers will do loading and PROCESSOR only has to deliver from cooler to truck, which cost has been included in storage costs.

7. *Storage of Concentrate*

The concentrate is to be placed in cold storage as soon as possible but in no event shall it be held longer

than four (4) hours before being placed in a refrigerated [fol. 226] area.

The products produced for the account of the SUPPLIER shall be marked, tagged, and stored so that it will be absolutely apparent that SUPPLIER is the sole owner of the goods. The products produced for SUPPLIER shall under no circumstances be intermingled in storage with the PROCESSOR'S own products.

8. *Certification of Fruit Weight*

All fruit is to be weighed on certified public weighmaster scales and a certified weighmaster certificate obtained for each load of fruit. This weight certificate will be released to SUPPLIER.

9. *Orange Oil*

Any orange oil produced from SUPPLIER'S fruit shall become the property of SUPPLIER. The PROCESSOR will be paid fifteen ($.15) cents per pound for cleaned oil. Cleaned oil means free from water and dirt. If SUPPLIER finds it necessary to reclean any oil upon delivery at Ontario, the PROCESSOR agrees that the basis for payment on the cleaned oil is the weight of cleaned oil obtained by SUPPLIER. If the PROCESSOR wishes to purchase any of the oil it produces from SUPPLIER'S fruit, SUPPLIER agrees to sell any quantity of such oil at 87½% of current sales price, less twenty-five ($.25) cents per pound for unpackaged oil.

Orange oil shall be recovered from the peel unless this contract is amended. SUPPLIER is to furnish steel drums for storage of the orange oil.

10. *Salvage Value of Peel*

Any salvage value shall accrue to the account of SUPPLIER. If the peel is used in the PROCESSOR'S drier, the value of the peel shall be determined at the actual time of use.

[fol. 227]

11. *Processor Performance*

The PROCESSOR agrees to operate its plant as efficiently when working under this contract as it ordinarily operates on its own production. The PROCESSOR further agrees to allow SUPPLIER to make necessary inspections of product, production, and records as pertain to this contract and to obtain necessary samples other than those supplied by PROCESSOR.

12. *Payment to Processor*

The PROCESSOR shall invoice SUPPLIER as soon as possible after the close of a Sunday to Saturday week. When a month-end does not fall on Saturday, the PROCESSOR will prepare two invoices for such week. An invoice covering the part of the week falling in the closing month will be submitted to SUPPLIER within four (4) working days after the end of the month.

The SUPPLIER will make payment to PROCESSOR not earlier than ten (10) days after the close of a week and not later than two (2) weeks. This permits SUPPLIER to completely analyze the product and prove to its satisfaction that the products produced are up to its specifications. Payment will be withheld on all products not meeting specifications until such time as products have been reworked and approved by SUPPLIER.

13. *Insurance*

SUPPLIER will insure all its own products and supplies.

14. *Other Conditions*

The PROCESSOR will be instructed specifically as to how products shall be marked, how taken, and quantity in regard to samples, and the various accounting reports that will be necessary.

[fol. 228]

15. *Contract Period*

This contract is to run from June 1, 1951 to May 31, 1952, and thereafter from June 1 to May 31 of each year unless either party gives notice of termination at least ninety (90) days prior to May 31 of each year.

Signed:

Hyland-Stanford Company
(Processor)

By /s/ R. S. Horne
Vice President in Charge of Production

The Exchange Orange Products Company
(Supplier)

By /s/ A. JD Smith
A. JD Smith, Assistant Secretary

Date Signed: June 19, 1951

fol. 229]

In United States District Court

Plaintiffs' Exhibit 16

JBS:MO(3)6/6/51

HE EXCHANGE ORANGE PRODUCTS COMPANY
616 East Grove Street • Phone Ontario 611-11

(Emblem)

Manufacturers of
ORANGE AND GRAPEFRUIT OILS
JUICES, PECTIN and MEAL

Producing Plants
ONTARIO, CALIFORNIA
TEMPE, ARIZONA

Distributed by
PRODUCTS DEPARTMENT
LIFORNIA FRUIT GROWERS EXCHANGE
Ontario, California

Mailing Address
P. O. Box 233
Ontario, California

FRUIT PURCHASING CONTRACT

The Exchange Orange Products Company
Ontario, California

as SELLER

Hyland-Stanford Corporation
58 Mesquit Street
Los Angeles 21, California

as PURCHASER

Details of Contract

1. ***Fruit Supplies***

The Exchange Orange Products Company is to be the only supplier of oranges to Hyland-Stanford Corporation unless otherwise mutually agreed upon because of inability of **SELLER** to supply requirements of **PURCHASER**. It is further agreed that in the event of short fruit supplies the **PURCHASER** will receive his proper prorata share of fruit along with other purchasers of **SELLER'S** fruit.

2. *Fruit Value*

The value of the fruit supplied under this contract shall be the going market price of the same quality California Fruit Growers Exchange fruit sold to other processors at the time fruit is delivered to PURCHASER. PURCHASER is to take delivery of fruit fob packing house. PURCHASER has the right to accept or reject fruit as any other buyer.

[fol. 230] It is further agreed that the PURCHASER may stop buying for its own account from the SELLER if the average cost of fruit goes over $40.00 per ton fob packing house on fruit yielding 120# of solids per ton according to laboratory analysis.

In the event PURCHASER finds it necessary to stop the purchase of fruit, then Section 16 is to apply to the situation.

3. *Products to be Made*

The fruit thus supplied to PURCHASER shall be made into mainly 65° Brix Orange Concentrate and placed in barrels; however, it is acceptable that other types of concentrates and juices be manufactured.

4. *Payment for fruit*

Payment for fruit shall be made in the following manner:

a. The value of fruit delivered per week shall be converted over to a price per gallon on all concentrates and juices produced in such week.

b. The PURCHASER shall make proper arrangements with Lawrence Warehouse so that all products made from fruit delivered under this contract are placed in Lawrence Warehouse with proper warehouse receipts promptly delivered to the SELLER.

c. **The PURCHASER cannot secure any products so produced from Lawrence Warehouse for its own use except by payment for products upon a gallonage basis as under (a) when presenting SELLER with a request for release from Lawrence Warehouse.**

d. **The price to be paid under the warehouse release system is that the highest fruit price which has been converted to a gallonage basis is to be paid first.**

e. **In the event PURCHASER finds it necessary to [fol. 231] use concentrate directly from production to save barrelling and other costs, it shall remit for such usage at the end of the week when making report to SELLER. This price to be based upon the current week's fruit prices.**

f. **Lawrence Warehouse Receipts shall be so prepared that signatures of both parties are necessary for stock withdrawal.**

5. *Storage Withdrawal Date*

All products placed in Lawrence Warehouse shall be paid for by and released to PURCHASER by May 31 following the season of production.

6. *Payment Enforcement*

In the event PURCHASER cannot pay for all products in Lawrence Warehouse by May 31 following the season of production, the PURCHASER must cause to be released to SELLER by Lawrence Warehouse all such products if SELLER so demands. The SELLER will dispose of such products to the best of its ability, retaining for itself only the value of the fruit in such products as is determined in Paragraph 4. All funds received in excess of this amount shall revert to PURCHASER.

7. *Product Carry-Over Estimate*

PURCHASER estimates that it will need 80,000 gallons of orange concentrate on hand at October 31.

8. *Insurance*

PURCHASER to have SELLER'S name added as additional insured on its finished products fire insurance policies and have copies delivered to SELLER.

9. *Costs*

All costs incurred for processing, warehousing, etc. [fol. 232] under this contract are for the account of PURCHASER.

10. *Production Facilities*

PURCHASER agrees that in the event it stops buying fruit because of price, or because of excess capacities over its own needs, its production facilities shall be made available to SELLER upon its request. The SELLER agrees that in the event PURCHASER stops buying fruit when the average price of fruit purchased under this contract goes above $40.00 per ton for fruit yielding 120# solids per ton, as described in Section 2, PURCHASER is permitted to buy fruit of sufficient quantities on the open market to produce requirements of Tru-Ade products. Any production capacities above these requirements shall be available to SELLER at its request. Details covering the use of PURCHASER'S production facilities for SELLER'S use are set forth in a separate contract called "ORANGE CONCENTRATE PROCESSING CONTRACT".

11. *Seller's Function*

SELLER'S prime function is to supply fruit at current prices but to await payment until PURCHASER withdraws products from Lawrence Warehouse.

12. *Records*

PURCHASER agrees to supply records as requested by SELLER, to allow examination of records and products as SELLER believes necessary.

13. *Contract Period*

This contract is to be effective June 1, 1951, to May 31, 1952, and thereafter is to run from June 1 to May 31 of each year unless either party gives notice of termination at least ninety (90) days prior to May 31 of each year.

Signed:

THE EXCHANGE ORANGE PRODUCTS COMPANY
(Seller)

By /s/ A. JD SMITH
A. JD Smith, Assistant Secretary

HYLAND-STANFORD CORPORATION (Purchaser)

By /s/ R. S. HORNE
Vice President in Charge of Production

Date Signed: June 29, 1951

[fol. 233]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 17

AJDS:MO(3)7/11/51

ORANGE CONCENTRATE PROCESSING CONTRACT

The MISSION DRY CORPORATION of Los Angeles, which shall be known in this contract as PROCESSOR, hereby agrees to process oranges into orange concentrate and orange oils for the account of THE EXCHANGE ORANGE PRODUCTS COMPANY, Ontario, California, which shall be known as the SUPPLIER, under the terms and conditions as are set forth in this agreement. This agreement is a supplement to the Fruit Purchasing Agreement as entered into by these two parties.

1. *Fruit*

The SUPPLIER will arrange for fruit to be made available to the PROCESSOR. The PROCESSOR will arrange for the trucking of the fruit to its plant. The actual cost of trucking shall be for the account of the SUPPLIER.

The SUPPLIER will do everything possible to insure an even flow of fruit to the PROCESSOR, but it cannot make any guarantee that a certain tonnage will be delivered per day or week.

2. *Concentrate*

The PROCESSOR is to be paid fifty-five ($.55) cents per gallon for producing 65° Brix orange concentrate. The volume of production is to be determined by the nominal volume content of filled containers. This rate includes all costs from the time of receiving fruit until the moment the juice is ready to be placed in cans or barrels. It also includes a first month storage charge. The principal costs generally are fruit receiving, juice extraction, concentration, pasteurization, refuse disposal, etc., overhead expenses of the PROCESSOR, and a reasonable profit on the complete operation. The first month's storage, as is included in the fifty-five ($.55) cents per gallon rate, includes the handling in and out of storage, and cooling the product for a period of one month where the PROCESSOR has such facilities.

The 65° Brix concentrate shall meet the following specifications:

a. Product must be sterile.

b. Product must be free from specks.

[fol. 234]

c. Product must have cloud stability.

d. The raw juice before being concentrated must have been passed over a 40 or 50 mesh screen as specified by the SUPPLIER.

e. The brix of the finished concentrate shall be a minimum of 65° not corrected for acid.

3. *Cold Storage*

The PROCESSOR is to provide cold storage accommodations for a minimum period of two (2) days and for a full month as specified in Item 2, if possible, when requested by the SUPPLIER.

Should any products remain in storage more than thirty (30) days, the PROCESSOR will be paid twenty ($.20) cents per barrel, three ($.03) cents per 6 #12 or 6 #10 case, per month.

The cold storage temperature shall mean a temperature of approximately 35° F.

4. *Failure of Product to Meet Specifications*

In the event the product does not meet the SUPPLIER'S specifications, then, any and all expenses necessary to bring the product up to such specifications shall be borne by the PROCESSOR, and it is the PROCESSOR'S responsibility to bring such product up to specifications.

5. *Packaging*

The PROCESSOR will pack the concentrate in various containers at the rates as are shown.

a. When packed in 50-gallon barrels, the PROCESSOR will be paid $.02 per gallon for barrelling costs. The SUPPLIER will furnish the barrels.

b. When packed in cans, the SUPPLIER will supply cans, labels, and cases and the PROCESSOR will be paid:

(1) $.36 per case when packed 6 #12 cans per carton; and

(2) $.30 per case when packed 6 #10 cans per carton.

[fol. 235]

(3) The rates paid in (1) and (2) of this section cover filling cans, labelling and casing the product.

(4) When lithographed lids are used instead of labels, the rate per case shall be reduced $.02 per case for labor saved.

6. *Shipping and Other Expenses*

In the event it becomes necessary to ship to SUPPLIER'S accounts from the PROCESSOR'S plant, the PROCESSOR will be reimbursed for actual shipping costs up to a maximum of $.10 cwt. Shipping expenses are defined as those expenses occurring after juice has been removed from cooler until the juice has been completely loaded for shipment. Items such as bracing, dunnage, and clerical expenses of routing are included in the $.10 cwt. The cost of loading the products into trucks bound for the SUPPLIER'S plant or the SUPPLIER'S other warehouses shall have been included as part of the rate paid in Item 2. If strapping, or any other unusual expense be incurred, the PROCESSOR will be paid actual costs.

7. *Storage of Concentrate*

The concentrate is to be placed in cold storage as soon as possible but in no event shall it be held longer than four (4) hours before being placed in a refrigerated area.

The products produced for the account of SUPPLIER shall be marked, tagged, and stored so that it will be absolutely apparent that the SUPPLIER is the sole owner of the goods. The products so produced under this contract shall under no circumstances be intermingled in storage with the PROCESSOR'S own products.

8. *Certification of Fruit Weight*

All fruit is to be weighed on certified public weighmaster scales and a certified weighmaster certificate obtained for each load or lot of fruit. This weight certificate is to be released to the SUPPLIER.

9. *Orange Oil*

It is the desire of the SUPPLIER that PROCESSOR produce all orange oil possible from the fruit so supplied under this contract. Any oil so produced is the [fol. 236] property of SUPPLIER and the PROCESSOR is to be paid twenty ($.20) cents per pound of cleaned oil. Cleaned oil means oil that is free from water and dirt. If the SUPPLIER finds it necessary to reclean any oil upon delivery at its Ontario plant, the PROCESSOR agrees that the basis for payment on the cleaned oil is the weight of cleaned oil obtained by the SUPPLIER.

10. *Salvage Value of Peel*

Any salvage value of the peel shall accrue to the account of the SUPPLIER.

11. *PROCESSOR'S Performance*

The PROCESSOR agrees to operate its plant as efficiently when working under this contract as it ordinarily operates on its own production. The PROCESSOR further agrees to allow the SUPPLIER to make necessary inspections of product, production, and records as pertain to this contract ~~and to~~ obtain necessary samples other than those supplied by PROCESSOR.

12. *Payment to PROCESSOR*

The PROCESSOR shall invoice SUPPLIER as soon as possible after the close of a Sunday to Saturday week. When a month end does not fall on Saturday, the PROCESSOR will prepare two invoices for such week. An invoice covering the part of the week falling in the closing month will be submitted to SUPPLIER within four (4) working days after the end of the month.

The SUPPLIER will make payment to PROCESSOR not earlier than ten (10) days after the close of a week and not later than two (2) weeks. This permits the SUPPLIER to completely analyze the product and to prove to its satisfaction that the products are up to specifications. Payment will be withheld on all products not meeting specifications until such time as the products have been reworked and approved by SUPPLIER.

13. *Insurance*

SUPPLIER will insure all of its own products and supplies.

[fol. 237] 14. *Other Conditions*

The PROCESSOR will be instructed specifically as to how products shall be marked, how taken and quantity in regard to samples, and the various accounting reports that will be necessary.

15. *Contract Period*

This orange concentrate processing contract shall be a continuing contract on an annual term, commencing June 1, 1951, and ending May 31 of the succeeding year provided, however, that either party may terminate the same as to the next succeeding year upon written notice of not less than ninety (90) days to be given prior to the commencement of any contract year.

IN WITNESS WHEREOF, the parties hereto have executed this agreement.

Signed:

THE EXCHANGE ORANGE PRODUCTS COMPANY, Supplier

By /s/ A. JD SMITH
Asst. Secy.

MISSION DRY CORPORATION, Processor

By /s/ (Signature illegible)
President

By /s/ J. D. REID
Treasurer

Date August 9, 1951

[fol. 238]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 17-A

AJDS:MO(3)7/10/51

FRUIT PURCHASING (CONDITIONAL SALES) AGREEMENT

THIS AGREEMENT, made and entered into at Los Angeles, California, on this 1st day of June, 1949.

BY AND BETWEEN

THE EXCHANGE ORANGE PRODUCTS COMPANY, a California corporation, having its principal place of business in the County of Los Angeles and State of California, hereinafter referred to as the SELLER, the Party of the First Part,

AND

MISSION DRY CORPORATION, a Delaware corporation, having its principal place of business in the County of Los Angeles and State of California, hereinafter referred to as the PURCHASER, the Party of the Second Part,

WITNESSETH:

ARTICLE I

PURCHASE AND SALES COVENANTS:

The SELLER agrees to sell to the PURCHASER, under the terms and conditions and subject to the provisions and restrictions hereinafter set forth, all of the PURCHASER'S requirements of oranges to be used by it for processing in accordance with the provisions herein appearing, and reciprocally, the PURCHASER agrees to purchase from the SELLER all of such requirements; provided, however, that the PURCHASER shall be permitted to purchase a portion of its requirements elsewhere, in the event the SELLER is unable to furnish such requirements, but in any event the

PURCHASER shall be entitled to receive its proper pro-ta share of fruit along with other purchasers of SELL-ER'S fruit, in the event there is any such shortage.

[fol. 239]

ARTICLE II

OSTS:

The cost of the fruit to be supplied under this contract hall be the regular "going" market price of the fruit of the ame quality as established by California Fruit Growers Exchange, based on actual sales to other processors at the me the fruit is delivered to the PURCHASER.

The PURCHASER shall take delivery of fruit f.o.b. pack-ng house, and shall have the right to accept or reject such fruit, based on the condition and quality thereof.

The PURCHASER shall at all times have the right to iscontinue the purchasing of fruit if the price of the same verages in excess of $40.00 per ton f.o.b. packing house n fruit yielding 120 pounds of solids per ton.

ARTICLE III

PRODUCTS:

The fruit thus supplied to PURCHASER shall be con-verted (in the main) into 65° brix orange concentrate, and placed by PURCHASER in 50-gallon barrels—the PUR-CHASER, however, shall be permitted to produce other types of concentrates and juices at its option.

ARTICLE IV

WAREHOUSING and PAYMENT for FRUIT:

The PURCHASER undertakes and agrees to place all of such concentrates and produced juices with Lawrence Warehouse Company and to procure appropriate receipts therefor from said Lawrence Warehouse, and to deliver promptly all such receipts to the SELLER, with the under-standing at all times that the title to the fruit purchased hereunder and the concentrates and juices produced there-from shall continue to be and remain and vest in the name of the SELLER until the same are paid for and released by said Lawrence Warehouse, in accordance with the provisions hereinafter appearing. It is understood in this respect that all receipts from the Warehouse covering such products shall be so drawn that the signatures of both parties hereto shall be necessary to effect a withdrawal of any of the stock so placed in storage.

[fol. 240] The cost of the fruit delivered hereunder shall each week be converted to a price per gallon on all concentrates and juices produced during such week, and the price to be paid by the PURCHASER, as a condition to procuring a release from the Warehouse and the SELLER, shall be the highest fruit price based on the gallonage conversion, as aforesaid—which is to say, that if the converted gallonage at the time of any release has been produced from average priced fruit, the highest price shall be first paid, and it is expressly understood that the PURCHASER shall not be entitled to procure the release of any products stored in the Lawrence Warehouse, as aforesaid, for its own use, except by payment for such products on the basis hereinabove set forth, and upon procuring a release thereof from the Warehouse, based on the signature of the SELLER on the Warehouse receipts covering such products to be so released.

Anything to the contrary in the foregoing notwithstanding, however, the PURCHASER, by first paying to the SELLER the selling price (in accordance with the foregoing formula) shall be entitled to use and treat as its own property the concentrates or juices without barrelling the same or placing the same in warehouse. In such event, the price shall be based upon the current fruit prices during the week in which such products are purchased and paid for.

ARTICLE V

STORAGE WITHDRAWAL DATE:

All products placed in Lawrence Warehouse, in accordance with the foregoing provisions, shall be purchased, paid for in full by and released to the PURCHASER on or fore the 31st day of May following the season of production.

Should the PURCHASER fail so to do it agrees to lease any such products to the SELLER upon the SELLER'S demand, to the end that the same may be removed from the said Lawrence Warehouse and taken into the possession of the SELLER at its option.

[fol. 241] Further, in such event, the SELLER agrees to promptly dispose of such products to the best of its ability, and to pay to the PURCHASER any sums received from the sale thereof in excess of the cost of such products (based on the formula aforesaid) but after first deducting from the gross proceeds all costs of handling and selling such products.

ARTICLE VI

CARRY-OVER ESTIMATE:

The PURCHASER estimates that it will require .... gallons of orange concentrate on hand at the end of the current producing season, and that it will furnish the SELLER, on or before the .... day of .... of each contract year, with an estimate of its carry-over requirements for the ensuing year.

ARTICLE VII

GENERAL PROVISIONS:

(a) The PURCHASER shall cause SELLER'S name to be included on all fire insurance policies covering products affected by this agreement, and will cause copies of such policies to be delivered to the SELLER.

(b) All costs incurred for processing, warehousing and miscellaneous other costs incurred under this contract shall be for the account of the PURCHASER.

(c) In consideration of the premises, the PURCHASER agrees to make its production facilities available to the SELLER at such times as it is not using the same for its own account, or at such times as it may have excess capacity over its own needs. In this respect, it is recognized that the parties hereto are entering into an independent contract termed "Orange Concentrate Processing Contract".

(d) The SELLER shall have the privilege of examining the records of PURCHASER kept with respect to the subject matter of this contract at any and all reasonable times.

(e) This contract of conditional sales shall be deemed [fol. 242] to be a continuing contract on an annual term, commencing June 1st of each year, and ending May 31st of the succeeding year, provided, however, that either party may terminate the same as to the next succeeding year upon written notice of not less than ninety (90) days, to be given prior to the commencement of any contract year.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

Signed:

The Exchange Orange Products Company (Seller)

By /s/ A. JD Smith
Asst. Secy.

Mission Dry Corporation (Purchaser)

By /s/ (Signature illegible)
President

By /s/ J. D. Reid
Treasurer

[fol. 243]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 18

ORANGE PRODUCTS PROCESSING CONTRACT

The General Foods Corporation having its Bireley's Division headquarters at 1127 North Mansfield Avenue, Hollywood 38, California, which shall be known in this contract as PROCESSOR, hereby agrees to process oranges into orange concentrates and oils for the account of The Exchange Orange Products Company, 616 East Grove Street, Ontario, California, to be known as SUPPLIER, under the terms and conditions as are listed below.

1. FRUIT

The SUPPLIER will arrange for fruit to be made available to the PROCESSOR. The PROCESSOR will arrange for the trucking of the fruit to its plant. The actual cost of trucking the fruit shall be for the account of the SUPPLIER. The PROCESSOR will make payment to trucker and in turn bill SUPPLIER for this cost.

The SUPPLIER will do everything possible to insure an even flow of fruit to the PROCESSOR but does not make any guarantee that a certain tonnage will be delivered per day or week.

2. CONCENTRATE

65° Brix Orange Concentrate

The PROCESSOR is to be paid $.58 per gallon for producing 65° Brix Orange Concentrate; the volume to be determined by the nominal volume content of filled containers. This rate includes all costs from the time of receiving fruit until the moment the juice is ready to be placed in cans or barrels. The principal costs generally are fruit receiving, juice extraction, concentration, pasteurization, refuse disposal, etc., overhead expenses, and a reasonable profit on the complete operation.

The 65° Brix Orange Concentrate shall meet these specifications:

A. Product must be sterile.

B. Product must be free from specks.

C. Product must have cloud stability.

D. Raw juice before being concentrated must have been passed over a 40 or 50 mesh shaker or Chisholm Ryder finisher as specified by SUPPLIER.

[fol. 244] E. Brix of finished concentrate shall be a minimum of 65° not corrected for acid.

Packaging

The PROCESSOR may pack the 65° brix concentrate in various containers and at rates as are shown in addition to processing cost shown above.

A. When packed in 50-gallon barrels, the PROCESSOR will be paid $.005 per gallon for barreling costs; SUPPLIER to supply the barrels.

B. When packed in cans, the SUPPLIER will supply cans, labels, and cases, and the PROCESSOR will be paid:

(1) $.35 per case when packed 6 #12 cans per case.

(2) $.30 per case when packed 12/46-oz. cans per case.

(3) The rates paid in (1) and (2) of this section cover filling cans, labeling, and casing product.

(4) When lithographed lids are used instead of labels, the rate per case shall be reduced $.02 per case for labor saved.

Frozen Concentrated Orange Juice

The PROCESSOR is to be paid $.33 per dozen, when packed 24/6-oz. or 48/6-oz. cans per carton, and $1.76 per dozen when packed in 12/32-oz. cans per carton, for processing and packaging. The rates per dozen for processing and packaging do not include cost of sugar. **PROCESSOR** is to invoice **SUPPLIER** for actual sugar used or arrangements may be made for **SUPPLIER** to furnish the sugar. The cans and cases are to be furnished by **SUPPLIER**.

These rates per dozen include all costs from the time of receipt of fruit until the product is in the sharp freezer storage, plus a profit for **PROCESSOR**. The rates also include delivery from storage into some type of conveyance.

Specifications of Product (To be added by Supplement)

[fol. 245] *Other Products*

In the event other products are required, a supplement to this contract will be issued.

Juice Yields

The processing rates set forth here are based upon the fruit being capable of yielding approximately 90 gallons raw juice and/or 13 gallons 65° Brix juice per ton of fruit. In the event an analysis of fruit delivered shows a marked variance from the 90 gallons raw juice, or 13 gallons 65° Brix concentrate per ton, the rates set forth here may be renegotiated.

It also is assumed that PROCESSOR will recover approximately 85% of the juice as is determined to be available by California Fruit Growers Exchange.

3. STORAGE

The PROCESSOR is to provide sharp freezer accommodations for frozen products for a minimum period of two (2) days. The PROCESSOR has freezer capacity for about 12,000 cases of 48/6-oz. cartons, or about two (2) days' production.

PROCESSOR has no cold storage facilities so any product requiring cold storage must be trucked to other locations.

4. FAILURE of PRODUCT to MEET SPECIFICATIONS

In the event the product does not meet SUPPLIER'S specifications as set forth in Item 2, then any and all expenses necessary to bring the product up to specification shall be borne by the PROCESSOR and it is the PROCESSOR'S responsibility to bring such product up to specifications.

5. SHIPPING AND OTHER ITEMS

In the event it becomes necessary to ship to SUPPLIER'S accounts from the PROCESSOR'S plant, the PROCESSOR will be reimbursed for actual shipping labor and material costs which are in excess of ordinary expenses of making delivery of product to a truck. If case strapping, Government Inspection Service, or unusual expense be incurred, the PROCESSOR will be paid his actual cost of such operation.

[fol. 246] 6. STORAGE of PRODUCTS

PROCESSOR will ordinarily precool the 65° Brix concentrate to 35°-40° Fahrenheit before barreling or canning. If the juice is precooled, it can be moved to cold storage within twenty-four (24) hours; otherwise, it is to be moved to cold storage as quickly as possible.

The frozen concentrated orange juice shall be placed in a sharp freezer immediately.

The products produced for the account of SUPPLIER shall be marked, tagged, and stored so that it will be absolutely apparent the SUPPLIER is the sole owner of the goods. The products produced for SUPPLIER shall under no circumstances be intermingled in storage with the PROCESSOR'S own products.

7. CERTIFICATION of FRUIT WEIGHT

All fruit is to be weighed on certified public weighmaster scales and a certified weighmaster certificate obtained for each load or lot of fruit. This weight certificate will be released to SUPPLIER.

8. ORANGE OIL

Any orange oil produced from fruit furnished by SUPPLIER shall become the property of SUPPLIER. The

PROCESSOR will be paid $.15 per pound for cleaned oil. Cleaned oil means free from water and dirt. If SUPPLIER finds it necessary to reclean any oil upon delivery at Ontario, the PROCESSOR agrees that the basis for payment on the cleaned oil is the weight of cleaned oil obtained by SUPPLIER.

SUPPLIER is to furnish steel drums for oil storage.

9. SALVAGE VALUE of PEEL

Any salvage value for the fruit peel shall accrue to the account of the SUPPLIER. If the peel is used in the PROCESSOR'S pectin plant, or sent to a drier plant, the value of the peel shall be determined at the actual time of use. The value for peel for both uses shall be the value as set forth in an agreement between PROCESSOR and Downey Fertilizer Company covering the use of the peel for the production of dried orange meal.

[fol. 247] 10. PROCESSOR PERFORMANCE

The PROCESSOR agrees to operate its plant as efficiently when working under this contract as it ordinarily operates on its own production. The PROCESSOR further agrees to allow SUPPLIER to make necessary inspections of product, production, and records as pertain to this contract and to obtain necessary samples other than those supplied by PROCESSOR.

11. PAYMENT to PROCESSOR

The PROCESSOR shall invoice SUPPLIER as soon as possible after the close of a Monday through Sunday week. When a month end does not fall on Sunday, the PROCESSOR will prepare two invoices for such week. An invoice covering the part of the week falling in the closing month will be submitted to SUPPLIER within four (4) working days after the end of the month.

The SUPPLIER will make payment to PROCESSOR not earlier than ten (10) days after the close of a week and not later than two (2) weeks. This permits SUPPLIER to completely analyze the product and prove to its satisfaction that the products produced are up to its specifications. Payment will be withheld on all products not meeting specifications until such time as products have been reworked and approved by SUPPLIER.

12. INSURANCE

The SUPPLIER will insure all its own products and supplies.

13. OTHER CONDITIONS

The PROCESSOR will be instructed specifically as to how products shall be marked, how taken and quantity in regard to samples, and the various accounting reports that will be necessary.

14. CONTRACT PERIOD

This contract is a continuing one and is to run from May 1 to April 30 of each year unless either party gives notice at least thirty (30) days prior to termination date. All provisions are to be subject to review at each renewal date.

[fol. 248]

Signed:

General Foods Corporation
Processor

By /s/ Darrell Ingalls
General Manager, Bireley's Division

Date June 22, 1951

The Exchange Orange Products Company
Supplier

By /s/ A. JD Smith
Asst. Secy.

Date July 2, 1951

[fol. 309]

In United States District Court

Plaintiffs' Exhibit 19

FROZEN ORANGE CONCENTRATE PROCESSING CONTRACT

The HART'S FRUIT PRODUCTS CO., of 237 No. Orange Avenue, Brea, California, which shall be known as the PROCESSOR in this contract, hereby agrees to process oranges into frozen orange concentrates for the account of THE EXCHANGE ORANGE PRODUCTS COMPANY, [illegible] known as SUPPLIER, under the following terms and conditions.

I. FRUIT

The SUPPLIER will arrange for approximately 100 tons of valencia oranges per day to be made available to PROCESSOR from the time valencia oranges meet the SUPPLIER'S specifications for the production of frozen orange concentrate until the end of the current valencia season, until the fruit quality fails to meet specifications for this product, or when fruit supplies are not sufficient for the SUPPLIER'S needs, whichever time arrives first.

SUPPLIER will do everything possible to insure an even flow of such fruit to PROCESSOR but it does not make a guarantee that the approximate 100 tons per day will be delivered every day.

PROCESSOR agrees to receive and process such fruit when it is available six (6) days per week.

II. TRUCKING OF FRUIT

All trucking expense will be borne by SUPPLIER.

III. PRODUCTION of FROZEN ORANGE CONCENTRATE

PROCESSOR will extract the juice, screen it, concentrate it in a low temperature vacuum pan and package and freeze the concentrated juice in 24/6-oz. [fol. 250] can cartons or 48/6-oz. cartons for $.33 per dozen cans.

The $.33 rate per dozen does not include sugar, if necessary, cans or cartons as these items are to be supplied by SUPPLIER; it does, however, cover all costs to the PROCESSOR from the time the fruit arrives at the plant until the product is in sharp freezer, plus a profit for PROCESSOR. The rate also includes delivery from storage into some type of conveyance.

The overuse factor allowed to PROCESSOR as applies to cans and cartons shall be a maximum of one-quarter of one per cent (¼ of 1%).

IV. PRODUCT SPECIFICATIONS

This product is frozen concentrated orange juice prepared from unpasteurized low temperature concentrate blended with cut-back juice and sugar. It contains a minimum of forty-two (42%) per cent by weight of orange juice solids. When diluted with three volumes of water the reconstituted juice has the color, flavor, and nutritive value of the average California valencia orange juice. The product meets specifications for U. S. Grade A frozen concentrated orange juice.

Fruit Quality

The valencia oranges used in this product must be sound and free from rots, splits, and badly deformed fruit. No extremely dirty fruit nor observably aged (includes anaerobic off-flavor), shriveled, or dry fruit can be used. Sound fruit is understood to mean that not more than ten (10%) per cent of the fruit in the sample shall show damage from crushing, frost, or granulation. Injury must exist in three or more segments to classify the fruit as damaged. Brix/Acid ratio of the juice must be 9.85 : 1 or higher. Taste of the juice must be distinctly fresh without off-flavor or odor.

[fol. 251] *Pan Feed Juice*

Juice fed to the vacuum pans to be extracted on Brown juice extractors and the juice to be run through a screw finisher equipped with an .023 perforated screen.

Cut-back Juice

Cut-back juice is to be of such specifications that a desired flavor and pulp content will be achieved in the finished product. The cut-back juice is to be screened over a coarse wire mesh screen on a shaker screen or through a loosely set screw finisher. This juice must be delivered immediately to a cold wall tank for chilling to 35° F.

Concentrate

The pan feed juice is concentrated in the low temperature vacuum pan to 58° Brix. A reasonable variation is allowable but it should not exceed a plus or minus 1° Brix.

Blending

The blending may be carried on continuously or the finished product may be mixed and standardized on a batch basis. Concentrated orange juice comprises about 60% of the finished volume; cut-back juice about 40%, less the volume of sugar added for standardization. Sugar is added to bring the Brix/Acid ratio of the finished product in the range of 12 to 12.5 : 1. The Brix of the finished product must be adjusted by sugar according to the juice used. The juices should be held at approximately 32° F. during blending. The finished blend is to be canned at 28° F or less.

[fol. 252] *Can Fill*

The net contents of the can will be the declared amount as closely as possible. At least two cans should be slightly overfilled for each can underfilled.

The cans from the canner must show a 6-inch vacuum or higher.

Freezing Temperature

The temperature of the cans coming out of the freezing unit must be 0° F or lower.

Packaging

The SUPPLIER is to furnish the proper cans and cartons.

Storage Temperature

Approximately minus 10° F.

Analysis of Finished Product

To be supplied when all other factors of contract have been agreed upon.

Plate Count

Through the use of orange serum agar with 48 hour incubation at 30° C. the total count on the finished concentrate will be 50,000 micro-organisms per ml or less. The plate should be observed closely for any unusual change in predominant flora such as lactobacillus.

V. STORAGE

The PROCESSOR is to provide sharp freezer accommodations for frozen concentrated orange juice for a minimum of four (4) days.

The SUPPLIER is to arrange for removal of frozen concentrate after four (4) days storage. [fol. 253] Storage temperature shall be approximately minus 10° F.

VI. FAILURE of PRODUCT to MEET SPECIFICATIONS

It is PROCESSOR'S responsibility to know that fruit it processes is of such quality as to be satisfactory for the production of frozen orange concentrate.

Any failure of product to meet specifications shall be the sole responsibility of PROCESSOR.

The SUPPLIER shall have final say whether the products produced meet the specifications in Item IV.

In the event any production does not meet specifications set forth in section IV., then SUPPLIER is to invoice PROCESSOR for fruit, trucking, cans, and cartons used in the manufacture of such under-quality production and destruction expense.

Should SUPPLIER be able to realize a salvage value from such under-quality production, then PROCESSOR shall receive credit for the salvage value as it may exceed salvage expense, fruit value, freight on fruit, and SUPPLIER'S materials used.

VII. SHIPPING and OTHER EXPENSE

Should it become necessary to ship to SUPPLIER'S accounts from PROCESSOR'S plant, the PROCESSOR will be reimbursed for actual shipping labor and materials costs which are in excess of ordinary expenses of making delivery of product to a truck as described in Section III. If case strapping, Government inspection service, or extra expense be incurred, the PROCESSOR will be paid his actual cost of such operation.

[fol. 254]

VIII. FRUIT WEIGHTS

All fruit is to be weighed on certified public weighmaster scales and a certified weighmaster certificate obtained for each load or lot of fruit. This weight certificate, with O.A.C. form covering load, is to be released to SUPPLIER.

IX. SALVAGE VALUE of PEEL

The peel is the property of the SUPPLIER, and SUPPLIER shall make arrangements for taking delivery of the peel at the PROCESSOR'S plant.

X. PROCESSOR PERFORMANCE

The PROCESSOR agrees to operate its plant as efficiently when working under this contract as it ordinarily operates on its own production.

XI. PAYMENT to PROCESSOR

The PROCESSOR shall invoice SUPPLIER as soon as possible after the close of a Sunday through Saturday week. When a month end does not fall on Saturday, the PROCESSOR will prepare two invoices for such week. An invoice covering the part of the week falling in the closing month will be submitted to SUPPLIER within four (4) working days after the end of the month.

The SUPPLIER will make payment to PROCESSOR not earlier than ten (10) days after the close of a week and not later than two (2) weeks. This permits SUPPLIER to completely analyze the product and prove to its satisfaction that the products produced are up to its specifications. Payment will be withheld on all products not meeting specifications until final determination is made by SUPPLIER.

XII. INSURANCE

The SUPPLIER will insure all its own products and supplies.

[fol. 255]

XIII. OTHER CONDITIONS

The PROCESSOR will be instructed specifically as to how products shall be marked, and the various accounting reports that will be necessary. Four (4) 6-oz. cans, taken evenly throughout production of each 300 gallon batch, shall be withheld from production as samples.

The SUPPLIER shall have the right at its own expense to make such checks upon the quality of the concentrate produced and upon the sanitary condition of the PROCESSOR'S plant as the SUPPLIER may desire, including the right to install one or more quality control representatives in PROCESSOR'S plant. The PROCESSOR shall grant SUPPLIER'S quality control representatives complete access to its plant, as pertains to processing under this contract and PROCESSOR shall also cooperate fully with SUPPLIER in checking for sanitation and quality purposes.

The SUPPLIER will accept or reject finished product on a flavor basis within twenty-four (24) to forty-eight (48) hours after production. Final acceptance, which is contingent upon the microorganisms count, will be made within seventy-two (72) to ninety-six (96) hours.

XIV. OWNERSHIP of FROZEN ORANGE CONCENTRATE

The products produced under this contract are the sole property of SUPPLIER and PROCESSOR shall not store any supplies furnished or finished products in such a manner as to indicate that ownership is other than that of SUPPLIER.

XV. RIGHT of TERMINATION in EVENT of NON-PERFORMANCE

Time is the essence of this contract. Failure of the PROCESSOR to perform any of the terms or conditions of the contract shall at the option of the SUPPLIER cause termination of the contract.

[fol. 256]

XVI. CONTRACT PERIOD

This contract period is to be governed by Section I, paragraph one.

IN WITNESS WHEREOF, the contracting parties have executed this contract.

Signed:

The Exchange Orange Products Company (Supplier)

By /s/ A. JD Smith
Asst. Sec'y.

Hart's Fruit Products Co. (Processor)

By /s/ Marc D. Leh
Marc D. Leh, Vice-President

Date July 23, 1951

[fol. 257]

In United States District Court

Plaintiffs' Exhibit 20

[Letterhead of The Exchange Orange Products Company, Ontario, California]

[Stamp—Received—Sep 12 1951—Santa Ana, Calif.—Ans. ....]

September 11, 1951

TreeSweet Products Company
P. O. Box 28
Santa Ana, California

Effective Date: July 23, 1951

Attention: Mr. W. B. Taylor, Treasurer

Dear Mr. Taylor:

We have rewritten the contract between our two organizations on our own stationery.

We have made one change in the contract with which we feel you will be in agreement. The change is that under section 10 we have added the sentence whereby the processor will be required to purchase and make payment to the supplier for all inventory still on hand on June 1, 1952. That I believe is the only change you will find in the contract from the way you submitted it.

We are enclosing three copies of the contract and would like to ask that you sign the original and return it to us, keeping the other two copies for your use. Please sign both Schedule No. 1 and Schedule No. 2 in addition to the regular contract.

Also, in connection with the contract signing, we are perfectly agreeable that the inventory you had as of July 31, 1951, that was of the 1950 pack, should be considered as the first sold under this year's sales. According to your records, you had the following cases on hand July 31, 1951:

48/5½ oz.	1,349	cases
48/6 oz.	742	"
24/12 oz.	217	"
24/#2s	499	"

Your note of August 10 forwarded to us Notices of Insurance. We would like to call to your attention that the Loss Payable Clauses have been written in the name of California Fruit Growers Exchange. This is an error as the policies should be in the name of The Exchange Orange Products Company and not California Fruit Growers Exchange. Therefore, we would appreciate a correction in the Loss Payable Clause when the new policies are issued.

[fol. 258] We would like also to ask that you sign the original copy of this letter as being in agreement with the conditions that have been related in previous paragraphs and also the conditions as will be set forth following this paragraph.

According to the arrangements between the two organizations, the supplier is to pay you each week for the processing of orange oil and for the cost of hauling the oranges to your plant. You, as processor, are to pay to us the funds from the sale of wet peel. Beyond this point you, as the processor, are to use money received from the sales of the product to offset the weekly processing costs that, according to section 3, we were to pay to the processor each week. This should be watched carefully and should the sales proceeds begin to materially exceed the processing costs, then funds should be remitted to the supplier. In any event, this is to be thoroughly analyzed at October 31 and a determination made as to what the future policy will be at that time. Also TreeSweet is to continue to send through their purchase orders to us in the regular manner as their sales are made. We shall have the purchase orders recorded on our records as such and therefore, there will be an accounts receivable on our records against TreeSweet for such sales. Off-setting this, however, on our records there will be an accounts payable to TreeSweet for the processing costs.

As a matter of safe-guarding the interests of both the supplier and the processor, TreeSweet Products Company agrees to allow the supplier to examine and audit its books if and when the supplier considers it necessary.

Very truly yours,

THE EXCHANGE ORANGE PRODUCTS COMPANY

/s/ A. JD SMITH
A. JD Smith, Assistant Secretary

Accepted:

TREESWEET PRODUCTS COMPANY

By /s/ W. K. MCCRACKEN
President

AJDS:MO
encs.

[fol. 259]

JDS:MO(5)9/11/51

[Letterhead of The Exchange Orange Products Company, Ontario, California]

FRUIT PROCESSING CONTRACT

The Exchange Orange Products Company
Ontario, California

As Supplier

TreeSweet Products Co.
1044 East Fourth Street
Santa Ana, California

As Processor

1. Effective date—July 23, 1951.

2. SUPPLIER is to make available to PROCESSOR for processing and conversion into single strength canned orange juice such quantities of oranges as SUPPLIER in its discretion may determine. PROCESSOR is to process said oranges and can said juice subject to the terms and conditions expressed in this contract. It is understood that the finished product manufactured from oranges processed under this contract shall be and remain the property of SUPPLIER until purchased by PROCESSOR as elsewhere provided in Paragraph 9.

3. SUPPLIER will pay to PROCESSOR weekly the processing costs including everything except labels at the rates set out in Schedule 1 attached. At the end of the Valencia pack, billings will be revised to apply the rates for the gallonage bracket attained to all the cases packed. Should PROCESSOR'S costs of cans and cartons change during the pack, processing costs will be adjusted by the actual amount of such cost changes.

[fol. 260] 4. The SUPPLIER will pay trucking costs from Exchange packing houses to PROCESSOR'S plant in Santa Ana in accordance with the rates set out in attached Schedule No. 2. PROCESSOR will pay trucking charges as billed and will invoice SUPPLIER for same each week.

5. PROCESSOR will store without cost to SUPPLIER up to the capacity of plant facilities and leased warehouse space at the Central Lemon Association in Tustin and at the Wiegand Warehouse at El Toro. Other storage and transportation to same shall be at actual cost.

6. PROCESSOR will deliver to SUPPLIER the actual juice yield from the fruit which is obtained. It shall be the responsibility of the PROCESSOR to obtain fruit from Exchange packing houses which will make satisfactory product.

7. PROCESSOR will return to the SUPPLIER the Oil of Orange recovered from SUPPLIER'S fruit. PROCESSOR is to be paid 22½¢ per pound of clean oil produced. SUPPLIER will supply drums and transportation of the oil to its plant in Ontario. Clean oil means free from water and dirt. If SUPPLIER finds it necessary to reclean any oil upon receipt at Ontario, the PROCESSOR agrees that the basis for payment on the cleaned oil is to be the weight of cleaned oil obtained by SUPPLIER.

8. PROCESSOR will arrange for the sale of wet orange peel and turn over to SUPPLIER any revenue which is obtained.

9. PROCESSOR agrees to purchase their canned juice requirements from the California Fruit Growers Exchange at the Exchange price in effect at the time of purchase, less $0.077 label allowance on the 48/5½ ounce; $0.062 on the 24/12 ounce; $0.07 on 24/2's; [fol. 261] and $0.065 on the 12/46 ounce less 15% (calculated on the gross sales price before deduction of label allowance), and less 7¢ per case (regardless of size), as advertising allowance. Any Exchange discounts and rebates under price protection agreements,

other than swell allowance, brokerage, cash discount, and label allowance allowed by the Exchange to any of its buyers will also be made available to PROCESSOR. Payments for purchases shall be made weekly.

10. PROCESSOR agrees to purchase from the Exchange all the juice packed by them under their own label and to pay for same as sold. PROCESSOR is to purchase and make immediate payment on all inventory still on hand June 1, 1952.

Additional juice may be packed for the SUPPLIER in two categories:

a. Bright (naked and cased).
On such stock which is subsequently rehandled and labeled there shall be an additional processing (handling) charge allowed of 4½¢ per case.

b. Labeled and cased for sale by or for inventory of SUPPLIER.
On such stock an additional amount of 5% on processing cost (including extra charge if packed bright) shall be allowed.

11. PROCESSOR agrees to carry, at its expense, fire insurance on all products in their possession and SUPPLIER is to be furnished a copy of policies in which SUPPLIER is named as an additional insured party.

12. In the event that PROCESSOR packs orange juice from fruit other than that supplied under the terms of this contract:

a. At the completion of the Valencia pack, billing of processing costs shall be revised so that the SUPPLIER will be allocated the same propor- [fol. 262] tionate number of each case size packed as the total gallons supplied by SUPPLIER bears to the total gallons packed. Any corresponding revision required in purchases under Paragraph 9 shall also be made.

b. Should the Exchange selling prices vary during the term of this agreement, liability for purchases of orange juice made by PROCESSOR from the Exchange shall be adjusted so that the Exchange will be paid for that proportion of the total units sold at each price as the gallons supplied by SUPPLIER'S fruit bears to the total gallons supplied from all sources.

Signed:

THE EXCHANGE ORANGE PRODUCTS COMPANY (Supplier)

/s/ A. JD SMITH—Asst. Secy.

TREESWEET PRODUCTS Co. (Processor)

/s/ W. K. MCCRACKEN, President

Effective date: July 23, 1951

5]

SCHEDULE No. 1

MPO(5)9/11/51

CESSING COSTS per CASE with VARYING VOLUMES of O. J. PACK

t Costs		1.06762	1.21987	.86987	1.01481	1.02729	
O.J. PACK 0,000 Gals. J. Items)		48/5½ oz. W/Paper Labels	46/6 oz. Litho'd	24/12 oz.	24/2's	12/46 oz.	
O.J. in nds But Less than	O.H. per gal.						
1,7	.10806	1.29022	1.46301	1.11301	1.37951	1,49330	
1,8	.10352	1.28037	1.45279	1.10279	1.36419	1.47372	
1,9	.09939	1.27236	1.44350	1.09350	1,35025	1,45591	
2,0	.09562	1.26460	1.43502	1.08502	1.33753	1.43965	
2,1	.09215	1.25745	1.42721	1.07721	1.32582	1.42469	
2,2	.08895	1.25086	1.42001	1.07001	1.31502	1.41089	
2,3	.08599	1.24476	1.41335	1.06335	1.30503	1.39812	
2,4	.08325	1.23912	1.40718	1.05718	1.29578	1.38631	
2,5	.08070	1.23386	1.40145	1.05145	1.28717	1.37531	—Actual result 1951
2,6	.07832	1.22896	1.39609	1.04609	1.27914	1.36505	
2,7	.07610	1.22439	1.39110	1.04110	1.27165	1.35547	
2,8	.07402	1.22010	1.38642	1.03642	1.26463	1.34650	
2,9	.07207	1.21608	1.38203	1.03203	1.25805	1.33809	
3,0	.07023	1.21229	1.37789	1.02789	1.25184	1.33016	
3,1	.06851	1.20875	1.37402	1.02402	1.24603	1.32274	
3,2	.06688	1.20539	1.37035	1.02035	1.24053	1.31571	
3,3	.06534	1.20222	1.36689	1.01689	1.23533	1.30907	
3,4	.06388	1.19921	1.36360	1.01360	1.23041	1.30277	
3,5	.06249	1.19616	1.36047	1.01047	1.22571	1.29678	
3,6	.06118	1.19365	1.35753	1.00753	1.22129	1.29113	
3,7	.05993	1.19108	1.35471	1.00471	1.21707	1.28574	
3,8	.05874	1.18862	1.35204	1.00204	1.21306	1.28061	
3,9	.05761	1.18630	1.34949	.99949	1.20924	1.27573	
4,0	.05653	1.18407	1.34706	.99706	1.20560	1.27108	
4,1	.05550	1.18195	1.34475	.99475	1.20212	1.26663	
4,2	.05451	1.17991	1.34252	.99252	1.19868	1.26236	
Per Case		2.06	2.25	2.25	3.375	4.3125	

TreeSweet Products Co.
By /s/ W. K. McCracken
President

Exchange Orange Products Company
A. JD Smith—Asst. Secy.

Copied MPO(5)9/11/51

SCHEDULE NO. 2

TRUCKING RATES FOR ORANGES AND LEMONS

Effective July 23, 1951

.90	1.10	1.25	1.35	1.50	1.75
Southern Orange Co.	Anaheim	La Habra	Rivera	Corona	Pomona
Santa Ana	Fullerton		Downey	Pico	Ontario
Orange	Placentia		Whittier	Walnut	North Whittier
Tustin	Olive		Capistrano		La Verne
Villa Park	Yorba Linda		East Whittier		Irwindale
Irvine	Garden Grove				Arlington

2.00	2.50	2.25	3.00	3.50
Glendora	San Fernando	Redlands	Escondido	Ventura District
Azusa	Canoga Park	Highlands	Fallbrook	Piru
Monrovia		Bryn Mawr	Vista	Rancho Sespe
Riverside		Crafton	San Diego	Tapo
Highgrove		Mentone	Chula Vista	Mupu
Colton			El Cajon	Camarillo
Upland				Oxnard
Cucamonga				Santa Paula
Alta Loma				Saticoy
Etiwanda				Coachella Valley
Lamanda Park				Indio
Fontana				Ojai
Rialto				Fillmore
Claremont				
San Dimas				
No. Pomona				
Covina				

4.00	5.00
Santa Barbara Area	Brawley
Carpinteria	El Centro
Goleta	Imperial Valley

THE EXCHANGE ORANGE PRODUCTS COMPANY

By /s/ A. JD SMITH—Asst. Secy.

TREESWEET PRODUCTS CO.

By /s/ W. K. MCCRACKEN
President

[fol. 265]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 21

[Letterhead of The Exchange Orange Products Company, Ontario, California]

July 27, 1949

Mr. W. K. McCracken
TreeSweet Products Company
1044 East Fourth Street
Santa Ana, California

Dear Mr. McCracken:

This will confirm our agreement for TreeSweet Products Company to can for the account of The Exchange Orange Products Company on the following basis:

1. Effective date—July 22, 1949.
2. The EOP Company will pay to TreeSweet weekly the processing costs including everything except labels at the rate of \$1.30 for 48/5½ ounce, \$1.03 for 24/12 ounce, \$1.30 for 24/2's, and \$1.39 for 12/46 ounce.
3. The EOP Company will pay trucking costs from Exchange packing houses to the TreeSweet Products Company plant in Santa Ana at the rate of 50¢ per ton plus 4¢ per ton mile. TreeSweet will pay trucking charges as billed and will invoice EOP for same each week.
4. TreeSweet will store up to the capacity of plant facilities and leased warehouse space at the Central Lemon Association in Tustin without cost to The EOP Company.
5. TreeSweet will deliver to EOP the actual juice yield from the fruit which is obtained. It shall be the responsibility of TreeSweet to obtain fruit from Exchange packing houses which will make a satisfactory product.

6. TreeSweet will return to The EOP Company any orange oil produced by TreeSweet. The EOP Company will furnish drums. If EOP does not request TreeSweet to recover the oil, TreeSweet will not recover it for their own account.

7. TreeSweet will arrange for the sale of wet orange peel and turn over to The EOP Company any revenue which is obtained.

[fol. 266] 8. TreeSweet agrees to purchase their requirements from the Exchange at the Exchange price in effect at the time of purchase, less $0.05 label allowance on 24/12 ounce, $0.06 on 24/2's, and $0.055 on 12/46 ounce, less 15%. Any Exchange discounts, other than swell allowance, brokerage, cash discount, and label allowance allowed by the Exchange to any of its buyers, will also be made available to TreeSweet.

9. TreeSweet agrees to purchase from the Exchange all of the juice packed by them and to pay for same by January 1, 1950.

10. TreeSweet agrees to carry insurance on all products in their possession and EOP is to be furnished a copy of policies in which The EOP Company is named as an additional insured party.

If the above correctly states your understanding of our agreement, will you please sign the enclosed copy of this letter and return it for our files.

Very truly yours,

THE EXCHANGE ORANGE PRODUCTS COMPANY

/s/ J. A. FINLEY
James A. Finley, Manager

JAF:gw

TREESWEET PRODUCTS COMPANY

By /s/ W. K. MCCRACKEN

[fol. 267] August 3, 1949

Mr. W. K. McCracken
TreeSweet Products Company
1044 East Fourth Street
Santa Ana, California

Dear Mac:

I have gone over the trucking rates which you sent me and I agree with you that it would be much simpler to run this on an area basis rather than on each individual packing house. This letter will serve as an amendment to our 1949 contract by replacing Section 3 with these new rates.

Very truly yours,

THE EXCHANGE ORANGE PRODUCTS CO.

James A. Finley, Manager

JAF:gw

cc: A. JD Smith

[fol. 268]

TREESWEET PRODUCTS CO.

Packers of (Emblem) TREESWEET BRAND PURE CITRUS FRUIT JUICES

PLANTS IN
FORT PIERCE, FLORIDA
SANTA ANA, CALIFORNIA

1044 EAST FOURTH STREET
SANTA ANA, CALIFORNIA

August 16, 1949

Exchange Orange Products Co.
616 E. Grove Street
Ontario, California

Attention: Mr. Jim Finley

Gentlemen:

This letter amends our agreement dated July 27, 1949.

The trucking rates for oranges hauled will be in accordance with schedule attached.

By reason of the high acid, sugar is being added to the orange juice processed for your account and actual cost of sugar will be added to the processing costs, plus a charge of .0015¢ per gallon covering factory cost of adding the sugar.

Yours very truly,

TREESWEET PRODUCTS CO.
By /s/ W. B. TAYLOR

WBT:ab
enc.

TREESWEET PRODUCTS CO.
TRUCKING RATES FOR ORANGES AND LEMONS
(APPROVED BY E.O.P. CO. 8/3/49)

effective July 1949

.90

- Southern Orange County District
- Santa Ana
- Orange
- Tustin
- Villa Park
- Irvine

1.10

- Anaheim
- Fullerton
- Placentia
- Olive
- Yorba Linda
- Garden Grove

1.25

- La Habra

1.35

- Rivera
- Downey
- Whittier
- Capistrano
- E. Whittier

1.50

- Corona
- Pico
- Walnut

1.75

- Pomona
- Ontario
- N. Whittier
- La Verne
- Covina
- Irwindale
- Arlington
- Los Angeles

2.00

- Glendora
- Azusa
- Monrovia
- Riverside
- Highgrove
- Colton
- Uplands
- Cucamonga
- Alta Loma
- Etiwanda
- Lamanda Park
- Fontana
- Rialto
- Claremont
- San Dimas
- No. Pomona

2.50

- Redlands
- Highland
- Bryn Manor
- Crafton
- Mentone

2.25

- San Fernando
- Canoga Park

3.00

- Escondido
- Fallbrook
- Vista
- San Diego
- Chula Vista
- El Cajon

3.50

- Ventura District
- Fillmore
- Piru
- Rancho Sespe
- Tapo
- Mupu
- Camarillo
- Oxnard
- Santa Paula
- Saticoy
- Coachella Valley
- Indio
- Ojai

4.00

- Santa Barbara Area
- Carpenteria
- Goleta

5.00

- Brawley
- El Centro
- Imperial Valley

[fol. 270] August 16, 1949

Mr. W. K. McCracken
Treesweet Products Company
1044 East Fourth Street
Santa Ana, California

Dear Mr. McCracken:

In response to a request by your Mr. Taylor, the following amendments are hereby incorporated in the processing contract between our firms dated July 27, 1949.

1. The E.O.P. Company agrees to reimburse Treesweet for the actual cost of the sugar added to the canned juice.
2. The E.O.P. Company agrees to reimburse Treesweet for the cost of adding the above sugar to the canned juice at a rate of $0.0015 per gallon of juice.
3. The E.O.P. Company agrees that the 15% cash discount as mentioned in Paragraph 8 of the original agreement shall apply against the gross sales price before any deductions for label allowances.

Very truly yours,

THE EXCHANGE ORANGE PRODUCTS CO.

/s/ J. A. F.
J. A. Finley, Manager

HGC/jb

cc: Mr. Finley
Contract File
A. JD Smith

[fol. 271]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 22

[Letterhead of The Exchange Orange Products Company, Ontario, California]

[Stamp—Received—Aug (Date illegible) 1950—Ans'd ......]

FRUIT PROCESSING CONTRACT

The Exchange Orange Products Company
Ontario, California
As Supplier

Treesweet Products Company
1044 East Fourth Street
Santa Ana, California
As Processor

Details of Contract:

1. Effective date—July 20, 1950

2. The Exchange Orange Products Company is to make available to Treesweet for processing and conversion into single strength canned orange juice such quantities of oranges as The Exchange Orange Products Company in its discretion may determine. Treesweet is to process said oranges and can said juice subject to the terms and conditions expressed in this contract. It is understood that the finished product manufactured from oranges processed under this contract shall be and remain the property of The Exchange Orange Products Company until purchased by Treesweet as elsewhere provided in Paragraph 9.

3. The EOP Company will pay to Treesweet weekly the processing costs including everything except labels
   1.01
   at the rate of $1.30 for 48/5½ ounce, ~~$0.99~~ for 24/12 ounce, $1.25 for 24/2's, and $1.34 for 12/46 ounce. In the event that the total pack of juice by the

W K Mc

Processor exceeds 1,600,000 gallons, the above costs on all cases packed will be reduced in accordance with the schedule listed below. Should Treesweet's costs of cans and cartons change during the pack, processing costs will be adjusted by the actual amount of such cost changes.

At the completion of the valencia pack, the billing costs to The EOP Company shall be revised as follows.

[fol. 272]

Total Number of Gallons Packed From Fruit Supplied Under This Agreement and Any Other Fruit Purchased by Treesweet	Processing Cost Per Case for Everything But Labels			
Up To:	48/5½	24/12	24/2	12/46
1,600,000	$1.30	$1.01	$1.25	$1.34
1,800,000	1.285	.995	1.23	1.31
2,000,000	1.27	.98	1.21	1.29
2,200,000	1.25	.97	1.20	1.27
2,400,000	1.24	.955	1.18	1.24

4. The EOP Company will pay trucking costs from Exchange Packing houses to the Treesweet Products Company Plant in Santa Ana in accordance with the rates set out in attached Schedule No. 1. Treesweet will pay trucking charges as billed and will invoice EOP for same each week.

5. Treesweet will store up to the capacity of plant facilities and leased warehouse space at the Central Lemon Association in Tustin without cost to The EOP Company.

6. Treesweet will deliver to EOP the actual juice yield from the fruit which is obtained. It shall be the responsibility of Treesweet to obtain fruit from Exchange packing houses which will make satisfactory product.

7. Treesweet will return to The EOP Company any orange oil produced by Treesweet from EOP fruit. The EOP Company will furnish drums and take delivery at Treesweet's Plant. If EOP does not request Treesweet to recover the oil, Treesweet will not recover it for their own account.

8. Treesweet will arrange for the sale of wet orange peel and turn over to The EOP Company any revenue which is obtained.

9. Treesweet agrees to purchase their canned juice requirements from the California Fruit Growers Exchange at the Exchange price in effect at the time of purchase, less $0.05 label allowance on the 24/12 ounce, $0.06 on 24/2's, and $0.055 on 12/46 ounce less 15% (calculated on the gross sales price before deduction of label allowance). Any Exchange discounts and rebates under price protection agreements, other than swell allowance, brokerage, cash discount, and label allowance allowed by the Exchange to any of its buyers will also be made available to Treesweet. Payments for purchases shall be made weekly.

10. Treesweet agrees to purchase from the Exchange all of the juice packed by them and to pay for same by February 1, 1951.

11. Treesweet agrees to carry insurance on all products in their possession and The EOP Company is to be furnished a copy of policies in which The EOP Company is named as an additional insured party.

[fol. 273] 12. Treesweet shall have discretion in adding sugar. If sugar is added, The EOP Company agrees to reimburse Treesweet for the actual cost of the sugar added to the canned juice. The EOP Company also agrees to reimburse Treesweet for the cost of adding sugar at the rate of $0.0015 per gallon of juice to which sugar is added.

13. In the event that Treesweet packs orange juice from fruit other than that supplied under the terms of this contract:

A. At the completion of the valencia pack, billing of processing costs shall be revised so that The EOP Company will be allocated the same proportionate number of each case size packed as the total gallons supplied by The EOP Company bears to the total gallons packed. Any corresponding revision required in purchases under Paragraph 9 shall also be made.

B. Should the Exchange selling prices vary during the term of this agreement liability for purchases of orange juice made by Treesweet from the Exchange shall be adjusted so that the Exchange will be paid for that proportion of the total units sold at each price as the gallons supplied by EOP fruit bears to the total gallons supplied from all sources.

14. Contract Period—July 20, 1950 to February 1, 1951.

THE EXCHANGE ORANGE PRODUCTS CO.

By: /s/ J. A. FINLEY

TREESWEET PRODUCTS CO.

By: /s/ W. K. MCCRACKEN

Date: 7/20/50

[fol. 274]

SCHEDULE NO. 1

TRUCKING RATES FOR ORANGES AND LEMONS

Effective July 20, 1950

.90	1.10	1.25	1.35	1.50	1.75
Southern Orange Co.	Anaheim	La Habra	Rivera	Corona	Pomona
Santa Ana	Fullerton		Downey	Pico	Ontario
Orange	Placentia		Whittier	Walnut	N. Whittier
Tustin	Olive		Capistrano		La Verne
Villa Park	Yorba Linda		E. Whittier		Irwindale
Irvine	Garden Grove				Arlington

2.00

Glendora
Azusa
Monrovia
Riverside
Highgrove
Colton
Upland
Cucamonga
Alta Loma
Etiwanda
Lamanda Park
Fontana
Rialto
Claremont
San Dimas
No. Pomona
Covina

2.50

San Fernando
Canoga Park

2.25

Redlands
Highlands
Bryn Mawr
Crafton
Mentone

3.00

Escondido
Fallbrook
Vista
San Diego
Chula Vista
El Cajon

3.50

Ventura District
Piru
Rancho Sespe
Tapo
Mupu
Camarillo
Oxnard
Santa Paula
Saticoy
Coachella Valley
Indio
Ojai
Fillmore

4.00

Santa Barbara Area
Carpinteria
Goleta

5.00

Brawley
El Centro
Imperial Valley

[fol. 275]

[Stamp—Received—Sep 2 1950—Ans'd ....]

SUPPLEMENT NO. 1

Paragraph 7. Orange Oil

Effective August 31, 1950, The Exchange Orange Products Company wishes for Treesweet to recover orange oil from the fruit Treesweet is processing for The Exchange Orange Products Company.

Treesweet is to be paid $.225 per pound of clean oil produced. The Exchange Orange Products Company is to supply steel drums as containers for the oil. The Exchange Orange Products Company will arrange for delivery of the orange oil to its plant in Ontario.

Clean oil means free from water and dirt. If The Exchange Orange Products Company finds it necessary to reclean any oil upon receipt at Ontario, the processor agrees that the basis for payment on the cleaned oil is to be the weight of cleaned oil obtained by The Exchange Orange Products Company.

Treesweet Products Company
By /s/ W. K. McCracken

The Exchange Orange Products Co.
By /s/ A. JD Smith

Date: Aug. 31, 1950

[fol. 276]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 25

[Letterhead of The Exchange Orange Products Company,
Ontario, California]

August 1, 1951

E. A. Silzle Corporation
P. O. Box 27
Anaheim, California

Gentlemen:

We would like to use this letter as a medium for the agreement between our two organizations covering the production of orange oil from our wet peel as will be supplied to your organization from the Hart's Fruit Products Company in Brea, and the Brea Valley Processing Company, also of Brea, California.

The peel that will be delivered to you by Hart's Fruit Products Company for the processing of orange oil for our account will originate in Brea, California. The peel that will be delivered to you for processing for oil for our account from the Brea Valley Processing Company will originate at the Cold Gold Corporation in La Habra, California

TERMS of AGREEMENT

(1) The E. A. Silzle Corporation agrees to process wet orange peel for the recovery of cold pressed orange oil as will be made available to it by the Brea Valley Processing Company and Hart's Fruit Products Company for the account of The Exchange Orange Products Company.

(2) The E. A. Silzle Corporation is to receive $1.60 per ton for the extraction of such cold pressed orange oil, and for which the processor agrees to guarantee a minimum of 4-pounds of cold pressed orange oil per ton

of wet orange peel made available to it. The oil is to be clean and free from water. The Exchange Orange Products Company will inspect the oil and should recleaning be necessary, any loss shall be deducted.

(3) The Exchange Orange Products Company is to supply the containers in which the oil will be packaged.

(4) The E. A. Silzle Corporation will invoice the The Exchange Orange Products Company once each week for the orange oil produced. Such invoice will show the details of the tons of peel received from each of the [fol. 277] two accounts for the week, the tons of peel processed, and the production of cold pressed orange oil obtained from such processing.

(5) This agreement is to be in force from the date of July 15, 1951, and continue as long as Hart's Fruit Products Company or James A. Haddad are processing fruit for our account during the present valencia season. James A. Haddad is operating as lessee of Cold Gold Corporation and such peel as will be made available at that plant is being handled for The Exchange Orange Products Company by the Brea Valley Processing Company

If this agreement meets with your approval, kindly sign two copies and return the original and one copy to us, keeping the third copy for your own use.

Very truly yours,

THE EXCHANGE ORANGE PRODUCTS COMPANY

/s/ A. JD SMITH
A. JD Smith, Assistant Secretary

Accepted by:

E. A. SILZLE CORPORATION

By /s/ ROBERT V. CLARK
Secretary

Date Aug. 1, 1951

[fol. 278] AJDS:MO(5)8/24/51

PURCHASING AGREEMENT

The Exchange Orange Products Company
Ontario, California
as SELLER

E. A. Silzle Corporation
212 South Atchison Street
Anaheim, California
as PURCHASER

DETAILS of AGREEMENT

Commodity

California Valencia Oranges.

Quantity

The SELLER is to make oranges available to PURCHASER for conversion into canned orange juice under the PURCHASER'S labels, the quantities as are set forth later in this Agreement. The oranges are to be made available, however, only as the SELLER is able to make the fruit available.

Price

A. The first 527.95 tons delivered under this agreement shall be priced at $22.50 per ton.

B. On approximately 2,362 tons to cover the production of:

46,800 cases of 12 46-oz.
9,400 cases of 24 #2's
1,000 cases of 24 12-oz.

57,200

the price shall be as follows: The fruit shall be paid for according to these sales prices of the canned juices:

	12 46 oz.	24 #2's	24 12 oz.
Sales Price per Case	$2.20	$1.98	$1.74
Less:			
Sales Expense, Brokerage & Profit—12½%	.2750	.2475	.2175
Label allowance	.0540	.0576	.0528
Manufacturing Cost	1.35	1.25	1.01
Advertising Allowance..	.07	.05	.04
Trucking on fruit @ $1.10 per ton with 100 gals. recoverable juice per ton	.0474	.0371	.0248
Rate per Case to be paid SELLER for fruit supplied	$ .4036	$ .3378	$ .3949

[fol. 279]

C. On approximately 1,047 tons to cover the production of:

1,000 cases of 48—5½ oz.
15,000 cases of 12—46 oz.
10,250 cases of 24 #2's
1,500 cases of 24—12 oz.

27,750

the prices shall be as follows: The fruit shall be paid for according these sales prices of the canned juice:

	12 46 oz.	24 #2's	24 12 oz.	48 5½ oz.
Sales Price Per Case	$2.50	$2.20	$1.79	$2.14
LESS:				
Sales expense, brokerage & profit—12½%	.3125	.2750	.2238	.2675
Label allowance	.0540	.0576	.0528	.0650
Manufacturing Cost	1.35	1.25	1.01	1.19
Advertising Allowance	.07	.05	.04	.04
Trucking on fruit @ $1.10 per ton with 100 gals. recoverable juice per ton	.0474	.0371	.0248	.0227
Rate per Case to be paid SELLER for fruit	$ .6661	$ .5303	$ .4386	$ .5548

Terms of Payment

As under Price Arrangement

Price A. Payment due immediately upon completion of delivery of the 527.95 tons of oranges.

Price B. and C. Payment due immediately upon making shipment when production does not go into storage. The PURCHASER is to mail on the day following shipment a check supported by copy of bill of lading. The PURCHASER, if it wishes, may obliterate the name and address of its customer. Payment shall, however, be made according to whether the shipment was made under orders received under B or C sales prices.

If production is not shipped immediately upon production, it is to be placed in Lawrence Warehouse Company's possession. The warehouse receipt need not be made in SELLER'S name but arrangements are to be made immediately with Lawrence Warehouse to the effect that both SELLER and PURCHASER must sign warehouse release before PURCHASER can remove these goods from Lawrence Warehouse. The SELLER is to get a copy of this Agreement with Lawrence Warehouse. The [fol. 280] SELLER is also to get a copy of the warehouse receipts.

The condition for signing such warehouse releases by SELLER is that the request for release be accompanied by PURCHASER'S check according to whether a B or C sale is involved.

Costs and Other Expenses

All costs and expenses in connection with the entire operation, such as freight on fruit, receiving, juice extraction, canning, storage, shipping, selling, disposing of peel, etc. are entirely for account of PURCHASER.

Fruit Weights

All fruit is to be weighed on a certified public weighmaster scale and a certified weight certificate obtained for each load or lot of fruit. The weight certificate, with the OAC form covering the load or lot, is to be released to SELLER.

Salvage Value of the Orange Peel

The orange peel as produced is the property of the SELLER.

It is agreed that the PURCHASER will extract the orange oil from the peel for the SELLER for $.25 per pound of clean oil. Clean oil means, among other things, free from water. The SELLER will inspect the oil upon receipt at its Ontario plant. Any loss because of re-cleaning shall be deducted.

The SELLER shall supply steel drums for the storage of its oil.

Because of production problems the PURCHASER is unable to keep the orange oil as may be produced from SELLER'S fruit separate from orange oil being produced from other parties' orange peel.

Because of this the SELLER agrees to take its pro rata share of orange oil according to total tons of orange peel processed per week for orange oil by the PURCHASER.

It is further agreed that for computation for production purposes, because the SELLER'S peel will not be weighed and other parties' peel will, that for each 2,000 pounds of SELLER'S fruit processed, 1,100 pounds shall be considered the peel weight for oil extraction.

After each week's calculation, the SELLER will take delivery of its share of orange oil and examine. Payment shall be made immediately the SELLER ascertains weight of oil if any re-cleaning is necessary.

It is further agreed that PURCHASER is to pay the SELLER after each week's production $2.08 per each ton of orange peel as is produced from SELLER'S [fol. 281] fruit. In this case it is agreed that SELLER is to receive credit for 1,000 pounds of orange peel for each 2,000 pounds of its oranges processed.

Insurance

PURCHASER is to insure at market prices for fire and extended coverage the SELLER'S orange oil and storage drums as may be in PURCHASER'S possession at any time.

The PURCHASER will also have the SELLER made an additional insured under its insurance policies and have copies delivered to SELLER with such endorsement.

This is to cover SELLER'S interest in products mentioned in this section as well as any canned juice that may be in Lawrence Warehouse.

In any event the fruit prices paid to SELLER are to be as set forth under Price B and C, whether the goods are actually sold or destroyed in some manner.

Purchaser Performance

PURCHASER agrees to operate its plant as efficiently under this Agreement as it ordinarily operates its plant.

Other Conditions

It is agreed that SELLER may examine and audit PURCHASER'S records at any time during business hours it may select for the purpose of ascertaining that all conditions of this Agreement are being fulfilled.

Reports

PURCHASER agrees to:

1. Mail to SELLER daily the fruit weight certificates and accompanying OAC form.
2. By Tuesday, after each week's production, mail to SELLER a summarized report showing:

    Weight of fruit received.
    Weight of fruit processed.
    Production of juices by case size.
    Total quantity of shipments for week by case size.
    Inventory of juices by case size, on floor awaiting shipment and in Lawrence Warehouse at end of week.

Details of computation of orange oil produced from SELLER'S peel for the week.

[fol. 282] *Right of Termination*

Time is the essence of this Agreement. Failure of the PURCHASER to perform or comply with any of the terms or conditions of this Agreement shall at the option of the SELLER cause immediate termination of the Agreement.

Contract Period

This Agreement shall be in effect from June 26, 1951 until approximately 3,937 tons of oranges or 527.95 tons plus the tonnage required to produce the running case total of 85,050 has been delivered.

Signed:

The Exchange Orange Products Company (Seller)

By /s/ A. JD Smith
Asst. Secy.

E. A. Silzle Corporation (Purchaser)

By /s/ Robert V. Clark
Secretary

Date Signed: Sept. 10, 1951

[fol. 283] AJDS:MO(5)9/10/51

SUPPLEMENT No. 1**

to PURCHASING AGREEMENT between THE EXCHANGE ORANGE PRODUCTS COMPANY and E. A. SILZLE CORPORATION dated September 10, 1951

It is further agreed that SELLER is to attempt to supply an additional quantity of oranges to produce approximately 15,000 running cases more of canned orange juice than is itemized in the Agreement.

** See attached Amendment No. 1 to Supplement No. 1 (2/6/52).

The fruit as will be supplied under this Supplement will not be delivered until the full production under the Agreement has been packed and if not for immediate delivery, has been placed in Lawrence Warehouse as per details set forth in the body of the Agreement.

The fruit in these 15,000 running cases will be paid for as follows:

	12 46-oz.	24 #2s	24 12-oz.	48 5½ oz.
A—Seller's sales price in effect at the time Purchaser makes delivery				
side Cal. Ariz.	2.35	2.05		
Ariz.	2.65			
B—Sales Expense, brokerage & profit	12½%	12½%	12½%	12½%
C—Label Allowance	$ .0540	$ .0576	$ .0528	$ .0650
D—Mfging. Cost	1.35	1.25	1.01	1.19
E—Advertising allowance	.07	.05	.04	.04
F—Trucking on fruit @ $1.10 per ton with 100 gals. recoverable juice per ton	.0474	.0371	.0248	.0227
per case to be paid SELLER for fruit				

These are pencil figures as entered on cc of this supplement as filed in is office, made by Nylander.

All terms and conditions of Purchasing Agreement are applicable to this Supplement.

PURCHASER is to advise SELLER immediately of the exact quantities by case size and whether for delivery in California and Arizona or in other States.

Signed: THE EXCHANGE ORANGE PRODUCTS COMPANY (Seller)

/s/ A. JD SMITH
Asst. Secy.

E. A. SILZLE CORPORATION (Purchaser)

/s/ ROBERT V. CLARK

Date Sept. 10, 1951

[fol. 284]

[Letterhead of E. A. Silzle Corporation, Anaheim, California]

February 1, 1952

The Exchange Orange Products Company
P.O. Box #233
Ontario, California

Attention: Mr. A. D. D.J. Smith
Controller

Gentlemen:—

Enclosed is report of Inventory movement for period November 29 to December 31, 1952.

I have not kept up with these reports on a weekly basis because of the lack of movement of the Inventory, however in the future, the reports will be made each week as per the agreement.

Confirming telephone conversation with your Mr. Jim Finley and our Mr. Wurgaft, an agreement was entered into January 7th whereby 12,000 cases could be sold at the following noted prices:—

24/#2	$2.20 PER CASE
12/46 oz.	$2.50 PER CASE

The sale for this merchandise will be negotiated immediately and payment for this merchandise will be made pursuant to the terms of the original processing agreement.

Kindly initial a copy of this letter and return copy for our files. Perhaps a formal Supplement to the original Agreement would be more in order, you be the judge in this case.

Sincerely,

E. A. Silzle Corporation

/s/ Robert V. Clark
Robert V. Clark—Ass't. Gen. Mgr.

RVC:ar
Enc.

[Handwritten notation—OK—Subject to Amend 1 to Supplement 1—The Exchange Orange Products Co—A. JD Smith—2/6/52] [fol. 285] AJDS:MO(5)2/7/52

AMENDMENT No. 1 to SUPPLEMENT No. 1

to PURCHASING AGREEMENT between THE EXCHANGE ORANGE PRODUCTS COMPANY and E. A SILZLE CORPORATION dated September 10, 1951

It is agreed that PURCHASER may sell outside the States of California and Arizona a running total of 12,000 cases o canned orange juice at the following prices, f.o.b. Anaheim, California:

24 #2's	$2.20 per case
12/46-oz.	$2.50 per case

All terms and conditions of PURCHASING AGREEMENT are applicable to this amendment.

Signed:

The Exchange Orange Products Company (Seller)

/s/ A. JD Smith—Asst. Sec'y

E. A. Silzle Corporation (Purchaser)

See Letter February 1, 1952 attacned

Date: February 6, 1952

UNITED STATES DISTRICT C

Exhibit 27

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WINCKLER & SMITH CITRUS PRODUCTS CO.,
a corporation,

vs.

SUNKIST GROWERS, INC., et al.

NO. 13768-C

. . .

Sunkist price schedules on certain juice products (shelf products). January 1, 1949 - February 1, 1952.

[fol. 2886]

IN UNITED STATES DISTRICT COURT
PLAINTIFFS' EXHIBIT 27

[fol. 287]

List No. C-111 **Effective June 9, 1952**

DELIVERED IN CALIFORNIA ONLY

POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
44½	Grapefruit Juice—Unsweetened	680	$ 2.57
37	" " — "	680	$ 1.14
44½	Grapefruit Juice—Sweetened	681	
37	" " — "	681	
44½	Grapefruit & Orange Juices—Unswtd.	695	$ 2.77
37	" " " — "	695	$ 1.22
44½	Grapefruit & Orange Juices—Swtd.	696	
37	" " " — "	696	
44½	Valencia Orange Juice—Unsweetened	260	
38½	" " " — "	260	
28½	" " " — "	260	
44½	Valencia Orange Juice—Sweetened	261	
28½	" " " — "	261	
28½	" " " — "	261	

SHIPMENTS: 16,000 pounds minimum shipments to points in and California **ONLY.** Rail shipments 65,000 pounds to all

ANT: On consolidated shipments, usual split delivery, and/or transit charges shall be for the account of the buyer.

SHIPMENTS: Truck shipments shall be subject to our confirma- confined to the regular truck routes where the minimum rate

MS. ALLOWANCES & CONDITIONS OF SALE

be the same as shown on our regular price list for all Shelf

Blank Squares Indicate Not Quoting

287

Price Lists No. A-111 **Effective June 9, 1952**

F.O.B. TEMPE, ARIZONA

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	[illegible]
12-46 oz.	44½	Grapefruit Juice—Unsweetened	680	$ 2
24-2's	37	" " — "	680	$ 1
[illegible]6 oz.	44½	Grapefruit Juice—Sweetened	681	
[illegible]-2's	37	" " — "	681	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	$ 2
24-2's	37	" " " — "	695	$ 1
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2's	37	" " " — "	696	
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2's	38½	" " " — "	260	
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	38½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points Arizona and California **ONLY.** Rail shipments 65,000 pounds to points.

IMPORTANT: On consolidated shipments, usual split delivery, and stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confir tion and confined to the regular truck routes where the minimum applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Products.

Mark Symbol Indicates Not Quoting

1-3

THESE QUOTATIONS APPLY ON SALES IN C

PRICES F.O.B. SHIPPING POINT

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	23	Pure Lemon Juice	360	$ .82
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2's	38½	" " " — "	260	
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	38½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	
24-2's	37	" " " — "	695	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2's	37	" " " — "	696	

EXCHANGE BRAND OR BUYER'S LABEL*

48-5½ oz.	23	Pure Lemon Juice	316	$ .82
6 1 gal.	37	" " "	316	$14.40
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	53	
24-2's	38½	" " " — "	53	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	52	
24-2's	38½	" " " — "	52	
12-46 oz.	44½	Grapefruit Juice—Unsweetened	603	$ 2.11
24-2's	37	" " — "	603	$ .95
12-46 oz.	44½	Grapefruit Juice—Sweetened	602	$ 2.19
24-2's	37	" " — "	602	$ .97½
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	634	
24-2's	37	" " " — "	634	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	635	
24-2's	37	" " " — "	635	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

ALIFORNIA AND ARIZONA ONLY

PRICES EX WAREHOUSE WHERE STOCKED

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	23	Pure Lemon Juice	360	$ .86
24-6 oz.	15	Concentrate for Lemonade	381	$ 1.25
24-6 oz.	15	Concentrate for Orangeade	250	$ 1.42½
12-46 oz.	64½	Valencia Orange Juice—Unsweetened	260	
24-2's	38½	" " " — "	260	

CASE SIZE	POUNDS PER CASE	EXCHANGE SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	24	Pure Lemon Juice	316	$ .88
6/1 gal.	50	" " "	316	$10.40
48-6 oz.	28	Lemonade Base	319	
24-6 oz.	15	" "	319	
48-6 oz.	31	Orangeade Base	27	
24-6 oz.	15	" "	27	

EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices.

CASE SIZE	PER DOZ. [illegible]	CASE SIZE	PER DOZ. [illegible]
24-6 oz.		24-2's	
48-5½ oz.		12-46 oz.	
48-6 oz.		6/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Squares Indicate Not Quoting

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . . ¼ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1000
46 oz. tins 4.50 per 1000	128 oz. tins 7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

Sunkist Growers, Inc.

Formerly CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA

[illegible] Dallas 1, Texas

[illegible] W. [illegible] St., Chicago 6, Ill. [illegible] St., New York 13, N.Y.

Sunkist® Citrus Products News

June 9, 1952

TO OUR BROKERS

WEATHERVANE

[illegible] information obtained from weathermen throughout the country definitely points to a hot, humid, and sultry summer which simply means that **Sunkist** Orangeade and **Sunkist** Lemonade will be greater favorites than ever with brokers, wholesalers, retailers, and consumers. Therefore, you should anticipate heavy sales and keep us fully posted regarding your consigned stock needs.

SUNKIST SUZY

What a **success** our SUZY DISPLAY units have been! They've made merchandising history!! Of course, it was a combination of your aggressive work and a truly natural floor display that quickly exhausted original supplies, but shipments from our **second** printing moved forward last week. Practically all Brokers have reported outstanding results. Have you requested additional SUZYS to install through the months of June and July? Be sure to keep those displays filled and attractive.

COOLER CARNIVAL

One of the most colorful grocery promotions of the year gets underway this month. It's the **"Sunkist Cooler Carnival"**, built around the hot weather favorites, **Sunkist** Orangeade and Lemonade. Properly handled, it will make summer's first warm week a profit week for jobber and retailer. Order your store-wide display materials immediately. They'll give you action in color.

DOLLAR SALES

To increase sales materially and to promote better retail movement of **Sunkist** Citrus Products, why not suggest "dollar sales" to your retailers and chains. By doing so, they will sell multiples of **Sunkist** Orangeade, Lemonade, and Lemon Juice for one dollar. The results will surprise you, and you can tie in such a promotion with the Cooler Carnival.

Sunkist
CITRUS PRODUCTS
PRICE LIST No. W-111

Cancelled per

Effective June 9, 1952

Cancelling All Previous Quotations

"the most complete line of quality citrus products under one label!"

Sunkist
Sunkist

Sunkist . . . the brand they'll reach for first!

Sunkist Growers, Inc.
Formerly
CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkis
It's the
brand they'll
reach for first

1-4

THESE QUOTATIONS DO NOT APPLY ON SAL

PRICES F.O.B. SHIPPING POINT

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	23	Pure Lemon Juice	360	$ .82
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2's	36½	" " " — "	260	
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	36½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	
24-2's	37	" " " — "	695	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2's	37	" " " — "	696	

EXCHANGE BRAND OR BUYER'S LABEL*

48-5½ oz.	23	Pure Lemon Juice	316	$ .82
6 1 gal.	57	" " "	316	$14.40
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	53	
24-2's	36½	" " " — "	53	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	52	
24-2's	36½	" " " — "	52	
12-46 oz.	44½	Grapefruit Juice—Unsweetened	603	
24-2's	37	" " — "	603	
12-46 oz.	44½	Grapefruit Juice—Sweetened	602	
24-2's	37	" " — "	602	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	634	
24-2's	37	" " " — "	634	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	635	
24-2's	37	" " " — "	635	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

ON SALES IN CALIFORNIA AND ARIZONA

PRICES EX WAREHOUSE WHERE STOCKED

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	23	Pure Lemon Juice	360	$ .93
24-6 oz.	15	Concentrate for Lemonade	381	$ 1.40
24-6 oz.	15	Concentrate for Orangeade	250	$ 1.52½
12-46 oz.	44⅓	Valencia Orange Juice—Unsweetened	280	
24-2's	38⅓	" " " — "	280	

EXCHANGE SHELF PRODUCTS

48-5½ oz.	24	Pure Lemon Juice	316	$ .93
6/1 gal.	50	" " "	316	$16.40
48-6 oz.	29	Lemonade Base	319	
24-6 oz.	15	" "	319	
48-6 oz.	31	Orangeade Base	27	
24-6 oz.	15	" "	27	

EX CAR ON ARRIVAL AT WAREHOUSE

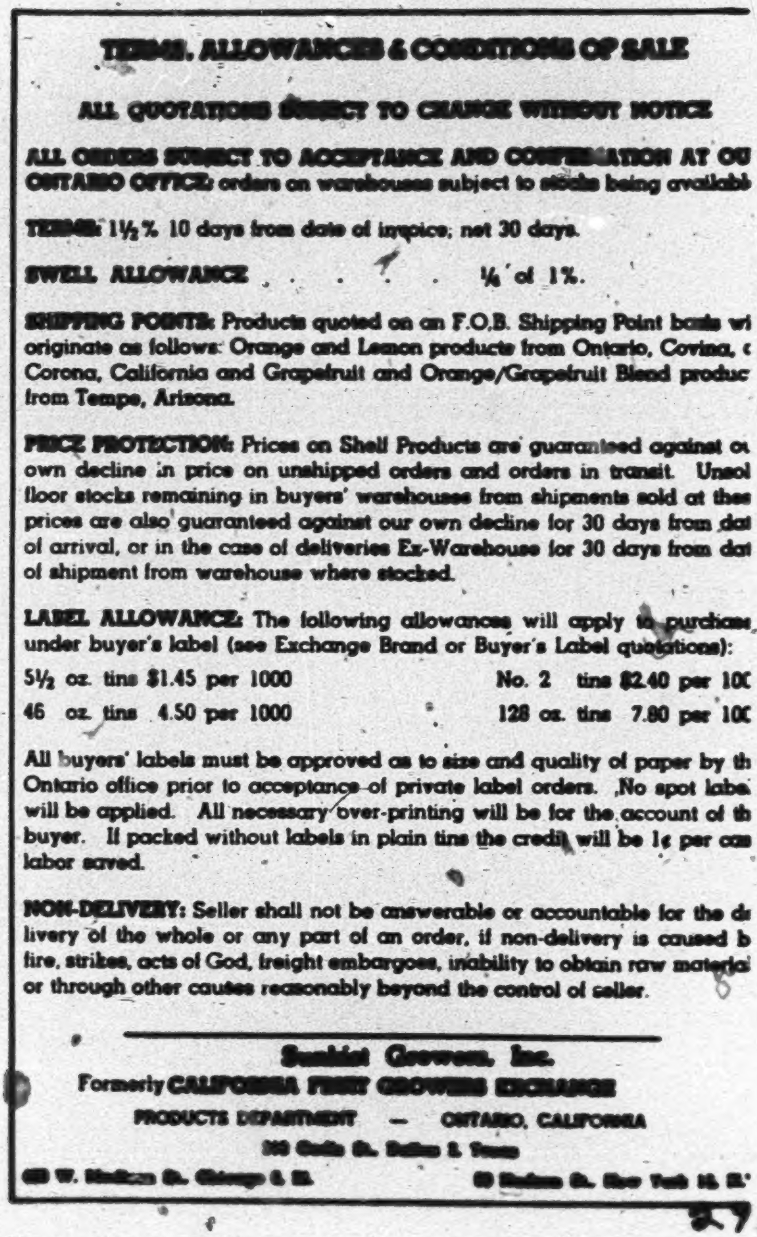
Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices

CASE SIZE	PER DOZ. [illegible]	CASE SIZE	PER DOZ. [illegible]
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		6 1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Spaces Indicate Not Quoting

[fol. 291]



TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OU ONTARIO OFFICE: orders on warehouses subject to stocks being availabl

TERMS: 1½% 10 days from date of invoice, net 30 days.

SWELL ALLOWANCE . . . . . ⅛ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis wi originate as follows: Orange and Lemon products from Ontario, Covina, c Corona, California and Grapefruit and Orange/Grapefruit Blend produc from Tempe, Arizona.

PRICE PROTECTION: Prices on Shell Products are guaranteed against ou own decline in price on unshipped orders and orders in transit. Unsol floor stocks remaining in buyers' warehouses from shipments sold at thes prices are also guaranteed against our own decline for 30 days from dat of arrival, or in the case of deliveries Ex-Warehouse for 30 days from dat of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchase under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 10C
46 oz. tins 4.50 per 1000	128 oz. tins 7.80 per 10C

All buyers' labels must be approved as to size and quality of paper by th Ontario office prior to acceptance of private label orders. No spot labe will be applied. All necessary over-printing will be for the account of th buyer. If packed without labels in plain tins the credit will be 1¢ per cas labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the de livery of the whole or any part of an order, if non-delivery is caused b fire, strikes, acts of God, freight embargoes, inability to obtain raw materia or through other causes reasonably beyond the control of seller.

Sunkist Growers, Inc.

Formerly **CALIFORNIA FRUIT GROWERS EXCHANGE**

PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA

[illegible] St. Dallas [illegible] Texas

[illegible] W. Madison St. Chicago [illegible] Ill. **[illegible] St. New York [illegible] N.Y.**

Sunkist Citrus Products News

June 9, 1952

TO OUR BROKERS

WEATHERVANE

Secret information obtained from weathermen throughout the country definitely points to a hot, humid, and sultry summer, which simply means that **Sunkist** Orangeade and **Sunkist** Lemonade will be greater favorites than ever with jobbers, wholesalers, retailers, and consumers. Therefore, you should anticipate heavy sales and keep us fully posted regarding your consigned stock needs.

SUNKIST SUZY

What a success our SUZY DISPLAY units have been! They've made merchandising history!! Of course, it was a combination of your aggressive work and a truly natural floor display that quickly exhausted original supplies, but shipments from our second printing moved forward last week. Practically all Brokers have reported outstanding results. Have you requested additional SUZYS to install through the months of June and July? Be sure to keep those displays filled and attractive.

COOLER CARNIVAL

One of the most colorful grocery promotions of the year gets underway this month. It's the **"Sunkist Cooler Carnival"**, built around the hot weather favorites, **Sunkist** Orangeade and Lemonade. Properly handled, it will make summer's first warm week a profit week for jobber and retailer. Order your store-wide display materials immediately. They'll give you action in color.

DOLLAR SALES

To increase sales materially and to promote better retail movement of **Sunkist** Citrus Products, why not suggest dollar sales to your retailers and chains. By doing so, they will sell multiples of **Sunkist** Orangeade, Lemonade, and Lemon Juice for one dollar. The results will surprise you, and you can tie in such a promotion with the Cooler Carnival.

292

Sunkist
CITRUS PRODUCTS
PRICE LIST No. N-111

Effective June 9, 1952

Cancelling All Previous Quotations

"the most complete line of ***quality*** *citrus products under one label!"*

Sunkist
Sunkist
Sunkist
Sunkist
Sunkist
Sunkist

Sunkist . . . the brand they'll reach for first!

Sunkist Growers, Inc.
Formerly
CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkist
It's the brand they'll reach for first

[fol. 293]

Price List No. C-110 **Effective April 7, 1952**

DELIVERED IN CALIFORNIA ONLY

[illegible]	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
6 oz.	44½	Grapefruit Juice—Unsweetened	680	$ 2.57
s	37	" " — "	680	$ 1.14
6 oz.	44½	Grapefruit Juice—Sweetened	681	
s	37	" " — "	681	
6 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	$ 2.77
s	37	" " " — "	695	$ 1.22
6 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
s	37	" " " — "	696	
6 oz.	44½	Valencia Orange Juice—Unsweetened	260	
s	38½	" " " — "	260	
6 oz.	25½	" " " — "	260	
6 oz.	44½	Valencia Orange Juice—Sweetened	261	
s	38½	" " " — "	261	
6 oz.	25½	" " " — "	261	

NIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in rizona and California **ONLY.** Rail shipments 65,000 pounds to all oints.

PORTANT: On consolidated shipments, usual split delivery, and/or top in transit charges shall be for the account of the buyer.

UCK SHIPMENTS: Truck shipments shall be subject to our confirma ion and confined to the regular truck routes where the minimum rate pplies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

hall be the same as shown on our regular price list for all Shelf roducts.

Price List No. A-110 **Effective April 7, 19**

F.O.B. TEMPE, ARIZONA

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	[illegible]
12-46 oz.	44½	Grapefruit Juice—Unsweetened	600
24-2's	37	" " — "	600
12-46 oz.	44½	Grapefruit Juice—Sweetened	601
24-2's	37	" " — "	601
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	605
24-2's	37	" " " — "	605
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	606
24-2's	37	" " " — "	606
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260
24-2's	36½	" " " — "	260
48-6 oz.	25½	" " " — "	260
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261
24-2's	36½	" " " — "	261
48-6 oz.	25½	" " " — "	261

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to poi Arizona and California **ONLY.** Rail shipments 65,000 pounds to points.

IMPORTANT: On consolidated shipments, usual split delivery, and stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our tion and confined to the regular truck routes where the minimum applies.

TERMS, ALLOWANCES & CONDITIONS OF SA

Shall be the same as shown on our regular price list for al Products.

THESE QUOTATIONS APPLY ON SALES IN CAL

PRICES F.O.B. SHIPPING POINT

[illegible]	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-3½ oz.	23	Pure Lemon Juice	360	$ .82
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2's	38½	" " " — "	260	
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	38½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	
24-2's	37	" " " — "	695	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2's	37	" " " — "	696	

EXCHANGE BRAND OR BUYER'S LABEL*

48-3½ oz.	23	Pure Lemon Juice	316	$ .82
6-1 gal.	57	" " "	316	$14.40
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	53	
24-2's	38½	" " " — "	53	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	52	
24-2's	38½	" " " — "	52	
12-46 oz.	44½	Grapefruit Juice—Unsweetened	603	$ 2.11
24-2's	37	" " — "	603	$ .95
12-46 oz.	44½	Grapefruit Juice—Sweetened	602	
24-2's	37	" " — "	602	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	604	$ 2.39
24-2's	37	" " " — "	604	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	606	
24-2's	37	" " " — "	606	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

48-3
24-4
24-6
12-4
24-2
48-3
6/1
48-4
24-4
48-4
24-4

Sh
Ex

It
ag
sp

[illegible]

PRICES EX WAREHOUSE WHERE STOCKED

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	20	Pure Lemon Juice	300	$ .96
24-6 oz.	15	Concentrate for Lemonade	301	$ 1.25
24-6 oz.	15	Concentrate for Orangeade	250	$ 1.42½
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	280	
24-2's	30½	" " " — "	280	

EXCHANGE SHELF PRODUCTS

48-5½ oz.	26	Pure Lemon Juice	316	$ .96
6/1 gal.	30	" " "	316	$16.40
48-6 oz.	30	Lemonade Base	319	$ 1.00
24-6 oz.	15	" "	319	$ 1.00
48-6 oz.	31	Orangeade Base	27	$ 1.25
24-6 oz.	15	" "	27	$ 1.25

EX CAR ON ARRIVAL AT WAREHOUSE

Shell Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices

[illegible]	[illegible]	[illegible]	[illegible]
24-6 oz.		24-2's	
48-5½ oz.		12-46 oz.	
48-6 oz.		6/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the [illegible] period. Seller will be responsible for all distribution charges at the warehouse.

[illegible]

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE; orders on warehouses subject to stocks being available.

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE ½ of 1%.

SHIPPING POINTS: Products quoted to us on F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000	No. 2 tins [illegible] per 1000
46 oz. tins 4.50 per 1000	128 oz. tins [illegible] per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be responsible or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain cans or materials or through other causes reasonably beyond the control of seller.

Sunkist Growers, Inc.
Formerly **CALIFORNIA FRUIT GROWERS EXCHANGE**
PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA
[illegible]
[illegible] W. Madison St., Chicago 6, Ill. **[illegible] St., New York [illegible]**

[illegible]

[illegible]

[illegible]

3-4

[illegible] Citrus Products News

April 7, 1952

TO OUR BROKERS

EASTER PARADE

Put on your Easter bonnet and join the Sunkist Parade down the avenue—any avenue—for Easter brings many things, not the least of which are a breath of spring and warmer weather. All of which reminds us that summer is nigh and every buyer will want to stack his Easter basket with the twin coolers, Sunkist Orangeade, Sunkist Lemonade and Sunkist [illegible]. With warehouse stocks now speeding to your market, let's all get off to a record breaking year by joining the Sunkist Parade.

SUZY

Last week in a separate note we told you all about "Suzy." She's coming to visit you and to pay her respects to every retail and chain buyer in your territory. We know she'll [illegible] [illegible] simply by demonstrating an age-old formula: Display plus Turnover plus Sunkist equals PROFITS.

THE [illegible]

When our last published news bulletin made its appearance last autumn, the Giants and Dodgers were in a titanic struggle for the National League pennant. Next week they'll be back at it again, swinging a merry tune of base knocks. But we're [illegible] [illegible] now to open the season. Batter up!

[illegible]

Our [illegible] year completed, we look forward with hope [illegible] to our [illegible] year under the Sunkist ban[illegible] [illegible] with the goals we now [illegible] [illegible] [illegible] successful. Let's pull together [illegible] [illegible] to our accomplishments. Good luck and [illegible]

[illegible]

Sunkist

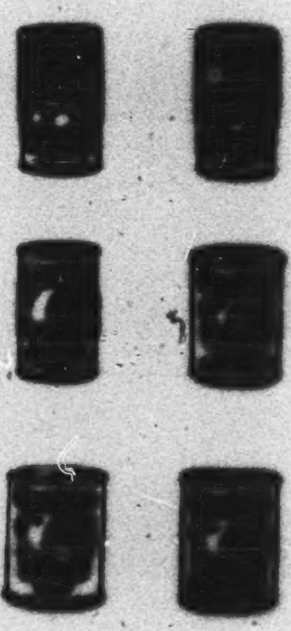
CITRUS PRODUCTS

PRICE LIST No. W-110

Effective April 7, [illegible]

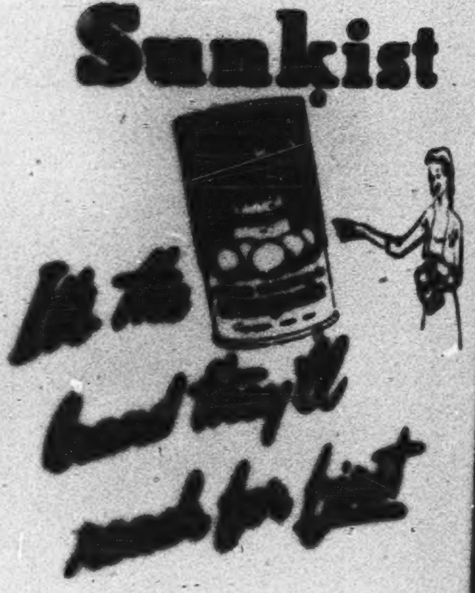
Cancelling All Previous Quotations

"the most complete line of ***quality*** *citrus products under one label!"*



Sunkist . . . the brand that's [illegible] for [illegible]

[illegible] Inc.
Former
[illegible]
[illegible]
[illegible]



THESE QUOTATIONS DO NOT APPLY ON SALES

PRICES F.O.B. SHIPPING POINT —

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	23	Pure Lemon Juice	360	$ .02
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2s	28½	" " " — "	260	
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2s	28½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	
24-2s	37	" " " — "	695	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2s	37	" " " — "	696	
		EXCHANGE BRAND OR BUYER'S LABEL*		
48-5½ oz.	23	Pure Lemon Juice	316	$ .02
6-1 gal.	37	" " "	316	$14.40
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	53	
24-2s	28½	" " " — "	53	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	52	
24-2s	28½	" " " — "	52	
12-46 oz.	40½	Grapefruit Juice—Unsweetened	603	
24-2s	37	" " — "	603	
12-46 oz.	40½	Grapefruit Juice—Sweetened	602	
24-2s	37	" " — "	602	
12-46 oz.	40½	Grapefruit & Orange Juices—Unswtd.	634	
24-2s	37	" " " — "	634	
12-46 oz.	40½	Grapefruit & Orange Juices—Swtd.	635	
24-2s	37	" " " — "	636	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

48-5
36-6
24-6
12-4
24-2

48-5
6 1
48-6
24-6
48-6
24-6

Sh
Ex

It
og
sp

[illegible] CALIFORNIA AND ARIZONA

PRICES EX WAREHOUSE WHERE STOCKED

CASE SIZE	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	20	Pure Lemon Juice	300	$ .88
24-6 oz.	18	Concentrate for Lemonade	301	$ 1.35
24-6 oz.	18	Concentrate for Orangeade	290	$ 1.43½
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	290	
24-2's	38½	" " " — "	290	

CASE SIZE	[illegible]	EXCHANGE SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	24	Pure Lemon Juice	316	$ .93
6-1 gal.	50	" " "	316	$16.40
48-6 oz.	20	Lemonade Base	319	
24-6 oz.	15	" "	319	
48-6 oz.	31	Orangeade Base	27	
24-6 oz.	15	" "	27	

EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices

CASE SIZE	[illegible]	CASE SIZE	[illegible]
24-6 oz.		24-2's	
48-5½ oz.		12-46 oz.	
48-6 oz.		6-1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

[illegible]

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE.

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE; orders on warehouse subject to stocks being available.

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . . ⅛ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shell Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz.	tins	$1.45	per 1000	No. 2	tins	$2.40	per 100(
46 oz.	tins	4.50	per 1000	120 oz.	tins	7.80	per 100(

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

Sunkist Growers, Inc.

Formerly **CALIFORNIA FRUIT GROWERS EXCHANGE**

PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA

[illegible] St. Dallas 1, Texas

[illegible] W. Madison St. Chicago 6, Ill. **[illegible] St. New York 13, N.Y**

827

[illegible]

[illegible]

[illegible] Citrus Products News

April 7, 1952

TO OUR BROKERS

EASTER PARADE

Put on your Easter bonnet and join the Sunkist Parade down the avenue—any avenue—for Easter brings many things, not the least of which are a breath of spring and warmer weather. All of which spreads to that consumer is nigh and every buyer will want to stock his Easter basket with the twin coolers—Sunkist Orangeade, Sunkist Lemonade and Sunkist Lemon Juice. With warehouse stocks now spreading to your market, let's all get off to a record breaking year by joining the Sunkist Parade.

SUSY

Last week in a separate note we told you all about "Susy". She's coming to visit you and to pay her respects to every retail and chain buyer in your territory. We know she'll charm everyone easily by demonstrating an age-old formula: Display plus Turnover plus Sunkist equals PROFITS.

[illegible]

When our last published price bulletin made its appearance last summer, the Giants and Dodgers were in a titanic struggle for the National League pennant. Next week they'll be back at it again, singing a merry tune of base hits. But we're ready right now to open the season. Batter up!

[illegible]

Our business, your department, we look forward with hope and enthusiasm to our [illegible] year under the Sunkist banner. With your help, together with the tools we can furnish, 1952 should be outstandingly successful. Let's pull together and point with pride to our accomplishments. Good luck and good selling!

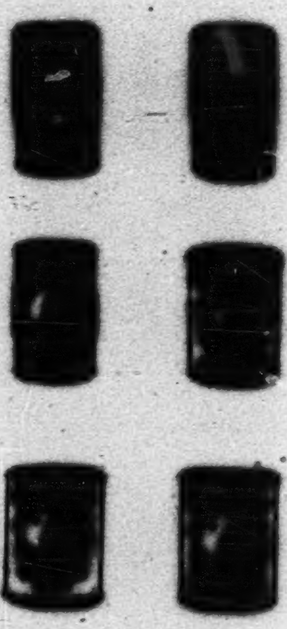
278

Sunkist
CITRUS PRODUCTS
PRICE LIST No. [illegible]

Effective April 7, [illegible]

Cancelling All Previous Quotations

"The most complete line of quality citrus products under one label!"



Sunkist . . . the brand they'll speak for you

Sunkist
Be the brand they'll reach for first

[illegible]

Formerly

[illegible]

[illegible]

[illegible]

[fol. 299]

List No. C-1[illegible] **Effective February 25, 19[illegible]**

DELIVERED IN CALIFORNIA ONLY

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
46 oz.	44½	Grapefruit Juice—Unsweetened	680	$ 2.57
2s	37	" " — "	680	$ 1.14
46 oz.	44½	Grapefruit Juice—Sweetened	681	
2s	37	" " — "	681	
46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	$ 2.77
2s	37	" " " — "	695	
46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
2s	37	" " " — "	696	
46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
2s	38½	" " " — "	260	
[illegible] oz.	23½	" " " — "	260	
46 oz.	44½	Valencia Orange Juice—Sweetened	261	
2s	38½	" " " — "	261	
[illegible] oz.	23½	" " " — "	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

IMPORTANT: On consolidated shipments, usual split delivery, and/or stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shell Products.

Blank Squares Indicate Not Quoting

Price List No. A-[illegible] **Effective February [illegible]**

F.O.B. TEMPE, ARIZONA

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
12-46 oz.	44½	Grapefruit Juice—Unsweetened	660	$1
24-2's	37	" " — "	660	$1
12-46 oz.	44½	Grapefruit Juice—Sweetened	661	
24-2's	37	" " — "	661	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	$1
24-2's	37	" " " — "	695	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2's	37	" " " — "	696	
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	$1
24-2's	36½	" " " — "	260	$1
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	36½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

IMPORTANT: On consolidated shipments, usual split delivery and/or stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our [illegible]tion and confined to the regular truck routes where the minimum [illegible] applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all [illegible] Products.

[illegible]

[illegible]

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	Pure Lemon Juice	[illegible]	$ .02
[illegible]	[illegible]	Valencia Orange Juice—Unsweetened	[illegible]	$ 2.00
[illegible]	[illegible]	" " " — "	[illegible]	$ 1.33½
[illegible]	[illegible]	" " " — "	[illegible]	
[illegible]	[illegible]	Valencia Orange Juice—Sweetened	261	
[illegible]	[illegible]	" " " — "	261	
[illegible]	[illegible]	" " " — "	261	
[illegible]	[illegible]	Grapefruit & Orange Juices—Unswtd.	[illegible]	
[illegible]	[illegible]	" " " — "	[illegible]	
[illegible]	[illegible]	Grapefruit & Orange Juices—Swtd.	[illegible]	
[illegible]	[illegible]	" " " — "	[illegible]	

EXCHANGE BRAND OR BUYER'S LABEL*

[illegible]	[illegible]	Pure Lemon Juice	316	$ .02
6/1 gal.	[illegible]	" " "	316	$14.40
[illegible]	[illegible]	Valencia Orange Juice—Unsweetened	53	
[illegible]	[illegible]	" " " — "	53	
[illegible]	[illegible]	Valencia Orange Juice—Sweetened	52	
[illegible]	[illegible]	" " " — "	52	
[illegible]	[illegible]	Grapefruit Juice—Unsweetened	[illegible]	$ 2.11
[illegible]	[illegible]	" " — "	[illegible]	$ [illegible]
[illegible]	[illegible]	Grapefruit Juice—Sweetened	[illegible]	
[illegible]	[illegible]	" " — "	[illegible]	
[illegible]	[illegible]	Grapefruit & Orange Juices—Unswtd.	[illegible]	$ [illegible]
[illegible]	[illegible]	" " " — "	[illegible]	
[illegible]	[illegible]	Grapefruit & Orange Juices—Swtd.	[illegible]	
[illegible]	[illegible]	" " " — "	[illegible]	

*[illegible]

[illegible]

PRICES EX WAREHOUSE WHERE STOCKED

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	30	Pure Lemon Juice	300	$ .86
24-6 oz.	16	Concentrate for Lemonade	301	$ 1.35
24-6 oz.	16	Concentrate for Orangeade	250	$ 1.42½
12-46 oz.	40½	Valencia Orange Juice—Unsweetened	280	
24-2's	30½	" " " — "	280	

EXCHANGE SHELF PRODUCTS

48-5½ oz.	34	Pure Lemon Juice	316	$ .86
6/1 gal.	50	" " "	316	$10.40
48-6 oz.	30	Lemonade Base	319	$ 1.00
24-6 oz.	15	" "	319	$ 1.00
48-6 oz.	31	Orangeade Base	27	$ 1.25
24-6 oz.	16	" "	27	$ 1.25

EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices

[illegible]	[illegible]	[illegible]	[illegible]
24-6 oz.		24-2's	
48-5½ oz.		12-46 oz.	
48-6 oz.		6/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

[illegible]

[fol. 301]

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouse subject to stocks being available.

TERMS: 1½% 10 days from date of invoice, net 30 days.

SWELL ALLOWANCE . . . . . ¼ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shell Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations)

5⅓ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1000
46 oz. tins 4.50 per 1000	128 oz. tins 7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. [illegible] will be applied. All necessary over-printing will be for [illegible] buyer. If packed without labels in plain tins the credit will be [illegible] labor saved.

NON-DELIVERY: Seller shall not be answerable or [illegible] livery of the whole or any part of an order, if non delivery [illegible] fire, strikes, acts of God, freight embargoes, inability to [illegible] or through other causes reasonably beyond the control of seller.

Sunkist Growers, Inc.
Formerly **CALIFORNIA FRUIT GROWERS EXCHANGE**
PRODUCTS DEPARTMENT — ONTARIO [illegible]
[illegible] Dallas [illegible] Texas
[illegible] W. [illegible] St. Chicago [illegible] [illegible] St. New York [illegible]

301

4-4

Citrus Products News

February 25, 1952

WHAT'S IN A NAME

"An orange is an orange is an orange," says Gertrude Stein, and "An orange by any other name . . ." said Shakespeare. Famous quotes these. But more notable yet is our official change of name from California Fruit Growers Exchange to Sunkist Growers, Inc. A famous name takes on a new and better look. Kindly change your records accordingly.

BOARDWALK TALK

The convention over, and everyone back on the job, we would like to note herewith that we were much impressed with the fine group of brokers we met in personal conferences. We believe there now exists a closer liaison between broker and principal, which will reflect itself in the form of increased sales and greater all-round satisfaction for everyone concerned.

OUTLOOK

Clear the decks and man the oars, for it's full speed ahead with summer weather on the horizon. New promotions, greater sales efforts, and more powerful advertising on the Sunkist line will be sailing your way. In several important markets, from coast-to-coast this year, we found that Sunkist Valencia Orange Juice sold extremely well and maintained surprising volume in the face of drastic Florida prices. This performance conclusively proves the selling power of Sunkist. So clear the decks for sunny skies and record sales.

THE ATMOSPHERE

We're charging it with optimism; hope you're doing the same. Our new plans for the Sunkist twins—Lemonade and Orangeade, as well as that old favorite—Sunkist Lemon Juice, will be announced shortly, which will make the weather truly atmospheric.

Sincerely,

Sunkist Growers, Inc.

Formerly California Fruit Growers Exchange

Sunkist

CITRUS PRODUCTS

PRICE LIST No. W-109

Effective February 25, 1952

Cancelling All Previous Quotations

"the most complete line of quality citrus products under one label!"

Sunkist
Sunkist
Sunkist
Sunkist
Sunkist
Sunkist

Sunkist . . . the brand they'll reach for first!

Sunkist Growers, Inc.
Formerly
CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkist
It's the brand they'll reach for first

THESE QUOTATIONS DO NOT APPLY ON

PRICES F.O.B. SHIPPING POINT

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-6¾ oz.	23	Pure Lemon Juice	360	$ .82
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2's	38½	” ” ” — ”	260	—
48-6 oz.	25½	” ” ” — ”	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	38½	” ” ” — ”	261	
48-6 oz.	25½	” ” ” — ”	261	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	
24-2's	37	” ” ” — ”	695	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2's	37	” ” ” — ”	696	

EXCHANGE BRAND OR BUYER'S LABEL*

48-6¾ oz.	23	Pure Lemon Juice	316	$ .82
6/1 gal.	57	” ” ”	316	$14.40
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	53	
24-2's	38½	” ” ” — ”	53	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	52	
24-2's	38½	” ” ” — ”	52	
12-46 oz.	44½	Grapefruit Juice—Unsweetened	603	
24-2's	37	” ” — ”	603	
12-46 oz.	44½	Grapefruit Juice—Sweetened	602	
24-2's	37	” ” — ”	602	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	634	$ 2.53
24-2's	37	” ” ” — ”	634	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	635	
24-2's	37	” ” ” — ”	635	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

[illegible]

PRICES EX WAREHOUSE WHERE STOCKED

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	28	Pure Lemon Juice	280	$ .88
24-6 oz.	15	Concentrate for Lemonade	281	$ 1.35
24-6 oz.	15	Concentrate for Orangeade	259	$ 1.42½
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	280	
24-2's	28½	" " " — "	280	

		EXCHANGE SHELF PRODUCTS		
48-5½ oz.	24	Pure Lemon Juice	316	$ .93
6 1 gal.	30	" " "	316	$16.40
48-6 oz.	29	Lemonade Base	319	
24-6 oz.	15	" "	319	
48-6 oz.	31	Orangeade Base	27	
24-6 oz.	15	" "	27	

EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped [illegible] to our regular warehouses may be quoted Ex Car on arrival [illegible] the following allowances from the Ex-Warehouse Prices

CASE SIZE	PER DOZ. TINS	CASE SIZE	PER DOZ. TINS
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		6 1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse

Blank Squares Indicate Not Quoting

[fol. 303]

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available

TERMS: 1½% 10 days from date of invoice, net 30 days

SWELL ALLOWANCE ¼ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange, Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations).

5½ oz. tins	$1.45 per 1000	No. 2 tins	$2.40 per 1000
46 oz. tins	4.50 per 1000	128 oz. tins	7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1c per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain [illegible] or through other causes reasonably beyond the control of seller.

Sunkist Growers, Inc.

Formerly **CALIFORNIA FRUIT GROWERS EXCHANGE**

PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA

318 Cadiz St., Dallas 2, Texas

400 W. Madison St., Chicago 6, Ill. **90 Hudson St., New York 13, N.Y.**

303

Citrus Products News

February 25, 1952

WHAT'S IN A NAME

"An orange is an orange is an orange," says Gertrude Stein, and "An orange by any other name . . ." said Shakespeare. Famous quotes these. But more notable yet is our official change of name from California Fruit Growers Exchange to Sunkist Growers, Inc. A famous name takes on a new and better look. Kindly change your records accordingly.

BOARDWALK TALK

The convention over, and everyone back on the job, we would like to note herewith that we were much impressed with the fine group of brokers we met in personal conferences. We believe there now exists a closer liaison between broker and principal which will reflect itself in the form of increased sales and greater all-round satisfaction for everyone concerned.

OUTLOOK

Clear the decks and man the oars, for it's full speed ahead with summer weather on the horizon. New promotions, greater sales efforts, and more powerful advertising on the Sunkist line will be sailing your way. In several important markets, from coast-to-coast this year, we found that Sunkist Valencia Orange Juice sold extremely well and maintained surprising volume in the face of drastic Florida prices. This performance conclusively proves the selling power of Sunkist. So clear the decks for sunny skies and record sales.

IN THE ATMOSPHERE

We're charging it with optimism, hope you're doing the same. Our new plans for the Sunkist twins—Lemonade and Orangeade, as well as that old favorite—Sunkist Lemon Juice, will be announced shortly, which will make the weather truly atmospheric.

Sincerely,

Sunkist Growers, Inc

Formerly California Fruit Growers Exchange

304

Sunkist
CITRUS PRODUCTS
PRICE LIST No. N-109

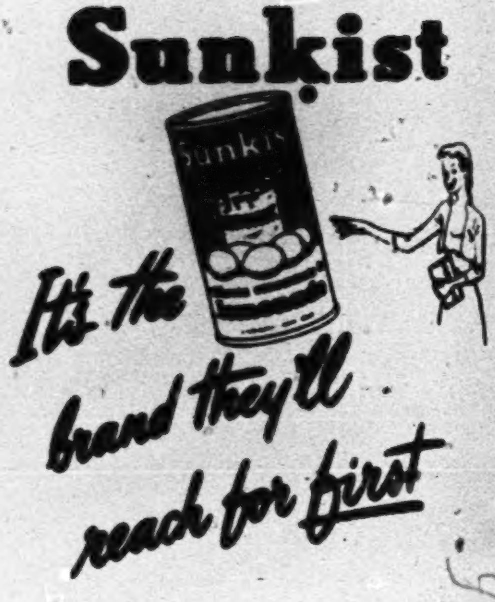
Effective February 25, [illegible]

Cancelling All Previous Quotations

"the most complete line of quality citrus products under one label!"

Sunkist . . . the brand they'll reach for first!

Sunkist Growers, Inc.
Formerly
CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA


Sunkist
Sunkist
It's the brand they'll reach for first

[fol. 305]

ice List No. C-168 **Effective January 14, 1955**

DELIVERED IN CALIFORNIA ONLY

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	Product Number	Price [illegible]
oz.	66½	Grapefruit Juice—Unsweetened	680	$ 2.57
[illegible]	37	" " — "	680	$ 1.14
oz.	66½	Grapefruit Juice—Sweetened	681	
[illegible]	37	" " — "	681	
oz.	66½	Grapefruit & Orange Juices—Unswtd.	695	$ 2.77
[illegible]	37	" " " — "	695	
oz.	66½	Grapefruit & Orange Juices—Swtd.	696	
[illegible]	37	" " " — "	696	
oz.	44½	Valencia Orange Juice—Unsweetened	260	
[illegible]	38½	" " " — "	260	
oz.	28½	" " " — "	260	
oz.	44½	Valencia Orange Juice—Sweetened	261	
[illegible]	38½	" " " — "	261	
oz.	25½	" " " — "	261	

NIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

IMPORTANT: On consolidated shipments, usual split delivery, and/or stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shelf Products.

Blank Squares Indicate Not Quoting

305

Sales List No. A-[illegible] **Effective January 15, [illegible]**

F.O.B. [illegible]

[illegible]	[illegible]	[illegible] PRODUCTS	[illegible]	[illegible]
12-46 oz.	46½	Grapefruit Juice—Unsweetened	[illegible]	$ [illegible]
24-2's	37	" " — "	[illegible]	$ [illegible]
12-46 oz.	46½	Grapefruit Juice—Sweetened	[illegible]	
24-2's	37	" " — "	[illegible]	
12-46 oz.	46½	Grapefruit & Orange Juices—Unswtd.	005	$ [illegible]
24-2's	37	" " " — "	005	
12-46 oz.	46½	Grapefruit & Orange Juices—Swtd.	006	
24-2's	37	" " " — "	006	
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	$ 2.18
24-2's	38½	" " " — "	260	$ 1.26
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	38½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

IMPORTANT: On consolidated shipments, usual split delivery and/or stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shell Products.

6-3

THESE QUOTATIONS APPLY ON SALES IN

PRICES F.O.B. SHIPPING POINT

		SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
[illegible]		Pure Lemon Juice	360	$ .82
6 oz.	11	Valencia Orange Juice—Unsweetened	260	$ 2.83
[illegible]	4½	" " " — "	260	$ 1.22½
6 oz.	23½	" " " — "	260	$ .80
46 oz.	44½	Valencia Orange Juice—Sweetened	261	
2s	20½	" " " — "	261	
46 oz.	23½	" " " — "	261	
46 oz.	41	Grapefruit & Orange Juices—Unswtd.	695	
2s	27	" " " — "	695	
46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
2s	27	" " " — "	696	

EXCHANGE BRAND OR BUYER'S LABEL*

8½ oz.	23	Pure Lemon Juice	316	$ .82
1 gal.	57	" " "	316	$14.40
46 oz.	44½	Valencia Orange Juice—Unsweetened	53	$ 2.73
2s	20½	" " " — "	53	$ 1.20
46 oz.	44½	Valencia Orange Juice—Sweetened	52	
2s	20½	" " " — "	52	
46 oz.	44½	Grapefruit Juice—Unsweetened	603	$ 2.11
2s	27	" " — "	603	$ .95
46 oz.	44½	Grapefruit Juice—Sweetened	602	
2s	27	" " — "	602	
46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	634	$ 2.53
2s	27	" " " — "	634	
46 oz.	44½	Grapefruit & Orange Juices—Swtd.	635	
2s	27	" " " — "	635	

IN CALIFORNIA AND ARIZONA ONLY

PRICES EX WAREHOUSE WHERE STOCKED

CASE SIZE	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
40-5½ oz.	23	Pure Lemon Juice	300	$ .86
24-6 oz.	15	Concentrate for Lemonade	301	$ 1.25
24-6 oz.	15	Concentrate for Orangeade	250	$ 1.42½
12-46 oz.	64½	Valencia Orange Juice—Unsweetened	280	
24-2's	36½	" " " — "	280	

		EXCHANGE SHELF PRODUCTS		
40-5½ oz.	24	Pure Lemon Juice	316	$ .86
6/1 gal.	50	" " "	316	$16.40
40-6 oz.	20	Lemonade Base	319	$ 1.00
24-6 oz.	15	" "	319	$ 1.00
40-6 oz.	31	Orangeade Base	27	$ 1.25
24-6 oz.	15	" "	27	$ 1.25

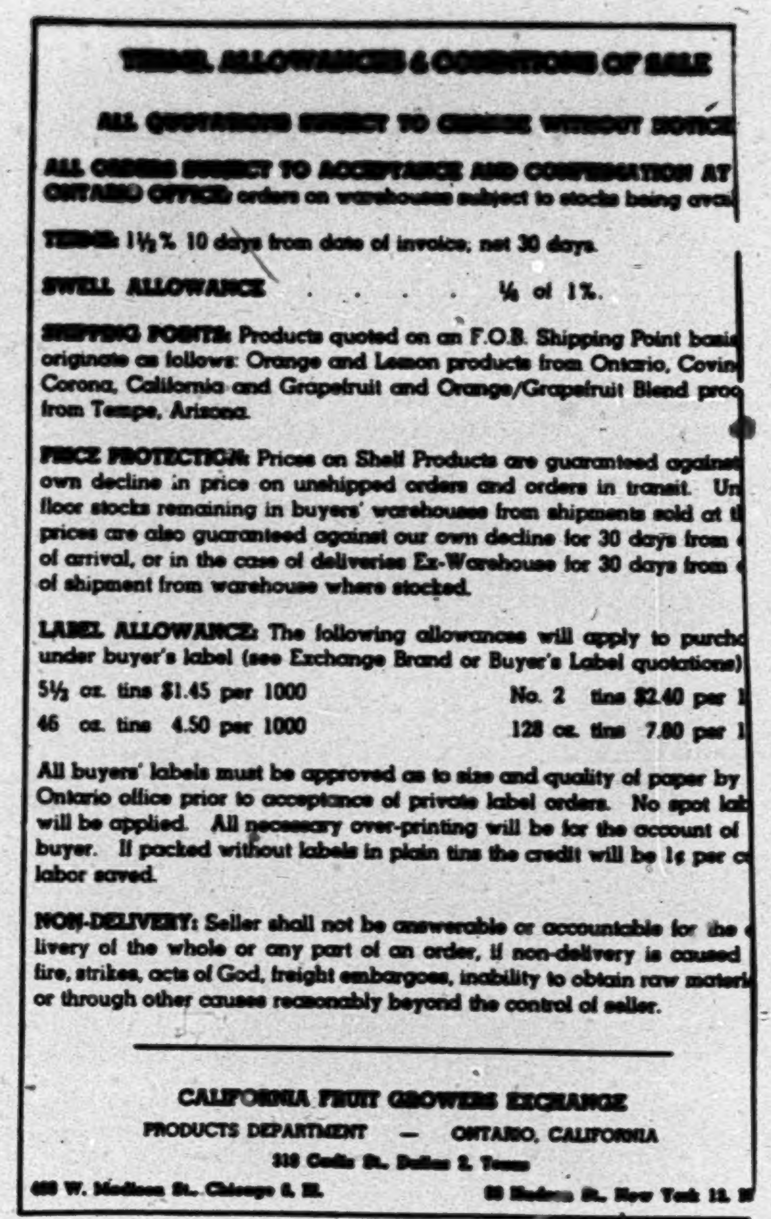
EX CAR ON ARRIVAL AT WAREHOUSE

Shell Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices:

CASE SIZE	PER DOZ. TINS	CASE SIZE	PER DOZ. TINS
24-6 oz.		24-2's	
40-5½ oz.		24-46 oz.	
40-6 oz.		6/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Not Quoting



TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTIC

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT ONTARIO OFFICE: orders on warehouses subject to stocks being avai

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . . ⅛ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basi originate as follows: Orange and Lemon products from Ontario, Covin Corona, California and Grapefruit and Orange/Grapefruit Blend proc from Tempe, Arizona.

PRICE PROTECTION: Prices on Shell Products are guaranteed against own decline in price on unshipped orders and orders in transit. Un floor stocks remaining in buyers' warehouses from shipments sold at t prices are also guaranteed against our own decline for 30 days from of arrival, or in the case of deliveries Ex-Warehouse for 30 days from of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purcha under buyer's label (see Exchange Brand or Buyer's Label quotations)

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1
46 oz. tins 4.50 per 1000	128 oz. tins 7.80 per 1

All buyers' labels must be approved as to size and quality of paper by Ontario office prior to acceptance of private label orders. No spot lab will be applied. All necessary over-printing will be for the account of buyer. If packed without labels in plain tins the credit will be 1¢ per c labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the d livery of the whole or any part of an order, if non-delivery is caused fire, strikes, acts of God, freight embargoes, inability to obtain raw materi or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA
310 Cadiz St., Dallas 2, Texas
[illegible] W. Madison St., Chicago 6, Ill. [illegible] Hudson St., New York 13, N

6-4

Sunkist Citrus Products News

January 14, 1952

TO OUR BROKERS

OUTLOOK

According to our sales statistics, most brokers have found renewed interest on the part of the trade for **Sunkist** Lemonade and **Sunkist** Orangeade. In some markets, sales have been brisk through the winter, which points to the prediction that this spring and summer will see us hitting a new high in volume on the "ades" and their companion, **Sunkist** Lemon Juice.

CONVENTION

We can hear the Boardwalk at Atlantic City groaning now under the prospects of a record assembly starting late this week. Do you have your train ticket and hotel reservations? If not, it will be a long, hard winter.

AGENDA

Talk at the convention, naturally, will be at the grass roots level. We want to talk facts as well as hear facts from you. We have big plans for the coming season and the "kickoff" will be mighty important. The theme will be cooperation and team work.

THE ATMOSPHERE

Hot weather is due any month now. Football is past. Spring training is coming up and so are booming sales for **Sunkist** Orange Juice, Grapefruit Juice, the **Sunkist** twins Orangeade and Lemonade—and that old favorite **Sunkist** Lemon Juice.

Sunkist
CITRUS PRODUCTS
PRICE LIST No. W-108

Effective January 14, 1952

Cancelling All Previous Quotations

"the most complete line of quality citrus products under one label!"

Sunkist
Sunkist
Sunkist
Sunkist
Sunkist
Sunkist
grapefruit juice

Sunkist . . . the brand they'll reach for first!

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkist
It's the brand they'll reach for first

7-1

THESE QUOTATIONS DO NOT APPLY ON

PRICES F.O.B. SHIPPING POINT

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
[illegible]	[illegible]	Pure Lemon Juice	300	$ .82
[illegible]	[illegible]	Valencia Orange Juice—Unsweetened	280	
[illegible]	[illegible]	" " " — "	280	$ 1.10
[illegible]	[illegible]	" " " — "	280	$ .55
[illegible]	[illegible]	Valencia Orange Juice—Sweetened	281	
[illegible]	[illegible]	" " " — "	281	
[illegible]	[illegible]	" " " — "	281	
[illegible]	[illegible]	Grapefruit & Orange Juice—Unswtd.	895	
[illegible]	[illegible]	" " " — "	895	
[illegible]	[illegible]	Grapefruit & Orange Juice—Swtd.	896	
[illegible]	[illegible]	" " " — "	896	

EXCHANGE BRAND OR BUYER'S LABEL*

[illegible]	[illegible]	Pure Lemon Juice	316	$ .82
[illegible]	[illegible]	" " "	316	$14.40
[illegible]	[illegible]	Valencia Orange Juice—Unsweetened	53	$ 2.30
[illegible]	[illegible]	" " " — "	53	$ 1.10
[illegible]	[illegible]	Valencia Orange Juice—Sweetened	52	
[illegible]	[illegible]	" " " — "	52	
[illegible]	[illegible]	Grapefruit Juice—Unsweetened	893	
[illegible]	[illegible]	" " — "	893	
[illegible]	[illegible]	Grapefruit Juice—Sweetened	892	
[illegible]	[illegible]	" " — "	892	
[illegible]	[illegible]	Grapefruit & Orange Juice—Unswtd.	894	$ 2.30
[illegible]	[illegible]	" " " — "	894	
[illegible]	[illegible]	Grapefruit & Orange Juice—Swtd.	895	
[illegible]	[illegible]	" " " — "	895	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

ON SALES IN CALIFORNIA AND ARIZONA

PRICES EX WAREHOUSE WHERE STOCKED

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	23	Pure Lemon Juice	300	$ .90
24-6 oz.	15	Concentrate for Lemonade	301	$ 1.35
24-6 oz.	15	Concentrate for Orangeade	299	$ 1.42½
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	299	
24-2's	39½	" " " — "	299	

		EXCHANGE SHELF PRODUCTS		
48-5½ oz.	24	Pure Lemon Juice	316	$ .98
6/1 gal.	59	" " "	316	$16.40
48-6 oz.	29	Lemonade Base	319	
24-6 oz.	15	" "	319	
48-6 oz.	31	Orangeade Base	27	
24-6 oz.	15	" "	27	

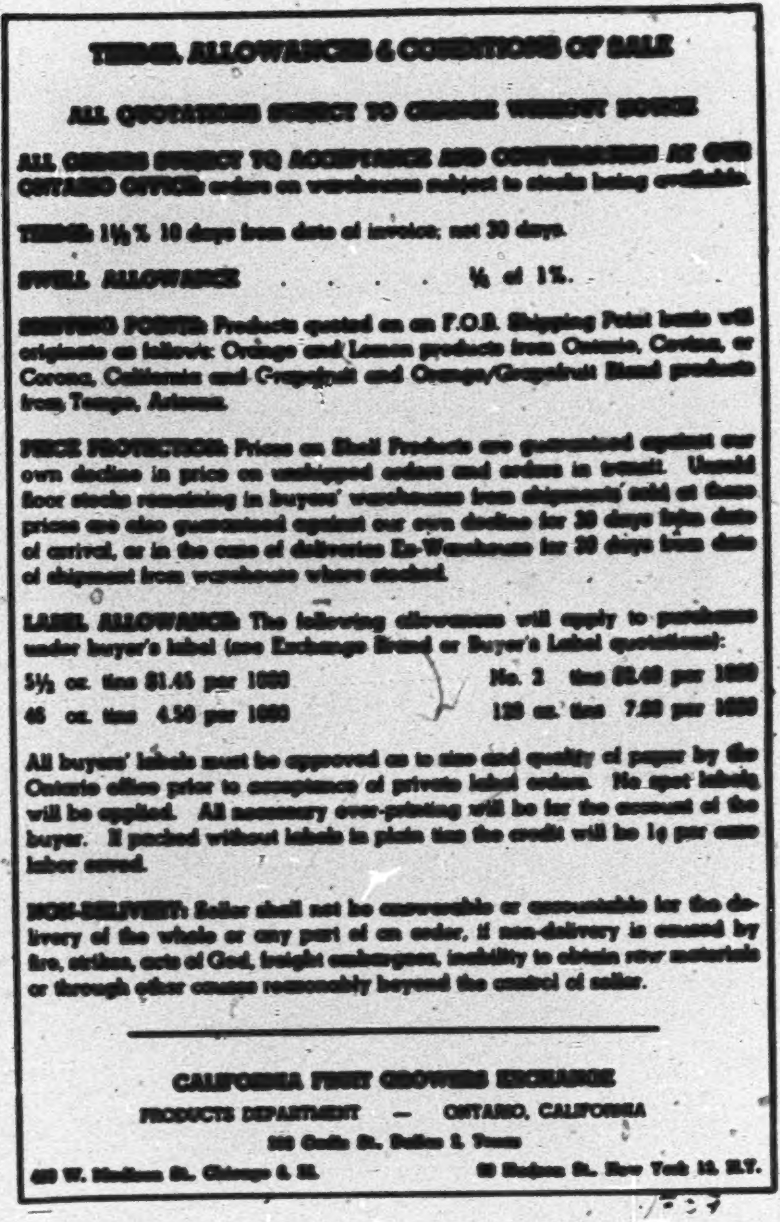
EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices:

[illegible]	[illegible]	[illegible]	[illegible]
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		6/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Squares Indicate Not Quoting



TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE; orders on warehouse subject to stocks being available.

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . ½ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at those prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1000
46 oz. tins 4.50 per 1000	128 oz. tins 7.00 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA
[illegible] Cadiz St., Dallas 2, Texas
[illegible] W. Madison St., Chicago 6, Ill.
[illegible] Hudson St., New York 13, N.Y.

7-2

[illegible] Citrus Products News

January 16, [illegible]

TO OUR BROKERS

[illegible]

According to our sales statistics, some brokers have found increased interest on the part of the trade for [illegible] Lemonade and [illegible] Orangeade. In some markets, sales have been brisk through the winter, which points to the prediction that the spring and summer will see us hitting a new high in volume on the "ades" and their companion, [illegible] Lemon Juice.

[illegible]

We can hear the Boardwalk at Atlantic City groaning now under the prospects of a record assembly starting late this week. Do you have your train tickets and hotel reservations? If not, it will be a long, hard winter.

[illegible]

Talk at the convention, naturally, will be at the grass roots level. We want to talk facts as well as hear facts from you. We have big plans for the coming season and the kickoff will be mighty important. The theme will be cooperation and team work.

[illegible]

Hot weather is due any month now. Football is past. Spring training is coming up and so are booming sales for [illegible] Orange Juice, Grapefruit Juice, the [illegible] twins, Orangeade and Lemonade—and that old favorite [illegible] Lemon Juice.

310

Sunkist

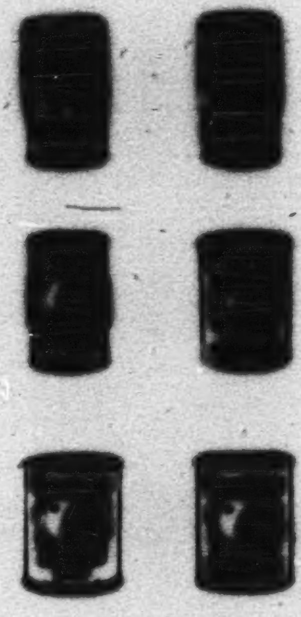
CITRUS PRODUCTS

PRICE LIST No. [illegible]

Effective January [illegible], [illegible]

Cancelling All Previous Quotations

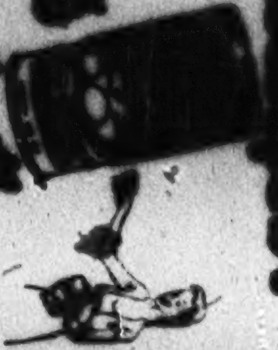
"The most
complete
line of
quality
citrus
products
under one
label!"



Sunkist . . . the brand they'll reach for first

[illegible]
[illegible]
[illegible]

Sunkist



[illegible]

[fol. 311]

ice List No. C-107 **Effective December 31, 1951**

DELIVERED IN CALIFORNIA ONLY

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
5 oz.	[illegible]	Grapefruit Juice—Unsweetened	680	$ 2.57
	37	" " — "	680	$ 1.14
oz.	[illegible]	Grapefruit Juice—Sweetened	681	
	37	" " — "	681	
oz.	[illegible]	Grapefruit & Orange Juices—Unswtd.	685	$ 2.77
	37	" " " — "	685	$ 1.22
oz.	[illegible]	Grapefruit & Orange Juices—Swtd.	686	
	37	" " " — "	686	
oz.	[illegible]	Valencia Orange Juice—Unsweetened	260	
	[illegible]	" " " — "	260	
oz.	[illegible]	" " " — "	260	
oz.	[illegible]	Valencia Orange Juice—Sweetened	261	
	[illegible]	" " " — "	261	
oz.	[illegible]	" " " — "	261	

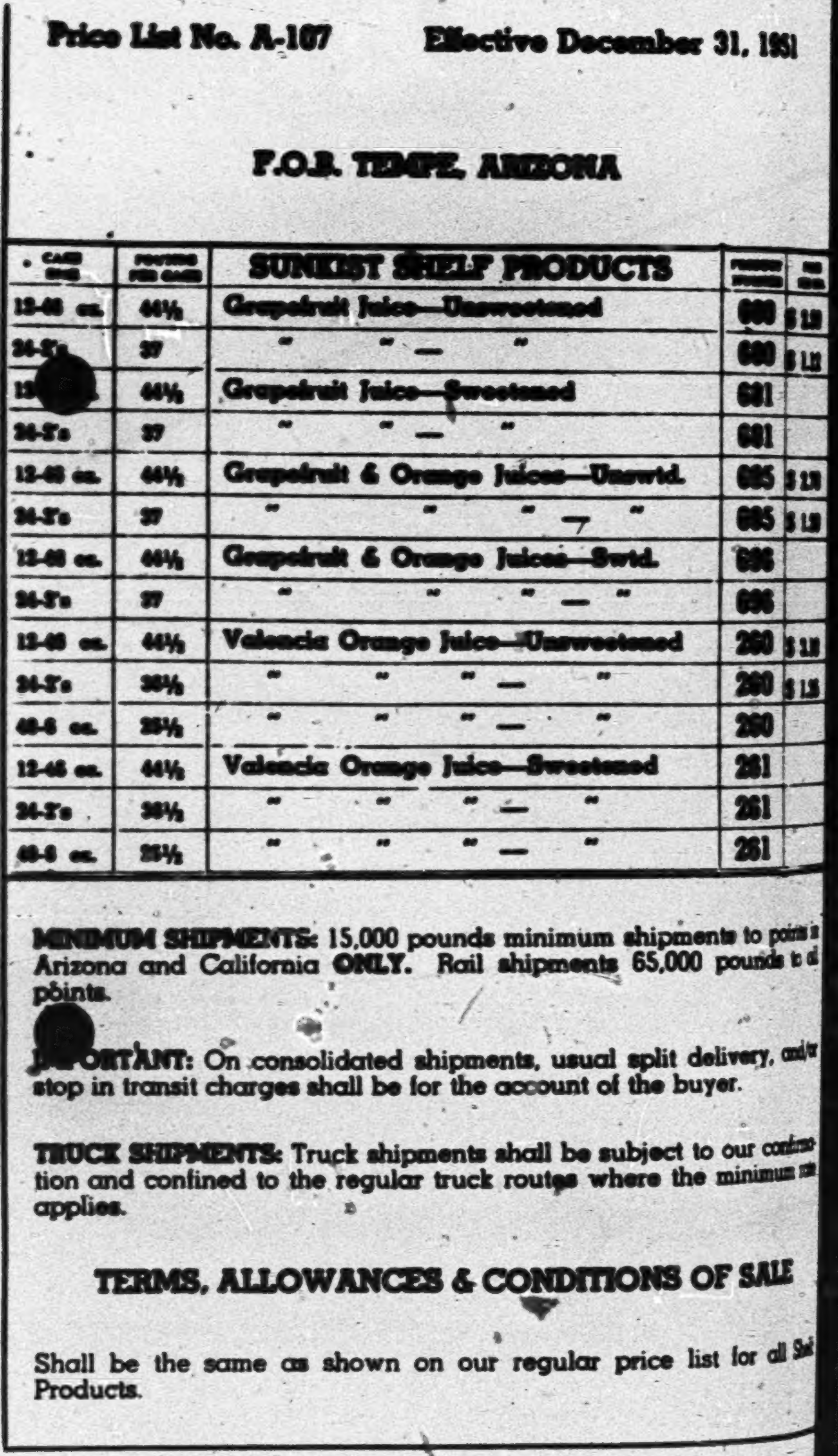
[illegible]: 15,000 pounds minimum shipments to points in zona and California ONLY. Rail shipments 65,000 pounds to all nts.

[illegible]: On consolidated shipments, usual split delivery, and/or in transit charges shall be for the account of the buyer

[illegible]: Truck shipments shall be subject to our confirma- and confined to the regular truck routes where the minimum rate plies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

ll be the same as shown on our regular price list for all Shell ducts



Price List No. A-107 **Effective December 31, 1951**

F.O.B. TEMPE, ARIZONA

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
12-46 oz.	44½	Grapefruit Juice—Unsweetened	600	$ 1.1
24-2's	37	" " — "	600	$ 1.1
1[illegible]	44½	Grapefruit Juice—Sweetened	601	
24-2's	37	" " — "	601	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	605	$ 2.1
24-2's	37	" " " — "	605	$ 1.1
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	606	
24-2's	37	" " " — "	606	
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	$ 1.1
24-2's	38½	" " " — "	260	$ 1.1
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	38½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

[illegible]PORTANT: On consolidated shipments, usual split delivery, and/or stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shelf Products.

6

THESE QUOTATIONS APPLY ON SALES IN

PRICES F.O.B. SHIPPING POINT

SUNKIST SHELF PRODUCTS

			[illegible]	[illegible]
[illegible]		Pure Lemon Juice	360	$ .82
[illegible]	[illegible]	Valencia Orange Juice—Unsweetened	260	$ 2.80
[illegible]	[illegible]	" " " — "	260	$ 1.22½
[illegible] oz.	25½	" " " — "	260	$ .80
[illegible] 16 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2s	36½	" " — "	261	
48 6 oz.	25½	" " — "	261	
12-46 oz.	41	Grapefruit & Orange Juices—Unswtd.	695	
24-2s	37	" " " — "	695	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
[illegible]	37	" " " — "	696	

EXCHANGE BRAND OR BUYER'S LABEL*

48 5½ oz.	23	Pure Lemon Juice	316	$ .82
6 1 gal.	57	" " "	316	$14.40
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	53	$ 2.73
24-2s	36½	" " " — "	53	$ 1.20
12-46 oz.	44½	Valencia Orange Juice—Sweetened	52	
24-2s	36½	" " " — "	52	
12-46 oz.	44½	Grapefruit Juice—Unsweetened	603	$ 2.11
24-2s	37	" " — "	603	$ .95
12-46 oz.	44½	Grapefruit Juice—Sweetened	602	
24-2s	37	" " — "	602	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	634	$ 2.53
24-2s	37	" " " — "	634	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	635	
24-2s	37	" " " — "	635	

IN CALIFORNIA AND ARIZONA ONLY

PRICES EX WAREHOUSE WHERE STOCKED

CASE SIZE	[illegible] PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	23	Pure Lemon Juice	360	$ .86
24-6 oz.	15	Concentrate for Lemonade	361	$ 1.35
24-6 oz.	15	Concentrate for Orangeade	250	$ 1.42½
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	280	
24-2's	30½	" " " — "	280	
		EXCHANGE SHELF PRODUCTS		
48-5½ oz.	24	Pure Lemon Juice	316	$ .86
8/1 gal.	90	" " "	316	$10.40
48-6 oz.	33	Lemonade Base	319	$ 1.00
24-6 oz.	15	" "	319	$ 1.00
48-6 oz.	31	Orangeade Base	27	$ 1.25
24-6 oz.	15	" "	27	$ 1.25

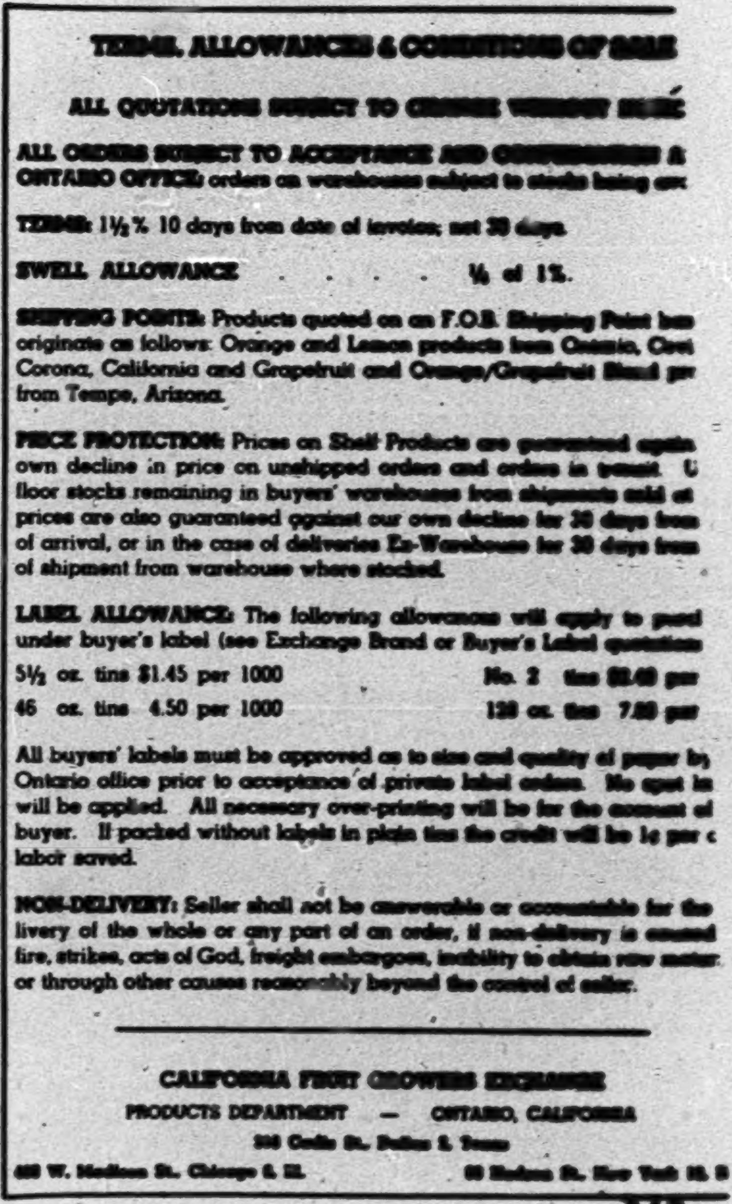
EX CAR ON ARRIVAL AT WAREHOUSE

Shell Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices:

CASE SIZE	PER DOZ. TINS	CASE SIZE	PER DOZ. TINS
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		8/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

[fol. 313]



TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTI

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION A
ONTARIO OFFICE; orders on warehouses subject to stocks being av

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . ⅛ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point bas
originate as follows: Orange and Lemon products from Ontario, Ora
Corona, California and Grapefruit and Orange/Grapefruit Blend pr
from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed again
own decline in price on unshipped orders and orders in transit. U
floor stocks remaining in buyers' warehouses from shipments sold at
prices are also guaranteed against our own decline for 30 days from
of arrival, or in the case of deliveries Ex-Warehouse for 30 days from
of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to prod
under buyer's label (see Exchange Brand or Buyer's Label quotations

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per
46 oz. tins 4.50 per 1000	120 oz. tins 7.80 per

All buyers' labels must be approved as to size and quality of paper by
Ontario office prior to acceptance of private label orders. No spot la
will be applied. All necessary over-printing will be for the account of
buyer. If packed without labels in plain tins the credit will be 1¢ per c
labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the
livery of the whole or any part of an order, if non-delivery is caused
fire, strikes, acts of God, freight embargoes, inability to obtain raw mater
or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA
[illegible] Cadiz St., Dallas 2, Texas
420 W. Madison St., Chicago 6, Ill. 90 Hudson St., New York 13, N

[fol. 314]

8-4

Sunkist Citrus Products News

December 31, 1951

To Our Brokers:

HAPPY NEW YEAR

With this issue of our price list, the New Year becomes a reality, and with it we extend to you and yours warmest greetings of the new season. May it bring you happiness and prosperity.

LEAP YEAR

As usual, leap year is election year and presidential campaigns will be in full swing ere long. However, our own campaign will unfold in mid-January when we greet you at the National Food Brokers Convention in Atlantic City January 19-23.

RESOLUTION

We sincerely resolve to do our very best in giving you more and better service during the new year. We also promise continuing competitive prices on all citrus products as well as maintaining the standard of quality under the Sunkist trademark.

THE ATMOSPHERE

It's been filled with turkeys lately and with footballs at the Bowl games on New Year's. But, the air is getting charged with Convention talk, so let's make the most of it before the train pulls away from the depot.

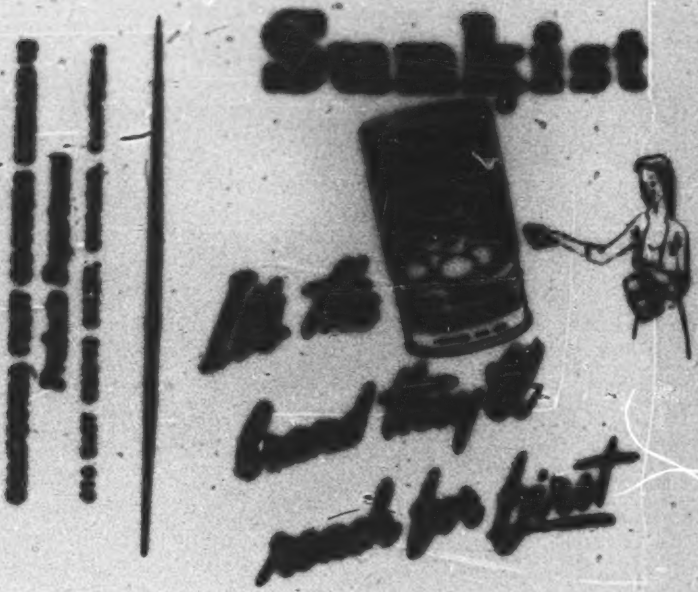
Sunkist
CITRUS PRODUCTS
PRICE LIST No. W-107

Effective December 31, 1951

Cancelling All Previous Quotations

"the most complete line of quality citrus products under one label!"

Sunkist . . . the brand they'll reach for first!


Sunkist

9-1

THESE QUOTATIONS DO NOT APPLY ON

PRICES F.O.B. SHIPPING POINT

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	Pure Lemon Juice	[illegible]	$ .40
[illegible]	[illegible]	Valencia Orange Juice—Unsweetened	[illegible]	$ [illegible]
[illegible]	[illegible]	" " " "	[illegible]	$ 1.10
[illegible]	[illegible]	" " " "	[illegible]	$ [illegible]
[illegible]	[illegible]	Valencia Orange Juice—Sweetened	[illegible]	
[illegible]	[illegible]	" " " "	[illegible]	
[illegible]	[illegible]	" " " "	[illegible]	
[illegible]	[illegible]	Grapefruit & Orange Juices—Blended	[illegible]	
[illegible]	[illegible]	" " " "	[illegible]	
[illegible]	[illegible]	Grapefruit & Orange Juices—Sweet.	[illegible]	
[illegible]	[illegible]	" " " "	[illegible]	

MERCHANDISE PACKED ON BUYER'S LABEL*

[illegible]	[illegible]	Pure Lemon Juice	[illegible]	$ .40
[illegible]	[illegible]	" " "	[illegible]	$[illegible]
[illegible]	[illegible]	Valencia Orange Juice—Unsweetened	[illegible]	$ [illegible]
[illegible]	[illegible]	" " " "	[illegible]	$ 1.10
[illegible]	[illegible]	Valencia Orange Juice—Sweetened	[illegible]	
[illegible]	[illegible]	" " " "	[illegible]	
[illegible]	[illegible]	Grapefruit Juice—Unsweetened	[illegible]	
[illegible]	[illegible]	" " "	[illegible]	
[illegible]	[illegible]	Grapefruit Juice—Sweetened	[illegible]	
[illegible]	[illegible]	" " "	[illegible]	
[illegible]	[illegible]	Grapefruit & Orange Juices—Blended	[illegible]	$ [illegible]
[illegible]	[illegible]	" " " "	[illegible]	
[illegible]	[illegible]	Grapefruit & Orange Juices—Sweet.	[illegible]	
[illegible]	[illegible]	" " " "	[illegible]	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

ON SALES IN CALIFORNIA AND ARIZONA

PRICES EX WAREHOUSE WHERE STOCKED

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	20	Pure Lemon Juice	300	$ .80
24-6 oz.	15	Concentrate for Lemonade	301	$ 1.35
24-6 oz.	15	Concentrate for Orangeade	330	$ 1.60½
12-46 oz.	60½	Valencia Orange Juice—Unsweetened	330	
24-2's	32½	" " " "	330	

		EXCHANGE SHELF PRODUCTS		
48-5½ oz.	25	Pure Lemon Juice	306	$ .80
6/1 gal.	59	" " "	306	$20.40
48-6 oz.	30	Lemonade Base	308	
24-6 oz.	15	" "	308	
48-6 oz.	30	Orangeade Base	27	
24-6 oz.	15	" "	27	

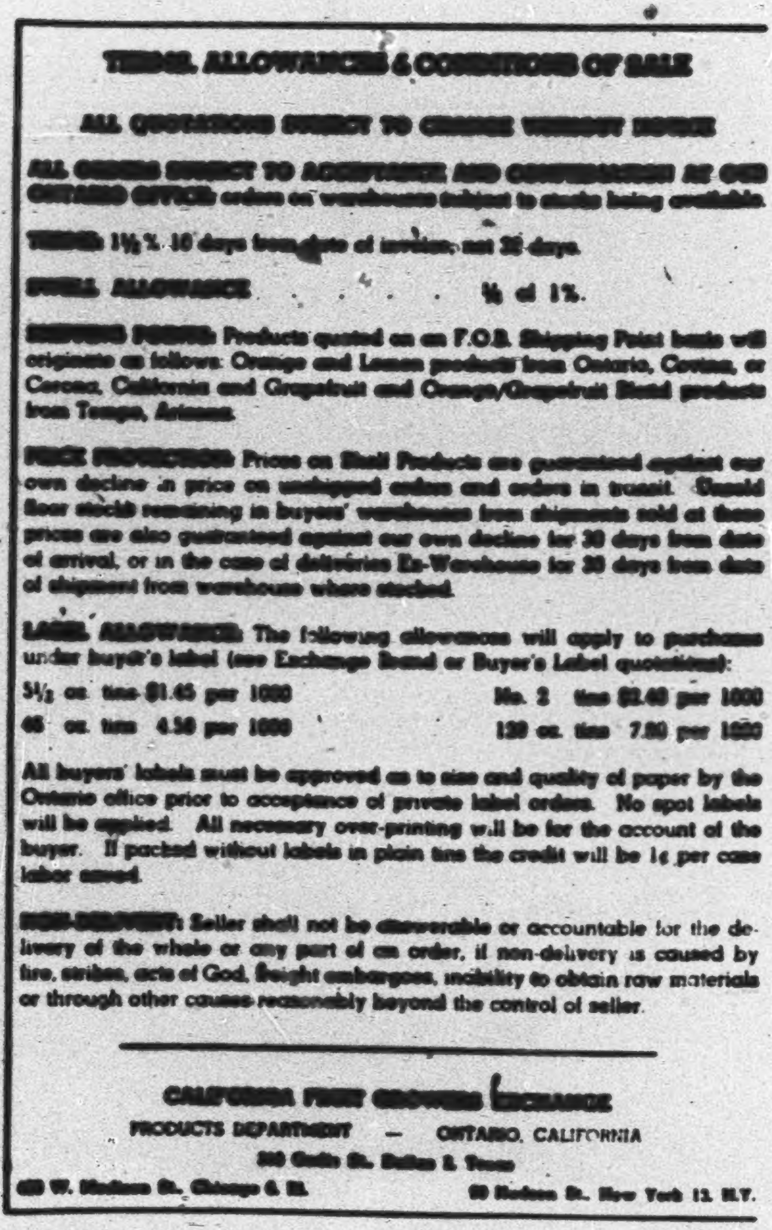
EX CAR ON ARRIVAL AT WAREHOUSE

Shell Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices

[illegible]	[illegible]	[illegible]	[illegible]
24-6 oz.		24-2's	
48-5½ oz.		12-46 oz.	
48-6 oz.		6/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Spaces Indicate Not Quoting



TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouse subject to stocks being available.

TERMS: 1½% 10 days from date of invoice, net 30 days.

SWELL ALLOWANCE . . . . . ½ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1000
46 oz. tins 4.30 per 1000	120 oz. tins 7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA
300 Cadiz St. Dallas 2, Texas
400 W. Madison St., Chicago 6, Ill.
90 Hudson St., New York 13, N.Y.

313

[illegible]

9-1

[illegible] Citrus Products News

[illegible]

To Our Customers

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

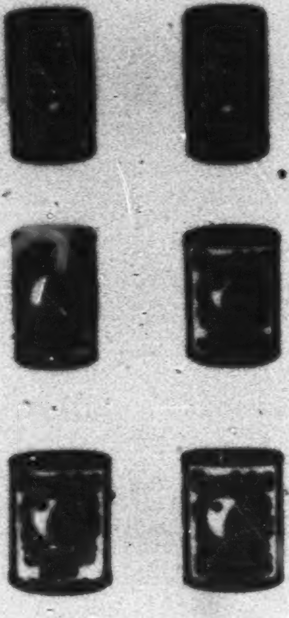
31

Sunkist
CITRUS PRODUCTS
PRICE LIST No. H-107

Effective December 31, [illegible]

Covering All Producer Operations

"The most complete line of quality citrus products under one label!"



Sunkist . . . the brand they'll reach for first!

Sunkist
It's the brand they'll reach for first
CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
ONTARIO, CALIFORNIA

rice List No. C-106 Effective December 3, 1951

DELIVERED IN CALIFORNIA ONLY

[illegible]	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
46 oz.	44½	Grapefruit Juice—Unsweetened	680	$ 2.57
[illegible]	37	" " — "	680	$ 1.14
46 oz.	44½	Grapefruit Juice—Sweetened	681	
[illegible]	37	" " — "	681	
46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	$ 2.77
[illegible]	37	" " " — "	695	$ 1.22
46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
[illegible]	37	" " " — "	696	
46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
[illegible]	38½	" " " — "	260	
[illegible] oz.	25½	" " " — "	260	
46 oz.	44½	Valencia Orange Juice—Sweetened	261	
[illegible]	38½	" " " — "	261	
[illegible] oz.	25½	" " " — "	261	

MUM SHIPMENTS: 15,000 pounds minimum shipments to points in izona and California **ONLY.** Rail shipments 65,000 pounds to all oints.

PORTANT: On consolidated shipments, usual split delivery, and/or top in transit charges shall be for the account of the buyer.

UCK SHIPMENTS: Truck shipments shall be subject to our confirma- n and confined to the regular truck routes where the minimum rate pplies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

all be the same as shown on our regular price list for all Shelf oducts.

[fol. 318]

Price List No. A-106 **Effective December 3, 1951**

F.O.B. TEMPE, ARIZONA

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER CS.
12-46 oz.	44½	Grapefruit Juice—Unsweetened	680	$ 2.50
24-2's	37	" " — "	680	$ 1.12
12-46 oz.	44½	Grapefruit Juice—Sweetened	681	
24-2's	37	" " — "	681	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	$ 2.70
24-2's	37	" " " — "	695	$ 1.28
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2's	37	" " " — "	696	
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	$ 3.10
24-2's	38½	" " " — "	260	$ 1.25
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	38½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

IMPORTANT: On consolidated shipments, usual split delivery, and/or stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shelf Products.

THESE QUOTATIONS APPLY ON SALES

PRICES F.O.B. SHIPPING POINT

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	23	Pure Lemon Juice	[illegible]	$ [illegible]
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	[illegible]	$ [illegible]
24-2's	30½	" " " — "	[illegible]	$ [illegible]
48-6 oz.	25½	" " " — "	[illegible]	$ [illegible]
12-46 oz.	44½	Valencia Orange Juice—Sweetened	[illegible]	
24-2's	30½	" " " — "	[illegible]	
48-6 oz.	25½	" " " — "	[illegible]	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	[illegible]	
24-2's	37	" " " — "	[illegible]	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	[illegible]	
24-2's	37	" " " — "	[illegible]	

EXCHANGE BRAND OR BUYER'S LABEL*

48-5½ oz.	23	Pure Lemon Juice	316	$ .32
6 1 gal.	57	" " "	316	$14.40
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	53	$ 2.73
24-2's	30½	" " " — "	53	$ 1.29
12-46 oz.	44½	Valencia Orange Juice—Sweetened	52	
24-2's	30½	" " " — "	52	
12-46 oz.	44½	Grapefruit Juice—Unsweetened	603	$ 2.11
24-2's	37	" " — "	603	$ .95
12-46 oz.	44½	Grapefruit Juice—Sweetened	602	
24-2's	37	" " — "	602	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	634	$ 2.53
24-2's	37	" " " — "	634	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	635	
24-2's	37	" " " — "	635	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

IN CALIFORNIA AND ARIZONA ONLY

PRICES EX WAREHOUSE WHERE STOCKED

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	23	Pure Lemon Juice	360	$ .88
24-6 oz.	15	Concentrate for Lemonade	381	$ 1.35
24-6 oz.	15	Concentrate for Orangeade	250	$ 1.42½
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	280	
24-2's	30½	" " " — "	280	

EXCHANGE SHELF PRODUCTS

48-5½ oz.	24	Pure Lemon Juice	316	$ .88
8/1 gal.	80	" " "	316	$10.40
48-6 oz.	29	Lemonade Base	319	$ 1.00
24-6 oz.	15	" "	319	$ 1.00
48-6 oz.	31	Orangeade Base	27	$ 1.25
24-6 oz.	15	" "	27	$ 1.25

EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices:

CASE SIZE	PER DOZ. TINS	CASE SIZE	PER DOZ. TINS
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		8/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse

Blank Squares Indicate Not Quoting

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available.

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . . ¼ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival; or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins	$1.45	per 1000	No. 2 tins	$2.40	per 1000
46 oz. tins	4.50	per 1000	128 oz. tins	7.80	per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA

318 Cadiz St., Dallas 2, Texas

600 W. Madison St., Chicago 6, Ill.   90 Hudson St., New York 13, N.Y.

10-4

Sunkist Citrus Products News

December 3, 1951

To Our Brokers

SUGGESTION

We wish to emphasize again the importance of covering all buyers — particularly through retail work — regarding our new prices on Sunkist Concentrates for Lemonade and Orangeade. Our prices are competitive and our quality is incomparable. Therefore, you have an excellent recipe for steady sales whereby you'll be keeping buyer's stocks properly supplied. Furthermore, prices might be higher in the spring.

THE ATMOSPHERE

Where's Santa Claus?

OUTLOOK

It's mostly about the Bowl football games on New Year's Day, and speaking of the New Year, here's wishing you the happiest and most joyful of all.

320

Sunkist

CITRUS PRODUCTS

PRICE LIST No. W-106

Effective December 3, 1951

Cancelling All Previous Quotations

"the most complete line of quality citrus products under one label!"

Sunkist
Sunkist

Sunkist . . . the brand they'll reach for first!

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkis
It's the brand they'll reach for first

11-1

THESE QUOTATIONS DO NOT APPLY ON

PRICES F.O.B. SHIPPING POINT

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	33	Pure Lemon Juice	380	$ .82
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	280	$ 2.50
24-2's	39½	" " " — "	280	$ 1.10
48-6 oz.	29½	" " " — "	280	$ .55
12-46 oz.	44½	Valencia Orange Juice—Sweetened	281	
24-2's	39½	" " " — "	281	
48-6 oz.	29½	" " " — "	281	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	685	
24-2's	37	" " " — "	685	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	686	
24-2's	37	" " " — "	686	

EXCHANGE BRAND OR BUYER'S LABEL*

48-5½ oz.	33	Pure Lemon Juice	316	$ .82
6/1 gal.	37	" " "	316	$14.40
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	53	$ 2.50
24-2's	39½	" " " — "	53	$ 1.10
12-46 oz.	44½	Valencia Orange Juice—Sweetened	52	$ .56
24-2's	39½	" " " — "	52	
12-46 oz.	44½	Grapefruit Juice—Unsweetened	603	
24-2's	37	" " — "	603	
12-46 oz.	44½	Grapefruit Juice—Sweetened	602	
24-2's	37	" " — "	602	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	634	$ 2.53
24-2's	37	" " " — "	634	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	635	
24-2's	37	" " " — "	635	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

ON SALES IN CALIFORNIA AND ARIZONA

PRICES EX WAREHOUSE WHERE STOCKED

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	28	Pure Lemon Juice	300	$ .90
24-6 oz.	15	Concentrate for Lemonade	301	$ 1.25
24-6 oz.	15	Concentrate for Orangeade	250	$ 1.42½
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	280	
24-2's	30½	" " " "	280	

EXCHANGE SHELF PRODUCTS

48-5½ oz.	24	Pure Lemon Juice	316	$ .93
6/1 gal.	50	" " "	316	$16.48
48-6 oz.	28	Lemonade Base	319	
24-6 oz.	15	" "	319	
48-6 oz.	31	Orangeade Base	27	
24-6 oz.	15	" "	27	

EX CAR ON ARRIVAL AT WAREHOUSE

Shell Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices:

CASE SIZE	PER DOZ. TINS	CASE SIZE	PER DOZ. TINS
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		6/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Squares Indicate Not Quoting

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO *ACCEPTANCE AND* CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available.

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . . . ⅛ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1000
46 oz. tins 4.50 per 1000	128 oz. tins 7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA

[illegible] Cadiz St. Dallas [illegible] Texas

[illegible] W. Madison St. Chicago 6, Ill.   [illegible] Hudson St. New York 13, N.Y.

321

11-2

Sunkist Citrus Products News

December 3, 1951

To Our Brokers:

SUGGESTION

We wish to emphasize again the importance of covering all buyers — particularly through retail work — regarding our new prices on Sunkist Concentrates for Lemonade and Orangeade. Our prices are competitive and our quality is incomparable. Therefore, you have an excellent recipe for steady sales whereby you'll be keeping buyer's stocks properly supplied. Furthermore, prices might be higher in the spring.

THE ATMOSPHERE

Where's Santa Claus?

OUTLOOK

It's mostly about the Bowl football games on New Year's Day, and speaking of the New Year, here's wishing you the happiest and most joyful of all.

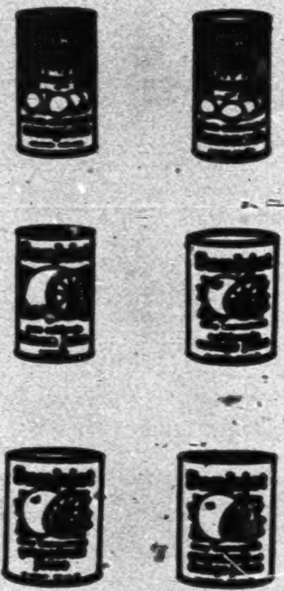
322

Sunkist
CITRUS PRODUCTS
PRICE LIST No. N-106

Effective December 3, 1951

Cancelling All Previous Quotations

"the most complete line of quality citrus products under one label!"



Sunkist . . . the brand they'll reach for first!

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkist
It's the brand they'll reach for first

[fol. 323]

Price List No. C-105 **Effective November 5, 1951**

DELIVERED IN CALIFORNIA ONLY

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
12-46 oz.	44½	Grapefruit Juice—Unsweetened	680	$ 2.57
24-2's	37	" " — "	680	$ 1.14
12-46 oz.	44½	Grapefruit Juice—Sweetened	681	
24-2's	37	" " — "	681	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	$ 2.77
24-2's	37	" " " — "	695	$ 1.22
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2's	37	" " " — "	696	
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2's	36½	" " " — "	260	
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	36½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

IMPORTANT: On consolidated shipments, usual split delivery, and/or stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shelf Products.

323

Price List No. A-165 **Effective November 5, 1951**

F.O.B. TEMPE, ARIZONA

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	[illegible]
12-46 oz.	44½	Grapefruit Juice—Unsweetened	680	$ 2.50
24-2's	37	" " — "	680	$ 1.12
12-46 oz.	44½	Grapefruit Juice—Sweetened	681	
24-2's	37	" " — "	681	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	$ 2.70
24-2's	37	" " " — "	695	$ 1.20
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2's	37	" " " — "	696	
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2's	38½	" " " — "	260	
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	38½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

IMPORTANT: On consolidated shipments, usual split delivery, and/or stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shelf Products.

324

THESE QUOTATIONS APPLY ON SALES

PRICES F.O.B. SHIPPING POINT

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-3½ oz.	23	Pure Lemon Juice	300	$ .02
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	200	$ 2.00
24-2's	30½	" " " — "	200	$ 1.22½
48-6 oz.	23½	" " " — "	200	$ .08
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	30½	" " " — "	261	
48-6 oz.	23½	" " " — "	261	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	605	
24-2's	37	" " " — "	605	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	606	
24-2's	37	" " " — "	606	

EXCHANGE BRAND OR BUYER'S LABEL*

48-3½ oz.	23	Pure Lemon Juice	316	$ .02
6/1 gal.	57	" " "	316	$14.00
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	53	
24-2's	30½	" " " — "	53	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	52	
24-2's	30½	" " " — "	52	
12-46 oz.	44½	Grapefruit Juice—Unsweetened	603	
24-2's	37	" " — "	603	
12-46 oz.	44½	Grapefruit Juice—Sweetened	602	
24-2's	37	" " — "	602	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	634	$ 2.50
24-2's	37	" " " — "	634	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	635	
24-2's	37	" " " — "	635	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

IN CALIFORNIA AND ARIZONA ONLY

PRICES EX WAREHOUSE WHERE STOCKED

CASE SIZE	[illegible] PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	25	Pure Lemon Juice	300	$ .96
24-6 oz.	15	Concentrate for Lemonade	301	$ 1.45
24-6 oz.	15	Concentrate for Orangeade	250	$ 1.67½
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	280	
24-2's	38½	" " " — "	280	

EXCHANGE SHELF PRODUCTS

CASE SIZE	[illegible] PER CASE	EXCHANGE SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	26	Pure Lemon Juice	316	$ .96
6/1 gal.	26	" " "	316	$10.40
48-6 oz.	29	Lemonade Base	319	$ 1.20
24-6 oz.	15	" "	319	$ 1.20
48-6 oz.	31	Orangeade Base	27	$ 1.58½
24-6 oz.	15	" "	27	$ 1.58½

EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices:

CASE SIZE	PER DOZ. TINS	CASE SIZE	PER DOZ. TINS
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		6/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Squares Indicate Not Quoting

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . . ⅛ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis wil originate as follows: Orange and Lemon products from Ontario, Covina, o Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against ou own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1000
46 oz. tins 4.50 per 1000	128 oz. tins 7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA
318 Cadiz St., Dallas 2, Texas
[illegible] W. Madison St., Chicago 6, Ill.
90 Hudson St., New York 13, N.Y.

12-4

Sunkist Citrus Products News

November 5, 1951

TO ALL BROKERS:

On November 1, 1951 we started a new marketing year which naturally causes us to review with you the progress made this past season under the **Sunkist** label. While it is true that we did not have the **Sunkist** label available for the full season in all markets, yet, we look with pride upon our joint accomplishments. Despite production and shipping delays, in most instances caused by the tight regulations attributed to the rearmament program, we feel that our progress was most substantial.

As a progress report to you, we wish to advise that in the past year we have had sales substantially in excess of those in the 1950 season for most of our shelf items but particularly single strength orange and lemon juices and the "ades." With a full year ahead of us and many of the problems incident to the development of a new label behind us, it is our confident belief, barring crop failures, that the coming year will be the greatest in our history insofar as the shelf items are concerned. We have endeavored to follow an aggressive merchandising and pricing program to accomplish our objective of making **Sunkist** an outstanding consumer label for our shelf items. We intend to continue this program, and with your continued cooperation we know that we will succeed.

PRICE CHANGE

We call your attention to an important change in this price bulletin on **Sunkist** Lemon Juice. Effective November 5, 1951 the f.o.b. price on our 48/5½ oz. **Sunkist** Lemon Juice is being reduced to .82 cents a dozen. The ex-warehouse price is also being reduced to reflect the change in our f.o.b. price. With **Sunkist** Lemon Juice now being sold at this very competitive price you should show a substantial improvement in your winter sales of this item. With an ever expanding demand for this item, particularly during the winter months, with colds at their peak, we know you will take full advantage of this change.

Sincerely

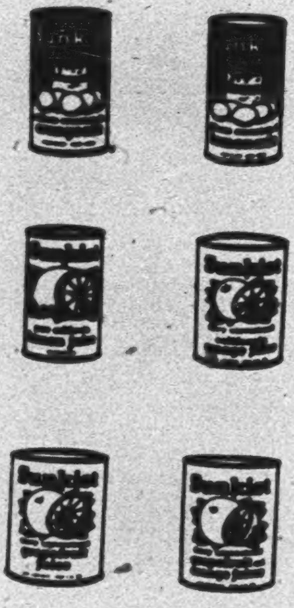
Sunkist
CITRUS PRODUCTS

PRICE LIST No. W-105

Effective November 5, 1951

Cancelling All Previous Quotations

"the most complete line of __quality__ citrus products under one label!"


Sunkist
Sunkist
Sunkist
Sunkist

.IFORNIA FRUIT GROWERS EXCHANGE
Products Department
EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkis
It's the
brand they'll

13-1

THESE QUOTATIONS DO NOT APPLY ON

PRICES F.O.B. SHIPPING POINT

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	23	Pure Lemon Juice	300	$ .02
12-46 oz.	40½	Valencia Orange Juice—Unsweetened	300	
24-2's	35½	" " " — "	300	
48-6 oz.	20½	" " " — "	300	
12-46 oz.	40½	Valencia Orange Juice—Sweetened	331	
24-2's	35½	" " " — "	331	
48-6 oz.	20½	" " " — "	331	
12-46 oz.	40½	Grapefruit & Orange Juices—Unswtd.	305	
24-2's	37	" " " — "	305	
12-46 oz.	40½	Grapefruit & Orange Juices—Swtd.	305	
24-2's	37	" " " — "	305	

EXCHANGE BRAND OR BUYER'S LABEL*

48-5½ oz.	23	Pure Lemon Juice	316	$ .02
6/1 gal.	37	" " "	316	$14.40
12-46 oz.	40½	Valencia Orange Juice—Unsweetened	33	
24-2's	35½	" " " — "	33	
12-46 oz.	40½	Valencia Orange Juice—Sweetened	32	
24-2's	35½	" " " — "	32	
12-46 oz.	40½	Grapefruit Juice—Unsweetened	030	
24-2's	37	" " — "	030	
12-46 oz.	40½	Grapefruit Juice—Sweetened	032	
24-2's	37	" " — "	032	
12-46 oz.	40½	Grapefruit & Orange Juices—Unswtd.	034	$ 2.55
24-2's	37	" " " — "	034	
12-46 oz.	40½	Grapefruit & Orange Juices—Swtd.	036	
24-2's	37	" " " — "	036	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

[illegible]

9

[illegible]

319

[illegible]

[illegible] Citrus Products News

[illegible] 3, 1954

TO ALL [illegible]:

[illegible]

[illegible]

[illegible]

[illegible]

Sincerely,

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT

328

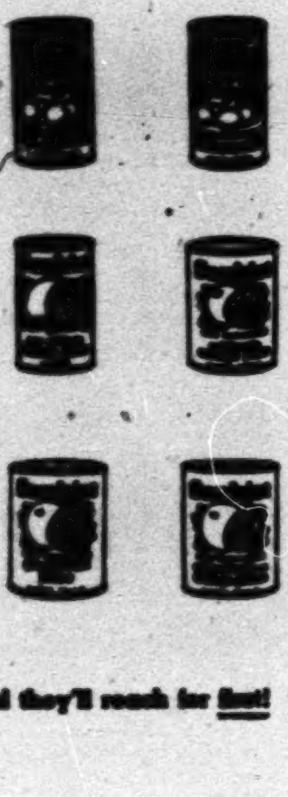
Sunkist
CITRUS PRODUCTS

PRICE LIST No. N-105

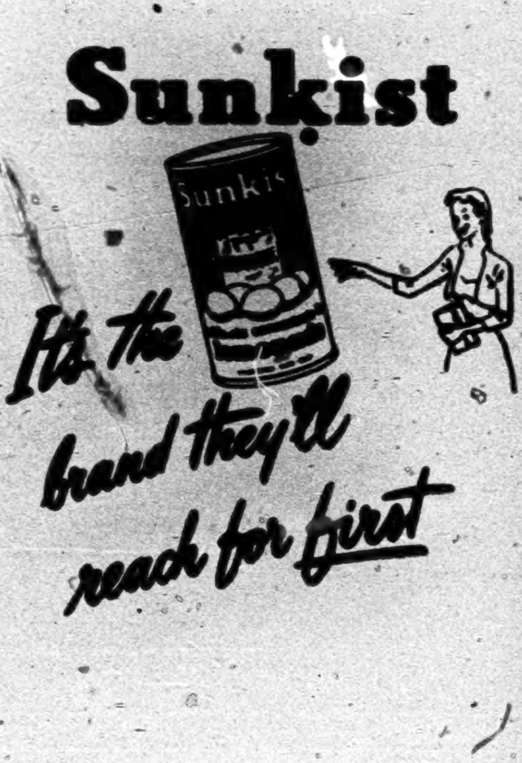
Effective November 5, 1951

Cancelling All Previous Quotations

"the most complete line of quality citrus products under one label!"



Sunkist . . . the brand they'll reach for first!


Sunkist
Sunkist
It's the brand they'll reach for first

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

[fol. 329]

Price List No. C-104 **Effective October 22, 1951**

DELIVERED IN CALIFORNIA ONLY

	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
oz.	44½	Grapefruit Juice—Unsweetened	680	$ 2.57
	37	" " — "	680	$ 1.14
oz.	44½	Grapefruit Juice—Sweetened	681	
	37	" " — "	681	
oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	$ 2.77
	37	" " " — "	695	$ 1.22
oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
	37	" " " — "	696	
oz.	44½	Valencia Orange Juice—Unsweetened	260	
	36½	" " " — "	260	
oz.	25½	" " " — "	260	
oz.	44½	Valencia Orange Juice—Sweetened	261	
	36½	" " " — "	261	
oz.	25½	" " " — "	261	

MUM SHIPMENTS: 15,000 pounds minimum shipments to points in izona and California **ONLY.** Rail shipments 65,000 pounds to all ints.

PORTANT: On consolidated shipments, usual split delivery, and/or p in transit charges shall be for the account of the buyer.

CK SHIPMENTS: Truck shipments shall be subject to our confirma- and confined to the regular truck routes where the minimum rate plies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

all be the same as shown on our regular price list for all Shelf oducts.

Price List No. A-104 **Effective October 22, 1951**

F.O.B. TEMPE, ARIZONA

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DZ.
12-46 oz.	44½	Grapefruit Juice—Unsweetened	680	$ 2.1
24-2's	37	" " — "	680	$ 1.12
12-46 oz.	44½	Grapefruit Juice—Sweetened	681	
24-2's	37	" " — "	681	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	$ 2.7
24-2's	37	" " " — "	695	$ 1.1
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2's	37	" " " — "	696	
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2's	38½	" " " — "	260	
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	38½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

IMPORTANT: On consolidated shipments, usual split delivery, and/or stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shell Products.

THESE QUOTATIONS APPLY ON SALES

PRICES F.O.B. SHIPPING POINT

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
60-3½ oz.	22	Pure Lemon Juice	380	$ .80
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	$ 2.80
24-2's	30½	" " " — "	260	$ 1.22½
48-6 oz.	25½	" " " — "	260	$ .80
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	30½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	605	
24-2's	37	" " " — "	605	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	606	
24-2's	37	" " " — "	606	

EXCHANGE BRAND OR BUYER'S LABEL*

60-3½ oz.	22	Pure Lemon Juice	316	$ .82
6-1 gal.	37	" " "	316	$14.40
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	53	
24-2's	30½	" " " — "	53	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	52	
24-2's	30½	" " " — "	52	
12-46 oz.	44½	Grapefruit Juice—Unsweetened	603	
24-2's	37	" " — "	603	
12-46 oz.	44½	Grapefruit Juice—Sweetened	602	
24-2's	37	" " — "	602	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	634	$ 2.53
24-2's	37	" " " — "	634	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	635	
24-2's	37	" " " — "	635	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

CALIFORNIA AND ARIZONA ONLY

PRICES EX WAREHOUSE WHERE STOCKED

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	20	Pure Lemon Juice	380	$ .93
24-6 oz.	15	Concentrate for Lemonade	381	$ 1.45
24-6 oz.	15	Concentrate for Orangeade	250	$ 1.87½
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2's	30½	" " " — "	260	

EXCHANGE SHELF PRODUCTS

CASE SIZE	POUNDS PER CASE	EXCHANGE SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	24	Pure Lemon Juice	316	$ .88
6/1 gal.	39	" " "	316	$16.40
48-6 oz.	29	Lemonade Base	319	$ 1.30
24-6 oz.	15	" "	319	$ 1.30
48-6 oz.	31	Orangeade Base	27	$ 1.58¼
24-6 oz.	15	" "	27	$ 1.58¼

EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices:

CASE SIZE	PER DOZ. [illegible]	CASE SIZE	PER DOZ. [illegible]
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		6/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Squares Indicate Not [illegible]

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . . ¼ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1000
46 oz. tins 4.50 per 1000	128 oz. tins 7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA

318 Cadiz St., Dallas 2, Texas

400 W. Madison St., Chicago 6, Ill. 90 Hudson St., New York 13, N.Y.

14-4

Sunkist Citrus Products News

October 22, 1951

TO OUR BROKERS:

PROVERB

Aesop once said that a bird in hand was worth two in the bush. How right he was. Keep that old proverb in mind and don't let your customers put off buying Sunkist Valencia Orange Juice until too late. Last week we withdrew from all markets except California and Arizona. Your market may be next Therefore take a tip from Aesop and protect your buyers now while stocks are still availablle.

THE ATMOSPHERE

It's filled with footballs.

BATTING AVERAGES

Two weeks ago we organized a winter grapefruit league, featuring our all-star aggregation of Sunkist players. Some teams really started hitting, others got off to a slow start. However, it's the finish that counts, so keep swinging away. Your equipment is top quality, for there is none better than Sunkist Grapefruit Juice and Sunkist Grapefruit and Orange Juice Blend.

WINTER WONDERLAND

With winter weather merely a conjecture at this stage, we hope you are not overlooking opportunities to continue selling Sunkist concentrates for Lemonade and Orangeade as well as Sunkist Pure Lemon Juice. They're as natural in your markets as the Golden Gate, the Grand Canyon, the Rose Bowl, and the Salton Sea.

Sincerely,

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT

Sunkist
CITRUS PRODUCTS

PRICE LIST No. W-104

Effective October 22, 1951

Cancelling All Previous Quotations

"the most complete line of quality citrus products under one label!"

Sunkist
Sunkist
Sunkist
Sunkist
Sunkist
Sunkist

Sunkist . . . the brand they'll reach for first!

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkist
It's the brand they'll reach for first

15-1

THESE QUOTATIONS DO NOT APPLY

PRICES F.O.B. SHIPPING POINT

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-3½ oz.	23	Pure Lemon Juice	360	$ .80
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2s	36½	" " " — "	260	
48-6 oz.	23½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2s	36½	" " " — "	261	
48-6 oz.	23½	" " " — "	261	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	
24-2s	37	" " " — "	695	
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2s	37	" " " — "	696	

EXCHANGE BRAND OR BUYER'S LABEL*

48-3½ oz.	23	Pure Lemon Juice	316	$ .82
6-1 gal.	57	" " "	316	$14.60
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	53	
24-2s	36½	" " " — "	53	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	52	
24-2s	36	" " " — "	52	
12-46 oz.	44½	Grapefruit Juice—Unsweetened	603	
24-2s	37	" " — "	603	
12-46 oz.	44½	Grapefruit Juice—Sweetened	602	
24-2s	37	" " — "	602	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	634	$ 2.50
24-2s	37	" " " — "	634	
12-46 oz.	44	Grapefruit & Orange Juices—Swtd.	635	
24-2s	37	" " " — "	635	

Buyer's Label Prices Are the Same As Exchange Brand Quotations

ON SALES IN CALIFORNIA AND ARIZONA

PRICES EX WAREHOUSE WHERE STOCKED

[illegible]	[illegible]	SUNKIST SHELF PRODUCTS	[illegible]	[illegible]
48-3½ oz.	22	Pure Lemon Juice	300	$ 1.60
24-6 oz.	15	Concentrate for Lemonade	301	$ 1.45
24-6 oz.	15	Concentrate for Orangeade	290	$ 1.07½
12-46 oz.	49½	Valencia Orange Juice—Unsweetened	300	
24-2's	30½	" " " " "	300	

		EXCHANGE SHELF PRODUCTS		
48-3½ oz.	28	Pure Lemon Juice	316	$ .80
6 1 gal.	30	" " "	316	$22.40
48-6 oz.	30	Lemonade Base	319	
24-6 oz.	15	" "	319	
48-6 oz.	31	Orangeade Base	27	
24-6 oz.	15	" "	27	

EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped on [illegible] of our [illegible] warehouses may be quoted Ex [illegible] allowance [illegible] the Ex Warehouse Prices.

Or

CASE SIZE	[illegible]	CASE SIZE	[illegible]
24-6 oz.		24-2's	
48-3½ oz.		24-46 oz.	
48-6 oz.		6 1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Squares Indicate Not Qu[illegible]

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available.

TERMS: 1½% 10 days from date of invoice, net 30 days

SWELL ALLOWANCE ½ of 1%

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis originate as follows: Orange and Lemon products from Ontario, California, or Corona, California and Grapefruit and Orange/Grapefruit blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Merchandise stocks remaining in buyers' warehouses from shipments made at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCES: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's label quotations):

3½ oz. tins $1.45 per 1000	No. 2 tins $[illegible] per 1000
46 oz. tins 4.50 per 1000	128 oz. tins 7.00 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1c per case labor saved.

NON-DELIVERY: Seller shall not be responsible or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA
[illegible] St. Dallas 1, Texas
[illegible] W. Madison St. Chicago 6, Ill. **[illegible] St. New York 13, N.Y.**

35

15-1

Sunkist Citrus Products News

October 22, 1934

TO OUR BROKERS:

PROVERB

Aesop once said that a bird in the hand was worth two in the bush. How right he was. We think that old proverb aptly applies to our Sunkist Valencia Orange Juice, for those customers who delayed buying until too late may not have another opportunity to purchase until next summer. We had to withdraw just when sales were hitting the high water mark, and as we were getting into the thick of things in this our last year under the Sunkist Label.

CALIFORNIA VALENCIA ORANGE JUICE

Pack starts July, 1935.

GOOD NEWS.

The very same brokers are selling Sunkist Lemonade and Orangeade since Labor Day, we suggest that they're earning the extra profits for a New Year's Day trip to California and a vacation. If you keep retailers and wholesalers stocks up to proper levels, you'll be doing your customers a favor, yourself an honest job.

THE ATMOSPHERE

It's filled with football.

Sincerely,

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT

Sunkist
CITRUS PRODUCTS

PRICE LIST No. N-104

Effective October 22, 1951

Cancelling All Previous Quotations

"the most complete line of quality citrus products under one label!"

Sunkist . . . the brand they'll reach for first!

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkis
It's the
brand they'll
reach for first

16-1

Price List No. C-~~104~~ 103 **Effective October ~~22~~ 8, 1951**

prices same

DELIVERED IN CALIFORNIA ONLY

CASE SIZE	POUNDS PER CASE	SUNKIST SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
12-46 oz.	44½	Grapefruit Juice—Unsweetened	680	$ 2.57
24-2's	37	" " — "	680	$ 1.14
12-46 oz.	44½	Grapefruit Juice—Sweetened	681	
24-2's	37	" " — "	681	
12-46 oz.	44½	Grapefruit & Orange Juices—Unswtd.	695	$ 2.77
24-2's	37	" " " — "	695	$ 1.22
12-46 oz.	44½	Grapefruit & Orange Juices—Swtd.	696	
24-2's	37	" " " — "	696	
12-46 oz.	44½	Valencia Orange Juice—Unsweetened	260	
24-2's	38½	" " " — "	260	
48-6 oz.	25½	" " " — "	260	
12-46 oz.	44½	Valencia Orange Juice—Sweetened	261	
24-2's	38½	" " " — "	261	
48-6 oz.	25½	" " " — "	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

IMPORTANT: On consolidated shipments, usual split delivery, and/or stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shelf Products.

[fol. 336]

Price List No. A-103 Effective October

F.O.B. TEMPE, ARIZONA

CASE SIZE	POUNDS PER CASE	SHELF PRODUCTS	
12-46 oz.	44½	Sunkist GRAPEFRUIT JUICE — NAT. STR. UNSWEETENED	080
24-2's	37	Sunkist GRAPEFRUIT JUICE — NAT. STR. UNSWEETENED	080
12-46 oz.	44½	Sunkist GRAPEFRUIT JUICE - NAT. STR. SWEETENED	081
24-2's	37	Sunkist GRAPEFRUIT JUICE — NAT. STR. SWEETENED	081
12-46 oz.	44½	Sunkist BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	085
24-2's	37	Sunkist BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	085
12-46 oz.	44½	Sunkist BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	086
24-2's	37	Sunkist BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	086
12-46 oz.	44½	Sunkist ORANGE JUICE - NATURAL STR. UNSWEETENED	280
24-2's	37	Sunkist ORANGE JUICE — NATURAL STR. UNSWEETENED	280
48-6 oz.		Sunkist ORANGE JUICE NATURAL STR. UNSWEETENED	280
24-6 oz.		Sunkist ORANGE JUICE NATURAL STR. UNSWEETENED	280
12-46 oz.	44½	Sunkist ORANGE JUICE NATURAL STR. SWEETENED	281
24-2's	37	Sunkist ORANGE JUICE NATURAL STR. SWEETENED	281
48-6 oz.		Sunkist ORANGE JUICE NATURAL STR. SWEETENED	281
24-8 oz.		Sunkist ORANGE JUICE - NATURAL STR. SWEETENED	281

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to p
Arizona and California **ONLY.** Rail shipments 65,000 pound
points.

IMPORTANT: On consolidated shipments, usual split delivery.
stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our co
tion and confined to the regular truck routes where the minimu
applies.

TERMS, ALLOWANCES & CONDITIONS OF SA

Shall be the same as shown on our regular price list for a
Products.

8

1951

$ 2.30

$ 1.12

$ 2.70

$ 1.30

nts if
to al

nd/or

Grow-
n rate

Shel

THESE QUOTATIONS APPLY ON SALES

F.O.B. SHIPPING POINT

[illegible]	[illegible]	SHELF PRODUCTS	[illegible]	[illegible]
[illegible]	[illegible]	Sunkist [illegible]	300	$ .30
[illegible]	[illegible]	Sunkist [illegible] — NATURAL STR.	300	$ 2.65
[illegible]	[illegible]	Sunkist [illegible] NATURAL STR.	300	$ 1.15
[illegible]		Sunkist [illegible] — NATURAL STR.	300	$ .27½
[illegible]		Sunkist [illegible] — NATURAL STR.	300	
[illegible]	[illegible]	Sunkist [illegible] — NATURAL STR.	281	
[illegible]	[illegible]	Sunkist [illegible] — NATURAL STR.	281	
[illegible]		Sunkist [illegible] — NATURAL STR.	281	
[illegible]		Sunkist [illegible] — NATURAL STR.	281	
[illegible]	[illegible]	Sunkist [illegible] AND ORANGE	005	
[illegible]	[illegible]	Sunkist [illegible] AND ORANGE	005	
[illegible]	[illegible]	Sunkist [illegible] AND ORANGE	006	
[illegible]	[illegible]	Sunkist [illegible] AND ORANGE	006	
EXCHANGE BRAND OR BUYER'S LABEL*				
[illegible]	[illegible]	Exchange [illegible]	316	$ .32
[illegible]	[illegible]	Exchange [illegible]	316	$14.40
[illegible]	[illegible]	Exchange [illegible] — NATURAL STR.	53	
[illegible]	[illegible]	Exchange [illegible] — NATURAL STR.	53	
[illegible]	[illegible]	Exchange [illegible] — NATURAL STR.	52	
[illegible]	[illegible]	Exchange [illegible] — NATURAL STR.	52	
[illegible]	[illegible]	Exchange [illegible] JUICE — NAT. STR.	003	
[illegible]	[illegible]	Exchange [illegible] JUICE — NAT. STR.	003	
[illegible]	[illegible]	Exchange [illegible] JUICE — NAT. STR.	002	
[illegible]	[illegible]	Exchange [illegible] JUICE — NAT. STR.	002	
[illegible]	[illegible]	Exchange [illegible]	034	$ 2.39
[illegible]	[illegible]	Exchange [illegible]	034	
[illegible]	[illegible]	Exchange [illegible]	035	
[illegible]	[illegible]	Exchange [illegible]	035	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

IN CALIFORNIA AND ARIZONA ONLY

EX WAREHOUSE WHERE STOCKED

CASE SIZE	POUNDS PER CASE	SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	23	Sunkist LEMON JUICE NATURAL STRENGTH	300	$ .93
24-6 oz.	15	Sunkist CONCENTRATE FOR LEMONADE	301	$ 1.45
24-6 oz.	15	Sunkist CONCENTRATE FOR ORANGEADE	250	$ 1.67½
12-46 oz.	44½	Sunkist ORANGE JUICE — NATURAL STR. UNSWEETENED	260	
24-2's	37	Sunkist ORANGE JUICE — NATURAL STR. UNSWEETENED	260	
12-46 oz.	44½	Sunkist ORANGE JUICE — NATURAL STR. SWEETENED	261	
24-2's	37	Sunkist ORANGE JUICE — NATURAL STR. SWEETENED	261	
48-5½ oz.	23	Exchange LEMON JUICE NATURAL STRENGTH	316	$ .88
6-1 gal.	37	Exchange LEMON JUICE NATURAL STRENGTH	316	$18.40
48-6 oz.	29	Exchange LEMONADE BASE	319	$ 1.30
24-6 oz.	15	Exchange LEMONADE BASE	319	$ 1.30
48-6 oz.	29	Exchange ORANGEADE BASE	27	$ 1.56¼
24-6 oz.	15	Exchange ORANGEADE BASE	27	$ 1.56¼

EX CAR ON ARRIVAL AT WAREHOUSE

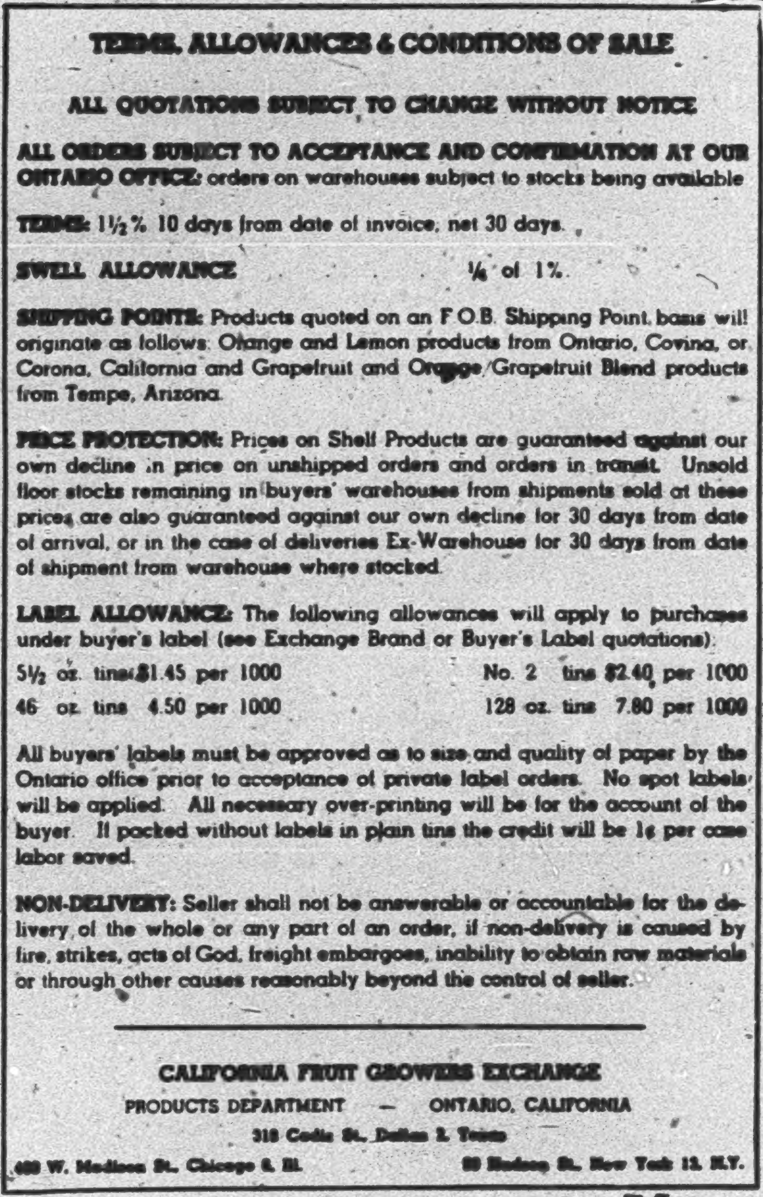
Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices

CASE SIZE	PER DOZ. TINS	CASE SIZE	PER DOZ. TINS
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		6/1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Squares Indicate Not Quoting

[fol. 337]



TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available

TERMS: 1½% 10 days from date of invoice, net 30 days.

SWELL ALLOWANCE ¼ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins	$1.45 per 1000	No. 2 tins	$2.40 per 1000
46 oz. tins	4.50 per 1000	128 oz. tins	7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA
318 Cadiz St., Dallas 2, Texas
[illegible] W. Madison St., Chicago 6, Ill. [illegible] Hudson St., New York 13, N.Y.

[fol. 338]

16-4

Sunkist Citrus Products News

October 8, 1951

TO OUR BROKERS:

PROGNOSTICATION

Two weeks ago we advised that sales of California Valencia Orange Juice were booming, making it obvious that prices would soon advance. Essentially, our try with the crystal ball was true, even though prices have held firm. Today—still in earnest—we say that dwindling supplies and accelerated sales make a bad combination if you're interested in holding the price line. A word to the wise is sufficient.

GRAPEFRUIT LEAGUE

No, we aren't speaking baseballically. We're talking about Sunkist Grapefruit Juice, thinking it's about time we made some HITS, got on BASE with big orders. SUGGESTION: Give your buyers the right PITCH, no CURVES, and WALK out with volume sales. Remember, SUNKIST Grapefruit Juice is the Best in the West, and always an appetizing juice at HOME PLATE.

THE ATMOSPHERE

How sultry can it get? First it's Yanks and Indians in a torrid duel. Then, Giants and Dodgers!! Next? Why, Sunkist Orangeade and Lemonade, of course. And don't forget, with winter just around the corner, your buyers' thoughts will also turn to Sunkist Lemon Juice. Quick, Jeeves, my order book.

THOUGHT FOR TODAY

Can you honestly say to yourself that you've covered the trade, given all buyers a chance before stocks go down, prices up. If the answer is no, wire orders promptly for confirmation.

Sincerely,

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT

338

Sunkist
CITRUS PRODUCTS

PRICE LIST No.W-103

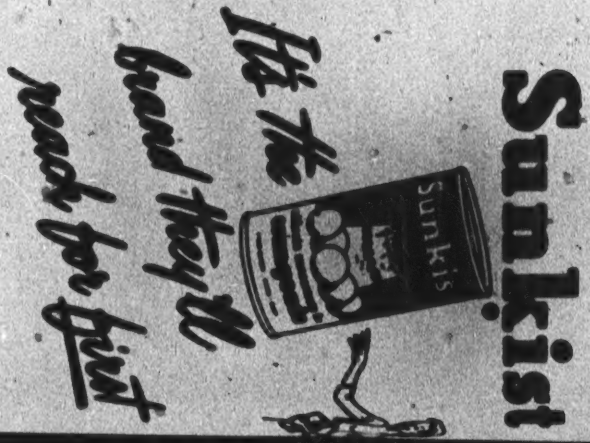
Effective October 8, 1951

Cancelling All Previous Quotations

"the most complete line of __quality__ citrus products under one label!"

Sunkist . . . the brand they'll reach for __first__!

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA


Sunkist
Sunkis
It's the brand they'll reach for first

17-1

THESE QUOTATIONS DO NOT APPLY

F.O.B. SHIPPING POINT

[illegible]	[illegible]	SHELF PRODUCTS	[illegible]	[illegible]
[illegible] oz.	33	**Sunkist** LEMON JUICE NATURAL STRENGTH	360	$ .89
18-46 oz.	64½	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	$ 2.35
24-2's	37	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	$ 1.02½
48-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	$ .55
96-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	
18-46 oz.	64½	**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	
24-2's	37	**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	
48-6 oz.		**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	
96-6 oz.		**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	
18-46 oz.	64½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	005	
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	005	
18-46 oz.	64½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	006	
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	006	
		EXCHANGE BRAND OR BUYER'S LABEL*		
[illegible] oz.	33	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$ .82
6-1 gal.	37	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$14.40
18-46 oz.	64½	**Exchange** ORANGE JUICE UNSWEETENED NATURAL STR.	53	
24-2's	37	**Exchange** ORANGE JUICE UNSWEETENED NATURAL STR.	53	
18-46 oz.	64½	**Exchange** ORANGE JUICE SWEETENED NATURAL STR.	52	
24-2's	37	**Exchange** ORANGE JUICE SWEETENED NATURAL STR.	52	
18-46 oz.	64½	**Exchange** GRAPEFRUIT JUICE UNSWEETENED NAT. STR.	003	
24-2's	37	**Exchange** GRAPEFRUIT JUICE UNSWEETENED NAT. STR.	003	
18-46 oz.	64½	**Exchange** GRAPEFRUIT JUICE SWEETENED NAT. STR.	002	
24-2's	37	**Exchange** GRAPEFRUIT JUICE SWEETENED NAT. STR.	002	
18-46 oz.	64½	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	034	$ 2.30
24-2's	37	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	034	
18-46 oz.	64½	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	035	
24-2's	37	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	035	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

SALES IN CALIFORNIA AND ARIZONA

EX WAREHOUSE WHERE STOCKED

SHELF PRODUCTS

[illegible]	[illegible]			[illegible]	[illegible]
48-5½ oz.	23	**Sunkist** LEMON JUICE NATURAL STRENGTH		300	$ 1.00
24-6 oz.	15	**Sunkist** CONCENTRATE FOR LEMONADE		301	$ 1.45
24-6 oz.	15	**Sunkist** CONCENTRATE FOR ORANGEADE		250	$ 1.07½
12-46 oz.	66½	**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL STR	280	
24-2's	37	**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL STR	280	
12-46 oz.	66½	**Sunkist** ORANGE JUICE SWEETENED	NATURAL STR	281	
24-2's	37	**Sunkist** ORANGE JUICE SWEETENED	NATURAL STR	281	
48-5½ oz.	23	**Exchange** LEMON JUICE NATURAL STRENGTH		316	$ .90
6 1 gal.	57	**Exchange** LEMON JUICE NATURAL STRENGTH		316	$10.40
48-6 oz.	33	**Exchange** LEMONADE BASE		319	
24-6 oz.	15	**Exchange** LEMONADE BASE		319	
48-6 oz.	30	**Exchange** ORANGEADE BASE		27	
24-6 oz.	15	**Exchange** ORANGEADE BASE		27	

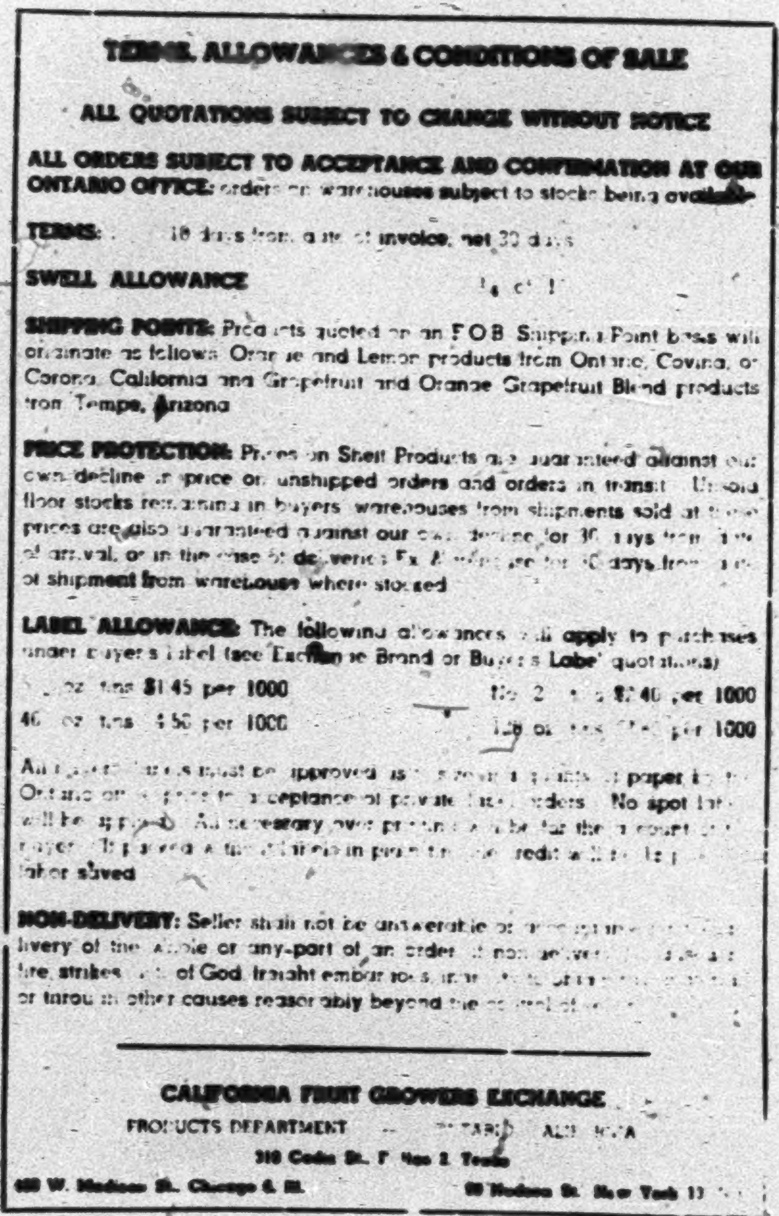
[illegible] CAR ON ARRIVAL AT WAREHOUSE

[illegible] shipped on consignment to our regular warehouses may be quoted [illegible] deducting the following allowances from the Ex Warehouse Prices

[illegible]	PER DOZ. TINS	CASE SIZE	PER DOZ. TINS
[illegible] oz.		24-2's	
48-5½ oz.		12-46 oz.	
48-6 oz.		6 1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Spaces Indicate Not Quoting



TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available

TERMS: [illegible] 10 days from date of invoice, net 30 days

SWELL ALLOWANCE ¼ c [illegible]

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange Grapefruit Blend products from Tempe, Arizona

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from time of arrival, or in the case of deliveries Ex [illegible] for 30 days from time of shipment from warehouse where stocked

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations)

[illegible] oz. tins $1.45 per 1000	No. 2 [illegible] $2.40 per 1000
46 oz. tins [illegible] 4.50 per 1000	128 oz. tins [illegible] per 1000

All [illegible] must be approved as [illegible] of paper [illegible] Ontario [illegible] to acceptance of private label orders. No spot [illegible] will be [illegible]. All necessary over [illegible] for the account of [illegible] buyer [illegible] in [illegible] credit [illegible] labor saved

NON-DELIVERY: Seller shall not be answerable [illegible] livery of the whole or any part of an order [illegible] non-delivery [illegible] fire, strikes, [illegible] of God, freight embargoes [illegible] or through other causes reasonably beyond the control of [illegible]

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA

310 Cedar St. [illegible] 2, Texas

[illegible] W. Madison St., Chicago 6, Ill. 90 Hudson St., New York 13 [illegible]

339

17-1

Sunkist Citrus Products News

October 8, 1951

TO OUR BROKERS

PROGNOSTICATION

The [illegible] that sales of California Valencia Oranges [illegible] making it obvious that prices would soon advance. [illegible] our try with the crystal ball was [illegible] even though [illegible] have held firm. Today, still in earnest, we say that dwindling supplies and accelerated sales make a bad combination if you're interested in holding the price line. A word to the wise is sufficient.

EXTRA PROFITS

In our last [illegible] we [illegible] you plus sales of Sunkist Concentrates for Orangeade and Lemonade, as well as Sunkist Lemon Juice. [illegible] us seriously, made some money, which is fine. Some selling points: Orangeade is a healthful, pure orange juice beverage. Lemonade and Lemon Juice are used throughout the country because of their Vitamin and Mineral content in the treatment of common colds. We still say, sell Sunkist during the winter for bigger profits in the summer.

THE ATMOSPHERE

How sultry can it get? First its Yanks and Indians in a torrid duel. Then Giants and Dodgers!! Next? Why, Sunkist Orangeade and Lemonade, of course.

THOUGHT FOR TODAY

Can you [illegible] say to yourself that you've covered the [illegible] a chance before stocks go down, prices up. If the answer is no, wire orders promptly for confirmation.

Sincerely,

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT

Sunkist
CITRUS PRODUCTS

PRICE LIST No. N-103

Effective October 8, 1951

Cancelling All Previous Quotations

---

*"the most complete line of **quality** citrus products under one label!"*

Sunkist . . . the brand they'll reach for first!

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
It's the brand they'll reach for first
Sunkist

[fol. 341]

18-1

Price List No. C-102 Effective September 24, 1951

DELIVERED IN CALIFORNIA ONLY

CASE SIZE	POUNDS PER CASE	SHELF PRODUCTS		PRODUCT NUMBER	PRICE PER DOZ.
12-46 oz.	44½	**Sunkist** GRAPEFRUIT JUICE UNSWEETENED	NAT. STR.	680	$ 2.57
24-2's	37	**Sunkist** GRAPEFRUIT JUICE UNSWEETENED	NAT. STR.	680	$ 1.14
12-46 oz.	44½	**Sunkist** GRAPEFRUIT JUICE SWEETENED	NAT. STR.	681	
24-2's	37	**Sunkist** GRAPEFRUIT JUICE SWEETENED	NAT. STR.	681	
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED		695	$ 2.77
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED		695	$ 1.22
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED		696	
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED		696	
12-46 oz.	44½	**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL STR	260	
24-2's	37	**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL STR	260	
48-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL STR	260	
24-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL STR	260	
12-46 oz.	44½	**Sunkist** ORANGE JUICE SWEETENED	NATURAL STR	261	
24-2's	37	**Sunkist** ORANGE JUICE SWEETENED	NATURAL STR	261	
48-6 oz.		**Sunkist** ORANGE JUICE SWEETENED	NATURAL STR	261	
24-6 oz.		**Sunkist** ORANGE JUICE SWEETENED	NATURAL STR	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

IMPORTANT: On consolidated shipments, usual split delivery, and or stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shelf Products.

Price List No. A-102 Effective September 24,

F.O.B. TEMPE, ARIZONA

CASE SIZE	POUNDS PER CASE	SHELF PRODUCTS	PRODUCT NUMBER
12-46 oz.	44½	**Sunkist** GRAPEFRUIT JUICE UNSWEETENED NAT. STR.	680
24-2's	37	**Sunkist** GRAPEFRUIT JUICE UNSWEETENED NAT. STR.	680
12-46 oz.	44½	**Sunkist** GRAPEFRUIT JUICE SWEETENED NAT. STR.	681
24-2's	37	**Sunkist** GRAPEFRUIT JUICE SWEETENED NAT. STR.	681
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	695
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	695
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	696
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	696
12-46 oz.	44½	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260
24-2's	37	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260
48-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260
24-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260
12-46 oz.	44½	**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261
24-2's	37	**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261
48-6 oz.		**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261
24-6 oz.		**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to poin Arizona and California **ONLY.** Rail shipments 65,000 pounds t points.

IMPORTANT: On consolidated shipments, usual split delivery, an stop in transit charges shall be for the account of the buyer

TRUCK SHIPMENTS: Truck shipments shall be subject to our confi tion and confined to the regular truck routes where the minimum applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all S Products.

B-3

THESE QUOTATIONS APPLY ON SALES

F.O.B. SHIPPING POINT

[illegible]	[illegible]	SHELF PRODUCTS		PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	23	**Sunkist**	LEMON JUICE NATURAL STRENGTH	360	$ .88
12-46 oz.	44⅓	**Sunkist**	ORANGE JUICE UNSWEETENED NATURAL STR	260	$ 2.05
24-2's	37	**Sunkist**	ORANGE JUICE UNSWEETENED NATURAL STR	260	$ 1.15
48-6 oz.		**Sunkist**	ORANGE JUICE UNSWEETENED NATURAL STR	260	$ .57½
24-6 oz.		**Sunkist**	ORANGE JUICE UNSWEETENED NATURAL STR	260	
12-46 oz.	44⅓	**Sunkist**	ORANGE JUICE SWEETENED NATURAL STR	261	
24-2's	37	**Sunkist**	ORANGE JUICE SWEETENED NATURAL STR	261	
48-6 oz.		**Sunkist**	ORANGE JUICE SWEETENED NATURAL STR	261	
24-6 oz.		**Sunkist**	ORANGE JUICE SWEETENED NATURAL STR	261	
12-46 oz.	44⅓	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	685	
24-2's	37	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	685	
12-46 oz.	44⅓	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	686	
24-2's	37	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	686	
		EXCHANGE BRAND OR BUYER'S LABEL*			
48-5½ oz.	23	**Exchange**	LEMON JUICE NATURAL STRENGTH	316	$ .82
6 1 gal.	57	**Exchange**	LEMON JUICE NATURAL STRENGTH	316	$14.60
12-46 oz.	44⅓	**Exchange**	ORANGE JUICE UNSWEETENED NATURAL STR.	53	
24-2's	37	**Exchange**	ORANGE JUICE UNSWEETENED NATURAL STR.	53	
12-46 oz.	44⅓	**Exchange**	ORANGE JUICE SWEETENED NATURAL STR.	52	
24-2's	37	**Exchange**	ORANGE JUICE SWEETENED NATURAL STR.	52	
12-46 oz.	44⅓	**Exchange**	GRAPEFRUIT JUICE UNSWEETENED NAT. STR.	603	
24-2's	37	**Exchange**	GRAPEFRUIT JUICE UNSWEETENED — NAT. STR.	603	
12-46 oz.	44⅓	**Exchange**	GRAPEFRUIT JUICE SWEETENED NAT. STR.	602	
24-2's	37	**Exchange**	GRAPEFRUIT JUICE SWEETENED — NAT. STR.	602	
12-46 oz.	44⅓	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	634	$ 2.53
24-2's	37	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	634	
12-46 oz.	44⅓	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	635	
24-2's	37	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	635	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

IN CALIFORNIA AND ARIZONA ONLY

EX WAREHOUSE WHERE STOCKED

CASE SIZE	[illegible] PER CASE	SHELF PRODUCTS	[illegible] NUMBER	PRICE PER DOZ.
48-5½ oz.	23	**Sunkist** LEMON JUICE NATURAL STRENGTH	300	$ .88
24-6 oz.	15½	**Sunkist** CONCENTRATE FOR LEMONADE	301	$ 1.45
24-6 oz.	15	**Sunkist** CONCENTRATE FOR ORANGEADE	250	$ 1.07½
12-46 oz.	44½	**Sunkist** ORANGE JUICE UNSWEETENED – NATURAL STR.	280	
24-2's	37	**Sunkist** ORANGE JUICE UNSWEETENED – NATURAL STR.	280	
12-46 oz.	44½	**Sunkist** ORANGE JUICE SWEETENED – NATURAL STR.	281	
24-2's	37	**Sunkist** ORANGE JUICE SWEETENED – NATURAL STR.	281	
48-5½ oz.	23	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$ .88
6 1 gal.	57	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$10.40
48-6 oz.	30	**Exchange** LEMONADE BASE	319	$ 1.20
24-6 oz.	15	**Exchange** LEMONADE BASE	319	$ 1.20
48-6 oz.	30	**Exchange** ORANGEADE BASE	27	$ 1.30½
24-6 oz.	15	**Exchange** ORANGEADE BASE	27	$ 1.30½

EX CAR ON ARRIVAL AT WAREHOUSE

Shell Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices

CASE SIZE	PER DOZ. TINS	CASE SIZE	PER DOZ. TINS
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		6 1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse

Blank Squares Indicate Not Quoting

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available.

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . . ½ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1000
46 oz. tins 4.50 per 1000	128 oz. tins 7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA

[illegible] Cadiz St., Dallas 2, Texas

[illegible] W. Madison St., Chicago 6, Ill.

[illegible] Hudson St., New York 13, N.Y.

3/43

18-4

Sunkist Citrus Products News

September 20, 1951

TO OUR [illegible],

CALIFORNIA VALENCIA ORANGE JUICE

Demand for quality [illegible] orange juice has been [illegible] during the past few weeks, and [illegible] the order of the day. Last week it was necessary to withdraw from the market on Exchange and Private Label Orange Juice, but at today's [illegible] low prices, SUNKIST California Orange Juice remains an excellent buy.

[illegible]

From this vantage point, it is apparent that practically all packers of citrus juices—from California to Florida—would have [illegible] of [illegible], but it is [illegible] by [illegible] will be little or no [illegible] of [illegible] February 1st. The [illegible] thing is that prices have been held at a [illegible] low level in face of [illegible]. California Orange Juice made only one slight advance in mid-August. Therefore, it is our considered opinion that buyers who [illegible] and early are the ones who will show the most profit on citrus juices, but fortunately there is still time to buy before stocks are completely [illegible].

THE [illegible]

Cool, [illegible] the [illegible] by Vacationers and [illegible] is [illegible] by the [illegible], but still warm enough to [illegible] of SUNKIST Orange Juice plus SUNKIST Concentrates for [illegible] and [illegible].

Sincerely,

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT

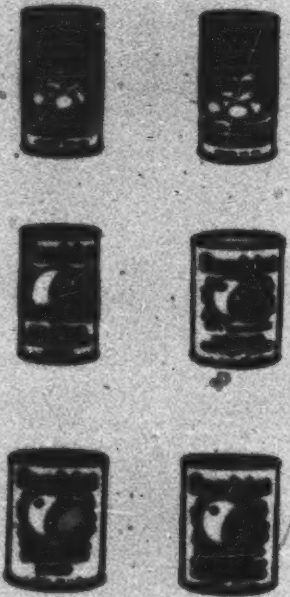
Sunkist
CITRUS PRODUCTS

PRICE LIST No. W-102

Effective September 24, 1951

Cancelling All Previous Quotations

"the most
complete
line of
quality
citrus
products
under one
label!"



Sunkist . . . the brand they'll reach for first

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkis
It's the brand they'll reach for first.

19-1

THESE QUOTATIONS DO NOT APPL

F.O.B. SHIPPING POINT

[illegible]	[illegible]	SHELF PRODUCTS			PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	23	**Sunkist**	LEMON JUICE NATURAL STRENGTH		300	$ .88
12-46 oz.	44½	**Sunkist**	ORANGE JUICE UNSWEETENED	NATURAL STR.	280	$ 2.35
24-2s	37	**Sunkist**	ORANGE JUICE UNSWEETENED	NATURAL STR.	280	$ 1.08½
48-6 oz.		**Sunkist**	ORANGE JUICE UNSWEETENED	NATURAL STR.	280	$ .55
24-6 oz.		**Sunkist**	ORANGE JUICE UNSWEETENED	NATURAL STR.	280	
12-46 oz.	44½	**Sunkist**	ORANGE JUICE SWEETENED	NATURAL STR.	281	
24-2s	37	**Sunkist**	ORANGE JUICE SWEETENED	NATURAL STR.	281	
48-6 oz.		**Sunkist**	ORANGE JUICE SWEETENED	NATURAL STR.	281	
24-6 oz.		**Sunkist**	ORANGE JUICE SWEETENED	NATURAL STR.	281	
12-46 oz.	44½	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED		085	
24-2s	37	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED		085	
12-46 oz.	44½	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED		086	
24-2s	37	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED		086	
		EXCHANGE BRAND OR BUYER'S LABEL*				
48-5½ oz.	23	**Exchange**	LEMON JUICE NATURAL STRENGTH		316	$ .82
6-1 gal.	37	**Exchange**	LEMON JUICE NATURAL STRENGTH		316	$14.40
12-46 oz.	44½	**Exchange**	ORANGE JUICE UNSWEETENED	NATURAL STR.	53	
24-2s	37	**Exchange**	ORANGE JUICE UNSWEETENED	NATURAL STR.	53	
12-46 oz.	44½	**Exchange**	ORANGE JUICE SWEETENED	NATURAL STR.	52	
24-2s	37	**Exchange**	ORANGE JUICE SWEETENED	NATURAL STR.	52	
12-46 oz.	44½	**Exchange**	GRAPEFRUIT JUICE UNSWEETENED	NAT. STR.	003	
24-2s	37	**Exchange**	GRAPEFRUIT JUICE UNSWEETENED	NAT. STR.	003	
12-46 oz.	44½	**Exchange**	GRAPEFRUIT JUICE SWEETENED	NAT. STR.	002	
24-2s	37	**Exchange**	GRAPEFRUIT JUICE SWEETENED	NAT. STR.	002	
12-46 oz.	44½	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED		034	$ 2.58
24-2s	37	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED		034	
12-46 oz.	44½	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED		035	
24-2s	37	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED		035	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

[illegible]

EX WAREHOUSE WHERE STOCKED

[illegible]	[illegible]	SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	10	**Sunkist** LEMON JUICE NATURAL STRENGTH	300	$ 1.60
24-6 oz.	10	**Sunkist** CONCENTRATE FOR [illegible]	301	$ 1.45
24-6 oz.	15	**Sunkist** CONCENTRATE FOR [illegible]	250	$ 1.57½
12-46 oz.	40½	**Sunkist** [illegible] — NATURAL STR.	300	
24-2's	27	**Sunkist** [illegible] — NATURAL STR.	250	
12-46 oz.	40½	**Sunkist** [illegible] — NATURAL STR.	251	
24-2's	27	**Sunkist** [illegible] — NATURAL STR.	251	
48-5½ oz.	10	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$ .90
6 1 gal.	27	**Exchange** LEMON JUICE NATURAL STRENGTH	318	$16.00
48-6 oz.	20	**Exchange** LEMONADE BASE	319	
24-6 oz.	15	**Exchange** LEMONADE BASE	319	
48-6 oz.	20	**Exchange** ORANGEADE BASE	27	
24-6 oz.	15	**Exchange** ORANGEADE BASE	27	

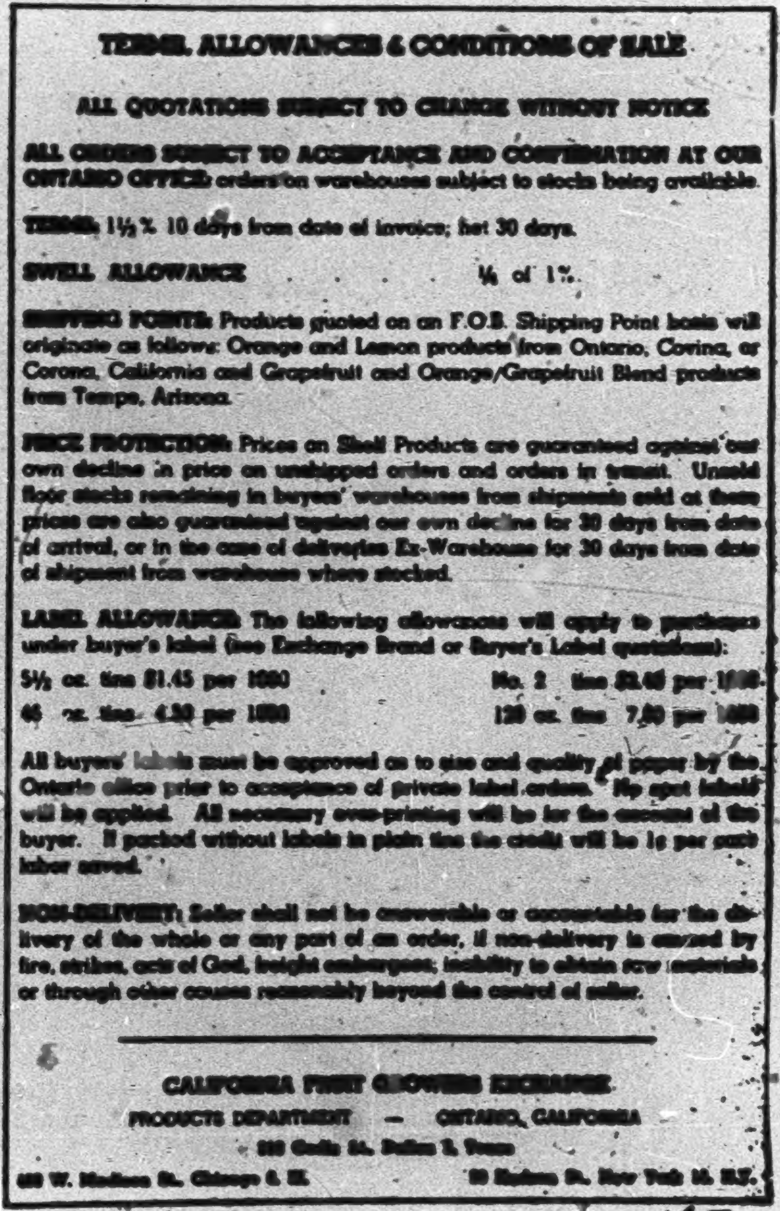
EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices

CASE SIZE	PER GAL. [illegible]	CASE SIZE	PER GAL. [illegible]
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		6 1 gal.	

It is specifically understood that Ex Car Prices will only be distributed if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Squares Indicate Not Quoting



TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available.

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . . ⅛ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1000
46 oz. tins 4.30 per 1000	120 oz. tins 7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per each label saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA
[illegible] Cadiz St., Dallas 2, Texas
[illegible] W. Madison St., Chicago 6, Ill. [illegible] Hudson St., New York 13, N.Y.

Sunkist Citrus Products News

September 24, 1951

TO OUR BROKERS:

CALIFORNIA VALENCIA ORANGE JUICE

Demand for quality unsweetened valencia orange juice has been turning steadily westward during the past few weeks, and continued heavy sales still remain the order of the day. Last week it was necessary to withdraw from the market on Exchange and Private Label Orange Juice, but at today's continued low prices, SUNKIST California Orange Juice remains an excellent buy.

VIEWPOINT

From this vantage point, it is apparent that practically all packers of citrus juices—from California to Florida—would have relished increased supplies of fresh fruit, but it is obvious by now that there will be little or no carryover of stocks beyond January 1st. The amazing thing is that prices have been held at a remarkably low level in face of booming sales. California Orange Juice made only one slight advance in mid-August. Therefore, it is our considered opinion that buyers who purchased reasonably and early are the ones who will show the most profit on citrus juices, but fortunately there is still time to buy before stocks are completely exhausted.

THE ATMOSPHERE

Cool, compared to the heat engendered by Yankees and Indians in race for the American League pennant, but still warm enough to push sales of SUNKIST Orange Juice plus SUNKIST Concentrates for Orangeade and Lemonade.

Sincerely,

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT

Sunkist
CITRUS PRODUCTS

PRICE LIST No. N-102

Effective September 24, 1951

Cancelling All Previous Quotations

"the most complete line of quality citrus products under one label!"

Sunkist
Sunkist
Sunkist
Sunkist
Sunkist
Sunkist

Sunkist . . . the brand they'll reach for first!

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkist
It's the brand they'll reach for first

Price List No. [redacted]01 Effective September 10, 1951

F.O.B. TEMPE, ARIZONA

CASE SIZE	POUNDS PER CASE	SHELF PRODUCTS	[illegible] NO.	PRICE PER DOZ.
12-46 oz.	44½	**Sunkist** GRAPEFRUIT JUICE, NAT. STR. UNSWEETENED	680	$ 2.50
24-2's	37	**Sunkist** GRAPEFRUIT JUICE NAT. STR. UNSWEETENED	680	$ 1.12
12-46 oz.	44½	**Sunkist** GRAPEFRUIT JUICE NAT. STR. SWEETENED	681	
24-2's	37	**Sunkist** GRAPEFRUIT JUICE NAT. STR. SWEETENED	681	
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND OR. NAT. JUICES UNSWEETENED	695	$ 2.70
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND OR. NAT. JUICES UNSWEETENED	695	$ 1.20
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND OR. NAT. JUICES SWEETENED	696	
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND OR. NAT. JUICES SWEETENED	696	
12-46 oz.	44½	**Sunkist** ORANGE JUICE NATURAL STR. UNSWEETENED	260	
24-2's	37	**Sunkist** ORANGE JUICE NATURAL STR. UNSWEETENED	260	
48-6 oz.		**Sunkist** ORANGE JUICE NATURAL STR. UNSWEETENED	260	
24-6 oz.		**Sunkist** ORANGE JUICE NATURAL STR. UNSWEETENED	260	
12-46 oz.	44½	**Sunkist** ORANGE JUICE NATURAL STR. SWEETENED	261	
24-2's	37	**Sunkist** ORANGE JUICE NATURAL STR. SWEETENED	261	
48-6 oz.		**Sunkist** ORANGE JUICE NATURAL STR. SWEETENED	261	
24-6 oz.		**Sunkist** ORANGE JUICE NATURAL STR. SWEETENED	261	

MINIMUM SHIPMENTS: [illegible] ONLY. [illegible]

IMPORTANT: [illegible]

TRUCK SHIPMENTS: [illegible] applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

[illegible] for all Shelf

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
Sunkist
It's the brand they'll reach for first

[fol. 353]

Price List No. C-169 Effective August 27, 1951

DELIVERED IN CALIFORNIA ONLY

CASE SIZE	POUNDS PER CASE	SHELF PRODUCTS			PRODUCT NUMBER	PRICE PER DOZ.
12-46 oz.	44½	Sunkist	GRAPEFRUIT JUICE UNSWEETENED	NAT STR	680	$ 2.57
24-2's	37	Sunkist	GRAPEFRUIT JUICE UNSWEETENED	NAT STR	680	$ 1.14
12-46 oz.	44½	Sunkist	GRAPEFRUIT JUICE SWEETENED	NAT STR	681	
24-2's	37	Sunkist	GRAPEFRUIT JUICE SWEETENED	NAT STR	681	
12-46 oz.	44½	Sunkist	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED		695	$ 2.77
24-2's	37	Sunkist	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED		695	$ 1.22
12-46 oz.	44½	Sunkist	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED		696	
24-2's	37	Sunkist	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED		696	
12-46 oz.	44½	Sunkist	ORANGE JUICE UNSWEETENED	NATURAL STR	260	
24-2's	37	Sunkist	ORANGE JUICE UNSWEETENED	NATURAL STR	260	
48-6 oz.		Sunkist	ORANGE JUICE UNSWEETENED	NATURAL STR	260	
24-6 oz.		Sunkist	ORANGE JUICE UNSWEETENED	NATURAL STR	260	
12-46 oz.	44½	Sunkist	ORANGE JUICE SWEETENED	NATURAL STR	261	
24-2's	37	Sunkist	ORANGE JUICE SWEETENED	NATURAL STR	261	
48-6 oz.		Sunkist	ORANGE JUICE SWEETENED	NATURAL STR	261	
24-6 oz.		Sunkist	ORANGE JUICE SWEETENED	NATURAL STR	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points in Arizona and California **ONLY.** Rail shipments 65,000 pounds to all points.

IMPORTANT: On consolidated shipments, usual split delivery, and or stop in transit charges shall be for the account of the buyer

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shelf Products.

[fol. 348]

Price List No. C-101 Effective September 10, 1951

DELIVERED IN CALIFORNIA ONLY

[illegible]	[illegible]	SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
12-46 oz.	44½	**Sunkist** GRAPEFRUIT JUICE UNSWEETENED NAT. STR.	680	$ 2.57
24-2's	37	**Sunkist** GRAPEFRUIT JUICE UNSWEETENED NAT. STR.	680	$ 1.14
12-46 oz.	44½	**Sunkist** GRAPEFRUIT JUICE SWEETENED NAT. STR.	681	
24-2's	37	**Sunkist** GRAPEFRUIT JUICE SWEETENED NAT. STR.	681	
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	695	$ 2.77
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	695	$ 1.22
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	696	
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	696	
12-46 oz.	44½	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	
24-2's	37	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	
48-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	
24-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	
12-46 oz.	44½	**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	
24-2's	37	**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	
48-6 oz.		**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	
24-6 oz.		**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	

MINIMUM SHIPMENTS: [illegible] ONLY. [illegible]

IMPORTANT: [illegible]

TRUCK SHIPMENTS: [illegible]

TERMS, ALLOWANCES & CONDITIONS OF SALE

[illegible] price list [illegible] Shelf Products

1

203

THESE QUOTATIONS APPLY ON SALES IN

F.O.B. SHIPPING POINT

CASE SIZE	POUNDS PER CASE	SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	23	**Sunkist** LEMON JUICE NATURAL STRENGTH	360	$ .89
12-46 oz.	44½	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR	260	$ 2.65
24-2's	37	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR	260	$ 1.15
48-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR	260	$ .57½
24-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR	260	
12-46 oz.	44½	**Sunkist** ORANGE JUICE SWEETENED NATURAL STR	261	
24-2's	37	**Sunkist** ORANGE JUICE SWEETENED NATURAL STR	261	
48-6 oz.		**Sunkist** ORANGE JUICE SWEETENED NATURAL STR	261	
24-6 oz.		**Sunkist** ORANGE JUICE SWEETENED NATURAL STR	261	
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	695	
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	695	
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	696	
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	696	
		EXCHANGE BRAND OR BUYER'S LABEL*		
48-5½ oz.	23	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$ .82
6-1 gal.	57	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$14.40
12-46 oz.	44½	**Exchange** ORANGE JUICE UNSWEETENED NATURAL STR	53	$ 2.58
24-2's	37	**Exchange** ORANGE JUICE UNSWEETENED NATURAL STR	53	$ 1.12½
12-46 oz.	44½	**Exchange** ORANGE JUICE SWEETENED NATURAL STR	52	
24-2's	37	**Exchange** ORANGE JUICE SWEETENED NATURAL STR	52	
12-46 oz.	44½	**Exchange** GRAPEFRUIT JUICE UNSWEETENED NAT. STR.	603	
24-2's	37	**Exchange** GRAPEFRUIT JUICE UNSWEETENED NAT. STR.	603	
12-46 oz.	44½	**Exchange** GRAPEFRUIT JUICE SWEETENED NAT. STR.	602	
24-2's	37	**Exchange** GRAPEFRUIT JUICE SWEETENED NAT. STR.	602	
12-46 oz.	44½	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	634	$ 2.53
24-2's	37	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	634	
12-46 oz.	44½	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	635	
24-2's	37	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	635	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

IN CALIFORNIA AND ARIZONA ONLY

EX WAREHOUSE WHERE STOCKED

SHELF PRODUCTS

CASE SIZE	[illegible] PER CASE		PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	20	**Sunkist** LEMON JUICE NATURAL STRENGTH	360	$ .98
24-6 oz.	15	**Sunkist** CONCENTRATE FOR LEMONADE	381	$ 1.45
24-6 oz.	15	**Sunkist** CONCENTRATE FOR ORANGEADE	250	$ 1.67½
12-46 oz.	44½	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	280	
24-2's	37	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	280	
12-46 oz.	44½	**Sunkist** ORANGE JUICE SWEETENED - NATURAL STR.	281	
24-2's	37	**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	281	
48-5½ oz.	20	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$ .88
6 1 gal.	37	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$10.40
48-6 oz.	30	**Exchange** LEMONADE BASE	319	$ 1.30
24-6 oz.	15	**Exchange** LEMONADE BASE	319	$ 1.30
48-6 oz.	30	**Exchange** ORANGEADE BASE	27	$ 1.58½
24-6 oz.	15	**Exchange** ORANGEADE BASE	27	$ 1.58½

EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices

CASE SIZE	PER DOZ. TINS	CASE SIZE	PER DOZ. TINS
24-6 oz.		24-2's	
48-5½ oz.		24-46 oz.	
48-6 oz.		6 1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse

Blank Squares Indicate Not Quoting

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available

TERMS: 1½% 10 days from date of invoice, net 30 days

SWELL ALLOWANCE . . . ¼ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shell Products are guaranteed against ours own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations).

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1000
46 oz. tins 4.50 per 1000	128 oz. tins 7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA
318 Cadiz St., Dallas 2, Texas
400 W. Madison St., Chicago 6, Ill. **80 Hudson St., New York 13, N.Y.**

3214

[fol. 350]

Sunkist Citrus Products News

TO OUR BROKERS:

The first issue of our new price bulletin was well received by our many brokers as your complimentary letters indicated. We appreciate your letters and take this opportunity to acknowledge with thanks your kind remarks.

We subsequently withdrew our opening offer on new pack California Valencia Orange Juice in all markets of the country except in California and Arizona. This withdrawal was necessary because sales were greatly in excess of our expectations, with the result that production and shipments lagged considerably behind sales. In analyzing the reasons for this heavy volume of sales, several are so prominent that we believe it is necessary to review them for you. As stated in our opening bulletin, the quality of this year's pack is exceptional, with the result that the trade in every market was highly complimentary as to our quality. This exceptional quality, combined with very attractive prices on a rapidly improving market, resulted in sales being very heavy.

The improved market is largely attributed to a rapid depletion of Florida supplies, particularly on 46 oz. unsweetened orange juice. With new pack unsweetened orange juice not normally expected from Florida until December, it appears that a strong demand can be anticipated on the available supplies of high quality California Valencia Unsweetened Orange Juice for the next few months. Therefore, in order to obtain a balance between sales and production it was necessary for us to withdraw to permit shipments to approximate sales and to review our entire price structure.

With this bulletin we are reoffering all markets in the country with our SUNKIST Unsweetened Valencia Orange Juice. Our present prices, while higher than our opening prices, are still very attractive and competitive under existing conditions. Therefore, we anticipate that sales will continue heavy.

Our pack of SUNKIST Orange Juice is expected to be a good one from the standpoint of volume but if sales continue heavy or even at a rate equal to 50% of those experienced the two weeks after our opening prices were announced, it is expected that it will be necessary for us again to review our situation from the standpoint of price. Therefore, we urge each of you to contact your trade promptly and see to it that all of your good buyers have had an opportunity to take advantage of this attractive offering.

Sincerely,

CALIFORNIA FRUIT GROWERS EXCHANGE

Howard W. Thompson

Sales Manager-Consumer Goods
PRODUCTS DEPARTMENT

Howard W. Thompson/hp

Sunkist
CITRUS PRODUCTS

PRICE LIST No. W-101

Effective September 10, 1951

Cancelling All Previous Quotations

---

*"the most
complete
line of
quality
citrus
products
under one
label!"*

Sunkist . . . the brand they'll reach for first!

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
It's the brand they'll reach for first

61-1

THESE QUOTATIONS DO NOT APPLY ON

F.O.B. SHIPPING POINT

[illegible]	[illegible]	SHELF PRODUCTS		[illegible]	[illegible]
48-3½ oz.	21	Sunkist	LEMON JUICE NATURAL STRENGTH	300	$ .90
12-46 oz.	66½	Sunkist	ORANGE JUICE — NATURAL STR. UNSWEETENED	260	$ 2.25
24-2's	37	Sunkist	ORANGE JUICE NATURAL STR. UNSWEETENED	260	$ 1.00½
48-6 oz.		Sunkist	ORANGE JUICE — NATURAL STR. UNSWEETENED	260	$ .35
24-6 oz.		Sunkist	ORANGE JUICE NATURAL STR. UNSWEETENED	260	
12-46 oz.	66½	Sunkist	ORANGE JUICE NATURAL STR. SWEETENED	261	
24-2's	37	Sunkist	ORANGE JUICE NATURAL STR. SWEETENED	261	
48-6 oz.		Sunkist	ORANGE JUICE NATURAL STR. SWEETENED	261	
24-6 oz.		Sunkist	ORANGE JUICE NATURAL STR. SWEETENED	261	
12-46 oz.	66½	Sunkist	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	005	
24-2's	37	Sunkist	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	005	
12-46 oz.	66½	Sunkist	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	006	
24-2's	37	Sunkist	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	006	
		EXCHANGE BRAND OR BUYER'S LABEL*			
48-6½ oz.	25	Exchange	LEMON JUICE NATURAL STRENGTH	316	$ .82
6, 1 gal.	57	Exchange	LEMON JUICE NATURAL STRENGTH	316	$14.40
12-46 oz.	66½	Exchange	ORANGE JUICE NATURAL STR. UNSWEETENED	53	$ 2.20
24-2's	37	Exchange	ORANGE JUICE NATURAL STR. UNSWEETENED	53	$ 1.00
12-46 oz.	66½	Exchange	ORANGE JUICE — NATURAL STR. SWEETENED	52	
24-2's	37	Exchange	ORANGE JUICE — NATURAL STR. SWEETENED	52	
12-46 oz.	66½	Exchange	GRAPEFRUIT JUICE — NAT. STR. UNSWEETENED	003	
24-2's	37	Exchange	GRAPEFRUIT JUICE — NAT. STR. UNSWEETENED	003	
12-46 oz.	66½	Exchange	GRAPEFRUIT JUICE — NAT. STR. SWEETENED	002	
24-2's	37	Exchange	GRAPEFRUIT JUICE — NAT. STR. SWEETENED	002	
12-46 oz.	66½	Exchange	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	034	$ 2.50
24-2's	37	Exchange	BLENDED GRAPEFRUIT AND ORANGE JUICES- UNSWEETENED	034	
12-46 oz.	66½	Exchange	BLENDED GRAPEFRUIT AND ORANGE JUICES—SWEETENED	035	
24-2's	37	Exchange	BLENDED GRAPEFRUIT AND ORANGE JUICES—SWEETENED	035	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

5

[illegible]

EX WAREHOUSE WHERE STOCKED

[illegible]	[illegible]	SHELF PRODUCTS	[illegible]	[illegible]
48-5½ oz.	20	**Sunkist** LEMON JUICE NATURAL STRENGTH	300	$ 1.09
24-6 oz.	18	**Sunkist** CONCENTRATE FOR LEMONADE	301	$ 1.65
24-6 oz.	18	**Sunkist** CONCENTRATE FOR ORANGEADE	250	$ 1.67½
12-46 oz.	40½	**Sunkist** [illegible] – NATURAL STR.	260	
24-2's	37	**Sunkist** [illegible] – NATURAL STR.	260	
12-46 oz.	40½	**Sunkist** [illegible] – NATURAL STR.	261	
24-2's	37	**Sunkist** [illegible] – NATURAL STR.	261	
48-5½ oz.	20	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$ .93
6 1 gal.	37	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$10.48
48-6 oz.	20	**Exchange** LEMONADE BASE	319	
24-6 oz.	15	**Exchange** LEMONADE BASE	319	
48-6 oz.	30	**Exchange** ORANGEADE BASE	27	
24-6 oz.	15	**Exchange** ORANGEADE BASE	27	

EX CAR ON ARRIVAL AT WAREHOUSE

Shelf Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices.

[illegible]	[illegible]	[illegible]	[illegible]
24-6 oz.		24-2's	
48-5½ oz.		12-46 oz.	
48-6 oz.		6-1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Spaces Indicate Not Quoting

[fol. 351]

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available.

TERMS: 1½% 10 days from date of invoice, net 30 days

SWELL ALLOWANCE ¼ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000 No. 2 tins $2.40 per 1000

46 oz. tins 4.50 per 1000 128 oz. tins 7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA

310 Cadiz St., Dallas 2, Texas

[illegible] W. Madison St., Chicago 6, Ill. 90 Hudson St., New York 13, N.Y.

Sunkist Citrus Products News

TO OUR BROKERS:

The first issue of our new price bulletin was well received by our many brokers as your complimentary letters indicated. We appreciate your letters and take this opportunity to acknowledge with thanks your kind remarks.

In mid-August we withdrew our opening offer on new pack California Valencia Orange Juice in all markets of the country except in California and Arizona. This withdrawal was necessary because sales were greatly in excess of our expectations, with the result that production and shipment lagged considerably behind sales. In analyzing the causes for this heavy volume of sales, several are so prominent that we believe it is necessary to review them for you. As stated in our opening bulletin, the quality of this year's pack is unsurpassed, with the result that the trade in every market was highly complimentary as to our quality. This exceptional quality, combined with very attractive prices on a rapidly improving market, resulted in sales being very heavy.

The improved market is largely attributed to a rapid depletion of Florida supplies, particularly on the unsweetened orange juice. With new pack unsweetened orange juice not normally expected from Florida until November, it appears that a strong demand can be anticipated on the available supplies of high quality California Valencia Unsweetened Orange Juice for the next few months. Therefore, in order to obtain a balance between sales and production it was necessary for us to withdraw to permit shipments to approximate sales and to review our entire price structure.

With this bulletin we are re-entering all markets in the country with our SUNKIST Unsweetened Valencia Orange Juice. Our present prices, while higher than our opening prices, are still very attractive and competitive under existing conditions. Therefore, we anticipate that sales will continue heavy.

Our pack of [illegible] Orange Juice is expected to be a good one from the standpoint of [illegible] sales continue heavy or even at a rate equal to 50% of those experienced [illegible] the weeks after our opening prices were announced, it is expected that [illegible] necessary for us again to review our situation from the standpoint [illegible] Therefore, we urge each of you to contact your trade promptly and [illegible] that all of your good buyers have had an opportunity to take advantage of this attractive offering.

Sincerely,

CALIFORNIA FRUIT GROWERS EXCHANGE

Howard W. Thompson

Sales Manager-Consumer Goods
PRODUCTS DEPARTMENT

Howard W Thompson/vp

Sunkist
CITRUS PRODUCTS

PRICE LIST No. N-101

Effective September 10, 1951

Cancelling All Previous Quotations

"the most
complete
line of
quality
citrus
products
under one
label!"

Sunkist
Sunkist
Sunkist
Sunkist
Sunkist
Sunkist

Sunkist . . . the brand they'll reach for first!

22-✓

Price List No. A-100 Effective August 27, 195

F.O.B. TEMPE, ARIZONA

CASE SIZE	POUNDS PER CASE	SHELF PRODUCTS			PRODUCT NUMBER	PR PER
12-46 oz.	44½	**Sunkist** GRAPEFRUIT JUICE UNSWEETENED	NAT.	STR.	680	$ 2
24-2's	37	**Sunkist** GRAPEFRUIT JUICE UNSWEETENED	NAT.	STR.	680	$ 1
12-46 oz.	44½	**Sunkist** GRAPEFRUIT JUICE SWEETENED	NAT.	STR.	681	
24-2's	37	**Sunkist** GRAPEFRUIT JUICE SWEETENED	NAT.	STR.	681	
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED			695	$ 2
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED			695	$ 1
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED			696	
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED			696	
12-46 oz.	44½	**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL	STR.	260	
24-2's	37	**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL	STR.	260	
48-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL	STR.	260	
96-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL	STR.	260	
12-46 oz.	44½	**Sunkist** ORANGE JUICE SWEETENED	NATURAL	STR.	261	
24-2's	37	**Sunkist** ORANGE JUICE SWEETENED	NATURAL	STR.	261	
48-6 oz.		**Sunkist** ORANGE JUICE SWEETENED	NATURAL	STR.	261	
96-6 oz.		**Sunkist** ORANGE JUICE SWEETENED	NATURAL	STR.	261	

MINIMUM SHIPMENTS: 15,000 pounds minimum shipments to points i Arizona and California **ONLY.** Rail shipments 65,000 pounds to al points.

IMPORTANT: On consolidated shipments, usual split delivery, and stop in transit charges shall be for the account of the buyer.

TRUCK SHIPMENTS: Truck shipments shall be subject to our confirmation and confined to the regular truck routes where the minimum rate applies.

TERMS, ALLOWANCES & CONDITIONS OF SALE

Shall be the same as shown on our regular price list for all Shell Products.

F.O.B. SHIPPING POINT

CASE SIZE	POUNDS PER CASE	SHELF PRODUCTS	PRODUCT NUMBER	PRICE PER DOZ.
48-5½ oz.	25	**Sunkist** LEMON JUICE NATURAL STRENGTH	380	$ .90
12-46 oz.	44½	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	$ 2.85
24-2's	37	**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	$ 1.15
48-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	
24-6 oz.		**Sunkist** ORANGE JUICE UNSWEETENED NATURAL STR.	260	
12-46 oz.	44½	**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	
24-2's	37	**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	
48-6 oz.		**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	
24-6 oz.		**Sunkist** ORANGE JUICE SWEETENED NATURAL STR.	261	
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	685	
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	685	
12-46 oz.	44½	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	686	
24-2's	37	**Sunkist** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	686	
		EXCHANGE BRAND OR BUYER'S LABEL*		
48-5½ oz.	23	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$ .92
6/1 gal.	37	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$14.40
12-46 oz.	44½	**Exchange** ORANGE JUICE UNSWEETENED NATURAL STR.	53	$ 2.50
24-2's	37	**Exchange** ORANGE JUICE UNSWEETENED — NATURAL STR.	53	$ 1.12½
12-46 oz.	44½	**Exchange** ORANGE JUICE SWEETENED — NATURAL STR.	52	
24-2's	37	**Exchange** ORANGE JUICE SWEETENED — NATURAL STR.	52	
12-46 oz.	44½	**Exchange** GRAPEFRUIT JUICE UNSWEETENED — NAT. STR.	603	
24-2's	37	**Exchange** GRAPEFRUIT JUICE UNSWEETENED — NAT. STR.	603	
12-46 oz.	44½	**Exchange** GRAPEFRUIT JUICE SWEETENED NAT. STR.	602	
24-2's	37	**Exchange** GRAPEFRUIT JUICE SWEETENED — NAT. STR.	602	
12-46 oz.	44½	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	634	$ 2.53
24-2's	37	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	634	
12-46 oz.	44½	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	635	
24-2's	37	**Exchange** BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	635	

*Buyer's Label Prices Are the Same As Exchange Brand Quotations

EX WAREHOUSE WHERE STOCKED

[illegible]	[illegible] PER CASE	SHELF PRODUCTS	[illegible]	PRICE PER DOZ.
48-5½ oz.	22	**Sunkist** LEMON JUICE NATURAL STRENGTH	300	$ .98
24-5 oz.	15	**Sunkist** CONCENTRATE FOR LEMONADE	301	$ 1.45
24-6 oz.	15	**Sunkist** CONCENTRATE FOR ORANGEADE	220	$ 1.07½
12-46 oz.	44½	**Sunkist** ORANGE JUICE [illegible] NATURAL STR.	300	
24-2's	27	**Sunkist** ORANGE JUICE [illegible] NATURAL STR.	300	
12-46 oz.	44½	**Sunkist** ORANGE JUICE [illegible] NATURAL STR.	301	
24-2's	27	**Sunkist** ORANGE JUICE [illegible] NATURAL STR.	301	
48-5½ oz.	22	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$ .96
6 1 gal.	57	**Exchange** LEMON JUICE NATURAL STRENGTH	316	$16.40
48-6 oz.	20	**Exchange** LEMONADE BASE	319	$ 1.20
24-6 oz.	15	**Exchange** LEMONADE BASE	319	$ 1.20
48-6 oz.	20	**Exchange** ORANGEADE BASE	27	$ 1.30½
24-6 oz.	15	**Exchange** ORANGEADE BASE	27	$ 1.30½

EX CAR ON ARRIVAL AT WAREHOUSE

Shell Products shipped on consignment to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices

CASE SIZE	PER DOZ. TINS	CASE SIZE	PER DOZ. TINS
24-6 oz.		24-2's	
48-5½ oz.		12-46 oz.	
48-6 oz.		6 1 gal.	

It is specifically understood that Ex Car Prices will only be authorized if buyers agree to take delivery before the expiration of the free period. Seller will be responsible for all distribution charges at the warehouse.

Blank Squares Indicate Not Quoting

TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available.

TERMS: 1½% 10 days from date of invoice; net 30 days.

SWELL ALLOWANCE . . . . ¼ of 1%.

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange/Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations).

5½ oz. tins	$1.45 per 1000	No. 2 tins	$2.40 per 1000
46 oz. tins	4.50 per 1000	128 oz. tins	7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels will be applied. All necessary over-printing will be for the account of the buyer. If packed without labels in plain tins the credit will be 1¢ per case labor saved.

NON-DELIVERY: Seller shall not be answerable or accountable for the delivery of the whole or any part of an order, if non-delivery is caused by fire, strikes, acts of God, freight embargoes, inability to obtain raw materials or through other causes reasonably beyond the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA
318 Cadiz St., Dallas 2, Texas
608 W. Madison St., Chicago 6, Ill. **90 Hudson St., New York 13, N.Y.**

Sunkist Citrus Products News

To All Brokers

It is with pleasure that we send you this first edition of a new type of price list for Sunkist Canned Orange, Lemon, and Grapefruit Juice products. Many of our brokers have suggested that we issue a printed price list at regular intervals and this is the first of a series which we plan to send you every two weeks, or more often if there are important price changes.

It will be more convenient to have prices of all Sunkist Canned Juice products in condensed form given on one bulletin with which will be included other information such as shipping weights, allowances, terms, etc. If you have suggestions from time to time to improve this new price list further, we would like to have them as we want to make these price bulletins complete and convenient for your use.

Sunkist Orange, Lemon, and Grapefruit Juice products have shown a continual and very gratifying increase in volume of sales since they were introduced to the trade in the spring. Our production department has been unable during the past few months to supply the demand of several items, but that situation has been improved and there will be adequate stocks in the immediate future. The tremendous popularity of Sunkist with the consumer and the retail grocer was clearly demonstrated during the first few months of the present sales campaign when it was impossible to keep adequate supplies in many markets which, together with the high quality standards which have been set for these products, assures consumer satisfaction and an ever-increasing volume of business for you and for us.

It is our intention to maintain as well as to increase the present Sunkist sales tempo by aggressive advertising, merchandising, and sales promotion plans to achieve the volume of business we must have and you will continue to receive details of these new programs as they are developed.

I want to take this occasion to thank each of you personally for the splendid and much appreciated effort you have put on Sunkist Citrus Juice Products in your territory and, as I have told you on previous occasions, it is our determination to provide you not only with quality products, but at the same time sales tools necessary to make our account one of your best. Your suggestions are always welcome and earnestly solicited.

Sincerely,

CALIFORNIA FRUIT GROWERS EXCHANGE

Don Thompson

Manager

PRODUCTS DEPARTMENT

D.R.Thompson:H

Sunkist
CITRUS PRODUCTS

PRICE LIST No. W-100

Effective August 27, 1951

Cancelling All Previous Quotations

"the most
complete
line of
quality
citrus
products
under one
label!"

Sunkist, . . . the brand they'll reach for first!

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
[illegible] CALIFORNIA

Sunkist

[illegible] DO NOT APPLY [illegible]

F.O.B. SHIPPING POINT

[illegible]	[illegible]	SHELF PRODUCTS		PRODUCT NUMBER	PRICE [illegible]
[illegible]	[illegible]	**Sunkist**	LEMON JUICE NATURAL STRENGTH	[illegible]	$.[illegible]
[illegible]	[illegible]	**Sunkist**	ORANGE JUICE UNSWEETENED NATURAL STR	[illegible]	
[illegible]	[illegible]	**Sunkist**	ORANGE JUICE UNSWEETENED NATURAL STR	[illegible]	
[illegible]		**Sunkist**	ORANGE JUICE UNSWEETENED NATURAL STR	[illegible]	
[illegible]		**Sunkist**	ORANGE JUICE UNSWEETENED NATURAL STR	[illegible]	
[illegible]	[illegible]	**Sunkist**	ORANGE JUICE SWEETENED NATURAL STR	[illegible]	
[illegible]	[illegible]	**Sunkist**	ORANGE JUICE SWEETENED NATURAL STR	[illegible]	4
[illegible]		**Sunkist**	ORANGE JUICE SWEETENED NATURAL STR	[illegible]	
[illegible]		**Sunkist**	ORANGE JUICE SWEETENED NATURAL STR	[illegible]	
[illegible]	[illegible]	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICE UNSWEETENED	[illegible]	
[illegible]	[illegible]	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICE UNSWEETENED	[illegible]	
[illegible]	[illegible]	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICE SWEETENED	[illegible]	
[illegible]	[illegible]	**Sunkist**	BLENDED GRAPEFRUIT AND ORANGE JUICE SWEETENED	[illegible]	
		EXCHANGE BRAND OR BUYER'S LABEL*			
[illegible]	[illegible]	**Exchange**	LEMON JUICE NATURAL STRENGTH	[illegible]	$.[illegible]
1 gal.	[illegible]	**Exchange**	LEMON JUICE NATURAL STRENGTH	[illegible]	$[illegible]
[illegible]	[illegible]	**Exchange**	ORANGE JUICE UNSWEETENED NATURAL STR	[illegible]	
[illegible]	[illegible]	**Exchange**	ORANGE JUICE UNSWEETENED NATURAL STR	[illegible]	
[illegible]	[illegible]	**Exchange**	ORANGE JUICE SWEETENED NATURAL STR	[illegible]	
[illegible]	[illegible]	**Exchange**	ORANGE JUICE SWEETENED NATURAL STR	[illegible]	
[illegible]	[illegible]	**Exchange**	GRAPEFRUIT JUICE UNSWEETENED NAT. STR.	[illegible]	
[illegible]	[illegible]	**Exchange**	GRAPEFRUIT JUICE UNSWEETENED NAT. STR.	[illegible]	
[illegible]	[illegible]	**Exchange**	GRAPEFRUIT JUICE SWEETENED NAT. STR.	[illegible]	
[illegible]	[illegible]	**Exchange**	GRAPEFRUIT JUICE SWEETENED NAT. STR.	[illegible]	
[illegible]	[illegible]	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	[illegible]	$ [illegible]
[illegible]	[illegible]	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES UNSWEETENED	[illegible]	
[illegible]	[illegible]	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	[illegible]	
[illegible]	[illegible]	**Exchange**	BLENDED GRAPEFRUIT AND ORANGE JUICES SWEETENED	[illegible]	

*Buyer's Label Prices Are the Same As Exchange Brand [illegible]

[illegible] CALIFORNIA AND ARIZONA

EX WAREHOUSE WHERE STOCKED

[illegible]	[illegible]	[illegible] PRODUCTS		[illegible]	[illegible]
48-5½ oz.	[illegible]	**Sunkist** LEMON JUICE NATURAL STRENGTH		300	$ 1.[illegible]
24-6 oz.	[illegible]	**Sunkist** [illegible] FOR LEMONADE		301	$ 1.45
24-6 oz.	15	**Sunkist** CONCENTRATE FOR ORANGEADE		230	$ 1.67½
12-32 oz.	[illegible]	**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL STR.	200	
24-2's	37	**Sunkist** ORANGE JUICE UNSWEETENED	NATURAL STR.	200	
12-46 oz.	[illegible]	**Sunkist** ORANGE JUICE SWEETENED	NATURAL STR.	201	
24-2's	37	**Sunkist** ORANGE JUICE SWEETENED	NATURAL STR.	201	
48-5½ oz.	[illegible]	**Exchange** LEMON JUICE NATURAL STRENGTH		306	$.[illegible]
6-1 gal.	37	**Exchange** LEMON JUICE NATURAL STRENGTH		306	[illegible]
48-6 oz.	[illegible]	**Exchange** LEMONADE BASE		[illegible]	
24-6 oz.	15	**Exchange** LEMONADE BASE		[illegible]	
48-6 oz.	[illegible]	**Exchange** ORANGEADE BASE		27	
24-6 oz.	15	**Exchange** ORANGEADE BASE		27	

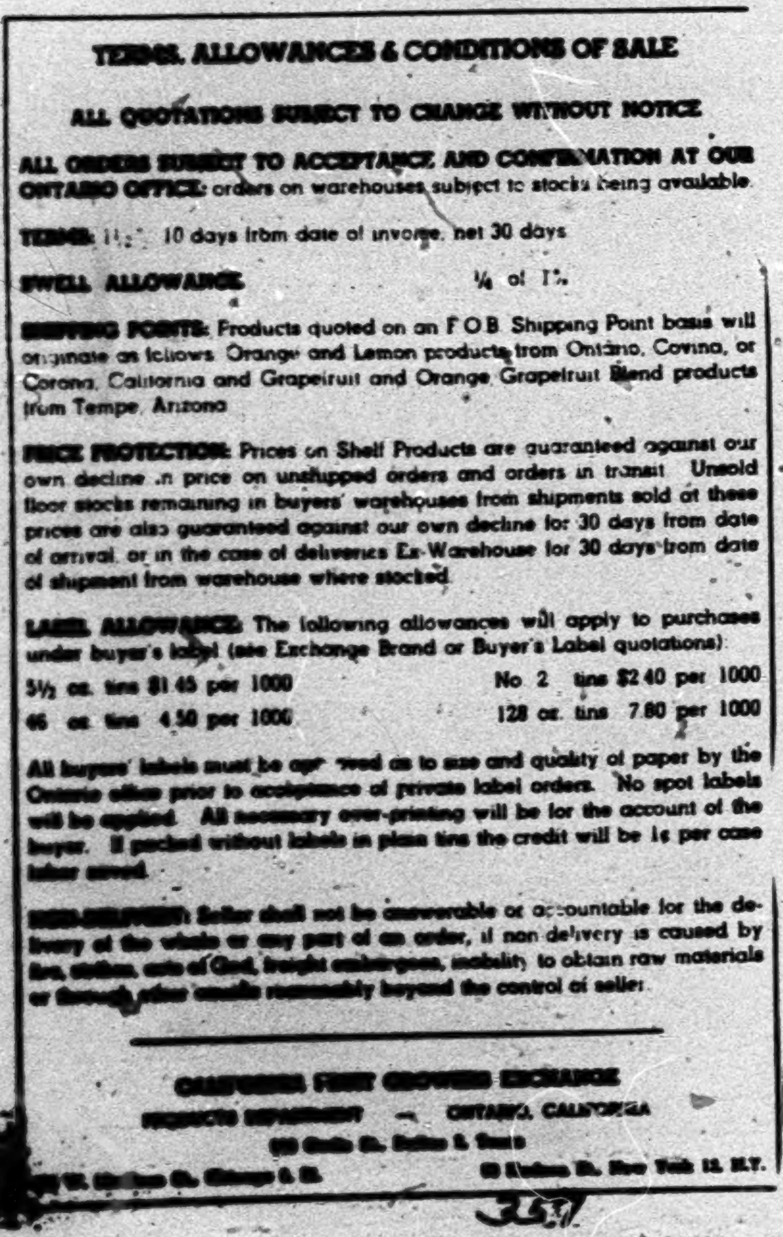
EX CAR ON ARRIVAL AT WAREHOUSE

[illegible] Products shipped [illegible] to our regular warehouses may be quoted Ex Car on arrival deducting the following allowances from the Ex Warehouse Prices.

[illegible]	[illegible]	[illegible]	[illegible]
[illegible]		[illegible]	
48-5½ oz.		[illegible]	
48-6 oz.		[illegible]	

It is [illegible]

[illegible]



TERMS, ALLOWANCES & CONDITIONS OF SALE

ALL QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

ALL ORDERS SUBJECT TO ACCEPTANCE AND CONFIRMATION AT OUR ONTARIO OFFICE: orders on warehouses subject to stocks being available.

TERMS: 1½% 10 days from date of invoice, net 30 days

SWELL ALLOWANCE ¼ of 1%

SHIPPING POINTS: Products quoted on an F.O.B. Shipping Point basis will originate as follows: Orange and Lemon products from Ontario, Covina, or Corona, California and Grapefruit and Orange-Grapefruit Blend products from Tempe, Arizona.

PRICE PROTECTION: Prices on Shelf Products are guaranteed against our own decline in price on unshipped orders and orders in transit. Unsold floor stocks remaining in buyers' warehouses from shipments sold at these prices are also guaranteed against our own decline for 30 days from date of arrival, or in the case of deliveries Ex-Warehouse for 30 days from date of shipment from warehouse where stocked.

LABEL ALLOWANCE: The following allowances will apply to purchases under buyer's label (see Exchange Brand or Buyer's Label quotations):

5½ oz. tins $1.45 per 1000	No. 2 tins $2.40 per 1000
46 oz. tins 4.50 per 1000	128 oz. tins 7.80 per 1000

All buyers' labels must be approved as to size and quality of paper by the Ontario office prior to acceptance of private label orders. No spot labels **will be applied. All necessary over-printing** will be for the account of the **buyer. If packed without labels in plain tins** the credit will be 1¢ per case **labor saved.**

NON-DELIVERY: Seller shall not be answerable or accountable for the de**livery of the whole or any part of an order,** if non delivery is caused by **fire, strikes, acts of God, freight embargoes,** inability to obtain raw materials **or through other causes reasonably beyond** the control of seller.

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT — ONTARIO, CALIFORNIA

[illegible] St., Dallas 1, Texas

[illegible] W. [illegible] St., Chicago 6, Ill. **[illegible] St., New York 13, N.Y.**

[fol. 358]

Sunkist Citrus Products News

To All Brokers:

It is with pleasure that we send you this first edition of a new type of price list for Sunkist Canned Orange, Lemon, and Grapefruit Juice products. Many of our brokers have suggested that we issue a printed price list at regular intervals and this is the first of a series which we plan to send you every two weeks, or more often if there are important price changes.

It will be more convenient to have prices of all Sunkist Canned Juice products in condensed form given on one bulletin with which will be included other information such as shipping weights, allowances, terms, etc. If you have suggestions from time to time to improve this new price list further, we would like to have them as we want to make these price bulletins complete and convenient for your use.

Sunkist Orange, Lemon, and Grapefruit Juice products have shown a continued and very gratifying increase in volume of sales since they were introduced to the trade in the spring. Our production department has been unable during the past few months to supply the demand of several items, but that situation has been improved and there will be adequate stocks in the immediate future. The tremendous popularity of Sunkist with the consumer and the retail grocer was clearly demonstrated during the first few months of the present sales campaign when it was impossible to keep adequate supplies in many markets which, together with the high quality standards which have been set for these products, assures consumer satisfaction and an ever-increasing volume of business for you and for us.

It is our intention to maintain as well as to increase the present Sunkist sales tempo by [illegible] advertising, merchandising, and sales promotion plans to achieve the volume of business we must have and you will continue to receive details of these new programs as they are developed.

I want to take this occasion to thank each of you personally for the splendid and much appreciated effort you have put on Sunkist Citrus Juice Products in your territory and, as I have told you on previous occasions, it is our determination to provide you not only with quality products, but at the same time sales tools necessary to make our account one of your best. Your suggestions are always welcome and earnestly solic[illegible]

Sincerely,

CALIFORNIA FRUIT GROWERS EXCHANGE

Don Thompson

Manager

PRODUCTS DEPARTMENT

D.R.Thompson:H

Sunkist
CITRUS PRODUCTS

PRICE LIST No. N-100

Effective August 27, 1951

Cancelling All Previous Quotations

---

*"the most
complete
line of
quality
citrus
products
under one
label!"*

Sunkist . . . the brand they'll reach for first!

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Department
616 EAST GROVE STREET, ONTARIO, CALIFORNIA

Sunkist
It's the brand they'll reach for first

[fol. 359]

In United States District Court

Plaintiffs' Exhibit 28

[Letterhead of California Fruit Growers Exchange, Ontario, California]

Bulletin #1

August 3, 1951

SUNKIST CALIFORNIA VALENCIA ORANGE JUICE
TO OUR BROKERS:

We are pleased to offer herewith our opening prices on Fancy CALIFORNIA VALENCIA ORANGE JUICE. Since we have been favored with the finest Orange crop in recent years, a crop which can rightfully be termed a "vintage" crop, we are justly proud to offer this juice under the famous SUNKIST label. We are also happy to offer at this time quality California Valencia Orange Juice under the EXCHANGE Brand label as well as private label. At this time we are only offering 24/2's and 12/46 oz., but it is expected that within a month we will offer SUNKIST Orange Juice in the 6 oz. size.

Our opening prices are:

		All States Except Calif. & Arizona	Calif. & Arizona
24/2's	#260 SUNKIST Pure California Valencia Orange Juice	$ .97½ doz.	$1.10 doz.
12/46 oz.	#260 SUNKIST Pure California Valencia Orange Juice	2.20 doz.	2.50 doz.
24/2's	#53 EXCHANGE or Private Label Valencia Orange Juice	$ .95 doz.	$1.07½ “
12/46 oz.	#53 EXCHANGE or Private Label Valencia Orange Juice	2.13 doz.	2.43 “

TERMS: F.O.B. Ontario, California
Cash Discount 1½%; net 10 days
Swell Allowance ¼ of 1%
Prompt Shipment first available car

Prices guaranteed against our own decline for a period of 30 days after arrival of shipment. on unsold warehouse portion of shipment.

In view of these exceptionally attractive prices we urge you to cover your trade thoroughly, submitting our offering to all buyers. Undoubtedly you will find many customers who have heretofore not stocked our merchandise, willing to buy SUNKIST ORANGE JUICE at these competitive prices. Therefore we suggest you wire all substantial orders to us for confirmation as we may be forced to withdraw this offering without prior notice. Now is the time, if ever, to sell SUNKIST PURE CALIFORNIA VALENCIA ORANGE JUICE. "Ring the Bell" in sales and profits by selling SUNKIST Orange Juice as well as the complete SUNKIST line of Shelf Items. (Incidentally, samples of our new SUNKIST Orange Juice are going forward to you today).

Administration of this offering will be handled by J. F. Marshall to whom you should address your correspondence pertaining to this attractive offering.

Very truly yours,

/s/ Howard W. Thompson
Howard W. Thompson
Sales Manager-Consumer Goods

HWT/vp

[fol. 360]

cc: All Brokers on Shelf Pack (except Arizona and California)
All Industrial Salesmen
Division Offices
Canadian Brokers.

[Letterhead of California Fruit Growers Exchange, Ontario, California]

Bulletin #4

August 20, 1951

WITHDRAWAL ON ORANGE JUICE

TO OUR BROKERS:

Because of the rapidly firming citrus market, and because sales to date of both SUNKIST and Exchange Valencia Unsweetened Orange Juice have been well in excess of our expectations, we wired you Saturday that, effective immediately, we were with-drawing our offering.

Our opening prices were extremely attractive and competitive. In addition, our SUNKIST juices are being advertised nationally as well as advertised in many sectional media. These two factors alone are sufficient to explain heavy sales, but our quality control department supplied unsurpassed quality this year through improved packing and technical processes. We have received many letters from our brokers, as well as from the trade, to document that fact.

Shipments of orders already confirmed are going forward as promptly as possible and after reviewing our position, we expect to re-enter the market shortly—perhaps in two weeks.

Very truly yours,

California Fruit Growers Exchange

/s/ Howard W. Thompson
Sales Manager-Consumer Goods
PRODUCTS DEPARTMENT

Howard W. Thompson/jhs

[Letterhead of California Fruit Growers Exchange,
Ontario, California]

Bulletin #5
September 4, 1951

SUNKIST UNSWEETENED VALENCIA ORANGE JUICE

TO OUR BROKERS:

We are pleased to advise that we are again entering the market on California Unsweetened Valencia Orange Juice. Fresh fruit receipts increased considerably during the period we were withdrawn, and shipments of orange juice have now closely approximated prior sales. As a result, we are able to offer the following attractive and competitive prices, in line with our policy:

24/2 #260	SUNKIST Valencia Orange Juice	$1.02½ doz.
12/46 oz.	SUNKIST Valencia Orange Juice	2.35 doz.
24/2 #53	Exchange or Private Label Valencia Orange Juice	$1.00 doz.
12/46 oz.	Exchange or Private Label Valencia Orange Juice	2.28 doz.

TERMS: F.O.B. Seller's California Plants
Cash Discount 1½%; net 10 days
Swell Allowance ¼ of 1%
Prompt Shipment first available car.

Prices guaranteed against our own decline for 30 days after arrival of shipment on unsold warehouse portion of shipment.

Even considering the volume orders previously received, we feel there is still much business to be obtained if your trade is covered thoroughly. We are in an excellent position to ship all orders promptly in first available rail and steamer pool cars.

With Florida Juice in somewhat short supply, you should find many buyers eager to submit orders for prompt delivery.

Very truly yours,

CALIFORNIA FRUIT GROWERS EXCHANGE
/s/ HOWARD W. THOMPSON
Sales Manager-Consumer Goods
PRODUCTS DEPARTMENT

H. W. Thompson/lg

[fol. 362]

[Letterhead of California Fruit Growers Exchange, Ontario, California]

Bulletin #8
September 19, 1951

WITHDRAWAL ON EXCHANGE & PRIVATE LABEL ORANGE JUICE

TO OUR BROKERS:

Effective immediately we are withdrawing our offering from all markets on EXCHANGE and PRIVATE LABEL California Valencia Unsweetened Orange Juice. This withdrawal is necessary because of extremely heavy demands for quality California Orange Juice and is coupled with the fact that Florida supplies are practically exhausted.

In consideration of continuing sales demands for citrus juices and in view of decreasing supplies, both in Florida and California, our present continued offering on #260 SUNKIST California Valencia Orange Juice remains attractive and competitive. Therefore, we urge you again to cover all buyers in your respective territories, wiring large orders for confirmation so that buyers may be protected.

For your ready reference we list below our prices terms on SUNKIST Orange Juice.

24/2's	#260 SUNKIST California Valencia Orange Juice, Unsweet.	$1.02½
12/46 oz.	#260 SUNKIST California Valencia Orange Juice, Unsweet.	$2.35

TERMS: F.O.B. Seller's California Plants
Cash Discount 1½% net 10 days
Swell Allowance ¼ of 1%
Prompt Shipment First Available Car

Very truly yours,

California Fruit Growers Excha

/s/ Howard W. Thompson
Sales Manager-Consumer Goods
PRODUCTS DEPARTMENT

Howard W. Thompson/vp

[fol. 363]

[Letterhead of California Fruit Growers Exchang
Ontario, California]

Bulletin #1

October 8, 1

PRICE ADVANCE
SUNKIST CALIFORNIA VALENCIA ORANGE JU

TO OUR BROKERS:

During recent weeks we have repeatedly advised th price increase on SUNKIST California Valencia Or Juice was imminent. Accordingly, effective as of Oct 9, 1951, we are advancing our prices as follows:

		All other States	Calif. & Ariz.
48/6 oz.	#260 SUNKIST California Valencia Orange Juice	$ .55 doz.	$ .60 doz.
24/2's	#260 SUNKIST California Valencia Orange Juice	1.10 doz.	1.22½ "
12/46 oz.	#260 SUNKIST California Valencia Orange Juice	2.50 doz.	2.80

TERMS: F.O.B. Ontario, California
Cash Discount 1½%; net 10 days
Swell Allowance ¼ of 1%
Prompt Shipment first available car

Prices guaranteed against our own decline for a period of 30 days after arrival on unsold warehouse portion of shipment.

We are frank to state that our supplies are abnormally low and in consideration of this inventory position, plus continued sales demand, there can be no doubt that our action is warranted. By now all customers should have had an opportunity to cover their needs for a reasonable period, but if some have not, we urge you to mail or wire additional orders without delay for it appears that we will have a complete sell out in the very near future.

Very truly yours,

California Fruit Growers Exchange
/s/ Howard W. Thompson
Sales Manager-Consumer Goods
PRODUCTS DEPARTMENT

Howard W. Thompson/vp

[Letterhead of California Fruit Growers Exchange,
Ontario, California]

Bulletin #13

October 17, 1951

WITHDRAWAL ON SUNKIST VALENCIA ORANGE JUICE

TO OUR BROKERS:

Effective immediately we are withdrawing from all markets except California and Arizona on #200 SUNKIST Unsweetened Valencia Orange Juice.

We know the above statement does not come to you as a surprise, for we have kept you fully posted concerning developments. Naturally, we hope that all customers have had an opportunity to purchase their requirements for a reasonable period and that there will be no hardship cases.

Frankly, our sales have exceeded current production and with perhaps another ten days remaining in which to pack, we are confident unshipped orders will complete the balance of our pack. If it develops that additional fresh fruit becomes available and our pack exceeds sales we will, of course, notify you accordingly. In the meantime, we suggest you review your unshipped sales, submitting shipping instructions immediately if they have not already been mailed.

Very truly yours,

California Fruit Growers Exchange

/s/ Howard W. Thompson
Sales Manager-Consumer Goods
Products Department

Howard W. Thompson/vp

[fol. 365]

[Letterhead of California Fruit Growers Exchange, Ontario, California]

AIR MAIL

Bulletin #15-A
November 30, 1951

NEW OFFERING
SUNKIST VALENCIA ORANGE JUICE

TO OUR BROKERS:

Effective Monday, December 3, 1951, we are offering to a very few select markets in the country the following items for prompt shipment:

48/6 oz.	#260 SUNKIST Valencia Orange Juice, Unsweet.	$ .55 per doz.
24/2's	#260 SUNKIST Valencia Orange Juice, Unsweet.	1.10 per doz.
12/46 oz.	#260 SUNKIST Valencia Orange Juice, Unsweet.	2.50 per doz.

Prices are f.o.b. Ontario, Calif., and our usual terms apply. Orders for private label must also be quoted at these prices.

This is not a general offering, but is given to you only because of your previously demonstrated efforts to obtain volume orders of SUNKIST Valencia Orange Juice in your territory. Furthermore, this offering was made possible due to recent heavy receipts of fresh fruit, and although our pack is completed, we do have sufficient stock to fill orders on a prompt shipment basis for a limited time.

The National Chains, and many local chains, together with outstanding jobbers, are showing renewed interest in our high quality SUNKIST Valencia Orange Juice, and we are firmly convinced that volume business can be obtained by your continued aggressive working of the above items.

We are particularly interested in working with those customers who are seeking a continuity of supply throughout the year, and will appreciate your advices concerning such customers as we will undoubtedly be able to work with them.

Government requirements are going to be considerable after December; therefore, we suggest no time be lost in forwarding orders for pool car shipments.

Good luck, and good selling!

Very truly yours,

CALIFORNIA FRUIT GROWERS EXCHANGE
/s/ HOWARD W. THOMPSON
Sales Manager-Consumer Goods
PRODUCTS DEPARTMENT

Howard W. Thompson/vp

[fol. 386]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 29

The following constitutes the only reference to *the 1951 agreement* TREESWEET PRODUCTS CO. contained in any of the Minutes of the Board of Directors or of the Executive Committee of the EXCHANGE ORANGE PRODUCTS COMPANY during the year 1951. The reference following is contained in the Minutes of the regular Executive Committee meeting of the EXCHANGE ORANGE PRODUCTS COMPANY held in Los Angeles, California, September 19, 1951, and is contained in the Manager's report referred to in said Minutes:

> "TREESWEET production has been cut one-half and it was felt that every effort should be made to have some SUNKIST and TREESWEET single-strength juice on the market over the winter even in limited supply so as to keep California single-strength juice labels on the market."

Italics indicate handwritten changes.

PLAINTIFFS' EXHIBIT 29

This exhibit contains the only reference to the 1951 TREESWEET agreement (plaintiffs' Exhibit 20) contained in any of the Minutes of the Board of Directors or the Executive Committee of EXCHANGE ORANGE during that year. The date of the meeting is September 19, 1951.

[fol. 267]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 30

Articles of
Incorporation
and By-Laws
of

EXCHANGE LEMON PRODUCTS COMPANY

Revised to Comply With Amendments to Date
Oct. 28, 1947

[fol. 268]

SECOND AMENDED ARTICLES OF INCORPORATION OF EXCHANGE LEMON PRODUCTS COMPANY

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, a majority of whom are residents of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the general laws of the State of California, and for such purpose we hereby certify:

FIRST: That the name of said corporation is and shall be:

EXCHANGE LEMON PRODUCTS COMPANY

SECOND: That the purposes for which the same is formed are:

(a) To receive lemons and other citrus fruit from its stockholders and other producers and to manufacture therefrom products or by-products including but not limited to any one or more of the following: citrate of lime, citric acid, pectin, oil, or juice products; to market the citrus fruit in the form received, or in manufactured or in other form, and to return to them the proceeds of sales, less the necessary operating and marketing expenses, on the basis of either the quantity or the value of the lemons or other citrus fruit furnished by them;

(b) To purchase, construct, or otherwise acquire; to equip, own, maintain and operate; to mortgage, pledge, or otherwise encumber; to sell, exchange, or otherwise dispose of, processing facilities, stores and warehouses, houses, buildings and appurtenances, appliances, equipment and personal property of every kind or character, and real property necessary or convenient for the conduct and operation of the business of the corporation, or incidental thereto;

* * * * * * *

(e) This corporation shall not declare or pay any dividend (or interest) on its capital stock; except that, upon dissolution of the corporation, or its partial liquidation by a reduction of the total amount of its outstanding stock, its stockholders, as stockholders, shall be entitled to receive back the par value of their stock, but no more, after provision has been made for the payment of corporate debts and the distribution of the proceeds of sales, less the necessary operating and marketing expenses.

* * * * * * *

[fol. 369] FIFTH: Unless and until changed by the By-Laws as hereinafter provided, the number of directors shall be eighteen (18); and authority is hereby conferred upon and reserved to the stockholders to adopt, repeal and amend By-Laws, wherein and whereby the number of directors of the corporation shall be fixed, and the number of directors at any time shall be as fixed and provided in the By-Laws of the corporation then in force, and such number may be changed from time to time by a By-Law adopted by the stockholders as other By-Laws are adopted.

Names:	Whose Residence is at:
C. C. Teague	Santa Paula, California
W. Grant Fraser	Riverside, California
D. Eyman Huff	Santa Ana, California
J. W. Freeman	Upland, California
Fred O. Sargent	Whittier, California
H. A. Lynn	Riverside, California
J. E. Adamson	Pomona, California
S. B. Hampton	Corona, California
W. C. McCully	Corona, California
M. Morgan	Lamanda Park, California
E. G. Dezell	Los Angeles, California
F. B. Browning	Tustin, California
A. W. Wohlford	Escondido, California
C. W. Leffingwell, Jr.	Pasadena, California
R. H. Wilkinson	Los Angeles, California
George E. Farrand	Ventura, California
G. W. Hosford	San Dimas, California

SIXTH: That the amount of the capital stock of said corporation is Two Million Dollars ($2,000,000.00), and the number of shares into which it is divided is Two Hundred Thousand (200,000) of the par value of Ten Dollars ($10.00) each.

• • • • • • •

[fol. 370] IN WITNESS WHEREOF we have hereunto set our hands this 6th day of January, 1915.

C. C. Teague
W. Grant Fraser
D. Eyman Huff
J. W. Freeman
Fred O. Sargent
H. A. Lynn
J. E. Adamson
S. B. Hampton
W. C. McCully
M. Morgan
E. G. Dezell
F. B. Browning

A. W. Wohlford
C. W. Leffingwell, Jr.
R. H. Wilkinson
George E. Farrand
G. W. Hosford

(Certificate of Notary follows)

[fol 371]

BY-LAWS
of
EXCHANGE LEMON PRODUCTS COMPANY

• • • • • • •

[fol. 372]

ARTICLE II.

BOARD OF DIRECTORS

Section 1.—Number.

Amended 12-12-50

The corporate powers, business and property of the corporation shall be exercised, conducted and controlled by a board of directors consisting of seventeen (~~17~~ *20*) persons, or such other increased or decreased number as may be hereafter provided for.

• • • • • • •

[fol. 373]

ARTICLE IV.

DUTIES OF DIRECTORS

It shall be the duty of the directors:

• • • • • • •

4. That whenever a prospective shipper of lemons through the California Fruit Growers Exchange shall have executed the Agreement Subscribing for Stock and Creating "Exchange Lemon Products Company Revolving Fund",

---

Italics indicate handwritten changes.

and amendments thereto, the Board of Directors, through its officers, are authorized to execute such agreement or agreements.

• • • • • • •

[fol. 374]

ARTICLE XV.

POLICY OF THE COMPANY

(a)—Concerning business done for other than Stockholders and Distribution of Sales Proceeds.

As disclosed by its Articles of Incorporation, Exchange Lemon Products Company was incorporated to receive lemons and other citrus fruit from its stockholders and other producers and to manufacture products and by-products therefrom; to market the citrus fruit in the form received, or in manufactured or in other form, and to return to them the proceeds of sales, less the necessary operating and marketing expenses, on the basis of either the quantity or the value of the lemons or other citrus fruit furnished.

These By-Laws do now expressly ratify, confirm and approve the purposes as in said articles contained, and reassert the proposition that said company is incorporated to act in the transaction of business for its stockholders only and at cost; provided, however, that fruit from non-stockholders who are producers may be handled from time to time, in accordance with federal and state laws and regulations applying to co-operatives, at the discretion of the Board of Directors; provided further that the fruit of such non-stockholders shall be handled on the same basis as that of stockholders, subject to such equitable adjustments as the Board of Directors may deem necessary for the purpose of equalizing the burdens of such stockholders and non-stockholders. A non-stockholder shall be bound and have the benefit of the Articles of Incorporation, By-Laws, and all rules, regulations and policies of the company concerning the handling of stockholders' lemons or other citrus fruit.

Inasmuch as it is the intent and purpose of the incorporators of this company that none shall become its stockholders except shippers affiliated with California Fruit Growers Exchange for the marketing of their citrus fruit, and as it is the intent that this company be co-operative i its activities, it is now expressly provided that all proceed of sales, less necessary operating and marketing expense [fol. 375] shall be returned to the persons entitled theret on the basis of either the quantity or the value of the lemon or other citrus fruit furnished. Such proceeds shall be s returned as promptly as the collection thereof, the financia position of the company and accounting procedure may permit. The determination of the Board of Directors as t the amount of necessary operating and marketing expenses including provisions for the creation, maintenance or expansion of necessary reserves, shall be conclusive.

* * * * * * *

(c)—Miscellaneous Conditions.

* * * * * * *

[fol. 376] Each stockholder shall deliver to Exchang Lemon Products Company all lemons under his contro not marketed by California Fruit Growers Exchange i fresh fruit channels.

This corporation shall be under no obligation to accep fruit from any stockholder after he has ceased to marke his fruit through the California Fruit Growers Exchange

* * * * * * *

All fruit received shall be handled as an annual poo or pools beginning November 1st of each year to and including October 31st of the succeeding year; but the Board o Directors may, if it deems advisable, make such pool o pools for a different period.

* * * * * * *

[fol. 377]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 31

[Letterhead of Exchange Lemon Products Company, Corona, California]

[Stamp—Received—Jul 11, 1951—Santa Ana, Calif.—Ans. ....]

July 10, 1951

Treesweet Products Company
P.O. Box 28
Santa Ana, California

Attention: Mr. W. B. Taylor

Gentlemen:

The following is our understanding of the terms under which the Exchange Lemon Products Company is furnishing you lemons, effective April 1, 1951.

1. Oil extracted will be returned to E. L. P. Co., who is to pay Treesweet 35¢ per pound for extracting the oil and furnish drums and transportation.
2. Peel is to be sold by Treesweet and whatever is realized is to be paid to E. L. P. Co.
3. The balance of the fruit is to be billed to Treesweet @ 57¢ per gallon for the lemon juice content. Lemon juice content shall be defined as the net gallons per ton as determined by E. L. P. Co., and reported on Fruit Received form by the laboratory.

We would appreciate your indicating your confirmation of the above on the copy of this letter enclosed.

Yours very truly,

EXCHANGE LEMON PRODUCTS COMPANY

/s/ LYNN L. HALL
Lynn L. Hall, Office Manager

LLH/bw
Enclosure

July 13, 1951
The above letter correctly states the terms
under which lemons are furnished by EXCHANGE
LEMON PRODUCTS COMPANY, effective April 1, 1951
TREESWEET PRODUCTS COMPANY

By: /s/ W. B. Taylor
Treas.

[fol. 378]

June 25, 1951

Memorandum

To: L. L. Hall

From: D. F. McMillen

Mr. McCracken called this morning in reference to our discussions of Saturday and we have agreed upon the following basis of fruit sales retroactive to cover the approximately 1800 tons delivered to date for which final settlement has not yet been made.

We will consider the arrangement as a processing arrangement rather than a cash sale insofar as our own internal records and pool payments are concerned since the oil will be returned to us, and therefore the full cash sale proceeds for the fruit are not immediately available for disbursement through the fruit sales pools.

However, insofar as our relations with Treesweet are concerned, the arrangement will be considered as an outright sale of fruit with no subsequent reductions or increases in the return related to the price at which they sell the finished product.

Billing will be on the basis of 57 cents per gallon of juice, the gallonage to be that shown by our sample records from the lots as delivered. The oil will be returned to us (unless special arrangements are made to the contrary) and we will pay the usual 35 cents per pound processing charge to Treesweet.

It will probably be necessary and desirable to continue the present arrangements concerning the disposition of peel.

The figure of 57 cents a gallon is based upon the standard yield of $75 *gal* per ton or a return of $42.75 per standard ton from the juice plus an estimated value of $19.84 per ton for peel products, making a total estimated return per standard ton of fruit of $62.59.

Mr. McCracken has requested that we bill him as promptly as possible on the fruit delivered ~~during~~ *through* May since their fiscal year closes May 31.

/s/ DFM

DFM:IL
cc: Kerby Moore

Italics indicate handwritten changes.

[fol. 379]

Plaintiffs' Exhibit 36

Treesweet Products Co.

BULLETIN

OPENING SPOT PRICES
1951 PACK
TREESWEET CALIFORNIA VALENCIA ORANGE JUICE UNSWEETENED

	Shipping Weight Per Case	PRICES PER DOZEN	
		F.O.B. Plant	Ex-Whse. Dist. Pts.*
48/6 oz.	26#	$ .50	$ .61
24/12 oz.	24#	.80	1.02
24/2's	36#	.97½	1.30
12/46 oz.	44½#	2.20	2.99

*Where warehouse stocks are available.

Actual trucking rate to Los Angeles Harbor will apply on all water shipments. Present truckload rate (30,000#) is 15½¢ per cwt.

TERMS: 1½% Cash Discount against arrival draft.

SWELL ALLOWANCE: ¼ of 1%.

These prices are guaranteed against our own decline in price on unshipped orders and goods in transit. Unsold floor stocks remaining in buyers' warehouse are also guaranteed against our own decline for 30 days from date of arrival of car at destination, and from date of invoice on ex-warehouse sales.

All orders are strictly subject to our final confirmation. Above prices are subject to change without notice.

The above prices apply to sales outside California and Arizona.

This bulletin supersedes prices given in our bulletin of 7/21/50.

August 3, 1951.

[fol. 380]

TREESWEET PRODUCTS CO.

BULLETIN

OPENING SPOT PRICES
1951 PACK
TREESWEET CALIFORNIA VALENCIA ORANGE JUICE
UNSWEETENED

	Shipping Weights Per Case	PRICES PER DOZEN F.O.B. PLANT Santa Ana
48/6 oz.	26#	$ .52½
24/12 oz.	24#	.87½
24/2's	36#	1.10
12/46 oz.	44½#	2.50

Actual trucking rate to Los Angeles Harbor will apply on all water shipments. Present truckload rate (30,000#) is 15½¢ per cwt.

TERMS: 1½%—10 days open billing on Pacific Coast.
1½%—10 day draft.

SWELL ALLOWANCE: ¼ of 1%.

These prices are guaranteed against our own decline in price on unshipped orders and goods in transit. Unsold floor stocks remaining in buyers' warehouse are also guaranteed against our own decline for 30 days from date of arrival of car at destination, and from date of invoice on ex-warehouse sales.

All orders are strictly subject to our final confirmation. Above prices are subject to change without notice.

The above prices apply to sales only in California, Arizona and Hawaii.

This bulletin supersedes prices given in our bulletin of 7/21/50.

August 3, 1951.

[fol. 381]

TREESWEET PRODUCTS CO.

BULLETIN

SPOT PRICES
1951 PACK
TREESWEET CALIFORNIA VALENCIA ORANGE JUICE
UNSWEETENED

	Shipping Weights Per Case	PRICES PER DOZEN F.O.B. PLANT Santa Ana
48/6 oz.	26#	$ .60
24/12 oz.	24#	.92½
24/2's	36#	1.15
12/46 oz.	44½#	2.65

Actual trucking rate to Los Angeles Harbor will apply on all water shipments. Present truckload rate (30,000#) is 15½¢ per cwt.

TERMS: 1½%—10 days open billing on Pacific Coast.
1½%—10 day draft.

SWELL ALLOWANCE: ¼ of 1%.

These prices are guaranteed against our own decline in price on unshipped orders and goods in transit. Unsold floor stocks remaining in buyers' warehouse are also guaranteed against our own decline for 30 days from date of arrival of car at destination, and from date of invoice on ex-warehouse sales.

All orders are strictly subject to our final confirmation. Above prices are subject to change without notice.

The above prices apply to sales only in California, Arizona and Hawaii.

This bulletin supersedes prices given in our bulletin of 8/3/51.

August 20, 1951.

[fol. 382]

Treesweet Products Co.

BULLETIN

SPOT PRICES
1951 PACK
TREESWEET CALIFORNIA VALENCIA ORANGE JUICE
UNSWEETENED

	Shipping Weight Per Case	PRICES PER DOZEN	
		F.O.B. Plant	Ex-Whse Dist. Pts.*
48/6 oz.	26#	$ .55	$ .66
24/12 oz.	24#	.85	1.07
24/2's	36#	1.02½	1.35
12/46 oz.	44½#	2.35	3.14

* Where warehouse stocks are available.

Actual trucking rate to Los Angeles Harbor will apply on all water shipment. Present truckload rate (30,000#) is 15½¢ per cwt.

TERMS: 1½% Cash Discount against arrival draft.

SWELL ALLOWANCE: ¼ of 1%.

These prices are guaranteed against our own decline in price on unshipped orders and goods in transit. Unsold floor stocks remaining in buyers' warehouse are also guaranteed against our own decline for 30 days from arrival of rail car at unloading point; after scheduled arrival at ocean port of discharge and from date of invoice on ex-warehouse sales.

The above prices are for prompt shipment only. No orders will be confirmed for delayed delivery at these prices. All orders are strictly subject to our final confirmation. Above prices are subject to change without notice.

The above prices apply to sales outside California and Arizona.

This bulletin supersedes prices given in our bulletin of August 3, 1951.

September 4, 1951.

[fol. 383]

TREESWEET PRODUCTS CO.

BULLETIN

SPOT PRICES
1951 PACK
TREESWEET CALIFORNIA VALENCIA
ORANGE JUICE
UNSWEETENED

	Shipping Weights Per Case	PRICES PER DOZEN F.O.B. PLANT Santa Ana
48/6 oz.	26#	$ .60
24/12 oz.	24#	.97½
24/2s	36#	1.22½
12/46 oz.	44½#	2.80

Actual trucking rate to Los Angeles Harbor will apply on all water shipments. Present truckload rate (30,000#) is 15½¢ per cwt.

TERMS: 1½%—10 days open billing on Pacific Coast.
1½%—10 day draft.

SWELL ALLOWANCE: ⅓ of 1%.

These prices are guaranteed against our own decline in price on unshipped orders and goods in transit. Unsold flour stocks remaining in buyers' warehouse are also guaranteed against our own decline for 30 days from arrival of rail car at unloading point; after scheduled arrival at ocean port of discharge and from date of invoice on ex-warehouse sales.

The above prices are for prompt shipment only. No orders will be confirmed for delayed delivery at these prices. All orders are strictly subject to our final confirmation. Above prices are subject to change without notice.

The above prices apply to sales only in California, Arizona and Hawaii.

This bulletin supersedes prices given in our bulletin of 9/20/51.

October 8, 1951.

39

PROSPECTUS

32,465 Shares

Winckler & Smith Citrus Products Co.

Anaheim, California

(A California Corporation)

Cumulative and Convertible 7% Preferred

Par Value: $5.00 per share
Offering Price: $5.00 per share

BECAUSE THESE SECURITIES ARE BELIEVED TO BE EXEMPT FROM REGISTRATION, THEY HAVE NOT BEEN REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION; BUT SUCH EXEMPTION, IF AVAILABLE, DOES NOT INDICATE THAT THE SECURITIES HAVE BEEN EITHER APPROVED OR DISAPPROVED BY THE COMMISSION, OR THAT THE COMMISSION HAS CONSIDERED THE ACCURACY OR COMPLETENESS OF THE STATEMENTS IN THIS COMMUNICATION.

IN UNITED STATES DISTRICT COURT

Deputy Clerk

WINCKLER & SMITH CITRUS PRODUCTS CO., INC.
P. O. Box 431
ANAHEIM, CALIFORNIA

These Securities are to be sold to bonafide residents of the State of California only.

The date of this Prospectus is May 1, 1951.

IN UNITED STATES DISTRICT COURT
PLAINTIFFS' EXHIBIT 39

Winckler & Smith Citrus Products Co.

THE CITRUS INDUSTRY IN PEACE AND WAR

The citrus industry is one of the few industries today which is sound in peace and war alike.

Records of the last war indicate that Army and Navy took as much as 50% of the citrus industry's canned output during World War II. For the coming year it is estimated that the Quartermaster Depot will take approximately 20% of the canned citrus juices produced and it is expected as our armed forces are going to be increased in number that the demand of the Quartermaster is going to increase in proportion.

It stands to reason that in supplying our armed forces, canned citrus juices are going to play an important role inasmuch as storage and handling of frozen juices involves more equipment and facilities than canned citrus juices, which do not need to be kept under refrigeration.

Aside from the ever increasing need of the armed forces, the American housewife is using more and more citrus products, not only for the sake of convenience and palatability, but for the recognized vitamin and mineral content.

While years ago hardly 10% of the fresh fruit was processed as canned goods or concentrates, today about one-half of the citrus crop is marketed in one or the other processed form, and only one-half sold as fresh fruit. The steadily increased ratio of processed citrus products versus fresh fruit supports a Government estimate that the time will come in the not too distant years when 80% to 90% of all citrus is going to be marketed canned, frozen or concentrated.

Due to the discouraging scarcity and excessive cost of materials, equipment, and labor for construction, it is expected that presently operating companies will participate in this increased volume of processing rather than newly formed ones.

The Company expects a definite increase in sales and profits for years to come inasmuch as it is one of the largest independently owned citrus processing plants in California.

HISTORY AND EARNINGS

Operation of the Corporation started after World War II and sales for the first six years amounted to $7,230,597.15. No war years were included in these six years. That is an average of better than $1,200,000.00 per year. Last year's sales amounted to $1,715,336.86.

The Business was originally started as a partnership on March 10, 1945 in Anaheim, California. The former Lash plant was purchased. Since then several hundred thousand dollars were spent for new equipment. The buildings were completely rehabilitated, and a new Class A building was erected for warehousing and other purposes.

Actual operation, as a partnership, began on July 7, 1945. On October 29, 1945 the company was incorporated. All assets and liabilities of the former partnership were assumed by the Corporation. The Corporation issued 1,000 Common Shares with no par value which were held by the former partners, in relationship to their capital accounts as of January 31, 1946.

The partnership as well as the corporation, operated on a substantial profit year after year with the exception of the last, six months of 1946 when the entire citrus industry sustained a set back unparalleled in its history.

In 1946 the company originated a new citrus blend, trade marked Citrus Cocktail, and due to an unusually heavy demand for this product, it was decided to pack an inventory. The decline of the citrus price during this year, which was occasioned by over production and dumping of war surplus citrus juices, caused very heavy inventory losses. This affected the entire industry. These losses were definitely of a non-recurring character. Due to the fact that the corporation since 1946 has not packed large inventories and has established the policy of packing only against firm orders, this speculative feature of the business is now eliminated. This set back caused the corporation a loss on its inventory, plus the inability to pack juices while the surplus inventory was being sold. This loss amounted to $519,155.55 and made it necessary to effect a re-organization in 1948 under the then existing law.

Disregarding this non-recurring inventory loss, which was absorbed by the corporation over a period of three years, the corporation auditors, Hodge & Company, reported the following profit figures for the business:

1. The earnings of Winckler & Smith Citrus Products Co., a partnership as predecessors to the corporation from March 10, 1945, date of inception, to December 31, 1945 were	$ 95,377.64
2. The earnings before taxes for the company after its incorporation for the period ending July 31, 1947 were	$197,169.51
3. The earnings for the 1947 packing season covering the operating period from August 1, 1947 to October 31, 1947 were	$ 54,937.99
4. For the 1948-49 year, which was the year of reorganization, earnings were over	$ 50,000.00
5. For the fiscal year ending January 31, 1950 the earnings amounted to	$121,360.21
6. For the fiscal year ending January 1, 1951, the earnings amounted to	$ 40,845.53
Total earnings for corporation	$464,313.24
Earnings of the partnership as shown on line 1	$ 95,377.64
Total earnings of co-partnership and corporation since inception	$559,690.88

(Copy of the full report of Hodge & Company may be obtained upon request.)

During the 1950-51 season, the Company introduced a completely new line in the beverage field, canned Orangeade and Lemonade, which were produced and sold in volume in two can sizes as ready to drink beverages and also in the form of one to six concentrated bases. Considerable money was spent on advertising and merchandising. The company was, by this means, successful in entrenching themselves in various markets with this new line which complimented the old line of canned citrus juices.

PLANT FACILITIES

The Company owns its plant facilities at 408 South Atchison Street, Anaheim, California. All major buildings are located on Company owned land, but substantial land is leased from the Santa Fe Railroad in addition, which gives the Company space for expansion.

There are five buildings on the premises, of which two are of concrete and steel construction, while the balance are of frame and steel. Substantial equipment such as is necessary for the fruit handling are located in the yard adjoining the processing buildings. Buildings and equipment were recently appraised by an old line bonded appraisal company at a sound value of $732,158.58. Replacement cost of the plant facilities would be in excess of $1,000,000.00. Buildings and equipment are in excellent repair. The Corporation has invested during the last two years close to $100,000.00 in new equipment, primarily to convert some of the plant facilities to the low temperature frozen concentrate field. While during the last year a comparatively small volume of frozen concentrates were sold, the plant is now fully equipped to produce the highest quality of these popular products.

METHODS OF SALES AND OPERATIONS

Over 100 food brokers, in the U. S. A. and abroad, who employ a total of close to 1,000 sales people are selling the company's products nationally. Traveling salesmen also are employed to supervise and improve the selling job done by these brokers.

The Corporation believes in merchandising and diversification of products and it now produces about 40 items, more or less all in the citrus field, which diversified production means better and safer earnings.

The by-products are all utilized. The essential oils are extracted from the citrus peel and then the peel is dehydrated into cattle feed.

The by-products have grossed in the past as much as $100,000.00 per year. Presently the capacity of the dehydrator will be increased by 50% which should result in increased profits in the by-product field, also taking into consideration a strong demand for all by-products.

With the ground work laid for the new products and improvements made in the plant for a more economical operation, the company has created one of the most diversified, streamlined and economical citrus plants in Southern California. The currently increased demand for the Company's products and all the aforementioned factors, should result in a larger sales volume, lower per unit overhead, and better profits for the years to come.

MANAGEMENT

The following are the names and mailing addresses of directors and officers of the Company:

Name	Office	Address
Nicholas J. Winckler	President and Chairman of the Board	720 North Lemon Street Anaheim, California
Maxwell L. Rubin	Treasurer and Director	1220 Sunset Plaza Drive Los Angeles, California
James F. Mesnard	Secretary and Director	540 South Colin Ave. Compton 3, California
Raymond Wallenstein	Vice President	10490 Wilshire Boulevard Los Angeles, California

Of the aforementioned officers and directors, Nicholas J. Winckler and James F. Mesnard are serving as full time employees, while the other officers do not draw any salaries.

Nicholas J. Winckler has been in the food and processing business for over twenty-five years and is founder of the Corporation. Mr. Mesnard is a graduate of the University of Southern California and serves in the capacity of comptroller, under the supervision of Hodge & Company, C.P.A.'s and auditors of the Company since its inception in 1945.

The Company employs an office staff of about ten people The number of plant employees varies according to seasonal requirements. All key employees are kept the year around, while during the season labor is hired as needed. The number of employees varies from a minimum of twenty, to up to one hundred and thirty. Most of the essential plant employees have been in the employ of the Corporation for several years.

PROCEEDS AND PURPOSE OF ISSUE

The present offer consists of 32,465 convertible, cumulative preferred shares at $5.00 par value each, to be issued and sold to California residents only, at the price of $5.00 per share cash, lawful money of the United States.

Out of these 32,465 shares 4,200 shares have been placed and the proceeds used for part-payment on real estate and machinery now owned and used by the Company for manufacturing purposes. The remaining 28,265 shares to be sold will net to the Company an amount of $113,060.00. These proceeds or any part thereof, will be used by the Company as additional working capital.

AUTHORIZED CAPITAL

Preferred Stock 59,000 Cumulative and Convertible 7% shares, par value $5.00 each, and Common Stock 1,000,000 shares, par value $1.00 each.

Total capital stock $1,295,000.00.

Out of these shares, 29,535 Preferred shares are issued and outstanding, and 315,110 of the Common shares are issued and outstanding.

157,551 of the Common shares are held in escrow by the Metropolitan Trust Company of California, Los Angeles, in compliance with the provisions of the Permit issued on April 13, 1951 by the Division of Corporation of the State of California.

DESCRIPTION OF SHARES

For a complete statement of the privileges and preferences of the holders of Preferred shares, reference is made to the Articles of Incorporation of the Corporation, as amended, a copy of which may be examined in the offices of the underwriter or will be mailed to prospective purchasers upon request.

The following, in part, are some of the preferences and privileges, viz:

Holders of Preferred shares are entitled to receive dividends at the rate of seven per cent (7%) of the par value of the shares from date of purchase, which dividends shall be cumulative and paid at such time as the Board of Directors may determine.

Preferred shares are convertible at the option of the holder, at any time on or prior to the fifth day prior to such date, if any, as may have been fixed for the redemption thereof in any notice of redemption given pursuant to the provisions of the Articles of Incorporation, upon the surrender of the certificates therefor, into fully paid and non-assessable shares at the following rate, viz: On or before December 31, 1955, at the rate of five (5) Common shares for each Preferred share so surrendered, and thereafter so long as Preferred shares are outstanding, at the rate of four (4) Common shares for each Preferred share so surrendered.

The Corporation, at the option of the Board of Directors, may redeem the whole, or from time to time may redeem any part of the Preferred shares on any dividend date by paying in cash therefor, FIVE AND 50/100 DOLLARS ($5.50) per share, and in addition to the aforementioned amount, a amount in cash equal to all dividends on Preferred shares unpaid and accumulated as provided in the Articles of Incorporation, as amended.

If at any time, eight (8) or more quarterly dividends (whether consecutive or not) on the Preferred shares shall be in default, in whole or in part, the holders of Preferred shares, as a class, shall be entitled to elect the smallest number of Directors which will constitute a majority of the authorized number of Directors, and the holders of Common shares, as a class, shall be entitled to elect the remaining members of the Board of Directors.

So long as Preferred shares shall be outstanding, the Corporation, as a sinking fund for the purchase or redemption of its Preferred shares, shall set aside in cash on the 31st day of December, of each year, commencing with December 31, 1951, a sum equal to ten per cent (10%) of the par value of the total number of Preferred shares theretofore issued. If, however, the net profit for the Corporation for the immediately preceding calendar year is not at least equal to ten per cent (10%) of the par value of the total number of Preferred shares theretofore issued, the Corporation shall not be required to set apart such sum, or any portion thereof in the sinking fund, and the same shall not be cumulative, provided; however, that the corporation may, at its option, set apart all or any portion of said sum in said sinking fund.

UNDERWRITER'S FEE

6700 Preferred shares are being underwritten and the Corporation is to receive $4.125 per share cash. These shares are being re-offered by the broker to the public at $5.00 per share. Any further Preferred shares sold are subject to payments of 20% selling expense.

EXHIBITS

(a) Financial statement as of end of fiscal year January 31, 1951, subject to notations attached.

(b) Proforma Balance Sheet as of January 31, 1951 showing final conditions after sale of Preferred stocks.

(c) Permit No. 78929-LA of the Department of Investment, Division of Corporations of the State of California.

Exhibit (a)

WINCKLER & SMITH CITRUS PRODUCTS CO.

PROFORMA (*) CONDENSED BALANCE SHEET

JANUARY 31, 1951

ASSETS

Current Assets		
Cash in Bank		$ 33,717.95
Accounts Receivable		16,819.71
Inventories		
Finished Goods		
Pledged under warehouse receipts	$ 28,681.94	
Not pledged	30,124.37	
	$ 58,806.31	
Raw materials and supplies	46,406.21	105,212.52
Total Current Assets		$ 155,750.18
Fixed Assets		
Plant and equipment at sound value as appraised of January 12, 1951		732,158.58
Other Assets		
Deferred charges	$ 47,354.50	
Other assets and prepaid expenses	22,535.71	
Goodwill & Trademark	1.00	69,891.21
		$ 957,799.97

LIABILITIES

Current Liabilities		
Accounts Payable		$ 73,375.47
Notes Payable		62,012.91
Other accrued expense		4,051.84
Total Current Liabilities		$ 139,440.22
Mortgage Payable, secured by plant		50,499.04
Capital Stock & Surplus		
Preferred Stock—30,735 shares @ $5.00 par each	$ 153,675.00	
Common Stock—315,110 shares @ $1.00 par each	315,110.00	
	$ 468,785.00	
Surplus	299,075.71	
Total Capital and Surplus		767,860.71
		$ 957,799.97

*Subject to notes on following page.

*The above financial statement reflects exact conditions as found by the Company's auditors, Hodge & Company, at close of fiscal year January 31, 1951, after giving effect to the acquisition of plant and certain machinery acquired in exchange for Preferred stocks on April 20, 1951.

Note: The Corporation has a contingent liability of twenty-six thousand, three hundred fifty dollars ($26,350.00), not shown above, which is explained as follows:

The Corporation, as a part of the consideration for the purchase of its real and personal property, has agreed that in the event all of its Preferred shares authorized and not issued, to wit, Twenty-Eight Thousand, Two Hundred Sixty-Five (28,265), have been sold and the stockholders receiving Twenty-Six Thousand, Five Hundred Thirty-Five (26,535) Preferred shares shall sell all or any part thereof on or before April 13, 1952, and pay a commission therefor, the Corporation will reimburse said stockholders to the extent of the actual cost of sales of shares not exceeding twenty per cent (20%) of the par value thereof, the maximum reimbursement not to exceed twenty-six thousand, three hundred fifty dollars ($26,350.00).

Note: Goodwill and Trade Marks are shown at the nominal value of $1.00. The Company is selling its products mainly under the ANAGOLD brand, which is a registered trade mark. ANAGOLD products are well-known in Southern California, as well as in many West Coast, Eastern and Mid-Western markets.

[fol. 380]

Exhibit (b)

WINCKLER & SMITH CITRUS PRODUCTS CO.
PROFORMA BALANCE SHEET
FEBRUARY 1, 1951

ASSETS

Current Assets		
Cash in Bank		$ 146,387.95
Accounts Receivable		16,819.71
Inventories		
Finished Goods		
Pledged under warehouse receipts	$ 28,681.94	
Not pledged	30,124.37	
	$ 58,806.31	
Raw material and supplies	46,406.21	105,212.52
Total Current Assets		$ 268,420.18
Fixed Assets		
Plant and equipment at sound value as appraisal of January 12, 1951		732,158.58
Other Assets		
Deferred charges	$ 47,354.50	
Other assets and prepaid expenses	22,535.71	
Goodwill and Trademark	1.00	69,891.21
		$1,070,469.97

LIABILITIES

Current Liabilities		
Accounts Payable		$ 75,375.47
Notes Payable		60,002.91
Other accrued expense		4,061.84
Total Current Liabilities		$ 139,440.22
Mortgage Payable, secured by plant		50,499.04
Capital Stock and Surplus		
Preferred Stock—59,000 at $5.00 par	$ 295,000.00	
Common Stock—315,110 at $1.00 par	315,110.00	
	$ 610,110.00	
Surplus	270,420.71	
Total Capital & Surplus		880,530.71

WINCKLER & SMITH
CITRUS PRODUCTS COMPANY, INC.
GENERAL OFFICES
408 SOUTH ATCHISON ST. - ANAHEIM, CALIF.

VOUCHER NO. 47

ANAHEIM BRANCH
Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION
ANAHEIM, CALIFORNIA

CHECK № 11803

DATE October 11, 1951

RECORD OF PAYMENT

DOLLARS $3,[illegible]

MADE TO California Fruit Growers Exchange
Ontario
California

COPY
NOT NEGOTIABLE

WINCKLER & SMITH
CITRUS PRODUCTS COMPANY, INC.
408 SOUTH ATCHISON ST. - ANAHEIM, CALIF.

DO NOT CHANGE OR ALTER

WHEN DETACHED AND PAID THE ABOVE CHECK BECOMES A RECEIPT IN FULL PAYMENT OF THE FOLLOWING ACCOUNT. NO OTHER RECEIPT NECESSARY

ITEM NO.	DATE	DESCRIPTION	AMOUNT	DISCOUNT		OTHER DEDUCTIONS		NET AMOUNT
				%	AMOUNT	FOR	AMOUNT	
	10/3/51	Invoice No. [illegible]	[illegible]					
		[illegible] Small Allow.	([illegible].70)					
		[illegible] Brokerage	(273.57)					
		[illegible] Discount	([illegible])					
			[illegible]					
		Orange Juice						
		Acct. 3[illegible]						

DISTRIBUTION

ACCOUNT			ACCOUNT			ACCOUNT			ACCOUNT		
ITEM NO.	MEMO	AMOUNT	ITEM NO.	MEMO	AMOUNT	ITEM NO.	MEMO	AMOUNT	ITEM NO.	MEMO	AMC

[fol. 397]

IN UNITED STATES DISTRICT COU
PLAINTIFFS' EXHIBIT 49

Department of Investment

DIVISION OF CORPORATIONS
OF THE
STATE OF CALIFORNIA

In the matter of the application of

Winckler & Smith Citrus Products Co.

for a permit authorizing the sale and issuance of securities.

PERMIT

File No. 78929LA

Receipt No. LA 82831

This Permit Does Not Constitute a Recommendation or Endorsement of the Securities Permitted To Be Issued, But Is Permissive Only

WINCKLER & SMITH CITRUS PRODUCTS CO. is a California corporation which at present is authorized to issue 1,059,000 shares, of which 59,000 are preferred shares of the par value of $5.00 each and 1,000,000 are common shares of the par value of $1.00 each.

Applicant represents that as of this date it has issued and now has outstanding 315,110 common shares.

The applicant has its present principal address at 406 South Atchison Street, Anaheim, California, and is engaged in processing, canning and selling orange, grapefruit, and a blend of orange-grapefruit juices; processing and selling hot, pasteurized citrus juice, and a low tempearture frozen concentrate citrus juice, and by-products, including essential oils, orange oil, lemon oil and dehydrated pulp.

The applicant now proposes to amend its articles of incorporation to change the preferences, rights and restrictions pertaining to the preferred shares authorized by its articles of incorporation as amended.

The proposed amendment to the articles will provide that holders of preferred shares will be entitled to receive preferential cumulative dividends of 7 per cent per annum and no more, and that upon liquidation, dissolution or winding-up, holders of preferred shares will be entitled to receive an amount equal to par plus unpaid accrued dividends and no more before any payment shall be made or any assets distributed to holders of common shares.

Preferred shares will be redeemable at $5.50 per share plus unpaid accrued dividends, and the proposed amendment to the articles contains a provision for the setting aside of profits commencing December 31, 1951, as a sinking fund for the purchase or redemption of preferred shares.

The proposed amendment to the articles will provide that holders of preferred shares may convert same into common shares at the following rate:

> On or before December 31, 1955, at the rate of five common shares for each preferred share so surrendered; thereafter, so long as preferred shares are outstanding, at the rate of four common shares for each preferred share so surrendered.
>
> No adjustment shall be made with respect to dividends which may be cumulated and unpaid at the date of surrender for conversion and no fractions of common shares shall be issued upon conversion, but in lieu thereof non-dividend-bearing, non-voting scrip (exchangeable for full shares) shall be issued.

Holders of common shares are to have exclusive voting rights provided that if at any time eight or more quarterly dividends (whether consecutive or not) on the preferred shares shall be in default then in such event holders of preferred shares as a class shall be entitled to elect a majority of the board of directors.

Prospective investors are referred to a copy of the amendment to the articles of incorporation for further information as to preferences, rights and restrictions.

A financial statement of the applicant, reflecting its condition as of December 31, 1950, indicates the following:

Gross tangible assets			$ 228,722.36
Liabilities			114,295.41
Net tangible assets			114,426.95
Intangibles:			
Prepaid expense and deposits		$ 26,128.63	
Unabsorbed factory overhead		15,422.78	
Organization expense		1,574.41	
Option to purchase		1.00	43,127.82
Book Net Worth			$ 157,554.77
REPRESENTED BY:			
Capital stock— *1,000 shares no par		$ 240,697.22	
Deficit	($ 103,492.35)		
Net profit 2/1/50 to 12/31/50	20,349.90	(83,142.45)	$ 157,554.77

The applicant represents that it can acquire the plant and certain of the equipment used by it in the conduct of its business as consideration for the issuance by it to the owners of 26,535 preferred shares and the payment by it to one of said owners of the sum of $17,325.00 cash. Applicant represents that the property it proposes to purchase is encumbered by a deed of trust and a chattel mortgage to secure a loan upon which there was an unpaid balance as of about January 19, 1951, of $52,499.05, payable in monthly installments of $1,500.00.

* Subsequent to the date of the financial statement of December 31, 1950, applicant issued 315,110 common shares for the 1,000 shares of no-par value reflected on said financial statement.

Funds to be derived from the sale of preferred shares authorized herein to be sold for cash will be used by applicant in furtherance of its corporate purposes, including the acquisition

[fol. 392]

Ontario
California

NOT NEGOTIABLE

**WINCKLER & SMITH
CITRUS PRODUCTS COMPANY, INC.**
405 SOUTH ATCHISON ST. - ANAHEIM, CALIF.

DO NOT CHANGE OR ALTER

WHEN DETACHED AND PAID THE ABOVE CHECK BECOMES A RECEIPT IN FULL PAYMENT OF THE FOLLOWING ACCOUNT. NO OTHER RECEIPT NECESSARY

ITEM NO.	DATE	DESCRIPTION	AMOUNT	DISCOUNT		OTHER DEDUCTIONS		NET AMOUNT
				%	AMOUNT	FOR	AMOUNT	
	10/3/51	Invoice No. 13409	5,480.08					
		Inf 1% Small Allow.	(8.70)					
		5% Brokerage	(273.57)					
		1/5% Discount	(10.47)					
			5,[illegible]					
		Orange Juice						

Acct. 380

DISTRIBUTION

ACCOUNT			ACCOUNT			ACCOUNT			ACCOUNT		
ITEM NO.	MEMO	AMOUNT	ITEM NO.	MEMO	AMOUNT	ITEM NO.	MEMO	AMOUNT	ITEM NO.	MEMO	AMO

COMPILED BY	AUDITED BY	APPROVED BY	ENTERED ON REGISTER BY	POSTED BY

[fol. 397]

In United States District Court

Plaintiffs' Exhibit 49

of new machinery and equipment, and for working capital. Data submitted indicates that for the eleven-month period ending December 31, 1950, officers' salaries amounted to $13,200.00.

WINCKLER & SMITH CITRUS PRODUCTS CO.

is hereby authorized to sell and issue its securities as hereinbelow set forth:

1. To sell and issue to Nicholas J. Winckler, Dr. Helena G. Niegosch, Allan A. Rubin, Maxwell L. Rubin and Albert B. Parvin an aggregate of not to exceed 315,110 of its new common shares in exchange for 315,110 common shares heretofore issued and now outstanding, provided that prior to or concurrently with the issuance of certificates evidencing common shares authorized herein certificates evidencing 315,110 outstanding common shares be returned to applicant for cancellation.
2. To sell and issue to Maxwell L. Rubin, Albert B. Parvin and Raymond Wallenstein an aggregate of not to exceed 28,535 of its preferred shares, as partial consideration for the property and assets described in its applications, first to be assigned, transferred and conveyed to applicant subject to liens, liabilities and encumbrances not exceeding an unpaid balance of $52,499.05 and servitudes of record and unpaid taxes and assessments not delinquent, and the unpaid balance of the purchase price thereof of not to exceed the sum of $17,325.00.
3. To sell and issue to Samuel B. Franklin, doing business as Samuel B. Franklin Co., an aggregate of not to exceed 6,700 of its preferred shares at and for the price of $4.125 per share, cash, lawful money of the United States, for the uses and purposes recited in its application, and so as to net applicant the full amount of the selling price thereof.
4. After the applicant shall have sold and issued 4,200 preferred shares under issuance paragraph 3 hereof, and has received the consideration therefor, and after the property and assets mentioned in issuance paragraph 2 hereof have been assigned, transferred and conveyed to the applicant free and clear of all liens, liabilities and encumbrances except an encumbrance upon which there is an unpaid balance of not to exceed $52,499.05 and servitudes of record and unpaid taxes and assessments not delinquent, to sell and issue an aggregate of not to exceed 25,765 of its preferred shares, at par, for cash, lawful money of the United States, for the uses and purposes recited in its application, subject to an aggregate selling expense of not to exceed 20 per cent of the amount received in cash on account of the selling price, including commissions payable only to duly licensed brokers or agents.
5. To sell and issue to the holders of the preferred shares authorized to be sold and issued pursuant to issuance paragraphs 2, 3 and 4 hereof, an aggregate of not to exceed 286,000 of its common shares and scrip certificates evidencing fractional common shares, in exchange for or in conversion of said preferred shares, in the manner and upon the basis provided in its articles of incorporation as amended.

This permit is issued upon each of the following conditions:

(a) That none of the shares authorized herein shall be sold or issued unless and until a certificate of amendment to the applicant's articles of incorporation substantially in the form and of the tenor of the copy contained in the application filed April 10, 1951, shall have been filed for record in the office of the Secretary of State of the State of California.

(b) That a true copy of this permit be given to each subscriber prior to the taking of his subscription and to each purchaser prior to the sale to him of the securities permitted to be issued under paragraph 4 hereof.

(c) That if any subscriptions are to be taken for any shares authorized by paragraph 4 hereof they shall be taken upon subscription blanks of a form first submitted to and approved by the Commissioner of Corporations, and that this permit shall be printed in full upon said subscription blanks.

(d) That, when issued, all certificates evidencing 157,555 of the common shares authorized by paragraph 1 hereof shall be forthwith deposited with the escrow holder heretofore selected by applicant and approved in writing by the Commissioner of Corporations to be held as an escrow pending the further written order of said Commissioner that the receipt of said escrow holder for said certificates shall be filed with said Commissioner; and that the owner or persons entitled to said shares shall not consummate a sale or transfer of said shares, or any interest therein, or receive any consideration therefor, until the written consent of said Commissioner shall have been obtained so to do.

(e) That 157,555 of the common shares authorized by paragraph 1 hereof shall not be sold or issued unless and until Nicholas J. Winckler, Dr. Helena G. Niegosch, Allan A. Rubin, Maxwell L. Rubin and Albert B. Parvin shall have executed an agreement in writing with applicant and filed a copy thereof with the Commissioner of Corporations whereby they shall waive for themselves, their successors, assigns, heirs, administrators and executors, as owners of said shares, all right to participate in any distribution of assets of applicant until all other common shareholders shall have received the return of the full amount of the purchase price thereof, and any unpaid accumulated dividends theron, after which all outstanding common shares of the applicant shall participate in any further distribution of assets share and share alike. The provisions of this condition shall apply until the Commissioner by order has released the 157,555 common shares issued under paragraph 1 from escrow.

(f) That 157,555 of the common shares authorized by paragraph 1 hereof shall not be sold or issued unless and until Nicholas J. Winckler, Dr. Helena G. Niegosch, Allan A. Rubin, Maxwell L. Rubin and Albert B. Parvin shall have executed an agreement in writing with applicant and filed a copy thereof with the Commissioner of Corporations whereby they shall waive for themselves, their successors, assigns, heirs, administrators and executors, as owners of said shares, all right to receive any dividends thereon until all other common shareholders shall have received cumulative dividends equal to 5 per cent per share per annum; thereafter all outstanding common shares of the applicant shall participate share and share alike in any additional dividends paid in any year. The provisions of this condition shall apply until the Commissioner by order has released the 157,555 common shares issued under paragraph 1 from escrow.

(g) That unless revoked or suspended, or renewed upon application filed on or before the date of expiration specified in this condition, all authority to sell securities under paragraphs 2 and 4 of this permit shall terminate and expire on the 12th day of October, 1951, and all authority to sell securities under paragraph 3 of this permit shall terminate and expire on the 12th day of January, 1952. All other paragraphs and/or conditions of this permit shall remain in full force and effect until revoked, suspended, or amended by order of the Commissioner.

Dated: Los Angeles, California
April 13, 1951.

EDWIN M. DAUGHERTY
Commissioner of Corporations
By H. A. SMITH
Assistant Commissioner

PMW:SM

WINCKLER & SMITH CITRUS PRODUCTS CO.

Anaheim, California

(A California Corporation)

32,465 Shares

Cumulative and Convertible 7% Preferred

$5.00 Par Value

PROSPECTUS

May 1, 1951

These Securities are to be sold to bonafide residents of the State of California only.

Santa Ana Printing Co., Santa Ana, Calif.

RECEIVED
APR 6 1951

CALIFORNIA FRUIT GROWERS EXCHANGE
780 South Alameda Street
Los Angeles 21, California

April 4, 1951

TO: ALL DISTRICT EXCHANGES
& ORANGE ASSOCIATIONS
LOOSE FRUIT SALESMEN

SUBJECT: VALENCIA PRICE SCHEDULE NO. 1-51, EFFECTIVE APRIL 9, 1951

Gentlemen:

Effective Monday, April 9, 1951, the following schedule of prices per ton will apply on sales of Valencia oranges to outside processors.

Yours very truly,

S. H. KELLY
District Manager

FIB:lm
Circ. C.D.P. 7-51

Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse	Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse	Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse
150	$51.50	120	$40.00	90	$28.50
149	51.12	119	39.62	89	28.12
148	50.73	118	39.23	88	27.73
147	50.35	117	38.85	87	27.35
146	49.97	116	38.47	86	26.97
145	49.58	115	38.08	85	26.58
144	49.20	114	37.70	84	26.20
143	48.82	113	37.32	83	25.82
142	48.43	112	36.93	82	25.43
141	48.05	111	36.55	81	25.05
140	47.67	110	36.17	80	24.67
139	47.28	109	35.78	79	24.28
138	46.90	108	35.40	78	23.90
137	46.52	107	35.02	77	23.52
136	46.13	106	34.63	76	23.13

Distric

FIB:lm
Circ. C.D.P. 7-51

Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse	Pounds of Soluble Solids Per Ton	Pri Pe To F.O. Pkg
150	$51.50	120	$40.
149	51.12	119	39.
148	50.73	118	39.
147	50.35	117	38.
146	49.97	116	38.
145	49.58	115	38.
144	49.20	114	37.
143	48.82	113	37.
142	48.43	112	36.
141	48.05	111	36.
140	47.67	110	36.
139	47.28	109	35.
138	46.90	108	35.
137	6.52	107	35.
136	46.13	106	34.
135	45.75	105	34.
134	45.37	104	33.
133	44.98	103	33.
132	44.60	102	33.
131	44.22	101	32.
130	43.83	100	32.
129	43.45	99	31.
128	43.07	98	31.
127	42.68	97	31.
126	42.30	96	30.
125	41.92	95	30.
124	41.53	94	30.
123	41.15	93	29.
122	40.77	92	29.
121	40.38	91	28.

Plaintiffs' Exhibit 42

[fol. 395]

ct Manager

Price Per Ton F.O.B. kg Hse	Pounds of Soluble Solids Per Ton	Price Per Ton F.O.B. Pkg Hse
0.00	90	$28.50
39.62	89	28.12
39.23	88	27.73
38.85	87	27.35
38.47	86	26.97
38.08	85	26.58
37.70	84	26.20
37.32	83	25.82
36.93	82	25.43
36.55	81	25.05
36.17	80	24.67
35.78	79	24.28
35.40	78	23.90
35.02	77	23.52
34.63	76	23.13
34.25	75	22.75
33.87	74	22.37
33.48	73	21.98
33.10	72	21.60
32.72	71	21.22
32.33	70	20.83
31.95	69	20.45
31.57	68	20.07
31.18	67	19.68
30.80	66	19.30
30.42	65	18.92
30.03	64	18.53
29.65	63	18.15
29.27	62	17.77
28.88	61	17.38
	60	17.00

[fol. 396]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 45

[Letterhead of Winckler & Smith Citrus Products Company, Anaheim, California]

July 16, 1951

[Stamp—Received—The EOP Company—Jul 17 1951—2 P.M.—Refer to J—(Balance illegible)]

Exchange Orange Products
616 E. Grove Street
Ontario, California

Attn: Mr. J. A. Finley

Dear Mr. Finley:

We are pleased to advise that at the present time we have surplus capacity and we would be prepared to do custom packing for your account on the following items:

A. Single strength citrus juices in any can size from 5 oz. to 1 gallon as requested.

B. Low temperature concentrate in any customary can size or bulk.

C. Hot pasteurized concentrate in any customary can size or bulk.

In the event you would be interested in our proposition, we would assure you of lowest quotations, strictly grade A. quality—in case of low temperature concentrate, under your supervision if necessary.

If you are interested, please be kind enough to communicate with the undersigned or, in his absence, with our Mr. Pendergrass.

Very truly yours,

WINCKLER & SMITH CITRUS PRODUCTS CO.

/s/ N. J. WINCKLER
Nicholas J. Winckler
President

NJW:sd

AMERICAN CRYSTAL SUGAR

Pure Granulated

CRYSTAL SUGAR

PO# 2985 REC. TK #______

Price Verified by ______

Extension Verified by ______

Final Discount Date ______

Payment authorization is necessary where either PO or REC TK are missing except utilities.

I AUTHORIZE THIS PAYMENT

______

______ Title

For Accounting Department Only

Acc't No.	Amount
300	3248.26

AMERICAN CRYSTAL SUGAR

Pure Granulated

CRYSTAL SUGAR

Pure Granulated

CRYSTAL SUGAR

	2580.00
	900.00
	3480.00
1/4 % Swell	8.70
	3471.30
5% Broker	173.57
	3297.73
1½ % Disc.	49.47
	3248.26

420 SOUTH SAN PEDRO STREET, LOS ANGELES 13
VAndyke 8184

NEW YORK OFFICE
99 HUDSON STREET

DALLAS OFFICE
318 CADIZ STREET

CHICAGO OFFICE
400 WEST MADISON STREET

ORANGE AND
GRAPEFRUIT PRODUCTS
THE EXCHANGE ORANGE PRODUCTS CO.
ONTARIO, CALIFORNIA

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT
ONTARIO, CALIFORNIA

Sunkist

[illegible]
CITRUS PRODUCTS

CABLE ADDRESS: [illegible], ONTARIO, CALIF.
A. B. C.—7TH EDITION
CODES: [illegible]

PRODUCTS
OCT 1951

CHARGED TO

Winckler & Smith Citrus Products Co.
408 Atcheson St.
Anaheim, Calif.

SHIPPED TO Same

Invoice No.	B3608
Date Invoiced	10/3/51
Date Shipped	9/28/51
Shipped From	Ontario
Shipped Via	P. E.
[illegible]	[illegible] F.O.B. X Ontario
Collect	X Prepaid
Terms	1½-10-30
Your Order	Phone, 2985-P
[illegible]	[illegible] 5812
Car Number	25337
[illegible]	Temp. 16

No. Packages	Type & Size Package	Product No.	Description	Total Units	Unit Price	Total
1000	cse(12/46)	53	Orange Juice - Unsweetened - Unlabeled 53 AHD 7	1000 cse	2.58	$2580.00
400	cse(24/2)	53	Orange Juice - Unsweetened - Unlabeled 53 AHH 1	400 cse	2.25	$ 900.00
						$3480.00
			Less ½ of 1% Swell Allce.			8.70
						$3471.30
			Less 5% Brokerage			170.96
						$3300.34
			60,000#			

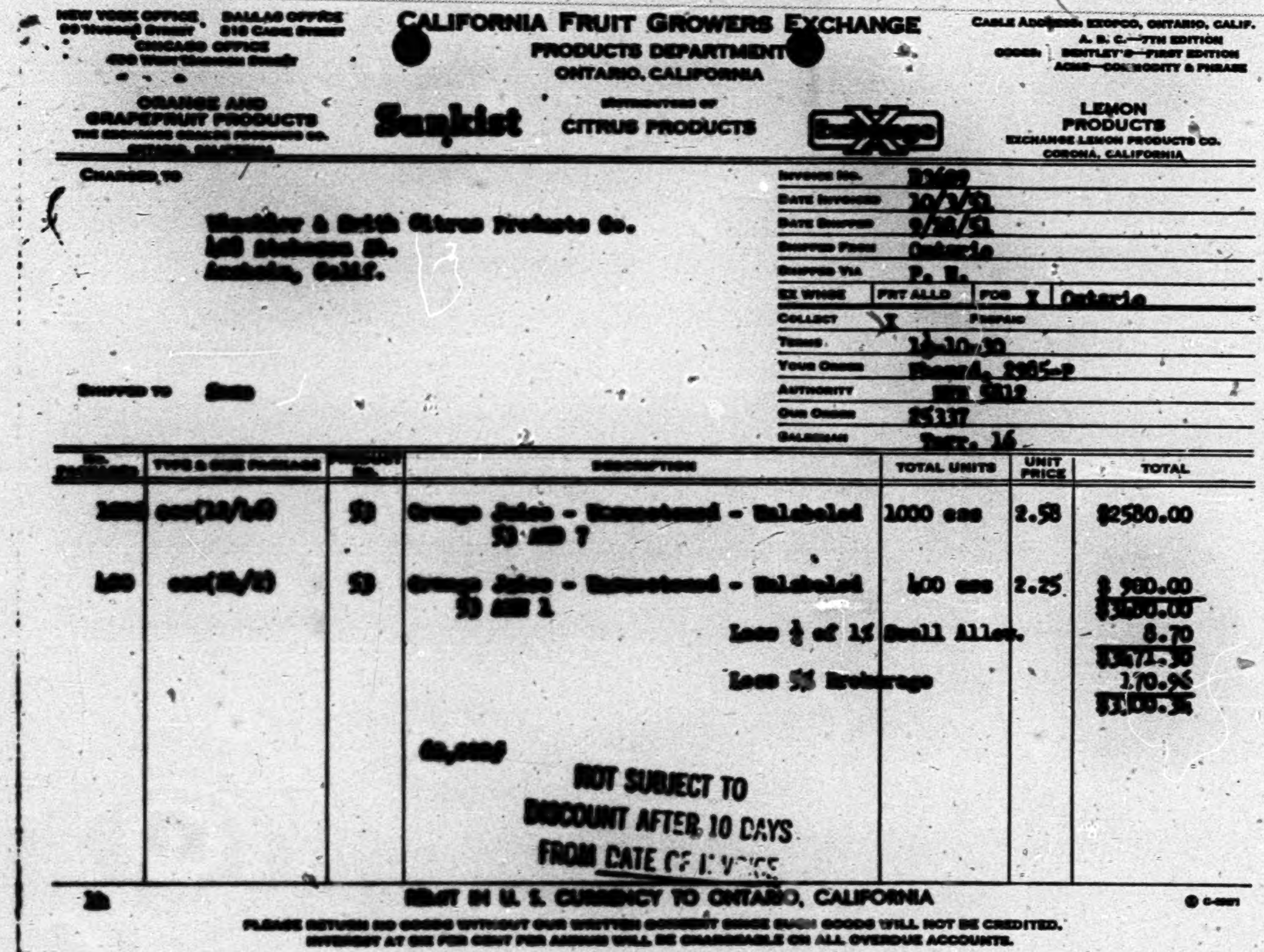
NOT SUBJECT TO
DISCOUNT AFTER 10 DAYS
FROM DATE OF INVOICE

14

REMIT IN U. S. CURRENCY TO ONTARIO, CALIFORNIA

[illegible]

400



NEW YORK OFFICE [illegible] STREET · DALLAS OFFICE [illegible] STREET
CHICAGO OFFICE [illegible]

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT
ONTARIO, CALIFORNIA

CABLE ADDRESS: EXOFCO, ONTARIO, CALIF.
CODES: A. B. C.—7TH EDITION
BENTLEY'S—FIRST EDITION
ACME—COMMODITY & PHRASE

ORANGE AND GRAPEFRUIT PRODUCTS
THE EXCHANGE ORANGE PRODUCTS CO.
ONTARIO, CALIFORNIA

Sunkist

DISTRIBUTORS OF CITRUS PRODUCTS

LEMON PRODUCTS
EXCHANGE LEMON PRODUCTS CO.
CORONA, CALIFORNIA

CHARGED TO

[illegible] & Smith Citrus Products Co.
[illegible] St.
Anaheim, Calif.

SHIPPED TO Same

INVOICE NO.	33609
DATE INVOICED	10/3/51
DATE SHIPPED	9/28/51
SHIPPED FROM	Ontario
SHIPPED VIA	P. E.
EX WHSE · FRT ALLD · FOB	X Ontario
COLLECT	X
PREPAID	
TERMS	1%-10-30
YOUR ORDER	[illegible] 2905-P
AUTHORITY	[illegible] 5812
OUR ORDER	25337
SALESMAN	Terr. 16

NO. PACKAGES	TYPE & SIZE PACKAGE	PRODUCT NO.	DESCRIPTION	TOTAL UNITS	UNIT PRICE	TOTAL
1000	cns([illegible])	53	Orange Juice - Unsweetened - Unlabeled 53 AND 7	1000 cns	2.58	$2580.00
400	cns([illegible])	53	Orange Juice - Unsweetened - Unlabeled 53 AND 1	400 cns	2.25	$ 900.00
						$3480.00
			Less ⅓ of 1% Swell Allow.			8.70
						$3471.30
			Less 5% Brokerage			170.96
						$3300.34

[illegible]

NOT SUBJECT TO
DISCOUNT AFTER 10 DAYS
FROM DATE OF INVOICE

REMIT IN U. S. CURRENCY TO ONTARIO, CALIFORNIA

PLEASE RETURN NO GOODS WITHOUT OUR WRITTEN CONSENT SINCE SUCH GOODS WILL NOT BE CREDITED.
INTEREST AT SIX PER CENT PER ANNUM WILL BE CHARGEABLE ON ALL OVERDUE ACCOUNTS.

ANAHEIM, CALIF.
Telephone 2181 P. O. Box 431

No 2985 F

402]

On All Invoices, Delivery Slips, Cases, Packages, Etc.

DATE September 27, 1951

TO Exchange Orange Products
ADDRESS 616 E. Grove Ave.
Ontario, California

SHIP TO	VIA	DELIVERY	TERMS	CONFIRMING
Plant	Our Truck	9/28/51	Open	Phone

QUANTITY WANTED		DESCRIPTION	PRICE		UNIT
1000 cs	12/46	Unlabeled Unsweetened Val. Orange Juice	2	58	Case
400 cs	24/2	" " " " "	2	25	Case
		less 5%			

TO Exchange Orange Products
ADDRESS 616 E. Grove Ave.
Ontario, California

SHIP TO	VIA	DELIVERY	TERMS	CONFIRMING
Plant	Our Truck	9/25/51	Open	Phone

QUANTITY WANTED			DESCRIPTION	PRICE		UNIT
1000 cs		12/46	Unlabeled Unsweetened Val. Orange Juice	2	58	Case
400 cs		24/2	" " " " "	2	25	Case
			less 5%			

	ORDERED BY	Charge Acct. No.	Orders to be effective must	WINCKLER & SMITH CITRUS PRODUCTS CO.

FORM 6B 10M 8-48

PURCHASE ORDER

TREESWEET PRODUCTS CO.

№ 6405

PACKERS OF TREESWEET BRAND PURE CITRUS FRUIT JUICES

SANTA ANA PLANT
1060 EAST FOURTH ST.
PHONE SANTA ANA 6020

MAIN OFFICE
1044 EAST FOURTH ST.
SANTA ANA, CALIFORNIA
P. O. BOX 28

PHOENIX, ARIZ. PLANT
909 EAST MADISON ST.
P. O. BOX 2356 PHONE 3-1060

DATE October 2, 1951

DATE

E.O.P.

CALIFORNIA FRUIT GROWERS EXCHANGE
Products Dept.
616 E. Grove St.
Ontario, Calif.

SHIP THE FOLLOWING ITEMS SUBJECT TO THE CONDITIONS HEREON:

SHIP TO

ADDRESS

VIA

PER

ON OR BEFORE

F.O.B.

TERMS

INVOICE IN TO OFFI

ITEM NO.	AMOUNT ORDERED	DESCRIPTION	WEIGHT	UNIT PRICE	NET PRICE	ACCOUNT
		Full strength orange juice previously packed for the account of the E.O.P. Company by Treesweet				
2.20	25 Cs	48-5½ oz @ 1.723 ✓ (Net) #2E			$ 43.08 ✓	
2.00	425 Cs	48/6 oz ~~xxxxxx~~ @ 1.63 ✓ Net #1E			692.75 ✓	
2.20	301 "	" ~~xxxxxxx~~ 1.80 ✓ Net #2E			541.80 ✓	
1.60	250 Cs	24/12 oz 1.228 ✓ (Net) #1E			307.00 ✓	
1.70	1641	" 1.313 ✓ #2E			2,154.63 ✓	
1.75	160	" 1.3555 ✓ #1W			216.88 ✓	
1.85	416	" 1.4405 ✓ #2W			599.25 ✓	
1.95	1270 Cs	24/2's @ 1.5175 ✓ #1E			1,927.22 ✓	
2.05	4795	1.6025 ✓ #2E			7,683.99 ✓	
Credit 2.20	(10)	1.73 ✓ #1W			(17.30) ✓ Credit	
2.30	2642	1.815 ✓ #2W			4,795.23 ✓	
2.20	2980 Cs	12/46 oz 1.735 ✓ #1E			5,170.30 ✓	
2.35	10121	1.8625 ✓ #2E			18,850.36 ✓	
2.65	6788	2.1175 ✓ #2W			14,373.59 ✓	
					57,338.78	
					57,338.78 ✓	

Credit [illegible]
to [illegible]
[illegible] trial

CONDITIONS

be assumed for verbal orders given by employees.
ptly acknowledged and actual shipping date given.
must be so [illegible] and adequately packed to insure safe delivery; will
[illegible] and until authorized by the Pur-
chaser.

[fol. 407]

2

ORDER FOR SHIPMENT

CALIFORNIA FRUIT GROWERS EXCHANGE

PRODUCTS DEPARTMENT
ONTARIO, CALIFORNIA

PLANTS
EXCHANGE LEMON PRODUCTS CO.
CORONA, CALIF.
THE EXCHANGE ORANGE PRODUCTS CO.
ONTARIO, CALIF.

DATE 9/28/51

SHIP TO WINCKLER & SMITH
408 ATCHESON ST.
ANAHEIM, CALIF.

SOLD TO SAME

SHIP FROM ONTARIO
ROUTING BUYER'S TRUCK

SEP 29 1951
WINCKLER & SMITH
CITRUS PROD. CO

ORDER REC'D	9/28/51 JH
CUST. ORDER NO.	PHONED, MTH-5812
SALESMAN	TERR 16
WHEN SHIP	9/28
CREDIT CHECK	OK
TERMS	1½-10-30
F.O.B.—XXX	ONTARIO
BILL INSTRUCT.	INV. IN DUP.
MARKINGS	

CUSTOMER'S ACKNOWLEDGEMENT COPY

THIS IS NOT AN INVOICE

NO. PKGS.	TYPE & SIZE PKGS.	PROD. NO.	DESCRIPTION	TOTAL UNITS	UNIT PRICE	TOTAL
1000	CSS 12/46	53	- - - - ORANGE JUICE UNSWEETENED - UNLABELED	1000 C	[redacted]	[redacted]
400	CSS 24/2	53	SAME	400 C		
			LESS ½ OF 1% SWELL ALLOW.			
			LESS 5% BROKERAGE			

3474.00
2.70
3471.30
173.57
3297.73

SELLER SHALL NOT BE RESPONSIBLE NOR ACCOUNTABLE FOR THE NONDELIVERY OF THE WHOLE OR ANY PART OF THE MERCHANDISE COVERED BY THIS ORDER IF DELIVERY IS PREVENTED BY FIRE, STRIKES, ACTS OF GOD, FREIGHT EMBARGOES, INABILITY TO OBTAIN RAW MATERIALS OR THROUGH OTHER CAUSES REASONABLY BEYOND CONTROL OF SELLER.

NO GOODS WILL BE ACCEPTED FOR CREDIT TO CUSTOMERS UNLESS RETURN IS AUTHORIZED BY THE SELLER IN WRITING.

NO. 25337

SHIP THE FOLLOWING ITEMS SUBJECT TO THE CONDITIONS HEREON:

SHIP TO

ADDRESS

VIA

PER

ON OR BEFORE

F.O.B.

TERMS

INVOICE IN TO OFFI

ITEM NO.	AMOUNT ORDERED	DESCRIPTION	WEIGHT	UNIT PRICE	NET PRICE	ACCOUNT
		FULL STRENGTH ORANGE JUICE PREVIOUSLY PACKED FOR THE ACCOUNT OF THE E.O.P. COMPANY BY TREESWEET				
2.20	25 Cs	46-5½ oz @ 1.723 ✓ (Net) #2E	$ 43.08 ✓			
2.00	425 Cs	46/6 oz ~~[illegible]~~ @ 1.63 ✓ Net #1E	692.75 ✓			
2.20	301 "	" ~~[illegible]~~ 1.80 ✓ Net #2E	541.80 ✓			
1.60	250 Cs	24/12 oz 1.228 ✓ (Net) #1E	307.00 ✓			
1.70	1641	" 1.313 ✓ #2E	2,154.63 ✓			
1.75	160	" 1.3555 ✓ #1W	216.88		✓	
1.85	416	" 1.4405 ✓ #2W	599.25 ✓			
1.95	1270 Cs	24/2's @ 1.5175 ✓ #1E	1,927.22 ✓			
2.05	4795	1.6025 ✓ #2E	7,683.99 ✓			
CREDIT 2.20	(10)	1.73 ✓ #1W	(17.30) ✓	CREDIT		
2.30	2642	1.815 ✓ #2W	4,795.23 ✓			
2.20	2980 Cs	12/46 oz 1.735 ✓ #1E	5,170.30 ✓			
2.35	10121	1.8625 ✓ #2E	18,850.36 ✓			
2.65	6788	2.1175 ✓ #2W	14,373.59 ✓			
			57,338.78			
			57,338.78 ✓			

OK/GL

Prices. Quantities ok - [illegible]

CONDITIONS

1. No responsibility will be assumed for verbal orders given by employees.
2. Orders must be promptly acknowledged and actual shipping date given.
3. All materials furnished must be [illegible] and substantially packed to insure safe delivery; will be subject to [illegible]
6. No [illegible] until authorized by the Pur- [illegible] container.

TREESWEET PRODUCTS CO.

BY W.B. TAYLOR

ON ITEMS YOU ARE UNABLE TO SHIP PLEASE ADVISE WHEN BALANCE CAN BE SHIPPED, IF BACK ORDERED

FORM W-S 104—5M SETS—9-50

WINCKLER & SMITH CITRUS PRODUCTS CO.
ANAHEIM, CALIF.

Nº 10270

RECEIVING RECORD

DATE 9/28

QUANTITY	SIZE	PRODUCT	FROM
100cs	12/46	Orange Juice	Exchange Bay
400cs	24/2	" "	

ENTERED

IN STOCK LEDGER BY

REC'D. BY WAREHOUSE

DELV. BY Hammond PLANT

[illegible] in Connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

SHIPPING ORDER

This Shipment is Correctly described. Correct Weight

.... lbs.

Subject to verification by the Trans-Continental Frt. Bureau Agreement No. A-[illegible]

THIS SHIPPING ORDER must be legibly filled in, in Ink, in Indelible Pencil or in Carbon and retained by the Agent.

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order,

FROM **THE EXCHANGE ORANGE PRODUCTS CO.**

[illegible]

Customer's Order No.

At ONTARIO, CALIF. Sept. 28 19 51

Shipper's No.

By Picked Up Company

Agent's No.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to Winkler & Smith

Destination State of County of

Route

Delivering Carrier Car Initial Car No.

No. Packages	Description of Articles, Special Marks and Exceptions	*Weight (Sub. to Corr.)	Class or Rate	Ck. Col.
	Bbls. Citrus Fruit Juice (Unfermented) (Not Frozen)			
	Kegs Citrus Fruit Juice " " "			
	Cases Citrus Fruit Juice " " " (in glass)			
1400	Cartons Citrus Fruit Juice " " " (in tin)	60000#		
	Drums Essential Oil			
	~~Cases~~ Essential Oil (in tin)			
	Cartons Citrus Fruit Juice (Unfermented) (Frozen) (in tin)			
P.2.P. —	3000 Cs. 12/46 #2E			
P.2P. —	400 Cs. 24/2 #2E			

9-28-51.

"This shipment is tendered and received subject to the terms and conditions of the company's Uniform Bill of Lading, effective June 15, 1941."

Shipper's signature Agent's signature

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

THE EXCHANGE ORANGE PROD. CO.

Per (Signature of consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per (The signature here acknowledges only the amount prepaid.)

Charges Advanced:

\$

*If the shipment moves between two ports by a carrier by water [illegible]

[fol. 405]

FORM [illegible]

PURCHASE ORDER

TREESWEET PRODUCTS CO.

Nº 6406

PACKERS OF TREESWEET BRAND PURE CITRUS FRUIT JUICES

SANTA ANA PLANT
1060 EAST FOURTH ST.
PHONE SANTA ANA 6829

MAIN OFFICE
1044 EAST FOURTH ST.
SANTA ANA, CALIFORNIA
P. O. BOX 28

PHOENIX. ARIZ. PLANT
909 EAST MADISON ST.
P. O. BOX 2356 PHONE 3-1060

DATE October 10, 1951
As of October 6, 1951

D 4208

DATE

RECEIVED
OCT

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT
616 E. Grove St.
Ontario, Calif.

SHIP THE FOLLOWING ITEMS SUBJECT TO THE CONDITIONS HEREON:

SHIP TO

ADDRESS

VIA

PER

ON OR BEFORE

F.O.B.

TERMS

INVOICE IN TO OFFICE

ITEM NO.	AMOUNT ORDERED	DESCRIPTION	WEIGHT	UNIT PRICE	NET PRICE	ACCOUNT
		Full strength Orange Juice previously packed for the account of The E.O.P. Co. by Treesweet Products Co.				
2.20	300	Cs 46/5½ oz @		1.723 ✓ (Net) #2E -	$ 516.90 ✓	
2.40	500	" "		1.893 ✓ #2W -	946.50 ✓	
2.00	150	Cs 46/6 oz @		1.63 ✓ #1E.	244.50 ✓	
2.20	251	" "		1.80 ✓ #2E.	451.80 ✓	
1.70	484	Cs 24/12 oz @		1.313 ✓ #2E	635.49 ✓	
1.75	509	" "		1.3555 ✓ #1W	689.95	689.97
1.85	1858	" "		1.4405 ✓ #2W	2,676.45 ✓	
1.95	84	Cs 24/2's @		1.5175 ✓ #1E	127.47 ✓	
2.05	1312	" "		1.6025 ✓ #2E	2,102.48 ✓	
2.30	4216			1.815 ✓ #2W	7,652.04 ✓	
2.20	1545	Cs 12/46 oz @		1.735 ✓ #1E	2,680.58 ✓	
2.35	4366	" "		1.8625 ✓ #2E	8,131.67 ✓	
2.65	6348	" "		2.1175 ✓ #2W	13,441.89 ✓	
					40,297.72	
					40,297.74	

Prices Quantities & Extensions

CONDITIONS

[illegible]

[fol. 408]

SHIP THE FOLLOWING ITEMS SUBJECT TO THE CONDITIONS HEREON:

SHIP TO	PER
	ON OR BEFORE
ADDRESS	F.O.B.
	TERMS
VIA	INVOICE IN TO OFFICE

ITEM NO.	AMOUNT ORDERED	DESCRIPTION	WEIGHT	UNIT PRICE	NET PRICE	ACCOUNT
		FULL STRENGTH ORANGE JUICE PREVIOUSLY PACKED FOR THE ACCOUNT OF THE E.O.P. CO. BY TREESWEET PRODUCTS CO.				
2.20	300	Cs 48/5½ oz @ 1.723 ✓ (Hwy) #2E -			516.90 ✓	
2.40	500	" " 1.893 ✓ #2W -			946.50 ✓	
2.00	150	Cs 48/6 oz @ 1.63 ✓ #1E -			244.50 ✓	
2.20	251	" " 1.80 ✓ #2E.			451.80 ✓	
1.70	464	Cs 24/12 oz @ 1.313 ✓ #2E			[illegible] ✓	
1.75	509	" " 1.[illegible] #1W			[illegible]	608.97
1.85	1856	" " 1.[illegible] #2W			2,[illegible] ✓	
1.95	84	Cs 24/2½ @ 1.5175 #1E			127.47 ✓	
2.05	1312	" " 1.[illegible] #2E			2,1[illegible] ✓	
2.30	4216	1.815 ✓ #2W			7,652.04 ✓	
2.20	1565	Cs 12/46 oz @ 1.7[illegible] ✓ #1E			2,[illegible] ✓	
2.35	4366	" " 1.8[illegible] #2E			8,131.67 ✓	
2.65	6946	" " 2.1175 #2W			[illegible] ✓	
					[illegible]	
					[illegible]	

OK/[illegible]

Prices, Quantities, Extensions OK - [illegible]

ON ITEMS YOU ARE UNABLE TO SHIP PLEASE ADVISE
WHEN BALANCE CAN BE SHIPPED, IF BACK ORDERED

TREESWEET PRODUCTS CO.
W. B. TAYLOR
BY

[fol. 408]

the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

At CORONA, CALIF. [illegible] 19 [illegible]

By [illegible]

Consigned to [illegible]

Destination [illegible] State of

Route

Delivering Carrier

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS
	Bbls. Citrus Fruit Juice (Unfermented) (Not Frozen)
	Kegs Citrus Fruit Juice " " "
	Cases Citrus Fruit Juice " " " In glass
[illegible]	Cartons Citrus Fruit Juice " " " In tin
	Drums Essential Oil
	[illegible] Essential Oil of [illegible]
	Cartons Citrus Fruit Juice (Unfermented) (Frozen) In tin
P. 2 P.	[illegible]
P. 21 P.	[illegible]

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

THE EXCHANGE [illegible]

Per

Permanent Post-Office Address of Shipper

2

... the conditions not prohibited by law, whether printed or written, herein contained, including

Customer's Order No.______

Shipper's No.______

______ Company   Agent's No.______

([illegible])

______ County of______

Car Initial______ Car No.______

[illegible]	[illegible]	[illegible]
[illegible]		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

[illegible] Co.

Per______
(Signature of consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

______

Received $______
to apply in prepayment of the charges on the property described hereon.

______
Agent or Cashier

Per______
(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$______

[illegible]

[illegible]

[illegible]

[illegible]

[fol. 405]

15933

[fol. 499]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 55 and DEFENDANTS' EXHIBIT Y

THIS AGREEMENT, executed in duplicate this 6th day of August, 1951, by and between INDEPENDENT CITRUS GROWERS & SHIPPERS ASSOCIATION, a non-profit corporation, hereinafter referred to as First Party, and WINCKLER & SMITH CITRUS PRODUCTS COMPANY, INC., a corporation, hereinafter referred to as Second Party, as follows:

WHEREAS, First Party has a supply of, and owns, valencia oranges suitable for the production of citrus by-products, and which it wishes to have processed and sold through the plant and facilities of Second Party; and

WHEREAS, Second Party owns and operates a citrus by-products plant in Anaheim, Orange County, California, with adequate facilities to produce, process, package and sell citrus by-products, such as, single strength orange juice and frozen or hot pasteurized concentrate, and desires to furnish its said plant and facilities to First Party upon the terms and conditions hereinafter set forth,

NOW, THEREFORE, in consideration of the premises, it is mutually understood and agreed as follows:

1. First Party shall deliver to the plant of Second Party, located at No. [illegible] South Atchison Street, Anaheim, California, approximately sixty (60) tons per day of valencia oranges of suitable quality to produce Grade A frozen concentrate, or three hundred sixty (360) tons per week for six (6) operating days. Title to the oranges so delivered to Second Party and the citrus concentrate and by-products derived therefrom, save orange peel, shall remain the property of First Party. Second Party shall give proper receipts for said oranges when delivered and shall account therefor as hereinafter set forth. Second Party agrees to process said oranges in a careful, prudent and expeditious manner by the use of its plant and proper facilities therefor, and to produce for First Party merchantable

D CONDITIONS

[illegible]

frozen concentrate of Grade A quality and in the 60° brix [fol. 410] frozen concentrate orange juice which shall, save as hereinafter provided, be packed in plyofilm lined 50 gallon quick opening drums furnished by and to remain the property of Second Party, and to be repackaged later in either 6 ounce or 32 ounce cans as 42° brix frozen concentrate orange juice of like grade and quality, and either under Second Party's ANAGOLD label or any other label available to either of the parties hereto which they consider will obtain the best price for the product sold. As soon as cans are available and a firm order received, said 42° brix frozen concentrate orange juice shall be placed directly in said cans and in such size and quantity as First Party shall direct.

2. Said concentrate shall be sold by Second Party in the name of Second Party, and for the account of First Party, and subject to prior immediate authorization or rejection of such sales by First Party. Accurate records of such sales shall be kept by Second Party and reports thereof and accountings therefor shall be made as hereinafter set forth to First Party. The full purchase price of the merchandise, except for customary brokerage charges and cash discounts, agreed to be paid First Party, shall be accounted for and paid to First Party as hereinafter provided. Sales made and confirmed shall be reported in writing to each of First Party's agents as hereinafter named once a week.

3. Said frozen concentrate, whether in drums or in cans, may be stored free of charge in Second Party's warehouse, which shall be under the supervision and control of the Lawrence Warehouse Company, and which shall issue and deliver warehouse receipts therefor to First Party, and upon which it may borrow money if it desires to do so. All expenses of the Lawrence Warehouse Company shall be paid by First Party. Withdrawals therefrom shall only be made upon the written consent of First Party. Second Party shall fully insure products stored in its warehouse at First Party's expense. If any of First Party's [fol. 411] merchandise remains in Second Party's warehouse for more than thirty (30) days, Second Party will charge First Party customary warehouse charges therefor

[fol. 406]

In United States District Court

Plaintiffs' Exhibit 50

TREESWEET PRODUCTS CO.

Nº 64

PACKERS OF TREESWEET BRAND PURE CITRUS FRUIT JUICES

SANTA ANA PLANT
1000 EAST FOURTH ST.
PHONE SANTA ANA 0020

MAIN OFFICE
1044 EAST FOURTH ST.
SANTA ANA, CALIFORNIA
P. O. BOX 28

PHOENIX, ARIZ. PLANT
909 EAST MADISON ST.
P. O. BOX 2356 PHONE 3-1060

DATE Sept 27, 1958
As of Sept. 22, 1951

DATE

CALIFORNIA FRUIT GROWERS EXCHANGE
PRODUCTS DEPARTMENT
616 E. Grove St.,
Ontario, Calif.

D4?7

10

SHIP THE FOLLOWING ITEMS SUBJECT TO THE CONDITIONS HEREON:

SHIP TO

ADDRESS

VIA

PER

ON OR BEFORE

F.O.B.

TERMS

INVOICE IN TO

ITEM NO.	AMOUNT ORDERED	DESCRIPTION	WEIGHT	UNIT PRICE	NET PRICE
		Full strength orange juice previously packed for the account of The Exchange Orange Products Company by Treesweet Products Co.			
2.20	54	Cs 48/5½ oz @ 1.723 ✓ (Net) #2E			$ 93.04 ✓
2.10	1165	Cs 48/6 oz @ 1.63 ✓ #1E			1898.95 ✓
2.20	540	" " @ 1.80 ✓ #2E			972.00 ✓
2.10	75	" " @ 1.715 #1W			128.63 ✓
1.60	870	Cs 24/12 oz @ 1.228 ✓ #1E			1068.36 ✓
1.70	700	" " 1.313 ✓ #2E			919.10 ✓
1.75	3216	" " 1.3555 ✓ #1W			4359.29 ✓
1.85	2000	" " 1.4405 ✓ #2W			[illegible] 2881.00 ✓
1.95	503	Cs 24/2's @ 1.5175 ✓ #1E			763.30 ✓
2.05	540	" 1.6025 ✓ #2E			865.35 ✓
2.20	330	" 1.73 ✓ #1W			570.90 ✓
2.30	2297	" 1.815 ✓ #2W			4169.05 ✓
2.20	6534	Cs 12/46 oz @ 1.735 ✓ #1E			11336.49 ✓
2.35	3055	1.8625 ✓ #2E			5689.94 ✓
2.65	4792	2.1175 ✓ #2W			10147.06 ✓
					~~[illegible]~~
					45,862.46 ✓

OK/BHL Prices & quantities OK - [illegible]

CONDITIONS

of 32¢ cwt. per month for the first month and 16¢ cwt. for each month thereafter. Said warehouse charges, if any, shall be paid by First Party to Second Party at the time it accounts and pays the processing charges of Second Party as hereinafter set forth.

4. For its services hereunder, First Party shall pay to Second Party all of Second Party's processing (hard) costs per case, and which are specifically tabulated and set forth in the annexed schedule marked Exhibit "A", and by this reference made a part hereof, which shall include cans, cartons, and each and every other article or thing necessary to process, pack and sell said merchandise. In addition thereto, First Party shall pay to Second Party five per cent (5%) of the net selling price, f.o.b., and in determining said price, customary brokerage and cash discounts shall be deducted therefrom. First Party shall pay to Second Party 15¢ per gallon for said frozen concentrate removed from drums and placed in cans. First Party shall pay Second Party for said processing costs, repackaging allowance and said five per cent (5%) of the net selling price weekly on Monday of each week during the continuance hereof. Said processing cost and repackaging allowance shall be paid for in full on said day and said five per cent (5%) of the net selling price shall be then paid on all sales then consummated, including the collection therefor during the preceding week. Second Party shall, immediately upon making sales, report and account to First Party therefor and pay over the proceeds derived therefrom. Because some of the merchandise sold will not be paid for at the time of sale, or during the week of processing and canning, First Party agrees to pay weekly five per cent (5%) of the estimated profit on the basis of Six Dollars ($6.00) per case; and which shall be paid weekly with the said processing charges and repackaging charges. Upon termination of this con- [fol. 412] tract an accounting shall be had between the parties hereto and the balance of profits, if any, due Second Party hereunder shall be paid to it and if any monies are due to First Party because of overpayment of estimated profits, Second Party agrees to repay said overpayments to First Party.

5. First Party hereby appoints Morgan U. Ward and V. W. Borden its agents to represent it in all matters concerning this Agreement, and shall be bound by their, or either of their, acts or agreements. First Party shall have the right, during the period of this Agreement, to change either one or both of its said agents by giving a written notice to that effect to Second Party, which notice shall be effective upon delivery to it. Such substitution of its agents, or either of them, shall not affect their acts occurring prior thereto.

6. Second Party shall keep careful and accurate records of all matters concerning this agreement or in any way connected therewith, which shall be open to the inspection of First Party's said agents, or either of them, at all reasonable times. Full and accurate written reports of oranges received, processed, stored, sold, or in any manner disposed of shall be made weekly by Second Party to each of First Party's said agents and on Monday of each week during the continuance hereof.

7. This Agreement may not be assigned by Second Party without first securing the written consent of First Party. This Agreement shall continue from month to month from the date hereof to the end of the 1951 valencia season, estimated to be the first day of November, 1951, provided either party may terminate this Agreement by written notice thereof to the other party at least ten (10) days prior to the end of the current monthly period. This Agreement and the performance thereof by either party is subject to industrial breakdowns, strikes, lack of necessary materials and supplies, failure of transportation facilities, Acts of God, or other conditions beyond the control of the parties hereto.

[fol. 413] 8. The written notices provided for herein may be mailed to First Party at No. 709 East Center Street, Anaheim, California, and to Second Party at No. 408 South Atchison Street, Anaheim, California, and shall be effective upon the date deposited in the United States mail; or said notices may be delivered personally to either one of First Party's said agents, or to Mr. Nicholas J. Winckler, President of Second Party. In the event of any dispute or difference arising between the parties hereto and growing

610 E. GROVE ST.,
ONTARIO, CALIF.

SHIP THE FOLLOWING ITEMS SUBJECT TO THE CONDITIONS HEREON;

SHIP TO

ADDRESS

VIA

PER
ON OR BEFORE
F.O.B.
TERMS
INVOICE IN TO

d States District Court
intiffs' Exhibit 50

FULL STRENGTH ORANGE JUICE PREVIOUSLY PACKED FOR THE ACCOUNT OF THE EXCHANGE ORANGE PRODUCTS COMPANY BY TREESWEET PRODUCTS CO.

ITEM NO.	AMOUNT ORDERED	DESCRIPTION	WEIGHT	UNIT PRICE	NET PRICE
2.20	54	Cs 46/5½ oz @ 1.723 (Net) ✓ #2E			$ 93.04 ✓
2.10	1165	Cs 46/6 oz @ 1.63 ✓ #1E			1898.95 ✓
2.20	540	" " @ 1.80 ✓ #2E			972.00 ✓
2.10	75	" " @ 1.715 #1W			128.63 ✓
1.60	870	Cs 24/12 oz @ 1.228 ✓ #1E			1068.36 ✓
1.70	700	" " 1.313 ✓ #2E			919.10 ✓
1.75	3216	" " 1.3555 ✓ #1W			4359.29 ✓
1.85	2000	" " 1.4405 ✓ #2W			[illegible] 2881.00 ✓
1.95	503	Cs 24/2's @ 1.5175 ✓ #1E			763.30 ✓
2.05	540	" 1.6025 ✓ #2E			865.35 ✓
2.20	330	" 1.73 ✓ #1W			570.90 ✓
2.30	2297	" 1.815 ✓ #2W			4169.05 ✓
2.20	6534	Cs 12/46 oz @ 1.735 ✓ #1E			11336.49 ✓
2.35	3055	1.8625 ✓ #2E			5689.94 ✓
2.65	4792	2.1175 ✓ #2W			10147.06 ✓
					[illegible]
					45,862.46 ✓

OK/Bkl Prices & quantities OK - Tc

TREESWEET PRODUCTS CO.

BY W. B. TAYLOR

ON ITEMS YOU ARE UNABLE TO SHIP PLEASE ADVISE WHEN BALANCE CAN BE SHIPPED, IF BACK ORDERED

CONDITIONS

out of this Agreement or connected therewith, the matter may be submitted to a proceeding for declaratory relief in the Superior Court of Orange County, or to arbitration as hereinafter set forth. The party hereto wishing to arbitrate any difference hereunder may notify the other party in writing, setting forth the name of the person appointed by it to act as its arbitrator, and stating in said written notice the matters it wishes to arbitrate; and ten (10) days after the mailing of said written notice the other party hereto shall in writing notify the party requesting arbitration of the name of its arbitrator and setting forth in its notice any additional matters it wishes to arbitrate; and within ten (10) days thereafter said two named arbitrators shall appoint a third arbitrator in writing and send notice thereof to each of the parties hereto; and within twenty (20) days thereafter said arbitrators shall submit in writing to the parties hereto their report and decision, which, when concurred in by a majority of said arbitrators, shall be binding upon the parties hereto. The expense of said arbitration shall be borne in equal shares by the parties hereto.

IN WITNESS WHEREOF the parties hereto by their duly authorized officers have hereto set their hands and their respective seals the day and year first above written.

INDEPENDENT CITRUS GROWERS & SHIPPERS ASSOCIATION,
a non-profit corporation

By /s/ BERT BANKS
Its President

By /s/ ARTHUR CLARK
Its Secretary
FIRST PARTY

[SEAL]

[fol. 414]

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, INC.
a corporation,

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, INC.,

By /s/ NICHOLAS J. WINCKLER
Its President

By /s/ J. MESNARD
Its Secretary
SECOND PARTY

[SEAL]

EXHIBIT "A"

FROZEN CONCENTRATE COSTS

Based on Laboratory Solids of 120 lbs.

48/6 oz—42° Brix Orange Concentrate

2.25 Gals per case

Fruit Price (includes) ($2.00 haul)	Ingred Cost Per Case	Hard Cost Per Case	Product Cost Per Case	Bkge. Cash Disc. & 5% Profit	Total Per Case
37.00	3.62	2.16	5.78	.64	6.42
34.50	3.38	2.16	5.54	.62	6.16
32.00	3.14	2.16	5.30	.59	5.89
29.50	2.90	2.16	5.06	.56	5.62
27.00	2.66	2.16	4.82	.54	5.36
—25.00					*—5.20*
24.50	2.42	2.16	4.58	.51	5.09
22.00	2.18	2.16	4.34	.48	4.82

12/32 oz—42° Brix Orange Concentrate

3 Gals per case

Fruit Price (includes) ($2.00 haul)	Ingred Cost Per Case	Hard Cost Per Case	Product Cost Per Case	Bkge. Cash Disc. & 5% Profit	Total Per Case
37.00	4.83	2.18	7.01	.78	7.79
34.50	4.51	2.18	6.69	.74	7.43
32.00	4.19	2.18	6.37	.71	7.08
29.50	3.87	2.18	6.05	.67	6.72
27.00	3.55	2.18	5.73	.64	6.37
24.50	3.23	2.18	5.41	.60	6.01
22.00	2.91	2.18	5.09	.57	5.66

Italicized figures handwritten.

FORMULA FOR OBTAINING INGRED. COST

Lbs. solids ÷ 5.2 = Gals per ton / Fruit Cost per ton =
cost per gal × gals per case = Cost.

EXAMPLE: 23.07

120 lbs. solids ÷ 5.2 = gals per ton / 37.00 (fruit cost) =
1.61 × 2.25 = 3.62 (cost per case)
gal gals per case

All the above prices are f.o.b. plant Anaheim.

Based on Laboratory solids of 120 lbs.
50 gal. barrels 60° Brix Orange Concentrate

Fruit Price (includes) ($2.00 haul)	Ingred Cost Per Case	Hard Cost Per Case	Product Cost Per Case	Bkge. Cash Disc. & 5% Profit	Total Per Case
37.00	2.48	.78	3.26	.36	3.62
34.50	2.32	.78	3.10	.34	3.44
32.00	2.15	.78	2.93	.33	3.26
29.50	1.98	.78	2.76	.31	3.07
27.00	1.81	.78	2.59	.29	2.88
24.50	1.64	.78	2.42	.27	2.69
22.00	1.48	.78	2.26	.25	2.51

[fol. 416]

FORMULA FOR OBTAINING INGRED. COST

120 lb. solids ÷ 8.05 = gals per ton / fruit cost per ton =
cost per gal.

EXAMPLE:

120 lbs. solids ÷ 8.05 = 14.9 / 32.00 (fruit cost) =
gals per
ton
2.48 gal. (cost per gal.)

[fol. 417]

AGREEMENT

Independent Citrus Growers

and

Winckler & Smith

Dated August 6, 1951.

STEPHEN F. GALLAGHER
ATTORNEY-AT-LAW
Bank of America Bldg.
ANAHEIM, CALIFORNIA

[fol. 418]

In United States District Court

Plaintiffs' Exhibit 61-A and Defendants' Exhibit G

[Letterhead of Winckler & Smith Citrus Products Company, Anaheim, California]

March 2, 1950

TO WHOM IT MAY CONCERN:

This is to certify that this is a true and exact copy of our audited statement as of the close of business, January 31, 1950.

Yours very truly,

Winckler & Smith Citrus Products Co.

A. D. Phelan
Secretary

Sec.

[fol. 419] Board of Directors
Winckler & Smith Citrus Products Co.
60 South Atchison Street
Anaheim, California

Gentlemen:

In accordance with instructions received, we have made an examination of the balance sheet of Winckler & Smith Citrus Products Co. as at January 31, 1950 and income account for the year then ended, and in connection therewith, we submit the attached statements:

Balance Sheet as at January 31, 1950

Income Account for the year ended
January 31, 1950

Cash on hand was counted during the course of our examination and amounts on deposit at January 31, 1950 were confirmed by direct communication with the depositories.

Physical inventories on hand at the company's warehouse were taken under our supervision on the morning of February 1, 1950 by responsible employees of the company. Inventories of finished products at January 31, 1950 comprise the following:

Canned juices	$34,527.86
Citrus Oils	5,970.00
Pulp	2,500.00
	$42,997.86

Inventories at January 31, 1950 were priced at cost which is lower than market. We made sufficient tests to satisfy ourselves as to the basis of pricing and accuracy of the inventories.

The fixed assets as of March 1, 1949 were sold under a lease and option to repurchase agreement which provides for the leasing of the assets until March 1, 1952 with an option to extend until March 1, 1954 and gives the Corporation the right to repurchase such assets, subject to the then unpaid balance payable on the mortgage, as follows:

[fol. 429]

1. If the option is exercised between September 2, 1949 and March 1, 1950 the cash consideration shall be $100,000.
2. If option is exercised between March 1, 1950 and March 1, 1951 the cash consideration shall be $125,000.
3. If option is exercised between March 1, 1951 and March 1, 1952 the cash consideration shall be $150,000; lessee also has the privilege of repurchase from March 1, 1952 to March 1, 1954 for a cash consideration of $150,000. if lease is extended.

The lease and option agreement is carried on the books at a nominal value of $1.00. As of March 18, 1946 and November 26, 1946 appraisals were made by Union Appraisal Company, Los Angeles, of all of the fixed assets covered by the lease and option to repurchase agreement. The sound values as of those dates as shown by the appraisals were as follows:

Land and improvements	$ 9,475.00
Buildings	215,397.00
Machinery and equipment	221,979.40
Office furniture and equipment	10,658.89
	$457,510.29

Notes payable were confirmed by direct communication with the creditors. We did not confirm the accounts payable by direct communication with the creditors. However, we made substantial tests of vendors invoices and other documents to ensure that substantially all of the Corporation's liabilities at January 31, 1950 are included in the attached balance sheet.

The number of shares of capital stock outstanding were verified by examination of capital stock ledger and share certificate books.

Yours very truly,

HODGE & COMPANY

MICRO CARD
TRADE MARK ®

22

MATTHEW BENDER & COMPANY

-61

microcard

[fol. 421]

WINCKLER & SMITH CITRUS PRODUCTS COMPANY

BALANCE SHEET

JANUARY 31, 1950

ASSETS

Current Assets				
Cash on hand and in bank			$ 3,317.25	
Accounts receivable:				
Open accounts		$29,825.17		
Sight drafts	$74,682.69			
Less advances by bank	25,000.00	49,682.69	79,507.86	
Inventories:				
Finished goods		$40,997.86		
Supplies		20,143.54	61,141.40	$143,96
Lease and Option to Repurchase				1
Fixed Assets				
Machinery and equipment			$43,531.19	
Furniture and fixtures			2,517.46	
Leasehold improvements			16,076.98	
Tools			138.56	
			$62,264.19	
Less reserves for depreciation and amortization			1,239.09	61,025.
Deferred Charges				
Prepaid royalties			$ 4,821.67	
Unexpired insurance			4,683.29	
Deposits			1,018.00	
Incorporation expense			1,574.41	12,097.
				$237,0

l (2)]

WICKLER & SMITH CITRUS PRODUCTS COMPANY

BALANCE SHEET

JANUARY 31, 1950

LIABILITIES

rent Liabilities			
ccounts payable:			
Trade		$ 70,929.18	
Brokers		4,615.58	
otes payable		15,837.35	
ccrued payroll		1,659.00	
oyalties payable		1,829.47	
ayroll taxes		2,434.61	
ccrued expenses		2,579.92	$ 99,885.11
tal Stock and Deficit			
Capital Stock:			
Authorized and issued 1,000 shares, no par value		$240,697.22	
eficit:			
January 31, 1949	$224,852.56		
Profit for the year ended January 31, 1950	121,360.21	103,492.35	137,204.87
			$237,089.98

[fol. 423]

WINCKLER & SMITH CITRUS PRODUCTS COMPANY

INCOME ACCOUNT
YEAR ENDED JANUARY 31, 1950

SALES, less discounts and allowances			$1,367,221.
COST OF SALES			1,107,197.
			$ 260,023.
SELLING EXPENSES			
Brokerage commissions	$44,504.74		
Sales and traffic salaries	12,567.38		
Advertising	8,571.27		
Travel	7,186.13		
Freight out	4,961.38		
Outside warehouse	1,536.30		
Telephone and telegraph	5,936.03		
Miscellaneous	1,591.92	$86,855.15	
ADMINISTRATIVE EXPENSES			
Executive salaries	$12,319.02		
Office salaries	14,419.57		
Telephone and telegraph	3,272.68		
Travel	4,962.76		
Stationery and supplies	4,726.24		
Interest and collection	11,670.55		
Professional fees	3,879.57		
Miscellaneous	1,166.99	56,417.38	143,272.
			$ 116,751.
MISCELLANEOUS INCOME			4,609.
PROFIT FOR YEAR			$ -121,360.

[fol. 424]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 63-A

WINCKLER & SMITH CITRUS PRODUCTS CO.

FINANCIAL STATEMENT

• • • • •

JANUARY 31, 1951

HODGE AND CO.
CERTIFIED PUBLIC ACCOUNTANT
205 SOUTH BEVERLY DRIVE
BEVERLY HILLS, CALIFORNIA
BRADSHAW 23409

[fol. 425]

HODGE AND CO.
CERTIFIED PUBLIC ACCOUNTANTS
205 SOUTH BEVERLY DRIVE
BEVERLY HILLS, CALIFORNIA
BRADSHAW 23409

March 1, 1951

Board of Directors
Winckler & Smith Citrus Products Co.
408 South Atchison Street
Anaheim, California

Gentlemen:

In accordance with instructions received, we have made an examination of the balance sheet of Winckler & Smith Citrus Products Company as at January 31, 1951 and income account for the year then ended, and in connection therewith, we submit the attached statements:

Balance Sheet as at January 31, 1951

Income Account for the year ended
January 31, 1951

Cash on hand was counted during the course of our examination and amounts on deposit at January 31, 1951 were confirmed by direct communication with the depositories.

Requests for confirmation of amounts due as of January 31, 1951 were mailed to all trade accounts. We received reports from customers whose accounts amounted to $66,007.69. Differences reported were minor and were satisfactorily accounted for by us. Collections from open accounts and drafts receivable as of January 31, 1951 amounted to $50,304.82 during the course of our examination. We reviewed the collectibility of the accounts and drafts receivable with officials of the Corporation and from information obtained, we believe that losses from bad debts will be minor.

Physical inventories on hand at the Company's warehouse were taken by responsible employees of the Company, under our supervision, as of the close of business January 31, 1951, and all quantities on hand at outside warehouses were confirmed by direct communication with officials of the warehouses. Inventories at January 31, 1951 were priced at cost which is lower than market. We made sufficient tests to satisfy ourselves as to the basis of pricing and accuracy of the inventories.

[fol. 426] The fixed assets as of March 1, 1949 were sold under a lease and option to repurchase agreement which provides for the leasing of the assets until March 1, 1952 with an option to extend until March 1, 1954 and gives the Corporation the right to repurchase such assets for a cash consideration of $150,000.00, subject to the then unpaid balance payable on the mortgage. The lease and option agreement is carried on the books at a nominal value of $1.00.

As of February 17, 1950 an appraisal was made by Union Appraisal Company, Los Angeles, of all of the fixed assets covered by the lease and option to repurchase agreement and all of the fixed assets acquired by the Corporation since March 1, 1949, carried on the balance sheet as of January 31, 1950 at $62,264.19. The sound values as of February 17, 1950 as shown by the appraisal, were as follows:

Land and improvements	$ 10,200.00
Buildings	193,451.00
Machinery and equipment	434,032.00
Office, laboratory and miscellaneous equipment	24,741.61
	$662,424.61

From February 17, 1950 to January 31, 1951 the Corporation expended $35,570.52 for additional equipment and leasehold improvements.

The deferred promotion expense of $24,910.66 represents the unamortized balance of expenditures made in 1950 to promote the sale of non-carbonated citrus beverages, namely orangeade, lemonade and citrus punch, which were developed in 1950. The Corporation is amortizing such expenditures over a two year period.

Loans payable and contracts payable were confirmed by direct communication with the creditors. We did not confirm the accounts payable by direct communication with the creditors. However, we made substantial tests of vendor invoices and other documents to ensure that substantially all of the Corporation's liabilities at January 31, 1951 are included in the attached balance sheet.

At a special meeting of the Board of Directors held on January 11, 1951, the Corporation amended the Article IV of the Articles of Incorporation as follows:

> "This Corporation is authorized to issue two classes of [fol. 427] stock designated respectively Preferred and Common. The total number of shares which this Corporation shall have authority to issue is 1,059,000 shares, and the aggregate par value of all shares that are to have a par value shall be $1,295,000; the number of Preferred shares that are to have a par value shall be 59,000 and the par value of each share of such class shall be $5.00; and the number of Common shares that are to have a par value shall be 1,000,000 and the par value of each share will be $1.00."

On January 15, 1951 the shareholders of the Corporation executed a written consent to the amendment of Article IV of the Articles of Incorporation.

On January 31, 1951 the Commissioner of Corporations, State of California, issued a permit authorizing the sale of 50,000 shares of its Preferred shares at par to the public and to exchange and issue 315,110 of its newly created common shares as consideration for the exchange of 1,000 outstanding shares of stock.

As of January 31, 1951 the Corporation had not issued any of its newly created capital stock.

In our opinion the attached balance sheet and related statement of income fairly present the financial position of Winckler & Smith Citrus Products Co. at January 31, 1951, and the results of its operations for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Hodge & Co.

4

WINCKLER & SMITH CITRUS PRODUCTS CO.

BALANCE SHEET — JANUARY 31, 1951

ASSETS

CURRENT ASSETS			
Cash on hand and in banks		$ 33,717.95	
Accounts receivable:			
Open accounts	$119,289.98		
Drafts receivable	2,464.45		
Notes receivable	28.58		
	$121,783.01		
Less: Advances by finance company	104,963.30	16,819.71	
Inventories:			
Finished products -			
Pledged under warehouse receipts collateral agreements	$ 28,681.94		
Not pledged	30,124.37		
	$ 58,806.31		
Supplies	46,406.21	105,212.52	$155,750.18
FIXED ASSETS			
Machinery and equipment		$ 70,257.81	
Furniture and fixtures		7,363.71	
Leasehold improvements		20,074.63	
Tools		138.56	
		$ 97,834.71	
Less: Reserves for depreciation and amortization		5,985.48	91,849.23
LEASE AND OPTION TO PURCHASE			1.00
OTHER ASSETS			
Deferred promotion expense		$ 24,910.66	
Prepaid rent		2,187.84	
Prepaid royalties		8,626.12	
Prepaid insurance		4,722.34	
Prepaid interest		1,875.00	
Unabsorbed pre-seasonal expenses		22,443.84	
Advances to employees		3,550.00	
Organization expense		1,574.41	69,890.21
			$317,490.62

LIABILITIES

CURRENT LIABILITIES			
Accounts payable:			
Trade		$ 70,804.52	
Brokers		4,570.95	
Loans payable:			
Secured under warehouse receipt collateral agreements	$ 10,000.00		
Unsecured	41,190.42	51,190.42	
Contracts payable		8,812.49	
Accrued payroll		452.68	
Royalties payable		1,110.34	
Payroll taxes		1,267.62	
Accrued expenses		1,231.20	$139,440.22
CAPITAL STOCK AND DEFICIT			
Capital Stock:			
Authorized and issued 1,000 shares, no par value		$240,697.22	
Deficit:			
January 31, 1951	$103,492.35		
Profit for the year ended January 31, 1951	40,845.53	62,646.82	
			178,050.40
			$317,490.62

Subject to notes contained in accompanying report dated March 1, 1951.

128

WINCKLER & SMITH CITRUS PRODUCTS CO.

INCOME ACCOUNT

YEAR ENDED JANUARY 31, 1951

SALES, less discounts and allowances			$1,715,336.86
COST OF SALES			1,464,694.59
			$ 250,642.27
SELLING EXPENSES			
Brokerage commissions	$43,680.39		
Sales and traffic salaries	18,745.79		
Advertising	24,748.59		
Travel	6,631.25		
Freight out	16,309.98		
Outside warehouse	3,917.34		
Telephone and telegraph	11,177.98		
Miscellaneous	2,885.59	$128,294.91	
ADMINISTRATIVE EXPENSES			
Executive salaries	$14,619.30		
Office salaries	20,793.95		
Telephone and telegraph	3,186.90		
Taxes	4,963.59		
Travel	11,236.60		
Stationery and supplies	3,954.04		
Finance charges	16,380.98		
Professional fees	9,693.00		
Miscellaneous	6,879.64	90,858.00	219,152.91
			$ 31,489.36
MISCELLANEOUS INCOME			9,356.17
PROFIT FOR THE PERIOD			$ 40,845.53

24,

Total - 1/2 Each year

Travel $10,304.93 - $5,152.46

Sales & Tr. Salaries) 12,771.93 - 6,385.47

Advertising 26,744.46 - 13,372.23

$49,821.32 - 24,910.66

Subject to notes contained in

INCOME ACCOUNT
YEAR ENDED JANUARY 31, 1951

SALES, less discounts and allowances			$1,715,356.03
COST OF SALES			1,464,683.76
			$ 250,672.27
SELLING EXPENSES			
Brokerage commissions	$43,880.39		
Sales and traffic salaries	13,765.79		
Advertising	24,768.50		
Travel	6,831.25		
Freight out	16,309.96		
Outside warehouse	3,917.34		
Telephone and telegraph	11,177.96		
Miscellaneous	2,885.39	$128,294.91	
ADMINISTRATIVE EXPENSES			
Executive salaries	$14,619.30		
Office salaries	20,795.85		
Telephone and telegraph	3,196.90		
Taxes	4,965.59		
Travel	11,236.60		
Stationery and supplies	3,954.04		
Finance charges	16,390.96		
Professional fees	9,695.00		
Miscellaneous	6,079.64	90,888.00	219,182.91
			$ 31,489.36
MISCELLANEOUS INCOME			9,356.17
PROFIT FOR THE PERIOD			$ 40,845.53

Total 1 - 1/2 Each year
Travel $10,304.93 - $5,152.46
Sales & Tr. Salaries) 12,771.93 - 6,385.47
Advertising 26,744.46 - 13,372.23
$49,821.32 - 24,910.66

24.

Subject to notes contained in
accompanying report dated March 1, 1951

fol. 430]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 65

WINCKLER & SMITH CITRUS PRODUCTS CO.

INCOME ACCOUNT

Year Ended January 31, 1952

ALES, less discounts and allowances			$670,701.51
Cost of Sales			680,845.97
			$(10,144.46)
LLING EXPENSES			
Brokerage commissions	$ 7,298.55		
Sales and traffic salaries	23,224.20		
Advertising	20,646.81		
Travel	9,539.55		
Freight out	8,175.07		
Outside warehouse	3,254.44		
Telephone and telegraph	8,156.89		
Miscellaneous	7,356.93		
		$ 87,652.44	
MINISTRATION EXPENSES			
Executive salaries	$18,008.88		
Office salaries	18,365.32		
Telephone and telegraph	1,462.61		
Taxes	901.40		
Travel	14,991.20		
Insurance	3,427.19		
Stationery and supplies	3,287.43		
Finance charges	13,541.48		
Dues	1,959.53		
Professional fees	13,339.48		
Depreciation	932.83		
Miscellaneous	3,496.14	93,713.49	181,365.93
			$(191,510.39)
CELLANEOUS INCOME			6,987.19
FOR THE PERIOD			$184,523.20

WINCKLER & SMITH CITRUS PRODUCTS CO.

BALANCE SHEET

ASSETS

CURRENT ASSETS			
Cash on hand and in banks		$ 2,165.30	
Accounts receivable		660.05	
Inventories:			
Finished products:			
Pledged under warehouse receipts Collateral Agreements	$ 7,174.25		
Not pledged	3,468.00		
Supplies	41,225.40	51,867.65	$ 54,693
FIXED ASSETS at appraisal values as of January 12, 1951, plus subsequent additions at cost, subject to mortgages payable, per contra;			
Land		$ 10,808.15	
Buildings	$253,062.55		
Machinery and equipment	452,480.80		
Furniture and fixtures	23,827.24		
Tools	138.56		
	$729,509.15		
Less: Reserves for depreciation	41,078.96	688,430.19	699,238
OTHER ASSETS			
Deferred taxes		$ 2,289.70	
Prepaid rent		2,187.59	
Prepaid royalties		5,876.91	
Unexpired insurance		1,889.04	
Prepaid expenses		147.50	
Deposits		775.11	
Organization expense		1,574.41	
Patents and formulas		1.00	14,741
			$768,672

Subject to notes contained in accompanying report dated March 18, 1952

JANUARY 31, 1952

LIABILITIES

ENT LIABILITIES			
Accounts payable:			
Trade		$ 54,721.62	
Brokers		2,818.64	
Loans payable:			
Secured under warehouse receipt collateral agreements	$ 4,685.77		
Unsecured	5,121.80	9,807.57	
Notes payable:			
Secured by first trust deed on fixed assets	$ 50,499.04		
Secured by second trust deed on fixed assets	57,500.00	107,999.04	
Contracts payable		203.47	
Royalties payable		2,983.11	
Accrued payroll taxes		10,458.70	
Accrued property taxes		5,495.23	
Accrued payroll		614.78	
Accrued interest		3,200.00	
Customer's deposits		297.00	$198,599.16
ITAL STOCK AND SURPLUS			
Capital Stock:			
Preferred 7% cumulative and convertible $5 par value:			
Authorized 59,000 shares			
Issued 34,113 shares		170,565.00	
Common $1 par value:			
Authorized 1,000,000 shares			
Issued 315,110 shares		315,110.00	
Capital surplus arising from appraisal of fixed assets and reorganization of Company		322,262.95	
		$807,937.95	
Operating deficit		237,864.51	570,073.44
			$768,672.60

[fol. 433]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 66-A

SILZLE "PURCHASING AGREEMENT"

(REVISED) (REVISED

Computations of Prices, Allowances and Costs under
Silzle—Exchange Orange "Purchasing Agreement"
("Date signed"—September 10, 1951)

Computations by Robert Hodge from Silzle "Purchasing Agreement (Plff. Exhibit 25) and Exchange Orange "Compilations and Table (Plff. Exhibit 11).

• • • • • • •

1. NET TONS of Valencia Oranges processed by Silzle (Exhibit 11, subd. "a"). *6,675.24* ~~7,208.1~~
2. TOTAL GALLONS processed by Silzle (subd. "f") from 6,675.245 tons 661,650.
3. TOTAL CASES processed by Silzle (subd. "b") from 6,675.245 tons 163,326.
4. AMOUNT "in actual dollars" Silzle paid "Seller (Exchange Orange) for fruit supplied" (6,675.245 tons) and processed into 163,326 cases (Agreement and subd. "g"). 90,661.55
5. "MANUFACTURING COST" specified in Purchasing Agreement for processing 6,675.245 tons, computed (*but not paid to Silzle* by Exchange Orange) (subd. "d" and footnote) at rates set forth in Agreement.

Cases		Processing
1,000	48/5-1/2 oz.	$ 1,190.00
3,450	24/12 oz.	3,484.50
35,550	24/2's	44,437.50
123,326	12/46 oz.	166,490.10
163,326 cases.		Total allowance for processing $ 215,602.1

Italics indicate handwritten changes.

TOTAL AMOUNT of Silzle's Processing (Manufacturing) cost and actual payment for 163,326 cases, $ 306,263.65

"Label Allowance," "Advertising Allowance" and "Trucking Allowance" at rates set forth in "Purchasing Agreement":

Cases		a/c Label	a/c Adv.	a/c Trucking	Total
1,000	48/5-1/2 oz.	.0650	.0227	.04	$ 127.77
3,450	24/12 oz.	.0528	.0248	.04	405.72
35,550	24/2's	.0576	.0371	.05	5,144.08
123,326	12/46 oz.	.0540	.0476	.07	21,162.74
163,326 Cases.	Total Label and Advertising Allowances				$ 26,840.31

434]

TOTAL "SALES PRICE FOR CANNED JUICES" (162,326 cases) computed at rates set forth in purchasing Agreement:

MEMO: Total of sales and advertising allowances, plus Manufacturing (processing) Cost, plus amount "to be paid to Seller for fruit supplied" is equal to 87½% of specified Exchange Orange "sales prices for canned juices."

Allowances (Item "7" hereof.)	$ 26,840.31
Manufacturing (processing) Cost (Item "5")	215,602.10
Amount "to be paid to Seller for fruit supplied." (Item "4")	90,661.55
Total of above items,	$ 333,103.96

TOTAL "SALES PRICE FOR CANNED JUICES" specified in Purchasing Agreement ($333,103.96 divided by 87½%). $ 380,690.24

9. "SALES EXPENSE, BROKERAGE and PROFIT—12½%" (380,690.24 multiplied by 12½%).		$ 47,586.2
10. OIL AND PEEL PRODUCED BY Silzle from 6,675.245 tons processed (subds. "f" and "h"):		
OIL: 9,347.52 lbs. oil produced x $2.75 per lb. sale price (subd. "f"),		$ 25,705.6
PEEL: "Income from sale" of peel (subd. "h")		6,955.3
Total sale price for oil and income from peel Silzle produced from 6,675.245 tons,		$ 32,661.0
Exchange Orange paid Silzle for processing oil at 25¢ per lb. (subd. "f"),	$2,336.88	
Brokerage cost (12½%) on sale of oil (subd. "f"),	3,213.21	
Total processing and brokerage costs,		5,550.0
NET AMOUNT Sunkist obtained for oil and peel,		$ 27,110.0

MEMO: Additional cost to be deducted from $27,024.46.

Finley testified oil containers cost about 2½¢ per lb. and freight about 3¢ per lb.; total 5½¢ per lb. x 9,347.52 lbs. $524.11, reducing net profit a/c oil and peel to $26,589.95.

AVERAGE AMOUNT PER TON Sunkist obtained for oil and peel	$ 4.0

[fol. 435]

1. AVERAGES FOR 7,203.195 tons process by Silzle:		PER TON
(a) SUNKIST SALE PRICES (Item 8) per ton for 163,326 cases processed from 6,675.245 tons ($380,690.24 divided by 6,675.245),		$ 57.03
DEDUCTIONS TO SILZLE FROM SUNKIST PRICES		
(b) Manufacturing Cost (Item 5) per ton to *allowed* to Silzle (*but not paid* by Exchange Orange) at rates set forth in Agreement ($215,602.10 divided by 6,675.245),	$ 32.30	
(c) Allowances (Item 7) per ton to Silzle at rates set forth in "Purchasing Agreement" ($26,840.31 divided by 6,675.245) @	4.02	
(d) 12½% "Sales Expense, Brokerage and Profit" (Item "9") per ton to Silzle ($47,586.28 divided by 6,675.245)	7.13	
TOTAL MANUFACTURING COST, ALLOWANCES and SALES EXPENSE, BROKERAGE AND PROFIT		43.45

(e) **AMOUNT ACTUALLY PAID BY SILZLE to Sunkist (Item 4) per ton for 163,326 cases processed from 6,675.245 tons ($90,661.55 divided by 6,675.245)**	$ 13.58
(f) **OIL AND PEEL per ton (Item 9)**	$ 4.08
Total received by Sunkist for 6,675.245 tons,	$ 17.64
Silzle paid Exchange Orange for 527.95 tons at $22.50 per ton,	$ 11,878.87

Italics indicate handwritten changes.

[fol. 436]

In United States District Court

Plaintiffs' Exhibit 67

TREESWEET CONTRACT

Computations of Prices, Discount and Allowances under subd. 9 of TreeSweet—Exchange Orange "Processing Contract" "Effective date" (July 23, 1951)

Computed by Robert Hodge from TreeSweet Contract (Plff. Exhibit and Exchange Orange "Compilations and Tables" (Plff. Exhibit 11.)

---

1. NET TONS of Valencia oranges processed by TreeSweet under contract (Exhibit 11, subd. "a").	24,148.190
2. TOTAL GALLONS processed by TreeSweet (subd. "f").	2,382,744.
3. TOTAL CASES processed by TreeSweet (subd. "b").	647,435.
4. TOTAL AMOUNT "in actual dollars" TreeSweet paid Sunkist for canned juice (647,435 cases) processed from 24,148.190 tons (subd. "g")	$1,204,031.41
5. AMOUNT PAID BY EXCHANGE ORANGE to to TreeSweet for processing 24,148.190 tons (subd. "d").	$ 859.004.49
6. AMOUNT TREESWEET ACTUALLY PAID to Sunkist for canned juice (647,435 cases) processed from 24,148.190 tons ($1,204,031.41 less $859,004.49).	$ 345,026.92
7. LABEL AND ADVERTISING ALLOWANCES computed at rates set forth in subd. 9 of the TreeSweet "Processing Contract" (Exhibit 20).	

(a) ***Label Allowance:***

Cases	Allowance per case	Amount
8,073—48/5-1/2 oz.	$0.077	$ 627.27
65,509—48/6 oz.	—	—
60,927—24/12 oz.	0.062	3,777.47
139,074—24/2's	0.07	9,735.18
373,852—12/46 oz.	0.065	24,300.38

647,345 cases. Total Label Allowance $ 38,440.30

(b) ***Advertising Allowance:***

647,435 cases x $0.07 per case, $ 45,320.45

[fol. 437]

8. SUNKIST PRICE for canned juice (647,435 cases) processed from 24,148.190 tons

MEMO: Total of Allowances (Item "7") and amount paid by TreeSweet for canned juice (Item "4") is equal to 85% of Sunkist prices for canned juice (subd. 9 of Contract).

Label Allowance (Item "7a")	$ 38,440.30	
Advertising Allowance (Item "7b")	45,320.45	
Paid by TreeSweet for canned juice (Item "4")	1,204,031.41	
Total allowances and amount paid by TreeSweet,		$1,287,792.16

Sunkist price for canned juice (647,435 cases) —($1,287,792.16 divided by 85%) $1,515,049.65

9. 15% DISCOUNT "on gross sales price" of 647,435 cases under subd. 9 of TreeSweet Contract (15% x $1,515,049.65) $ 227,792.20

10. TOTAL DISCOUNT AND ALLOWANCES deducted from Sunkist price in fixing price payable by TreeSweet under subd. 9 of Contract.

15% Discount,	$227,257.45
Label allowance,	38,440.30
Advertising allowance	45,320.45

Total discount and allowances to TreeSweet from Sunkist Price under subd. 9 of Contract,		$ 311,018.20

11. OIL AND PEEL produced by TreeSweet from 24,148.190 tons processed (subds. "e" and "h"):

OIL: 105,297 lbs. produced x $2.75 per lb. "sale price" of Orange Oil (subd. "e"),		$ 289,566.75
PEEL: "Income from sale of Orange Peel" (subd. "h"),		31,293.89
Total sale price for oil and income from peel TreeSweet produced from 24,148.190 tons (subds. "e" and "h"),		$ 320,860.64
Exchange Orange paid TreeSweet for processing oil at $.225 per lb. (subd. "e")	$23,691.83	
Brokerage cost (12½%) on sale of oil (subd. "e")	36,195.84	
Total processing and brokerage costs		$ 59,887.67
NET AMOUNT SUNKIST obtained for oil and peel,		$ 260,972.97
AVERAGE PER TON SUNKIST obtained for oil and peel,		10.81

[fol. 438]

MEMO: Additional cost to be deducted from $260,972.97:

Finley testified oil containers cost about 2½¢ per lb. and freight about 3¢ per lb.; total 5½¢ per lb. x 105,297. lbs., $5,791.23, reducing net profit a/c oil and peel to $254,181.74.

12. AVERAGES FOR 24,148.190 tons processed by TreeSweet:

	Per Ton
(a) SUNKIST SALE PRICES (Item "8") per ton for 647,435 cases processed from 24,148.190 tons ($1,515,049.65 divided by 24,148.190)	$ 62.74

DEDUCTIONS TO TREESWEET FROM SUNKIST PRICES.

(b) Processing Cost (Item 5) per ton paid to TreeSweet by Exchange Orange ($806,-604.49 divided by 24,148.190),	($33.37	
(c) Label Allowance (Item "7a") per ton to TreeSweet at rates set forth subd. "F" of Contract ($38,448.39 divided by 24,148.190),	1.59	
(d) Advertising Allowance (Item "7b") per ton to TreeSweet at rate set forth in subd. "F" of Contract ($45,320.65 divided by 24,148.190),	1.88	
(e) 15% Discount "on gross sales price" (Item "8") per ton to TreeSweet ($227,782.39 divided by 24,148.190),	9.41	
Total Processing Cost, Allowances and Discount		46.6
(f) AMOUNT ACTUALLY PAID by TreeSweet to Sunkist (Item "8") per ton for canned juice (867,485 cases) processed from 24,148.190 tons ($353,852.52 divided by 24,148.190),		14.5
(g) Amount per ton Sunkist obtained for oil and peel (Item 11)		*10.81*
(h) Total amount per ton Sunkist obtained for 24,148.190 tons		*$ 25.3*

Italics indicate handwritten changes.

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 69-A

OSS'S ESTIMATE OF GAIN TO WINCKLER & SMITH FROM PROCESSING 12,000 TONS OF VALENCIA ORANGES ON TERMS COMPARABLE TO TREESWEET CONTRACT, IN ADDITION TO ITS ACTUAL OPERATIONS in 1951.

000 tons at Sunkist prices per canned juice would have produced (at $62.34 per ton (Exhibit 67, Item 12a) would produce $748,080.00)		$750,000.00
ndicated Processing cost (Item 12b)	$35.57 per ton	
W & S Processing cost, computed on 1949 basis (includes $56,417.29 G & A in 1949),	34.06 per ton	
	1.51 per ton	
W & S Estimated Processing profit ($1.51 per ton × 12,000 tons,		18,120.00
Indicated Label allowance (Item 12c), $1.59 per ton × 12,000 tons,		19,080.00
Indicated Advertising allowance (Item 12d), $1.88 per ton × 12,000 tons,		22,560.00
Indicated 15% discount, (Item 12e) $9.41 per ton × 12,000 tons,		112,920.00
Total Gain from processing 12,000 tons,		$172,680.00
ss:		
W & S "Selling Expenses" in 1951,	$87,652.44	
Brokerage 3% × $750,000,	22,500.00	
Excess G and A in 1951 ($93,713.40) over 1949 ($56,417.29),	37,296.11	
Total deducted,		147,448.45

Winckler & Smith Estimated net profit in 1951 processing additional 12,000 tons of Valencia product oranges,	$ 25,221
Loss on 1950 Income Account (1951 season),	$184,513
Winckler & Smith Estimated gain from processing additional 12,000 tons of Valencia product oranges in 1951 on terms comparable to Tree-Sweet contract,	$209,734

* * * * *

Winckler & Smith Estimated net profit from processing additional 16,000 tons of Valencia product oranges,	$ 72,276
Loss on 1950 Income Account (1951 season),	$184,513
Winckler & Smith Estimated gain from processing 16,000 additional tons of Valencia product oranges on terms comparable to TreeSweet Contract,	$256,789

[fol. 440]

In United States District Court

Plaintiffs' Exhibit 72

EOP SUBPOENA TO PRODUCE DOCUMENTS
NO. 13788 C

Par. No. 8

Excerpt from

Minutes of the Regular Executive Committee Meeting
of
THE EXCHANGE ORANGE PRODUCTS COMPANY
Held in Los Angeles, California
January 2, 1951

Distribution of Fruit—1950-51:

Mr. Wilcox reported on the tentative distribution of fruit for the 1950-51 season. He stated that it is estimated the industry will have 54,000 tons of navels of which the Exchange will handle approximately 36,000 tons. The Exchange Orange Products Company has facilities to handle this fruit without outside help although some juice fruit will be sold to outside processors. The valencia estimate for 1951 is 485,000 tons eliminated from the industry of which the Exchange will have approximately 325,000 tons. There is then deducted approximately 25,000 tons of low-grade fruit and generally unsuitable for any juice products. This leaves 300,000 tons to be handled through The EOP Company and distributed to commercial processors for juice products. As The EOP Company does not have facilities to handle this total volume of fruit, Mr. Wilcox suggested that working agreements be made with reliable outside processors so that the valencia crop can be handled most efficiently, the price of this fruit to be set at the end of each two weeks period.

It was recommended that the California Fruit Growers Exchange be authorized to negotiate contracts with independent processors on some equitable basis. MOVED by Mills, seconded by Jennings, that the recommendation be approved. CARRIED.

[fol. 441]

In United States District Court

Plaintiffs' Exhibit 73

EOP SUBPOENA TO PRODUCE DOCUMENTS
No. 13788 C

Par. No. 8

Excerpt from

Minutes of Regular Executive Committee Meeting
of
THE EXCHANGE ORANGE PRODUCTS COMPANY
Held in Los Angeles, California
May 1, 1951

General Foods Fruit and Processing Contracts:

The Manager read a proposed fruit contract to be discussed with General Foods Corporation covering their fruit requirements for the valencia season. In addition to the fruit contract, it is proposed to have a processing contract with General Foods so that the Exchange can use their facilities in the event General Foods do not need their facilities for their own products. The general form of both of these contracts has been approved by Farrand & Farrand, the Manager said. The prices and charges for custom packing are to be negotiated with General Foods.

After some discussion, it was MOVED by Jennings, seconded by Mehren, that the management of California Fruit Growers Exchange and The Exchange Orange Products Company negotiate these contracts with the best possible terms. CARRIED.

[fol. 442]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 74

EOP SUBPOENA TO PRODUCE DOCUMENTS
No. 13788 C

Par. No. 8

Excerpt from

Minutes of Special Executive Committee Meeting
of
THE EXCHANGE ORANGE PRODUCTS COMPANY
Held in Los Angeles, California
June 13, 1951

Cold Gold and Harts Processing Facilities:

The manager stated that every effort should be made to put juice into frozen concentrate after July 15. To do this all frozen concentrate facilities shold be operated. Cold Gold Corporation and Harts Fruit Products Company, he said, are not going to operate for their own account this season and these facilities will be available to The EOP Company. He stated he has not been in these plants for several years and would look over their facilities but did not want to do so if it was not desirable to do business with them. It was MOVED by Jennings, seconded by Mills, that the manager be authorized to negotiate a contract with Cold Gold Corporation and Hart's Fruit Products Company on the best terms possible. CARRIED.

[fol. 443]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 75

EOP SUBPOENA TO PRODUCE DOCUMENTS
No. 13788 C

Par. No. 3

Specific data reported in Table 23 of the 1955 Supplement on Statistical Information was obtained from official records of the U.S.D.A. by Sunkist Growers. See Answer to No. 1 for copy of Supplement, etc.

The EOP Company does not know the composition of the figures reported by the U.S.D.A.

The EOP reported these figures to the U.S.D.A. for frozen concentrated orange juice for the period of November 1 to October 31 as requested by the U.S.D.A.

November 1, 1950 to October 31, 1951:

45° Brix Frozen Concentrated Orange Juice	2,427,572 gallons

No size reporting was required.

November 1, 1949 to October 31, 1950

45° Brix Frozen Concentrated Orange Juice	383,733 gallons

No size reporting was required.

[fol. 444]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT AX

[Letterhead of Winckler & Smith Citrus Products Company, Anaheim, California]

August 17, 1951

Independent Citrus Growers & Shippers Association
500 South Walnut Street
Anaheim, California

Attention: Mr. Morgan Ward

Dear Mr. Ward:

We discussed yesterday with Mr. V. W. Borden, Chairman of your By-Product Fruit Committee, the uncomfortable situation that we have to face with regard to the supply of Valencia oranges.

Our discussion was centered around the possibility that we buy from growers fruit which we would put through various packing houses owned and operated by the Independents in order to secure by-product fruit at a price comparable to our competitors.

Mr. Borden, as well as Mr. Knott, had a full understanding of our problem and suggested that we write this letter.

The contract of the Case Swayne Corporation, negotiated a few weeks ago, was discussed and we made the statement that due to this contract the pace was set for canned juice prices for the coming season. These prices were entirely out of line with the fruit prices requested by the packers, which has made it impossible for us to pack canned citrus juices up to this writing. We pointed to the fact that it would have been more advantageous from the angle of the Independents to offer the same deal to us which was offered to Case Swayne, and by doing so to create in the interest of the Independents a competitive situation rather than a monopolistic situation. Such competitive situation would have probably resulted in better return all along the line.

We are very definitely under the impression that Mr. Borden shared our views. Moreover, when we consider that during the past two years we have purchased close to $1,000,000.00 worth of fruit from the Independents, we [fol. 445] feel that a great injustice was done to us of entering into such a contract without even having had a chance to be consulted, or without any part of such surplus fruit ever being offered to us.

At Mr. Borden's suggestion we are writing this letter for the purpose that this letter should serve as the basis of a discussion during your next committee meeting with the intention that from here on we should be supplied, for the purpose of single strength juice canning, with an equal amount of fruit received in the past by Case Swayne at terms and conditions similar to such contract.

We sincerely hope that the other committee members are going to feel as strongly about this untenable situation as Mr. Borden did, and we hope that the committee is going to take action immediately to rectify such situation and supply us with adequate fruit for single strength juice canning, as mentioned herein.

It is a rather grotesque situation that at times when there is considerable by-product fruit available and when there is a ready market for canned orange juice, that we, being one of the largest independent canners in the State, should have no access to such fruit.

We realize that certain co-operatives are packing considerable inventories into frozen concentrates, based on the assumption that frozen concentrate will bring a better return for fruit than canned juices. However, it should be remembered that today the undertone in orange juice is firmer, while demand for frozen concentrate is lagging. While we don't want to stick out our neck to forecast any change in market trends, we just want to remember that a possibility exists that a gradual weakening of the frozen concentrate market and a slight strengthening of the canned juice market could easily result in a condition where the return of single strength juice would equal the return of frozen concentrate.

It also should be remembered that we would never suggest to pack single strength juices on speculation, but fill only firm orders, which would mean that the monies out of single strength juice would be probably sooner available to the packers than from frozen concentrate inventories.

We sincerely hope that your committee will give this letter your earliest consideration.

Yours very truly,

WINCKLER & SMITH CITRUS PRODUCTS CO.

/s/ N. J. WINCKLER
Nicholas J. Winckler,
President

NJW/ls
By Messenger
cc: V. W. Borden

N UNITED S
Defen

EXHIBIT BD. PREPARED BY JOHN A. LYNCH
(WITH ADJUSTMENT) FROM BOOKS AND RECORDS
OF WINCKLER & SMITH CITRUS PRODUCTS CO.

WINCKLER
COMPAN
YEARS ENDED

	January 31, 1950	
Sales - California	$1,418,996.68	
Sales Allowances	51,775.25	
Net Sales		$1,367,221.43
Cost of Sales		
Purchases	946,289.43	
Inventory variation	42,997.86	
Materials used	903,291.57	
Plant expense	207,601.86	
		1,110,893.43
Gross Profit		256,328.00
Selling Expense	86,855.15	
Administrative Expense	94,722.63	
		181,577.78
		74,750.22
Miscellaneous Income		4,609.14
		79,359.36
Miscellaneous Expense-(Depreciation on appreciation and loss on sale of assets)		170,579.56
Net Income or Loss - California		91,220.20
Sales - Florida		
Sales - Allowances		
Net Sales - Florida		
Cost of Sales		
Gross Profit - Florida		
Selling Expense		
Net Income or Loss - Florida		-0-
		$ 91,220.20

[fol. 446]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT BD

IN UNITED STATES DISTRICT COURT

Defendants Exhibit B.D.

WINCKLER & SMITH CITRUS PRODUCTS CO.
COMPARATIVE STATEMENTS OF INCOME
YEARS ENDED JANUARY 31, 1950, 1951 AND 1952

y 31, 1950		January 31, 1951			January 31, 1952		
	% of Net Sales			% of Net Sales			% of Net Sales
	103.79%	$1,531,543.19		103.52%	$528,735.91		101.91%
	3.79	52,116.60		3.52	9,918.57		1.91
,367,221.43	100.00%		$1,479,426.59	100.00%		$518,817.34	100.00%
		1,034,282.06			317,514.13		
		20,181.06			41,731.93		
	66.07	1,014,101.00		68.54	359,246.06		69.24
	15.18	253,685.80		17.15	159,359.44		30.72
,110,893.43	81.25		1,267,786.80	85.69		518,605.50	99.96
256,328.00	18.75		211,639.79	14.31		211.84	.04
		154,630.83			44,407.21		
		96,392.62			88,390.41		
181,577.78	13.28		251,023.45	16.97		132,797.62	25.60
74,750.22	5.47		39,383.66	2.66		132,585.78	25.56
4,609.14	.34		9,356.17	.63		6,987.19	1.35
79,359.36	5.81		30,027.49	2.03		125,598.59	24.21
170,579.56	12.48		-0-	-0-		21,536.74	4.15
91,220.20	6.67		30,027.49	2.03		147,135.33	28.36
		235,910.27			156,605.09		
		-0-			4,720.92		
		235,910.27			151,884.17		
		220,085.98			144,793.17		
		15,824.29			7,091.00		
		-0-			17,381.82		
-0-	-0-		15,824.29	1.07		10,290.82	1.98
91,220.20	6.67%		$ 14,203.20	.96%		$157,426.15	30.34%

ED STATES DISTRICT C

✓ Regan's audits PX Exhibit [illegible]

EXHIBIT NO. PREPARED BY FRANK REGAN OF JOHN
A. LYNCH & CO. (WITHOUT ADJUSTMENT) FROM
BOOKS AND RECORDS OF WINCKLER & SMITH
CITRUS PRODUCTS CO.

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, INC.

Sales of All Products

Excluding Florida Operations

Year Ended

	1/31/50	1/31/51	1/31/52
Orange Juice - Valencia	$ 814,996.28	$ 336,095.46	$ 3,250.34
Orange Juice - Navel	150.06	207,606.92	67,835.10
Orange Concentrate	81,856.00	278,931.38	155,514.90
" " - Frozen	-0-	-0-	56,937.48
Orangeade	-0-	50,121.09	6,328.94
Orangeade Base	-0-	14,736.94	70.20
Grapefruit Juice	157,871.90	225,692.56	92,315.70
Grapefruit Concentrate	-0-	-0-	12,550.00
Lemon Juice	-0-	15,507.40	1,801.11
Lemon Concentrate	-0-	-0-	3,717.50
Lemonade	11.40	98,409.93	12,644.67
Lemonade Base	-0-	7,273.04	116.80
Blended Juice	295,659.63	176,157.39	51,022.20
Cocktail Juice	36,990.80	44,816.46	11,164.30
Citrus Punch	-0-	15,986.16	723.90
Citrus Punch Base	-0-	1,133.66	124.20
Oil	4,712.00	19,978.80	19,952.00

Orange Juice - Navel	150.06	207,608.92	67,835.10
Orange Concentrate	81,236.00	276,931.38	155,514.50
" " - Frozen	-0-	-0-	56,937.48
Orangeade	-0-	50,1[illegible].09	8,328.94
Orangeade Base	-0-	14,736.94	70.20
Grapefruit Juice	157,871.90	225,692.56	92,315.70
Grapefruit Concentrate	-0-	-0-	12,550.00
Lemon Juice	-0-	15,507.40	1,801.11
Lemon Concentrate	-0-	-0-	3,717.50
Lemonade	11.40	98,409.93	12,644.67
Lemonade Base	-0-	7,273.04	118.80
Blended Juice	255,659.63	176,157.39	51,022.20
Cocktail Juice	36,990.80	44,016.48	11,164.30
Citrus Punch	-0-	15,986.18	723.90
Citrus Punch Base	-0-	1,133.66	124.20
Oil	4,712.00	19,978.80	19,952.00
Feed	50,366.61	39,093.96	30,664.97
	$1,418,996.68	$1,531,943.19	$528,735.91

In United States District Court

Defendants' Exhibit [illegible]

EXHIBIT BP. PREPARED BY FRANK REGAN OF JOHN
A. LYNCH & CO. (WITHOUT ADJUSTMENT) FROM
BOOKS AND RECORDS OF WINCKLER & SMITH
CITRUS PRODUCTS CO.

IN UNITED STATES DISTRICT COURT

Defendants' Exhibit BP

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, INC.

Purchases of Raw Fruit
Tons

	Year Ended 1/31/50			Year Ended 1/31/51				Year Ended 1/	
	Valencias	Navels	Grapefruit	Valencias	Navels	Grapefruit	Lemons	Valencias	Navels
February				19.61	1,509.11	1,241.00	-0-	84.69	87.35
March	(Operations began			16.15	1,296.58	665.25	14.07	241.15	146.43
April	in June 1949)			102.65	658.87	213.34	30.08	114.345	377.085
May				98.60	160.26	54.07	34.50	89.55	51.56
June	379.30	-0-	54.25	966.58	-0-	55.24	75.88	118.41	-0-
July	2,372.91	-0-	225.34	809.93	-0-	243.04	91.14	160.01	-0-
August	3,453.05	-0-	410.95	2,949.62	-0-	809.22	28.42	1177.175	-0-
September	3,993.34	-0-	319.57	2,563.75	-0-	609.05	13.42	1737.87	-0-
October	2,364.22	-0-	549.93	693.65	-0-	107.08	-0-	1131.00	-0-
November	91.27	-0-	252.67	22.65	-0-	225.57	-0-	154.595	-0-
December	85.89	187.43	433.61	36.19	52.29	202.15	-0-	11.26	98.985
January	-0-	1263.71	1917.28	19.71	159.72	78.17	14.94	4.18	-0-
	12,739.98	1451.14	4163.60	8,299.09	3,836.83	4,503.18	302.45	5024.235	761.410
Total Fruit Purchased for Year		18,354.72			16,941.55				8125.81

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT BP

PARED BY FRANK REGAN OF JOHN
(WITHOUT ADJUSTMENT) FROM
DS OF WINCKLER & SMITH
CO.

IN UNITED STATES DISTRICT COURT
Defendants' Exhibit BP

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, INC.

Purchases of Raw Fruit
Tons

	Year Ended 1/31/50			Year Ended 1/31/51				Year Ended 1/31/52			
	Valencias	Navels	Grape-fruit	Valencias	Navels	Grape-fruit	Lemons	Valencias	Navels	Grape-fruit	Lemons
bruary				19.61	1,509.11	1,241.00	-0-	84.69	87.35	82.85	-0-
rch	(Operations begun			16.15	1,296.58	665.25	14.07	241.15	146.43	214.42	-0-
ril	in June 1949)			102.65	658.87	213.34	30.08	114.345	377.085	142.82	-0-
y				98.60	160.26	54.07	34.50	89.55	51.56	544.41	-0-
ne	379.30	-0-	54.25	966.58	-0-	55.24	75.88	118.41	-0-	472.10	21.49
ly	2,372.91	-0-	225.34	809.93	-0-	243.04	91.14	160.01	-0-	172.21	-0-
gust	3,453.05	-0-	410.95	2,949.62	-0-	809.22	28.42	1177.175	-0-	383.635	29.68
ptember	3,993.34	-0-	319.57	2,563.75	-0-	609.05	13.42	1737.87	-0-	59.56	-0-
tober	2,364.22	-0-	549.93	693.65	-0-	107.08	-0-	1131.00	-0-	47.29	-0-
vember	91.27	-0-	252.67	22.65	-0-	225.57	-0-	154.595	-0-	61.725	12.92
cember	85.89	167.43	433.61	36.19	52.29	202.15	-0-	11.26	98.985	95.055	-0-
nuary	-0-	1283.71	1917.28	19.71	159.72	78.17	14.94	4.18	-0-	-0-	-0-
	12,739.98	1451.14	4163.60	8,299.09	3,836.83	4,503.18	302.45	5024.235	761.410	2276.075	64.09
otal Fruit urchased for Year		18,354.72			16,941.55				8125.81		

BY FRANK REGAN OF
JOHN A. LYNCH & CO.
(WITHOUT ADJUSTMENT)
FROM BOOKS AND RECORDS OF WINCKLER &
SMITH CITRUS PRODUCTS
CO.

Defendants Exhibit BQ

WINCKLER & SMITH CITRUS PRODUCTS COMPANY, INC.

Purchase of Raw Fruit
According to Source of Supply
Tons

Year Ended 1/31/50

	Valencias		Navels		Grapefruit		Lemons	
	Tons	%	Tons	%	Tons	%	Tons	%
Morgan Ward	9335.43	73.28	213.37	14.70	968.82	23.27	-0-	-0-
Exchange	2225.23	17.47	407.37	28.07	914.03	21.95	-0-	-0-
Other	1179.32	9.25	830.40	57.23	2280.75	54.78	-0-	-0-
Total	12739.98	100.00%	1451.14	100.00%	4163.60	100.00%	-0-	-0-

Year Ended 1/31/51

	Valencias		Navels		Grapefruit		Lemons	
	Tons	%	Tons	%	Tons	%	Tons	%
Morgan Ward	7577.83	91.31	1636.43	42.65	2141.39	47.55	190.05	62.84
Exchange	127.86	1.54	953.17	24.84	207.93	4.62	13.42	4.44
Other	593.40	7.15	1247.23	32.51	2153.86	47.83	98.98	32.72
Total	8299.09	100.00%	3836.83	100.00%	4503.18	100.00%	302.45	100.00%

Year Ended 1/31/52

	Valencias		Navels		Grapefruit		Lemons	
	Tons	%	Tons	%	Tons		Tons	%
Morgan Ward	4354.05	86.66	287.11	37.71	1313.58	57.71	-0-	-0-
Exchange	21.50	.43	452.21	59.39	191.10	8.40	51.17	79.84
Other	648.68½	12.91	22.09	2.90	771.39½	33.89	12.92	20.16
Total	5024.23½	100.00%	761.41	100.00%	2276.07½	100.00%	64.09	100.00%

Year Ended 1/31/51

	Valencias		Navels		Grapefruit		Lemons	
	Tons	%	Tons	%	Tons	%	Tons	%
Morgan Ward	7577.83	91.31	1636.43	42.65	2141.39	47.55	190.05	62.84
Exchange	127.86	1.54	953.17	24.84	207.93	4.62	13.42	4.44
Other	593.40	7.15	1247.23	32.51	2153.86	47.83	98.98	32.72
Total	8299.09	100.00%	3836.83	100.00%	4503.18	100.00%	302.45	100.00%

Year Ended 1/31/52

	Valencias		Navels		Grapefruit		Lemons	
	Tons	%	Tons	%	Tons		Tons	%
Morgan Ward	4354.05	86.66	287.11	37.71	1313.58	57.71	-0-	-0-
Exchange	21.50	.43	452.21	59.39	191.10	8.40	51.17	79.84
Other	648.68½	12.91	22.09	2.90	771.39½	33.89	12.92	20.16
Total	5024.23½	100.00%	761.41	100.00%	2276.07½	100.00%	64.09	100.00%

In United States District Court

Defendants' Exhibit BQ

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT CF

IN UNITED STATES DISTRICT COURT

Defendants' Exhibit C 7

SUNKIST PERCENTAGE OF TOTAL CALIFORNIA-ARIZONA TONNAGE OF VALENCIA PRODUCTS ORANGES

Season (Nov. 1-Oct.31)	Total Calif.-Ariz. Tons of Products Valencia Oranges*	Sunkist Tonnage	Sunkist % of Total	Sunkist Tonnage into Single-Strength and Frozen Concentrate for Sale by Exchange Orange	Sunkist % of Total into Single-Strength and Frozen Concentrate for Sale by Exchange Orange
1945-1946	227,300 T.	149,606 T.	65.8%	30,379 T. (Single-Strength only)	13.4%
1946-1947	357,287 T.	243,149 T.	68.1%	24,748 T. "	6.9%
1947-1948	287,473 T.	207,188 T.	72.1%	16,746 T. "	5.8%
1948-1949	406,664 T.	259,656 T.	63.9%	17,378 T. "	4.3%
1949-1950	455,347 T.	282,294 T.	62.0%	23,225 T.	5.1%
1950-1951	489,712 T.	318,087 T.	65.0%	117,519 T.	24 %

*Taken from U.S.D.A.-Publication - "Data Relating to Marketing of California-Arizona Oranges Seasons 1933-34 to 1950-51" - Table 7 - Published January 1953

[fol. 451]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT CI

IN UNITED STATES DISTRICT COURT

✓ Defendants' Exhibit CI

FROZEN CONCENTRATED ORANGE JUICE PRODUCTION

Season (Nov. 1-Oct. 31)	* U.S.Total	* Calif.-Ariz.	% Calif.-Ariz. of U.S.Total	** For Sale by Exchange Orange	Exchange Orange % of Calif.-Ariz.	Exchange Orange of U.S.Total
	Frozen Orange Concentrate 42° Brix					
1945-1946	226,000 Gals	-	-	-	-	-
1946-1947	559,000 Gals.	-	-	-	-	-
1947-1948	2,372,000 Gals.	437,000 Gals.	18.4%	-	-	-
1948-1949	12,195,000 Gals.	1,963,000 Gals.	16.1%	-	-	-
1949-1950	25,137,000 Gals.	3,490,000 Gals.	13.9%	384,000 Gals.	11.0%	1.5%
1950-1951	34,936,000 Gals.	4,180,000 Gals.	12.0%	2,428,000 Gals.	58.0%	6.9%

* U.S.D.A., P.M.A. Canned fruit juices and segments.

** Exchange Orange reports to the U.S.D.A.

✓ Defendants' Exhibit FC

EXCHANGE ORANGE PRODUCTS COMPANY

VALENCIA ORANGE UTILIZATION
1951
(WEEKLY TO NEAREST TON)

		FOR E.O.P.'s ACCOUNT							DEFERRED PAYMENT	
Week Ending	E.O.P.	Hyland-Stanford	Mission Dry	Bireley's	E.L.P. for Damerel & Allison	Cold Gold	Hart's	E.L.P.	Hyland-Stanford	Mission Dry
June 9	[illegible]								617	1,487
June 16	7,337	1,351		62						1,614
June 23	6,089	1,670		[illegible]						1,472
June 30	6,417	1,762								1,136
July 7	[illegible]	1,745	1,200	464	618					
July 14	[illegible]	[illegible]	[illegible]	1,274	1,676					
July 21	5,722	[illegible]	1,491	1,715	1,322	24				
July 28	[illegible]	[illegible]	1,511	1,659	903	119				
Aug. 4	[illegible]	[illegible]	[illegible]	[illegible]	1,676	104	113			489
Aug. 11	[illegible]	[illegible]		[illegible]	[illegible]	154	466	135		1,381
Aug. 18	[illegible]	352		1,701	[illegible]		790	807		1,156
Aug. 25	[illegible]			1,708	1,760		629	761		1,229
Sept. 1	[illegible]		71	1,799	1,759		608	896		641
Sept. 8	[illegible]			[illegible]	1,450		534	990		39
Sept. 15	[illegible]			1,668	1,508		470	849		86
Sept. 22	[illegible]			1,416	1,526		320	116		
Sept. 29	[illegible]									
Oct. 6	[illegible]									
Oct. 13	[illegible]				1,174			940		
Oct. 20	6,434				1,163			995		
Oct. 27	5,798				1,089			1,059		
Nov. 3	6,992				316			938		

DEFENDANTS' EXHIBIT FC

Defendants' Exhibit FC

EXCHANGE ORANGE PRODUCTS COMPANY

VALENCIA ORANGE UTILIZATION
1951
(WEEKLY TO NEAREST TON)

		FOR E.O.P.'s ACCOUNT							DEFERRED PAYMENT		GROWER PARTICIPATION	
ng	E.O.P.	Hyland-Stanford	Mission Dry	Bireley's	E.L.P. for Damerel & Allison	Cold Gold	Hart's	E.L.P.	Hyland-Stanford	Mission Dry	TreeSweet Products	Silzle Co.
	6,928								817	1,487		
	7,337	1,351		62						1,614		
	6,889	1,670		824						1,472		
	6,417	1,762								1,136		94
	4,851	1,743	1,200	464	618							96
	6,442	1,793	1,641	1,274	1,476							132
	5.722	1,968	1,491	1,715	1,322	24						66
	7.528	1,471	1,511	1,839	903	115						141
	6,309	1,449	859	1,830	1,676	104	113			489	1,137	283
	4,985	1,283		1,861	1,458	154	466	135		1,381	1,877	175
	5.751	352		1,701	1,854		590	807		1,156	1,342	330
	5,466			1,708	1,760		629	761		1,229	2,042	456
	5,433		71	1,799	1,559		608	896		641	2,156	422
	5.225			1,586	1,450		534	990		39	2,137	702
	5.273			1,668	1,508		470	849		86	2,342	564
	5,161			1,416	1,526		320	116			1,322	577
	6,565										1,365	416
	7.089										1,656	404
	6,284				1,174			940			1,320	468
	6,434				1,163			995			1,362	502
	5.758				1,089			1,059			1,793	533
	6.992				316			938			1,809	618

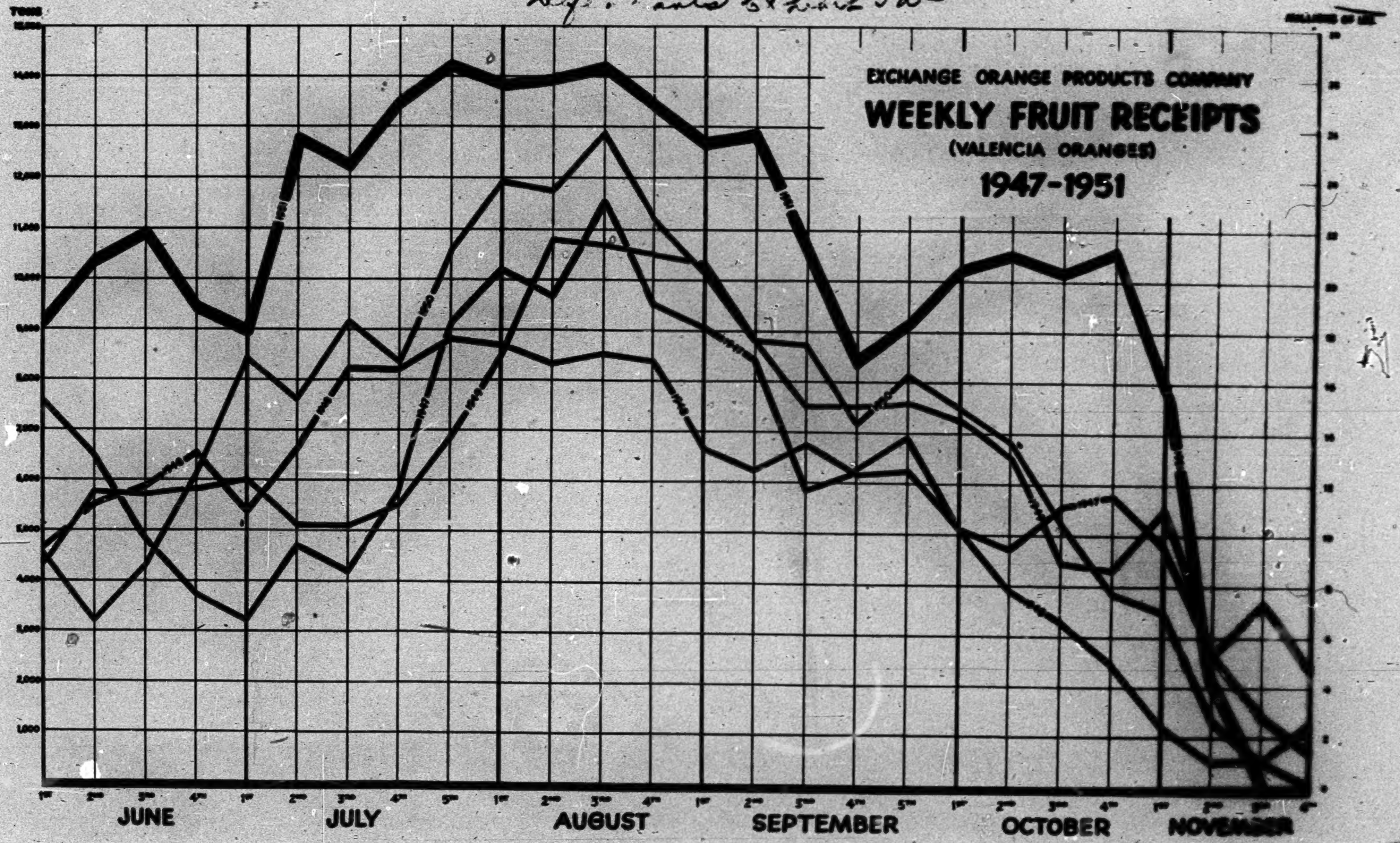
[fol. 453]

In United States District Court

Defendants' Exhibit FD

IN UNITED STATES DISTRICT COURT

✓Defendants' Exhibit FD



[fol. 454]

In United States District Court

Defendants' Exhibit FE

EXCHANGE ORANGE PRODUCTS COMPANY

VALENCIA ORANGE UTILIZATION
1951
(WEEKLY TO NEAREST TON)

		FOR E.O.P.'s ACCOUNT							DEFERRED PAYMENT		GROWER PARTICIPATION	
Week Ending	E.O.P.	Hyland-Stanford	Mission Dry	Bireley's	E.L.P. for Demerel & Allison	Cold Gold	Hart's	E.L.P.	Hyland-Stanford	Mission Dry	TreeSweet Products	Silzle Co.
June 9	6,928								817	1,487		
June 16	7,337	1,351		62						1,614		
June 23	6,889	1,670		824						1,472		
June 30	6,417	1,762								1,136		94
July 7	4,851	1,743	1,200	464	618							96
July 14	6,442	1,793	1,641	1,274	1,476							132
July 21	5,722	1,968	1,491	1,715	1,322	24						66
July 28	7,528	1,471	1,511	1,839	903	115						141
Aug. 4	6,309	1,449	859	1,830	1,676	104	113			489	1,137	283
Aug. 11	4,985	1,283		1,861	1,458	154	466	135		1,381	1,877	175
Aug. 18	5,751	352		1,701	1,854		590	807		1,156	1,342	330
Aug. 25	5,466			1,708	1,760		629	761		1,229	2,042	456
Sept. 1	5,433		71	1,799	1,559		608	896		641	2,156	422
Sept. 8	5,225			1,586	1,450		534	990		39	2,137	702
Sept.15	5,273			1,668	1,508		470	849		86	2,342	564
Sept.22	5,161			1,416	1,526		320	116			1,322	577
Sept.29	6,565										1,365	416
Oct. 6	7,089										1,656	404
Oct. 13	6,284				1,174			940			1,320	468
Oct. 20	6,434				1,163			995			1,362	502
Oct. 27	5,758				1,089			1,059			1,793	533
Nov. 3	6,992				316			938			1,809	618

EXCHANGE ORANGE PRODUCTS COMPANY

VALENCIA ORANGE UTILIZATION
1950
(WEEKLY TO NEAREST TON)

Week Ending	E.O.P.	FOR E.O.P.'s ACCOUNT					DEFERRED PAYMENT		GROWER PARTICIPATION
		Hyland-Stanford	Mission Dry	Case-Swayne	Demerel-Allison	Sizzle Co.	Hyland-Stanford	Mission Dry	TreeSweet Products
June 3	2,585						667	1,008	
June 10	1,647						753	831	
June 17	2,572						817	933	
June 24	3,526						1,389	1,216	
July 1	5,433						1,794	1,238	
July 8	5,339		1,197				1,070		
July 15	5,972	1,766	1,387						
July 22	4,791	1,902	1,200						473
July 29	5,656	1,880	1,103						1,944
Aug. 5	6,330	2,065	1,180						2,366
Aug. 12	6,222	2,009		192				1,439	1,865
Aug. 19	6,824	2,118		286				1,569	2,034
Aug. 26	6,909	1,957				98			2,173
Sept. 2	6,119	1,908			305	56			1,912
Sept. 9	5,620	1,622							1,488
Sept. 16	5,101	1,911				111			1,461
Sept. 23	4,467	1,606							1,104
Sept. 30	4,867	956	1,097						1,319
Oct. 7	5,546		1,501						429
Oct. 14	5,508		1,345						
Oct. 21	4,730							514	
Oct. 28	3,495							321	

EXCHANGE ORANGE PRODUCTS COMPANY

VALENCIA ORANGE UTILIZATION
1949
(WEEKLY TO NEAREST TON)

Week Ending	E.O.P.	FOR E.O.P.'s ACCOUNT				DEFERRED PAYMENT	GROWER PARTICIPATION
		Mission Dry	E.L.P.	Demerel-Allison	Hyland-Stanford	Mission Dry	TreeSweet Products
June 4	4,162	215					
June 11	4,717	300				544	
June 18	3,654		334			1,497	
June 25	4,173					1,476	
July 2	4,423					1,502	
July 9	3,517					1,230	
July 16	3,321			296		1,584	
July 23	4,385			75		939	155
July 30	5,120					907	756
Aug. 6	5,674	290	352		585	552	866
Aug. 13	5,424				1,947	1,657	1,783
Aug. 20	5,764				1,465	1,556	1,860
Aug. 27	5,456				1,448	1,384	2,193
Sept. 3	6,253				1,635	1,504	956
Sept. 10	4,321	1,183			1,244		1,972
Sept. 17	3,626	978			742		2,136
Sept. 24	4,048	670			509		2,276
Oct. 1	4,032	590	327		550		2,126
Oct. 8	4,938		310				2,219
Oct. 15	4,398		298				1,792
Oct. 22	4,067		306				
Oct. 29	4,324						

[fol. 457]

EXCHANGE ORANGE PRODUCTS COMPANY

VALENCIA ORANGE UTILIZATION
1948
(WEEKLY TO NEAREST TON)

		FOR E.O.P.'s ACCOUNT				DEFERRED PAYMENT		GROWER PARTICIPATION
Week Ending	E.O.P.	Anaheim Citrus Prod.	Hyland-Stanford	Mission Dry	Damerel-Allison	Mission Dry	Winckler & Smith (for Lynch)	TreeSweet Products
June 5	4,710	73						
June 12	3,482		152	844				
June 19	3,012		1,239	1,286				
June 26	3,195		1,223			1,338		
July 3	3,846		1,113			1,562		
July 10	3,921		769			1,111		
July 17	4,653		669			1,242		
July 24	4,806		1,066			1,539		759
July 31	4,525		1,184	2		1,590		910
Aug. 7	3,825		1,741			1,563		1,657
Aug. 14	3,843		1,338			1,649		1,864
Aug. 21	4,214		659			1,652		1,787
Aug. 28	4,727		476	1,493				1,934
Sept. 4	3,564		925	1,163	87		701	1,816
Sept. 11	2,893		330	852		270	659	1,689
Sept. 18	3,375			647			640	1,565
Sept. 25	3,756			839			498	1,562
Oct. 2	3,941		15	796		21	568	1,350
Oct. 9	3,739			697		16	764	1,161
Oct. 16	4,443					16	414	328
Oct. 23	3,403					476		
Oct. 30	3,110					233		

EXCHANGE ORANGE PRODUCTS COMPANY

VALENCIA ORANGE UTILIZATION
1947
(WEEKLY TO NEAREST TON)

		FOR E.O.P.'s ACCOUNT				DEFERRED PAYMENT	GROWER PARTICIPATION
Week Ending	E.O.P.	Winckler & Smith (For E.O.P.)	Hyland-Stanford	Mission Dry	Bireley's	Mission Dry	TreeSweet Products
June 7	5,929	508					
June 14	3,840	541	310				
June 21	3,634	520	690				
June 28	3,109	173	468				
July 5	2,591	28	612				
July 12	3,663		992				
July 19	3,621		516				
July 26	4,661		1,053				
Aug. 2	5,843	109	1,657			1,557	
Aug. 9	6,310	487	1,277		952	1,462	
Aug. 16	6,842	629	673		806	843	
Aug. 23	6,912	17	536		1,412	2,738	
Aug. 30	6,687		834	1,237	782		
Sept. 6	7,186	552	339	1,571	829	1	
Sept. 13	4,968		616	1,562	1,224		
Sept. 21	4,152	4	496	1,361	151		
Sept. 27	3,928		626	1,659			
Oct. 4	4,471			1,052	12		1,471
Oct. 11	3,061			317			1,758
Oct. 18	3,036			293			1,456
Oct. 25	3,041						2,360
Nov. 1	3,655			52	6		1,905

[fol. 459]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT FJ

I hereby certify that this is a
true and exact copy of the New
Code of By-Laws of The Exchange
Orange Products Company as of
November 19, 1952.

/s/ J A FINLEY
J. A. Finley, Secretary
The Exchange Orange Products Co.
January 27, 1956

(Copy of)

NEW CODE OF BY-LAWS
OF
THE EXCHANGE ORANGE PRODUCTS COMPANY

Adopted May 20, 1931, and Incorporating
All Amendments Through November 19, 1952

ARTICLE I

MEETINGS OF SHAREHOLDERS

Section 1. *Regular Meetings.**

A regular meeting of the shareholders shall be held at the place hereinafter in these by-laws provided for the holding of meetings of the shareholders, at 3:00 o'clock p.m., on the first Wednesday in December of each year, the first meeting hereunder to be held in December, 1953, for the purpose of electing a board of directors and transacting such other business as may come before the meeting.

---

* See Page A Attached.

Section 2. *Special Meetings.*

Except in those instances where a particular manner of calling a meeting of the shareholders is prescribed by law or elsewhere in these by-laws, a special meeting of the shareholders may be called at any time by the president or any vice president or by the board of directors, or by the holders of not less than one-third of the shares then issued and outstanding. Each call for a special meeting of the shareholders shall state the time, place, and the purpose of such meeting; if made by the board of directors it shall be by resolution duly adopted by a majority vote and entered in the minutes; if made by the president or a vice president or by the shareholders, it shall be in writing and signed by the person or persons making the same, and unless the office of secretary be vacant, delivered to the secretary. No business shall be transacted at a special meeting other than as is stated in the call and the notice based thereon.

Section 3. *Notice of Regular and Special Meetings of the Shareholders.*

(a) No notice need be given of the regular meeting of the shareholders, but each shareholder shall take notice thereof.

(b) Notice of each special meeting of the shareholders of the corporation shall be given by mailing to each of the shareholders of the corporation a notice of the time, place, and purpose of such meeting, addressed to such shareholder at his residence or place of business as the same shall appear upon the books of the corporation. Notices of each special meeting shall be deposited in a United States Post Office or mail box or mail chute or other agency thereof at any place within the County where at the time of such mailing the principal office for the transaction of the business of the corporation is located, with the postage thereon [fol. 460] prepaid, at least five days prior to the time fixed for such meeting. If the residence or place of business of a shareholder does not appear on the books of the corporation and his post office address is unknown to the person mailing such notices, the same shall be addressed to him at the place where at the time of such mailing the principal office for the transaction of the business of the corporation is located.

Section 4. *Quorum.*

At any meeting of the shareholders the presence in person or by proxy of the holders of a majority of the shares entitled to vote at any meeting shall constitute a quorum for the transaction of business, except when it is otherwise provided by law. Any regular or special meeting of the shareholders may adjourn from day to day, or from time to time, if, for any reason, there are not present in person or by proxy the holders of a majority of the shares entitled to vote at said meeting, or if no election is had, such adjournment and the reasons therefor being recorded in the minutes of the proceedings.

Section 5. *Waiver of Notice.*

When all the shareholders of the corporation are present at any meeting, or when the shareholders not represented thereat give their written consent to the holding thereof at the time and place the meeting is held, and such written consent is made a part of the records of such meeting, the proceedings had at such meetings are valid, irrespective of the manner in which the meeting is called or the place where it is held.

ARTICLE II

BOARD OF DIRECTORS

Section 1. *Number—Quorum.*

The business of the corporation shall be managed by a board of directors of such number of directors as the shareholders may, from time to time, determine, in the manner prescribed by law. A majority of the prescribed number of directors shall be necessary to constitute a quorum for the transaction of business. Every act or decision of a majority of the directors present at a meeting at which a quorum is present, made or done when duly assembled, shall be valid as the act of the board of directors; provided, that a majority of the directors in the absence of a quorum may adjourn from day to day, but may not transact any business.

Section 2. *Election and Eligibility.**

The directors must be elected annually at the regular meeting of the shareholders as provided by law; they need not be shareholders. No person shall be eligible to be elected or to act as such director unless he is at the time of his [fol. 461] election a director of California Fruit Growers Exchange, and if any person while a member of the board of directors of this corporation ceases to be a director of California Fruit Growers Exchange his seat as a director of this corporation may be declared vacant by the board of directors of this corporation.

Section 3. *Vacancies.**

Vacancies in the board of directors may be filled by a majority of the remaining directors, though less than a quorum, and each director so elected shall hold office until his successor is elected at the next annual meeting of the shareholders or at any special meeting duly called for that purpose prior thereto. A vacancy shall be deemed to exist in case the shareholders shall increase the authorized number of directors, but shall fail, for a period of thirty days from the effective date of such increase, to elect the additional directors so provided for, or in case the shareholders fail at any time to elect the full number of authorized directors. When one or more of the directors shall give notice of his or their resignation to the board, effective at a future date, the board shall have the power to fill such vacancy or vacancies to take effect when such resignation becomes effective. Each director so appointed shall hold office during the remainder of the term of office of the resigning director or directors or until their successors are appointed and qualify.

Section 4. *First Meeting of Directors.*

Upon their election the directors shall meet and organize by the election of a president, a secretary, and a treasurer. They may also at that meeting or at a later meeting elect such other officers as are provided for by these by-laws or permitted by law.

---

* See Page A Attached.

Section 5. *Regular Meetings.**

In addition to the regular meetings mentioned above, a regular meeting of the board of directors shall be held at 9:30 o'clock a.m. on Wednesday of each week.

Section 6. *Special Meetings.*

A special meeting of the board of directors shall be held whenever called by the president or any vice president or by five directors. Any and all business may be transacted at a special meeting. Each call for a special meeting shall be in writing, signed by the person or persons making the same, addressed and delivered to the secretary, and shall state the time and place of such meeting.

Section 7. *Notice of Regular and Special Meetings of the Directors.*

No notice shall be required to be given of any regular meeting of the board of directors, but each director shall take notice thereof. Notice of each special meeting of the board of directors shall be given to each of the directors by [fol. 462] mailing to each of them a copy of such notice at least 72 hours prior to the time fixed for such meeting, to the address of such director as shown on the books of the corporation. If his address does not appear upon the books of the corporation, then such notice shall be addressed to him at the place where at the time of such mailing the principal office for the transaction of the business of the corporation is located.

Section 8. *Waiver of Notice.*

When all the directors of the corporation are present at any directors' meeting, however called or noticed, and sign a written consent thereto, on the records of such meeting, or if the majority of the directors are present, and if those not present sign in writing a waiver of notice of such meeting, whether prior to or after the holding of such meeting, which said waiver shall be filed with the secretary of the corporation, the transactions of such meeting are as valid as if had at a meeting regularly called and noticed.

---

* See Page A Attached.

ARTICLE III

POWERS OF DIRECTORS

The Directors shall have power:

1. To call special meetings of the shareholders when they deem it necessary; and they shall call a meeting at any time upon the written request of shareholders holding one-third of all of the shares.

2. To appoint and remove at pleasure all officers, agents, and employees of the corporation, prescribe their duties; fix their compensation, and to require from them security for faithful service.

3. To create and appoint committees, offices, officers, and agents of the corporation, and to prescribe and from time to time change their duties and compensation.

4. To conduct, manage, and control the affairs and business of the corporation and to make rules and regulations not inconsistent with the laws of the State of California or the by-laws of the corporation for the guidance of the officers and management of the affairs of the corporation.

5. To levy and collect assessments upon all shares of stock of the corporation in the manner and form, and to the extent provided in the articles of incorporation.

ARTICLE IV

DUTIES OF DIRECTORS

It shall be the duty of the directors:

1. To cause to be kept a complete record of all their minutes and acts, and of the proceedings of the shareholders, and present a full statement at the regular annual [fol. 463] meeting of the shareholders, showing in detail the assets and liabilities of the corporation, and generally the condition of its affairs. A similar statement shall be presented at any other meeting of the shareholders when required by persons holding at least one-half of the shares of the corporation.

2. To supervise all officers, agents, and employees and see that their duties are properly performed. To cause to be issued to the shareholders, in proportion to their several interests, certificates of stock.

ARTICLE V

OFFICERS

The officers shall be a president, a secretary, and a treasurer, and the board of directors may also appoint a chairman of the board, which officers shall be elected by and hold office at the pleasure of the board of directors. In addition the board of directors may also appoint one or more vice presidents, and provide that one or more of such vice presidents need not be members of the board of directors, one or more assistant secretaries, and one or more assistant treasurers. Any two or more of such offices, except those of president and secretary, may be held by the same person. Any vice president, except a vice president who is not a member of the board of directors, may exercise any of the powers of the president; any assistant treasurer may exercise any of the powers of the treasurer; and any assistant secretary may exercise any of the powers of the secretary, as provided in these by-laws or as directed by the board of directors, and such officers shall perform such other duties as may be imposed upon them. The compensation and tenure of office of all the officers of the corporation (other than directors) shall be fixed and determined by the board of directors.

ARTICLE VI

PRESIDENT

The board of directors shall, at their first regular meeting, elect one of their number to act as president; and if at any time the president shall be unable to act, the vice president shall act in his place and perform his duties; if there is more than one vice president, the first vice president shall act, and in case of his absence or inability to act, the second vice president shall act, and so on in sequence; if the vice president or vice presidents, from any cause, shall be unable to act, they shall appoint some other member of the board to do so, in whom shall be vested, for the time being, all the duties and functions of president. No vice president shall ever exercise any of the functions of president unless he is at the time a member of the board of directors.

The president (or person acting as such) shall

1. Preside over all meetings of the shareholders and directors.

[fol. 464] 2. Sign, as president, contracts and other instruments in writing, if, when, and as directed so to do by the board of directors, which, however, may authorize such contracts and other instruments in writing instead of being signed by the president, to be signed by any other officer or person. The president may sign certificates of stock as provided in Article X hereof.

3. Call the directors together when he deems it necessary and shall have, subject to the advice of the directors, direction of the affairs of the corporation; and generally, shall discharge such other duties as may be required of him by the by-laws of the corporation.

ARTICLE VII

SECRETARY

The board of directors shall elect a secretary.

1. It shall be the duty of the secretary to keep a record of the proceedings of the board of directors and of the shareholders. He shall keep the corporate seal of the corporation, and the book of blank certificates of stock, fill up and countersign all certificates issued, and make the corresponding entries in the margin of such book on such issuance, and affix said corporate seal to all papers requiring it. He shall keep a proper transfer book, and a stock ledger in debit and credit form, showing the number of shares issued and transferred by any shareholder, and the dates of such issuance and transfer. He shall discharge such other duties as pertain to his office, or which may be prescribed by the board of directors.

2. Whenever it is provided in these by-laws that notice shall be given either of regular or special meetings of the shareholders, regular or special meetings of the directors, or otherwise, such notice shall be given by the secretary, or by the president, a vice president, or by any person designated by either of them, or by any person who shall have signed the call for such meeting. Any notice which the secretary may give or serve, or act required to be done by him, may with like effect be given or served or done by an assistant secretary.

ARTICLE VIII

TREASURER

The treasurer shall receive and keep all the funds of the corporation and pay them out only on checks or otherwise, as directed by the board of directors, provided, however, the board of directors may provide for a depositary of the funds of the corporation, and may by resolution prescribe the manner in which said funds shall be drawn from said depositary.

ARTICLE IX

BOOKS AND PAPERS

All of the records belonging to the corporation shall at [fol. 465] all times, in business hours, be open to the inspection of any director or bona fide shareholder thereof, subject at all times to the authority conferred upon the board of directors by Section 377 of the Civil Code of California.

ARTICLE X

CERTIFICATES OF STOCK

Certificates of stock shall be of such form and device as the board of directors may direct, and shall be signed by the president or a vice president and the secretary or an assistant secretary. Each certificate shall express on its face its number, date of issuance, the number of shares for which and the person to whom it is issued and such other matters as may be required by law.

The certificate book shall contain a margin on which shall be entered the number, date, number of shares, and the name of the person expressed in the corresponding certificate.

Certificates of stock may be issued prior to full payment, in harmony with any permit issued by the Commissioner of Corporations for that purpose, or as is otherwise allowed by law, but any certificate issued prior to full payment must show on its face what amount has been paid thereon.

ARTICLE XI

TRANSFER OF STOCK

Shares of stock of the corporation may be transferred at any time by the holders, or by power of attorney, or by their legal representatives, by endorsement on the certificate of stock. But no transfer is valid until the surrender of the endorsed certificate. A surrendered certificate shall be delivered up for cancellation before a new one is issued in lieu thereof, and the secretary shall preserve the certificate so cancelled, as a voucher. If, however, a certificate is lost or destroyed, the board of directors may order a new certificate issued as is by law required or permitted.

ARTICLE XII

VOTING

At all corporate meetings each shareholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock, in the manner required by the Civil Code. Such proxy shall be in writing and filed with the secretary.

ARTICLE XIII

INDEBTEDNESS

The board of directors shall have power to incur indebtedness, and the terms and amount thereof shall be entered in the minutes. The board of directors shall have the power to secure said indebtedness, or any obligation or obligations [fol. 466] of the corporation, by pledge, mortgage, deed of trust, or other security given upon any property owned by it or in which it has any interest.

ARTICLE XIV

GENERAL MANAGER

The board of directors may, in its discretion, appoint a general manager who shall hold office at the pleasure of the board of directors. Any director or other person may be elected to serve as manager. The manager shall have such authority and shall perform such duties as may be directed by the board of directors.

ARTICLE XV

MISCELLANEOUS

1. *Meetings. Where Held.*

(a) Meetings of the shareholders may be held at the principal office for the transaction of the business of the corporation, or at such other place within the State of California as may hereafter at any time be designated either in its articles of incorporation or by-laws.

(b) Meetings of the board of directors of the corporation, both regular and special, may be held at any place within or without the State of California, as may be from time to time fixed by a quorum thereof, provided, however, that until otherwise so fixed such meetings shall be held at the principal office for the transaction of the business of the corporation.

2. *Notice. When Conclusive.*

An entry made in the minutes of the directors or shareholders, pursuant to resolution or recital, that the notice required by these by-laws, or by law, to be given of such meeting has been given, shall be conclusive upon the corporation, its directors, shareholders, and all other persons, that such notice has been duly given, in proper form and substance, to the proper persons, and for the requisite length of time.

3. *Repeal of Former By-Laws.*

This new code of by-laws is in lieu of all other by-laws and amendments thereto of the corporation.

ARTICLE XVI

SEAL.

The board of directors shall provide a suitable seal containing the name of the corporation, the year of its creation, and other appropriate words, and may alter the same at pleasure.

ARTICLE XVII

AMENDMENTS

These by-laws may be repealed or amended, or new by- [fol. 467] laws may be adopted, at the annual meeting, or at any other meeting of the shareholders called for that purpose, by the directors, by a vote representing two-thirds of the subscribed shares. The written assent of the holders of two-thirds of the shares is effectual to repeal or amend any by-law, or to adopt additional by-laws.

ARTICLE XVIII*

EXECUTIVE COMMITTEE

The board of directors of this corporation may provide for the appointment of an executive committee, determine the number of its members, and its tenure of office, and may delegate to such committee any of the powers and authority of the board, except the power to declare dividends and to make any changes in the by-laws. Such committee shall be composed of members of the board and shall act only in the intervals between meetings of the board, and shall be subject at all times to the control of the board of directors.

---

* See Page A Attached.

[fol. 468]

ASSENT OF SHAREHOLDERS TO ADOPTION
OF
NEW CODE OF BY-LAWS
OF
THE EXCHANGE ORANGE PRODUCTS COMPANY

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, which is a shareholder of The Exchange Orange Products Company, a corporation, which owns 37,174 shares out of a total of 39,313 shares of the subscribed capital stock of said corporation, that being more than two-thirds of all of the subscribed capital stock of the corporation, does hereby assent to the adoption of the foregoing NEW CODE OF BY-LAWS of and for said corporation and does hereby adopt the same as such new code of by-laws of said corporation in lieu of all other by-laws.

IN WITNESS WHEREOF, the undersigned has hereunto caused its corporate name to be subscribed and its corporate seal to be affixed by its secretary thereunto duly authorized, on this 20th day of May, 1931.

California Fruit Growers Exchange
By (Signed) Paul S. Armstrong
Secretary

(seal)

CERTIFICATE OF DIRECTORS AND SECRETARY TO ADOPTION OF NEW CODE OF BY-LAWS

OF

THE EXCHANGE ORANGE PRODUCTS COMPANY

The undersigned, being a majority of the directors and the Secretary of THE EXCHANGE ORANGE PRODUCTS COMPANY, a corporation organized under the laws of the State of California, DO HEREBY CERTIFY that the following new code of by-laws, consisting of fourteen (14) pages of typewritten matter, numbered from page 1 to page 14, inclusive, exclusive of certificates attached thereto, has been adopted as the by-laws of said corporation, by the written assent of the holders of two-thirds of the subscribed capital stock of said corporation, and that said by-laws do now constitute the official by-laws of said corporation in lieu of all other by-laws thereof.

WITNESS our hands and the seal of said THE EXCHANGE ORANGE PRODUCTS COMPANY affixed this 20th day of May, 1931.

(Signed) W. E. Sprott
M. H. Butcher
Charles H. Clock
LeRoy E. Lyon
O. W. Maulsby
C. E. Myers
R. H. Wilkinson
Elbert B. Griffith
W. W. Wilson
E. J. Beck
D. G. Arbuthnot
R. L. Willits
W. K. Beattie
R. L. Knox
H. A. Lynn
J. C. Boyd

ATTEST:

(Signed) H. S. Bailey
Secretary

(seal)

[fol. 469]

[A]

SUMMARY OF AMENDMENTS TO THE BY-LAWS

The New Code of By-Laws of The Exchange Orange Products Company which were adopted May 20, 1931, have since that time been amended as follows:

1. ARTICLE I, Section 1—Regular Meetings (of the Shareholders)

   (1) November 10, 1937—changed from the second Wednesday in November of each year to the third Wednesday in November of each year.

   (2) November 19, 1952—changed from the third Wednesday in November of each year to the first Wednesday in December of each year.

2. ARTICLE II, Section 5—Regular Meetings (of the Board of Directors)

   (1) November 14, 1934—changed from the first Wednesday of each month to the last Wednesday of each month at 11:00 o'clock a.m.

   (2) March 17, 1937 —changed from the last Wednesday of each month to Wednesday of each week at 11:30 o'clock a.m.

   (3) November 15, 1950—changed to allow a regular meeting at 9:30 o'clock a.m. on Wednesday of each week.

3. ARTICLE XVIII—Executive Committee

   (1) Article XVIII was added to the New Code of By-Laws on July 1, 1931.

THE FOLLOWING IS A REMINDER ONLY—Not an amendment to the by-laws:

1. **ARTICLE II—Sections 2 and 3—Election and Eligibility and Vacancies (of the Board of Directors)**

(1) See Page B for a copy of a resolution passed by the Board of Directors on November 27, 1935, relating to these Sections of Article II.

[470]

[B]

The following is an excerpt from the minutes of a meeting of the Board of Directors of The Exchange Orange Products Company held November 27, 1935, in the offices of the corporation, Room 820 Consolidated Building, Sixth and Hill Streets, Los Angeles, California.

In order to facilitate the seating of directors in conformance with the by-laws, Assistant General Manager Wilson presented the following resolution:

WHEREAS, The By-Laws of The Exchange Orange Products Company provided that no person shall be eligible to be elected or to act as director of this corporation unless he is at the time of his election a director of California Fruit Growers Exchange, and if any person, while a member of the board of directors of this corporation, ceases to be a director of California Fruit Growers Exchange, his seat as a director of this corporation may be declared vacant by the Board of Directors of this corporation; and

WHEREAS, The By-Laws further provide that vacancies in the board of directors may be filled by a majority of the remaining directors:

NOW, THEREFORE, BE IT RESOLVED, That when a director resigns from the board of directors of the California Fruit Growers Exchange, his seat on the board of directors of this corporation be automatically declared vacant; and

FURTHER RESOLVED, That the successor appointed by the district exchange to serve on the board of directors of the California Fruit Growers Exchange be, without notification to this board, eligible for election to fill the vacancy caused by the resignation of this predecessor from the California Fruit Growers Exchange board.

The resolution was adopted on motion by Willits, seconded by Harwood.

LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
JUL 20 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961
No. 241

Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Company, a corporation,
Petitioners,

vs.

Winckler & Smith Citrus Products Co., a corporation, and Ronald Walker, as Trustee of Winckler & Smith Citrus Products Co.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Ross C. Fisher,
458 South Spring Street,
Los Angeles 13, California,

Herman F. Selvin,
523 West Sixth Street,
Los Angeles 14, California,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Opinion below 2

Jurisdiction 2

Questions presented 3

Statutes involved 5

Statement of the case 5

1. Jurisdiction of the courts below 5
2. The Sunkist agricultural cooperative organization 5
3. The plaintiff-respondent's business 7
4. The competition allegedly restrained or monopolized; and the relevant market 8
5. Winckler's sources of supply 9
6. The theories upon which the case was submitted to the jury 11
7. Excluded evidence of Winckler's illegal commerce 15

Reasons for granting the writ 15

1. The case presents an important question, concerning the nature and scope of the exemption from the antitrust laws accorded farmers by the Capper-Volstead Act, that has not been settled by this court 15
2. The decision below conflicts with decisions of the Seventh Circuit with respect to the protection given by the antitrust laws to unlawful articles of commerce 20
3. A question relating to definition of the relevant market has been decided below in conflict with the applicable decisions of this court 22

PAGE

4. The court of appeals, contrary to the decisions of this court, has held that a specific intent to produce the prohibited result is not necessary even when, to produce that result there had to be the intervention of independent acts of persons not parties to the alleged anti-trust violation 24

Conclusion 26

Appendices:

Appendix A. Opinion of the Court of Appeals......App. p. 1
Opinion modifying original opinion........App. p. 70

Appendix B. Statutes involved ....App. p. 71

TABLE OF AUTHORITIES CITED

Cases

PAGE

American Tob. Co. v. United States, 328 U. S. 781 25
Appalachian Coals v. United States, 288 U. S. 344 17
Carolene Products Co. v. Evaporated Milk Assn., 93 F. 2d 902 .... 4, 20
Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co., 293 U. S. 268 24
International Boxing Club v. United States, 358 U. S. 242 23
Locker v. American Tobacco Co., 218 Fed. 447 17
Maltz v. Sax, 134 F. 2d 2 .... 4, 20
Maryland v. Baldwin, 112 U. S. 490 12
Maryland & Virginia Milk Prod. Asso. v. United States, 362 U. S. 458 .... 16, 17, 19
Nashville Milk Company v. Carnation Co., 238 F. 2d 86, aff'd 355 U. S. 373 21
Proper v. John Bene & Sons, 299 Fed. 863 21
Samuel v. United States, 169 F. 2d 787 12
Smith v. Onyx Oil etc. Co., 218 F. 2d 104 17
Standard Oil Co. v. United States, 337 U. S. 293 23
Swift & Co. v. United States, 196 U. S. 375 .... 25, 26
Tampa Elec. Co. v. Nashville Coal Co., 365 U. S. 312 23
Times-Picayune Pub. Co. v. United States, 345 U. S. 594 .... 23, 25
United States v. Borden Co., 308 U. S. 188 .... 16, 17
United States v. Columbia Steel Co., 334 U. S. 495 .... 23, 24
United States v. E. I. DuPont de Nemours & Co., 351 U. S. 380 22
United States v. E. I. DuPont de Nemours & Co., 353 U. S. 586 22
United States v. Griffith, 334 U. S. 100 .... 22, 25
United States v. Socony-Vacuum Oil Co., 310 U. S. 150 .... 24, 26
United States v. Aluminum Co. of America, 148 F. 2d 416 26

MISCELLANEOUS

61 Congressional Record, p. 1033 18, 19
61 Congressional Record, pp. 1038, 1042 19
62 Congressional Record, pp. 2049, 2058-2060, 2122, 2257, 2261 19
House Report No. 24, 67th Cong., 1st Sess. 19
Report of United States Attorney General's Committee to Study the Antitrust Laws, p. 44 23
United States Dept. of Agric. General Rep. No. 76 (June, 1960), pp. 1-3, 5-9, 29-45 18

STATUTES

Act of July 2, 1890 (26 Stat. 209) 5
Act of October 15, 1914 (38 Stat. 731) 5
Act of February 18, 1922 (42 Stat. 388) 5
Capper-Volstead Act, Sec. 1 5
Capper-Volstead Act, Sec. 2 5
Clayton Act, Sec. 4 5
Clayton Act, Sec. 6 5
Federal Food, Drug and Cosmetic Act, Sec. 321(f) 21
Federal Food, Drug and Cosmetic Act, Sec. 333(2) 21
Federal Food, Drug and Cosmetic Act, Sec. 342(b) 21
Federal Food, Drug and Cosmetic Act, Sec. 343(2) 21
Sherman Act, Sec. 1 5
Sherman Act, Sec. 2 4, 5
United States Code Annotated, Title 7, Sec. 291 3, 5
United States Code Annotated, Title 7, Sec. 292 5
United States Code Annotated, Title 15, Sec. 1 5
United States Code Annotated, Title 15, Sec. 2 5
United States Code Annotated, Title 15, Sec. 15 5
United States Code Annotated, Title 15, Sec. 17 5
United States Code Annotated, Title 21, Secs. 61-63 20
United States Code Annotated, Title 21, Sec. 331 4, 21
United States Code Annotated, Title 28, Sec. 1254(1) 2
United States Code Annotated, Title 28, Sec. 1291 5
United States Code Annotated, Title 28, Sec. 1294(1) 5
United States Code Annotated, Title 28, Sec. 1337 5

IN THE

Supreme Court of the United States

October Term, 1961

No. ....

SUNKIST GROWERS, INC., a corporation, and THE EXCHANGE ORANGE PRODUCTS COMPANY, a corporation,

Petitioners,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation, and RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Sunkist Growers, Inc., and The Exchange Orange Products Company, appellants below, respectfully pray that a writ of certiorari issue to review so much of a judgment of the United States Court of Appeals for the Ninth Circuit as affirmed, upon the issue of liability, a judgment of the District Court for the Southern District of California. The District Court's judgment was one in favor of the respondents who were the plaintiffs in a treble-damage case under the antitrust laws. The Court of Appeals "affirmed on the issue of liability . . . and reversed and remanded on the issue of the amount of damages." [R. 4004.] The judgment, thus affirmed in part, was entered upon a general verdict after trial by jury. It awarded the respondents treble damages in the sum of $1,497,500.00, attorney's fees of $195,000.00 and costs. [R. 295, 336-339.]

Opinion Below.

The opinion of the Court of Appeals is reported in 284 F. 2d 1, and is found at pages 3952-4003 of the Record. That opinion was modified upon denial of petitions for rehearing filed respectively by the parties hereto. The modifying opinion is not yet reported, but is found at page 4005 of the Record. The opinions are printed in Appendix "A" to this petition.

Jurisdiction.

1. The judgment sought to be reviewed was entered on September 30, 1960. [R. 4004.]

2. Petitioners, as well as Respondents, filed timely petitions for rehearing, which were denied on ~~March~~ May 5, 1961. [R. 4005.]

3. The statutory provision believed to confer jurisdiction on this court to review the judgment in question is 28 U.S.C.A., sec. 1254(1).

4. The grounds upon which that jurisdiction is invoked are that the Court of Appeals in affirming on the issue of liability has decided an important question of federal law, arising under the antitrust laws, which has not been, but should be considered and settled by this court; has rendered a decision in conflict, on another of the questions involved, with the decision of

another court of appeals on the same matter; and has also decided two other important questions of federal law, arising under the antitrust laws, in a way in conflict with applicable decisions of this court.

Questions Presented.

1. Where a group of citrus fruit growers form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act [7 U.S.C.A., sec. 291]—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act upon proof only that these growers, through the agency of these three cooperatives, agreed among only themselves with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?

2. To a claim, by a private person, that he has been injured in his business as the result of a violation of the antitrust laws, is it a defense that the commodities produced by that individual in his business and introduced by him into interstate commerce, in respect of which he seeks the protection of the antitrust laws, were illegitimate and unlawful articles of commerce because they were intentionally and consistently adulterated and misbranded in violation of the

Federal Food, Drug and Cosmetic Act [21 U.S.C.A., secs. 331, *et seq.*]? And, does the decision of the Court of Appeals in respect of that question in the instant cause conflict with the decisions of the United States Court of Appeals for the Seventh Circuit in *Maltz v. Sax*, 134 F. 2d 2, and *Carolene Products Co. v. Evaporated Milk Assn.*, 93 F. 2d 902?

3. It being contended that by reason of an alleged conspiracy to restrain and monopolize trade in single-strength orange juice, respondents, who competed with petitioners and others in the national market for that commodity, were eliminated from that market because of their inability to obtain from petitioners the oranges from which juice was processed, is the relevant market the national market for orange juice, rather than the local market in which oranges to be processed into juice are sold and in which local market respondents did not engage or compete with petitioners?

4. When it is contended by respondents that they were eliminated as a competitor in the orange juice market as a result of petitioners' alleged refusal to supply respondents with oranges for processing into juice, is a violation by petitioners of the antitrust laws made out, in the absence of evidence that they specifically intended to bring about the consequences complained of, where neither respondents' inability to secure such oranges nor their claimed elimination as a competitor from such market was the necessary or probable effect of petitioners' alleged refusal and neither could nor would have occurred but for the wholly independent refusal of respondents' regular supplier, made for anti-competitive reasons of his own, to continue, as he had in the past, to supply respondents with oranges?

Statutes Involved.

The statutes involved are sections 1 and 2 of the Sherman Act [Act of July 2, 1890, 26 Stat. 209, as amended; 15 U.S.C.A., secs. 1, 2]; sections 4 and 6 of the Clayton Act [Act of Oct. 15, 1914, 38 Stats. 731; 15 U.S.C.A., secs. 15, 17]; and sections 1 and 2 of the Capper-Volstead Act. [Act of Feb. 18, 1922, 42 Stat. 388; 7 U.S.C.A., secs. 291, 292.] They are printed in Appendix "B" to this petition.

Statement of the Case.

1. Jurisdiction of the Courts Below.

The case is one brought by respondents to recover treble damages claimed to have been suffered in their business and property as the result of alleged violations of the federal antitrust laws. [R. 1-4, 13-16, 22-23.] It is, therefore, a case arising under an act of Congress protecting trade and commerce against restraints and monopolies; and so is one of which the District Court had original jurisdiction under 28 U.S.C.A., sec. 1337 and 15 U.S.C.A., sec. 15. The Court of Appeals had jurisdiction of the appeal from the judgment in the case under 28 U.S.C.A., secs. 1291, 1294(1).

2. The Sunkist Agricultural Cooperative Organization.

About 12,000 growers of citrus fruit in Arizona and California belong to Sunkist, an agricultural cooperative organization which, it was stipulated in the trial court, met all of the statutory requirements needed to make applicable to that organization the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act. In form, the Sunkist organization consists of three nonprofit agricultural associations, which are the agencies of the grower-members for the purpose of processing and marketing the members' fruit and the by-products processed from so much of that fruit as is not sold as fresh fruit. [R. 442-445, 448-449, 538-540, 549-563, 2693-2710, 2723-2725, 3043-3045.]

Petitioner Sunkist Growers, Inc. is the marketing agency for all 12,000 of its grower-members. Petitioner The Exchange Orange Products Company is the processing agency for oranges of these members. Exchange Lemon Products Company is the processing agency of the members for lemons.[1] Only the fruit of Sunkist members is handled, and all proceeds, less expenses of operation, are distributed to the grower-members in proportion to the fruit supplied by them. The three cooperative associations that make up the Sunkist organization are directed and controlled by grower-members selected by, and who serve as the representatives of, the entire group of grower-members. [R. 538-540, 549-569, 582-585, 593-594, 609, 666-669,

---

[1] It will be convenient to refer to the Sunkist agricultural cooperative organization of the growers collectively as "Sunkist"; to their marketing agency, Sunkist Growers, Inc., as "Growers"; to their processing agency for oranges, The Exchange Orange Products Company, as "E.O.P."; and to their processing agency for lemons, Exchange Lemon Products Company, as "E.L.P."

Growers, E.O.P. and E.L.P. are each California nonprofit corporations. So far as corporate structure is concerned, E.O.P. is a wholly owned subsidiary of Growers which, in turn, is a membership corporation whose members are the district exchanges of which the underlying fruit-growers and their local associations are members. E.L.P.'s stock is wholly owned by these growers and their local associations. [R. 538-540, 549-563, 666-669, 2693-2710, 2723-2726, 2959, 3043-3045. Exhibit 30.]

E.L.P. was originally a defendant below, but before trial the action was dismissed as to it with prejudice. [R. 144]. It continued, however, to be named as one of the alleged co-conspirators. [R. 255]

683-685, 695, 878-881, 2693-2710, 2721-2726, 2956-2960, 3043-3045. Exhibits 1, 3, 32, 33. See, also, note 1, p. 6, *supra.*]

3. The Plaintiff-Respondent's Business.

The respondent Winckler & Smith Citrus Products Company (referred to herein as "Winckler") during the period 1945-1952 engaged in the business of processing citrus fruit into various forms of juice and concentrates.[2] The greater part of its production was single-strength orange juice. It sold that product in the national market throughout the United States. In that market it competed with Florida processors—who had the overwhelmingly dominant share of the market [see pp. 8-9, *infra*]—as well as with various California processors. [R. 538-540, 992-995, 999-1001, 1005-1007, 1052, 1479-1485, 2969-2970. Exhibit BO.] Among the latter were Sunkist and two concerns—TreeSweet and Silzle—alleged to have been co-conspirators. [R. 256.]

Winckler's complaint alleged a restraint and monopolization of interstate trade in citrus juices generally. [R. 265-270.] Ultimately, however, the controversy was narrowed to Winckler's asserted inability in 1951 to get sufficient Valencia oranges from which to process single-strength orange juice; and it was on that narrowed basis that the case was submitted and argued to the jury. [See, the opinion of the Court of Appeals, *Pet.*, Appendix A, pp. 7, 13-14. Also, R. 3471, 3476-3477, 3478, 3540-3541, 3555-3556.]

---

[2] There are three kinds of juice produced from citrus fruit: (a) single-strength, which is the simple or straight juice of the fruit, with nothing added; (b) hot concentrate, which is a pasteurized and concentrated product of the fruit, used as the base or syrup for fruit-flavored drinks; and (c) frozen concentrate, which is the now familiar frozen concentrated product which the consumer converts into juice by mixing it with water. [R. 702-710.]

4. The Competition Allegedly Restrained or Monopolized; and the Relevant Market.

Winckler's claim was that the trade that had been restrained or monopolized was interstate trade throughout the United States in citrus fruit juices. [R. 265-270.] Winckler, as we have seen, competed in the national orange juice market, as did also Sunkist, the alleged co-conspirators TreeSweet and Silzle, other California processors, and the dominant Florida processors. [See, p. 7, *supra.*] Winckler was not a grower or supplier of by-product oranges and did not compete at all in that market.[3] [R. 538, 1052.]

The dominating influence in the national orange juice market was Florida production. It had the overwhelming share of the market. By reason of that, as well as its lower growing and production costs, and its ability, because of variations in growing seasons, to reach the market first, it was able, notwithstanding freight differentials, to compete strongly with the California product everywhere, even on the Pacific Coast. The market's price structure was set by the Florida product; and it was the Florida competition that all others in the market had to meet. [R. 1602-1603.] In 1951—the critical year here involved—California-Arizona production of single-strength juice was 7.1% of the national total, while Sunkist's production was only 1.8%. [R. 650-653, 1055, 1602-1603, 2186-2187, 2194-2198, 2203-

---

[3] By-product oranges are those not sold for consumption as fresh fruit but used for processing into juice and other byproducts such as oils, pharmaceuticals and the like. [R. 702-710.]

2212, 2281, 2721-2723, 2961-2965. See, also, Exhibits AQ, AS, AT, AU, DG, DK, DQ, DT, ET, EI.]

So far as by-product oranges in the California-Arizona area are concerned, the facts are stated post, pp. 9-10.

5. Winckler's Sources of Supply.

In the beginning Winckler got its supply of by-product oranges from Sunkist. Relations, however, were not satisfactory; and in 1948 Winckler transferred its patronage to other suppliers. From that time on it purchased only a small amount of oranges from Sunkist; and relied mainly on a concern called Independent Citrus Growers & Shippers Association, usually referred to in the record by the name of its selling agent, Morgan Ward.[4] [R. 646, 655-659, 661-662, 687-689, 1005-1006, 1012-1916, 1431-1450, 1587-1591. Exhibits 54, 55, BP, BQ.]

In the period 1945-51 the members of Sunkist produced on the average about 66% of the by-product oranges available in the California-Arizona area; and in 1951, 70%, or 318,000 tons. [R. 540-541, 551-552, 688-689, 1579-1582.] Morgan Ward, in that year, had from 12% to 15% of the total supply in the California-Arizona area, *i.e.*, not less than 54,000 tons.[5] [R. 1581.] As he himself testified he had "a lot of fruit" for which there was "no home . . . outside of Winckler-Smith, Case-Swayne, Paramount and a few other small plants. . . ." [R. 1600.]

---

[4] The only years in which Winckler was shown, even by its own records, to have made a profit were 1949 and 1950. [Exhibits A(p. 24), B(p.7), 61, 63.] In 1949 it got 17.47%, and in 1950 only 1.54%, of its by-product orange requirements from Sunkist; in terms of tonnage this amounted to 2225 tons and 127 tons, respectively. [Exhibits BP, BQ.] In 1948 it got 2161 tons from Sunkist, but the record does not show what percentage of its total purchases for that year this amount represented. [R. 1966-1967.]

The largest amount of valencia oranges ever used by Winckler for single-strength juice was about 9000 tons. That was in 1949 when it got a total of 12,700 tons, the very greater part from its regular suppliers, of which about 75% went into single-strength juice. [R. 1004, 1015, 1027.]

In 1951 Morgan Ward entered into a processing contract with Case-Swayne (a California processing firm) under which he supplied oranges to that firm for processing into single-strength juice. He entered into a similar contract with Winckler for processing into frozen concentrate, under which Winckler got about 6000 tons of oranges, in addition to 1455 tons from sources other than Ward or Sunkist. [R. 1439-1440.] Ward refused, however, to let Winckler have any oranges for processing into single-strength, because, as he testified, having made the single-strength processing contract with Case-Swayne, he did not want his oranges "out in the market competing in canned juice form, competing against each other." [R. 1601.] Winckler complained to Ward that his refusal created "a monopolistic situation" but Ward persisted in it. [Exhibits AX, 55. R. 1598.] Sunkist had nothing whatever to do with this refusal; indeed, it was not shown even to have had any knowledge of it. [R. 1576-1578, 1596-1602.]

Some time before, but not after, Ward's final refusal Winckler requested Sunkist either to sell it by-product oranges at less than its then prevailing price of $40 per ton or to enter into a single-strength processing contract. Sunkist declined to do either. [R. 608, 615-616, 857-858, 1058-1070, 2998-2999. Exhibit 45.]

---

[5] The record does not show directly the extent of Ward's supply in terms of tonnage. It does, however, show that he had 12% to 15% of the total supply and that Sunkist's 318,000 tons represented 70% of the total. Obviously, if 318,000 tons equal 70% of the total, 12% to 15% of the total would equal 54,516 tons to 68,145 tons.

It is respondent's claim that the inability to get by-product oranges in 1951 from Sunkist for processing into single-strength juice forced it out of business. [See, *e.g.*, R. 258, 260, 269-270, 3476-3480, 3556-3557.]

6. The Theories Upon Which the Case Was Submitted to the Jury.

(a) Respondents' pleaded theory was that Growers and E.O.P., and the alleged co-conspirators, E.L.P., TreeSweet and Silzle, had conspired to restrain and monopolize trade in citrus fruit juices; and that in pursuance of that alleged conspiracy the following acts —referred to throughout the trial as the "six acts"— had been done: (1) In 1950-51 E.L.P. processed some oranges for E.O.P. at cost; (2) in the same year, E.O.P. processed some lemons for E.L.P. at cost; (3) Growers and E.O.P. agreed upon the price to be charged by Growers for by-product oranges available to independent processors from Sunkist; (4) in 1951 E.O.P. entered into a contract with TreeSweet under which the latter, at its cost, processed oranges supplied by E.O.P. into single-strength juice; and TreeSweet agreed to buy the resulting juice at Sunkist's prevailing price; (5) in 1951 a similar processing contract was entered into by E.O.P. with Silzle; and (6) E.O.P. in 1951 refused to enter into such a contract with Winckler. [R. 254-256, 265-270.]

The jury were told, in general effect, that if the pleaded conspiracy were found to exist and any one of the six acts was done in pursuance of it, resulting in damage to Winckler, liability under the antitrust laws was established. [R. 3690, 3692-3694, 3711-3713.] The jury was not limited, however, to that theory of the case. They were permitted to find a conspiracy and to ground liability on the basis of collective action solely within the Sunkist cooperative organization.

Specifically, in this latter regard, they were told: (1) There was but one combination or conspiracy charged [R. 3697]; (2) Growers and E.O.P. could combine or conspire together [R. 3688-3689]; (3) while the charge was that the defendants (Growers and E.O.P.) and the co-conspirators (E.L.P., TreeSweet and Silzle) had conspired, the jury could find that nobody conspired or that "some number less than the total conspired . . ." [R. 3730]; and (4) there could be no verdict against Growers or E.O.P. unless it was found that they, or either of them, combined or conspired with either E.L.P. or TreeSweet or Silzle, and did one or more of the six acts in pursuance of such combination or conspiracy.* [R. 3711-3712.] The trial court refused to charge, at the defendants' request, that the Sunkist organization, *i.e.*, Growers, E.O.P. and E.L.P., constituted a single cooperative organization and, therefore, could not conspire with itself. [R. 182-183, 3253-3255.]

---

*Manifestly, the effect of this charge was to permit the jury to find liability based upon agreement or concert of action between or among only the processing and marketing agencies of the grower-members of the Sunkist cooperative organization, even if the only act done in pursuance thereof was no more than the ordinary and normal processing or marketing of Sunkist's fruit. The "six acts," separately or together, amounted to nothing more than processing and marketing the fruit of Sunkist's members. The jury's verdict was general [R. 295]; so that it is impossible to exclude the theory embraced in this charge as having been the basis of the verdict. [*Maryland v. Baldwin*, 112 U. S. 490, 493; *Samuel v. United States*, 9 Cir., 169 F. 2d 787, 794-796.]

The Court of Appeals held that the case was properly submitted to the jury on respondents' theory just outlined. It recognized that the Capper-Volstead Act exempted from the antitrust laws, or made privileged, the fact of combination by farmers into a cooperative organization for the purpose of collectively processing and marketing their products. Nevertheless it held this exemption inapplicable to petitioners because the jury could have found an "intra-corporate conspiracy" solely between or among the three cooperatives that made up the Sunkist cooperative organization. [*Pet.*, Appendix A, pp. 26-42.]

(b) It was a substantial part of petitioners' theory of the case that Sunkist's alleged refusal in 1951 to enter into business relations with Winckler did not simply by itself have either the necessary or probable result of rendering the latter unable to fill its by-product orange requirements. To the accomplishment of that result the independent, anti-competitively motivated refusal of Winckler's regular supplier, Morgan Ward, to deal with Winckler as he had in the past, was necessary. Accordingly, petitioners requested that the jury be charged that petitioners' responsibility for the result complained of could not be established without a showing of a specific intent on their part to bring the result about. [R. 186-191, 196-205.] The trial court refused so to charge. [R. 3282-3288, 3355-3359.] Instead, the jury were told that no such intent was needed. [R. 3689-3690, 3718.] The Court of Appeals agreed.[7] [*Pet.*, Appendix A, pp. 48-50.]

---

[7] In its original opinion the Court of Appeals posited several theories upon which the jury's verdict of liability could be affirmed. [*Pet.*, Appendix A, pp. 31-32.] One of these theories

(c) On the question of relevant market the petitioners requested instructions that would have permitted the jury to find that the relevant market was the national orange juice market. [R. 192-193.] The trial court refused to charge that this was the relevant market or to leave to the jury the question whether it was. [R. 3379, 3136-3143, 2866-2874.] The charge as given, told the jury, variously and without differentiation, that the relevant market was the California-Arizona market for by-product oranges [R. 3691-3693, 3702, 3706-3709, 3184-3188]; and that it was the market for orange juice processed in California and sold in interstate commerce. [R. 3692, 3698-3699, 3701, 3703, 3704-3706, 3709-3710, 3713, 3729-3730, 2865-2866, 2869-2870.] The Court of Appeals held that ". . . the relevant market area here involved was the California-Arizona area." [*Pet.*, Appendix A, pp. 14-15.] It did not say expressly whether the product forming the market in that area was by-product oranges or orange juice processed in California and sold in interstate commerce. It is, however, quite clear that the national market for single-strength orange juice was not considered by that Court to be either the, or a possible, relevant market.

---

was a "sole trader decision not to sell, made with an intent to illegally restrain trade or commerce . . ." [*Pet.*, Appendix A, p. 31.] Another was a "unilateral decision not to sell . . . made from a monopoly position, with an intent or purpose to eliminate a competitor . . ." [*Pet.*, Appendix A, p. 31.] In their petition for rehearing petitioners called attention to the inconsistency between these pronouncements and the Court's holding [*Pet.*, Appendix A, pp. 48-50] that a specific intent to eliminate or exclude Winckler as a competitor was not necessary. In denying the rehearing the Court modified the language quoted above by substituting "as a natural consequence" for the references to intent. [*Pet.*, Appendix A, p. 70.]

7. Excluded Evidence of Winckler's Illegal Commerce.

Evidence was offered by petitioners, but excluded by the trial court, that would have shown the following facts: (1) Winckler's single-strength orange juice, which went into interstate commerce, was intentionally and consistently adulterated by the addition to it of tapwater, citric acid, sugar, and other additives. [998-999, 1109-1112, 1121-1122, 1412-1413, 2528-2534, 2553, 2564-2572, 2581, 2595. Exhibits I-1 to I-4.] (2) The labels on the containers in which the juice was marketed did not disclose the addition of anything to the juice but represented it to be the pure and natural juice of the orange. [Ex. 38.] (3) The juice was frequently impure and unsterile and contaminated by the presence in it of dirt and the residue from rotten fruit. [R. 2664-2671.]

The Court of Appeals said that the exclusion of this evidence on the issue of liability "remains a close question" but, nonetheless, held its exclusion not to be prejudicial.[8] [R. 3996.]

Reasons for Granting the Writ.

1. The Case Presents an Important Question, Concerning the Nature and Scope of the Exemption From the Antitrust Laws Accorded Farmers by the Capper-Volstead Act, That Has Not Been Settled by This Court.

By virtue of the charge given the jury in this case it was clearly open to them to find a violation of the antitrust laws based solely upon a finding that there was collective action between the commonly owned cooperative processing and marketing agencies of one underlying group of growers, in pursuance of which only the fruit and fruit by-products of that group of growers were processed and marketed in the ordinary course of trade. [*Statement of the Case*, pp. 11-13, *supra*.] Had the organization here involved taken the form of one cooperative association or entity, which performed the entire function of processing and marketing, no one would seriously doubt that the fact of combination or collective action by the growers making up that cooperative would be lawful. The Capper-Volstead Act has no meaning unless at least that much is true.

---

[8] On the issue of damages, however, exclusion of this evidence was held to have been prejudicial. [R. 3996.]

As this Court has said, in respect of that Act, it provides that one of the " 'legitimate' objects of farmer organization" is " 'collectively processing, handling, and marketing' products through common marketing agencies and the making of 'necessary contracts and agreements to effect such purpose.' . . ." [*Maryland & Virginia Milk Prod. Asso. v. United States*, 362 U.S. 458, 466. See, *also: United States v. Borden Co.*, 308 U. S. 188, 204-205.] The Act's purpose, therefore, is "to make it possible for farmer producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws . . ." [*Maryland & Virginia Milk Prod. Asso. v. United States, supra*, 362 U. S. at 466.]

The courts below found the Capper-Volstead exemption inapplicable merely because the processing and marketing organization formed by this one group of growers embraced three cooperatives, instead of only one, notwithstanding that these three cooperatives did no more than process and market the fruit and processed by-products of this group of grower-members. Thus the purpose of the Act was subverted, by denying its application to ordinary processing and marketing through cooperative organization.

The antitrust laws do not impose restrictions that are merely "mechanical or artifical . . . Realities must dominate the judgment . . ." [*Appalachian Coals v. United States,* 288 U. S. 344, 360.] The realities of the situation here are that the three cooperatives were the processing and marketing agencies of the same single underlying group of growers; they were organized, controlled and operated by those same growers; and the organization thus created operated exactly as would have been the case if there were only one cooperative divided administratively into processing and marketing departments or divisions. [See, *Locker v. American Tobacco Co.,* 2 Cir., 218 Fed. 447, 449; *Smith v. Onyx Oil etc. Co.,* 3 Cir., 218 F. 2d 104, 109.]

The case, therefore, presents an important question dealing with the interpretation and operation of the Capper-Volstead Act, which has not been passed upon or settled by this Court. In two situations involving evidence of combination or conspiracy between a cooperative and persons and corporations not part of the cooperative organization, the Court has defined certain activities and methods of operation that are not within the coverage of Capper-Volstead. [*Maryland & Virginia Milk Prod. Asso. v. United States, supra,* 362 U. S. 458; *United States v. Borden Co., supra,* 308

U. S. 188.] It has not yet had the opportunity to define the activities that are within that coverage upon a record such as here presented where the jury's verdict, under the Court's charge, could have been based solely upon collective action wholly within the cooperative organization and involving only the normal processing and marketing of the members' products.

There are literally thousands of agricultural cooperatives in this country, having an aggregate membership in excess of 7 million farmers engaged in growing and producing a very large part of the agricultural produce and livestock of the nation. [*U. S. Dept. of Agric. General Report,* No. 76 (June, 1960), pp. 1-3, 5-9, 29-45.] Many of these cooperatives are organized, as was Sunkist, in multi-corporate form. [See, *op. cit.,* pp. 71-74.] It is important, therefore, that the members of cooperatives generally be able to ascertain with reasonable certainty the extent to which, within the confines of their particular cooperative organization, they may act collectively. That will be seen to be especially so when a moment's consideration is given to the conditions that, historically, produced the Capper-Volstead Act.

That act was not a routine piece of legislation. It received the extended and detailed consideration of the Congress during two separate sessions, in an effort to reach and solve a serious and persistent problem in the nation's economy. [61 *Cong. Rec.* 1033.] It was designed to relieve the chronically depressed state of agriculture. A principal cause of that condition, it was thought, was the fact that the bargaining power of the individual farmer was inadequate to enable him to get a proper price for his products from the many middlemen who stood between him and the ultimate market. The remedy, it was hoped, as it had been in the case of labor, was to equalize bargaining power by permitting farmers to combine into cooperatives. But an obstacle in the way of growth of cooperatives was the common belief, sedulously fostered by the middleman, that cooperative action would subject farmers to the criminal and civil sanctions of the antitrust laws. [See, *e.g.*, 61 Cong. Rec. 1033, 1038, 1042; 62 Cong. Rec. 2049, 2058-2060, 2122, 2257, 2261. Also, *Maryland & Virginia Milk Prod. Asso. v. United States*, supra, 362 U. S. at 464.] The answer was Capper-Volstead. [*House Report No. 24*, 67th Congress, 1st Session, p. 2.]

The purpose of the legislation is defeated if the boundary between permissible and impermissible collective action on the part of farmers is not marked out with reasonable clarity. Collective processing and marketing of agricultural products by the farmers who produce them is a settled and long-standing national policy. It is important that farmers know, or be able to ascertain, not alone what they may not do with others, but as well what they may lawfully do among themselves under the Act that made collective action by farmers the nation's policy. Doubt or imprecision in that regard will tend to a reversion to pre-Capper-Volstead days; to a situation in which the threat of antitrust sanctions will deter and impede the proper development and use of the cooperative principle that is the foundation of the policy.

The decision of the Court of Appeals in the case at bar will do much to accelerate that reversion. By the placing of its stamp of approval on the theory of liability submitted to the jury it has given substantial cause for concern that over a large part of the area in which the Act was intended to operate it is ineffective and inapplicable. These considerations, we earnestly urge, fully justify exercise of this Court's certiorari jurisdiction to the end that the serious concern thus engendered may be dispelled.

2. The Decision Below Conflicts With Decisions of the Seventh Circuit With Respect to the Protection Given by the Antitrust Laws to Unlawful Articles of Commerce.

The disposition by the courts below of the question raised by the offered evidence of intentional and consistent adulteration of Winckler's single-strength juice has created a conflict with the decisions of the Court of Appeals for the Seventh Circuit in *Maltz v. Sax*, 134 F. 2d 2, and *Carolene Products Co. v. Evaporated Milk Assn.*, 93 F. 2d 202. In the *Maltz* case, recovery in a treble-damage case under the antitrust laws was denied the plaintiff whose business consisted of the manufacture and sale of gambling equipment. That denial was based on the proposition that the plaintiff had "no legal right in a business, the conduct of which is gambling, for which he may obtain protection either in an action at law, or by a suit in equity. He had no legal rights to protect. . . ." [134 F. 2d at 5.] Similarly, in *Carolene Products Co.*, the plaintiff's product was filled milk, introduced into interstate commerce in violation of the Filled Milk Act, 21 U.S.C.A., secs. 61-63. Dismissal of a bill to enjoin an alleged conspiracy in restraint of interstate commerce was affirmed by the Court of Appeals upon the ground that "equity will not aid one who comes into court as a law violator. . . ."[9] [93 F. 2d at 203.]

The excluded evidence in the instant case would have shown that Winckler's purported single-strength orange juice was not the natural juice of the orange, but was juice to which water, citric acid, sugar and other elements had been added; and that the label did not disclose the presence of these additives, but represented the product to be pure or natural orange juice. [*Statement of the Case*, p. 15, *supra*.] The product,, therefore, was an illegitimate article of commerce and unlawful under the Federal Food, Drug, and Cosmetic Act.[10]

Had the evidence been received petitioners would have been entitled to a jury instruction that if plaintiff's product was introduced into commerce in violation of the cited Act it was an unlawful article of commerce and not entitled to the protection of the antitrust laws. If believed, that evidence would have established a complete defense to the action. The Court of Appeals, however, held that exclusion of the evidence, on the issue of liability, was not prejudicial error. By doing so it raised a direct conflict with the Seventh Circuit decisions referred to above.

---

[9] See, also, *Proper v. John Bene & Sons*, E.D.N.Y., 299 Fed. 863, in which it was held that it was a defense to a treble-damage antitrust action that the label on plaintiff's product in interstate commerce contained false statements making it violative of applicable federal legislation.

See also, *Nashville Milk Company v. Carnation Co.*, 7 Cir., 238 F. 2d 86, *affirmed* 355 U. S. 373. There, the District Court dismissed a treble-damage action "for the reason that no relief should be accorded to the plaintiff in view of the declared congressional policy . . . which proscribes the shipment or delivery for shipment of filled milk in interstate commerce." [238 F. 2d at 88.] The resulting affirmances by the Court of Appeals and by this Court were placed on other grounds.

[10] The Act prohibits the introduction into interstate commerce of any food that is adulterated or misbranded [21 U.S.C.A., sec. 331(a)(b)(c)]; and makes violation of this prohibition a crime [*op. cit.*, sec. 333(2).] It goes on to define food as "articles used for . . . drink for man . . ." [*op. cit.*, sec. 321(f)]; to provide that food is deemed adulterated "if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is." [*op. cit.*, sec. 342(b)]; and further to provide that food shall be deemed misbranded if "its labeling is false or misleading in any particular." [*op. cit.*, sec. 343(2)].

3. A Question Relating to Definition of the Relevant Market Has Been Decided Below in Conflict With the Applicable Decisions of This Court.

It was a contention vigorously pressed below by respondents, and as to which the jury were extensively instructed, that petitioners had "monopoly power" which was "abused" to respondents' injury. [R. 3691, 3693, 3695, 3700-3703, 3706-3707, 3729.] For the proper determination of such a contention it is, of course, necessary to determine first whether there was in fact the monopoly power claimed. That determination, in turn, rests upon a correct delineation of the relevant market and the line of commerce affected. Monopoly power is not something that exists *in vacuo*. It is the power to control prices or eliminate competition whenever the alleged monopolist desires. [*United States v. DuPont DeNemours & Co.*, 353 U. S. 586, 592-593; *United States v. Griffith*, 334 U. S. 100, 107.] It follows that existence of monopoly or market power can only be determined in relation to an actual and specific market. That market may be a product or a geographical area or, as is more usual, a combination of the two. [*United States v. E. I. DuPont DeNemours & Co.*, 351 U. S. 380, 391-394; *Times-Picayune Pub.*

Co. v. United States, 345 U. S. 594, 610-611. See, *Report of U. S. Attorney General's Comittee To Study The Antitrust Laws,* p. 44.] It is the ability to control prices or to eliminate competition in that market which determines the question whether there is in fact any monopoly power.

Petitioners' position, for which they requested but were refused appropriate jury instructions, was that the relevant market here involved was the national market for single-strength orange juice. That was the relevant market because it was the area of effective competition; it was the only market in which Sunkist, Winckler, and the alleged co-conspirators competed; it was the market that allegedly had been restrained or monopolized by Sunkist; and it was the market from which, allegedly, Winckler had been eliminated. [*Statement of the Case,* pp. 7-8, 14, *supra.*]

The Court of Appeals held the national orange juice market not to be the relevant market notwithstanding the court expressly recognized in its discussion that oranges "from both East and West Coasts competed in the national markets . . ." [*Statement of the Case,* p. 14, *supra.* Also, *Pet.,* Appendix, p. 15.] That holding does not square with the holdings of this Court on the subject. The gist of those holdings is that the relevant market is the market within the area of effective competition; the area in which the parties compete and which the alleged restraint affects. [In addition to the cases already cited, pp. 22-23, *supra,* see: *Tampa Elec. Co. v. Nashville Coal Co.,* 365 U. S. 312; *Standard Oil Co. v. United States,* 337 U. S. 293, 299 (n.5); *United States v. Columbia Steel Co.,* 334 U. S. 495, 520; *International Boxing Club v. United States,* 358 U. S. 242, 249-250; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 224 (n.59).]

"Relevant Market" as a distinct and concrete subject of inquiry in the enforcement of the antitrust laws is a concept of comparatively recent origin.[11] As a consequence the law in this regard is still in a formative and developing stage. Exploration and a proper determination of the relevant market must be made in every case in which monopolization or misuse of market power is in issue. It is, therefore, vital that the future course of the law in this respect be set correctly in the beginning. The importance of the question to the logical development of the law and to the orderly administration of the antitrust laws is thus manifest.

4. The Court of Appeals, Contrary to the Decisions of This Court, Has Held That a Specific Intent to Produce the Prohibited Result Is Not Necessary Even When, to Produce That Result There Had to Be the Intervention of Independent Acts of Persons Not Parties to the Alleged Antitrust Violation.

The crux of respondents' theory of this case is the claimed inability in 1951 to get by-product oranges for processing into single-strength juice. [*Statement of the Case*, pp. 7-8, *supra*.] It is, however, abundantly clear from the record that Sunkist's alleged refusal in that year to enter into business relations with Winckler did not, by itself, bring about the result complained of. Winckler's regular supplier had in the past met substantially all of the former's requirements; and had available more than enough fruit to supply Winckler's requirements in 1951. But for that supplier's independent and unforeseen refusal, for anticompetitive reasons of his own, to deal with Winckler as he had in the past, 1951 would have been no different in respect of available supply from those years in which Winckler had been able to operate at a profit. [*Statement of the Case*, pp. 9-11, *supra*.] To fasten legal responsibility for the failure of supply in 1951 upon petitioners a specific intent or purpose on their part to bring about that result was necessary.

---

[11] The first case to retrieve the concept from its submergence in the generalized issue monopolization *vel non* appears to have been *Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U. S. 268, 278-279. The phrase "relevant market" made its first appearance, so far as we are aware, in *United States v. Columbia Steel Co., supra*, 334 U. S. at 508, 520, as part of the Court's summary of the government's contention; and also as part of the Court's statement that it had "consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area. . . ."

Doubtless, when a voluntary act, by itself and as its natural and probable consequence, produces a given result, no intent beyond the intent to do the act is necessary. But when the result depends upon the intervention of independent acts and forces, a specific intent to bring about the result is required. [*United States v. Griffith, supra*, 334 U. S. at 105; *Swift & Co. v. United States,* 196 U. S. 375, 396. See, also: *Times-Picayune Pub. Co. v. United States, supra,* 345 U. S. at 626-627; *American Tob. Co. v. United States,* 328 U. S. 781, 813-814.] Upon the facts in this case it was certainly open to the jury to find, if indeed they were not compelled to find, that Sunkist's refusal in 1951 to deal with Winckler did not bring about, and by itself could not have brought about, the anticompetitive result of which complaint is made in this cause.

Thus, there was raised in this case a question that has been of recurring interest in the antitrust field since Holmes, J., gave it his inimitable touch in *Swift & Co. v. United States, supra,* 196 U. S. at 396. He there pointed out that where "acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary. . . ." Perhaps the broad sweep of this language has been confined; to what extent we do not know [see, *e.g., United States v. Aluminum Co. of America,* 2 Cir., 148 F. 2d 416, 431-432; *United States v. Socony-Vacuum Oil Co., supra,* 310 U. S. at 224(n. 59)] but surely, not to the point of extinction. Certain it is that the question whether and to what extent specific intent is an ingredient of the crime denounced by section 2 of the Sherman Act is one that has not yet been laid to an untroubled rest. Unless *Swift* and like decisions are now to be deemed wholly unauthoritative the treatment of this question below flies in the teeth of this Court's holdings on the subject.

Conclusion.

A writ of certiorari to the Court of Appeals for the Ninth Circuit should be issued, to the end that so much of that court's judgment as affirmed the judgment of the District Court on the issue of liability may be reviewed.

Respectfully submitted,

Ross C. Fisher,
Herman F. Selvin,
Attorneys for Petitioners.

APPENDIX A.

Opinion of the Court of Appeals.

Before: Stephens, Barnes and Merrill, Circuit Judges.
Barnes, Circuit Judge:

This is a private action for treble damages under the Sherman Act, 15 U.S.C. §§ 1-7, 15. Appellants are Sunkist Growers, Inc., a corporation (hereinafter referred to as Sunkist) and The Exchange Orange Products Company, a corporation (hereinafter referred to as Exchange Orange or EOP). Appellees are Winckler & Smith Citrus Products Co., a corporation and Ronald Walker, as trustee of Winckler & Smith (hereinafter referred to as Winckler or Trustee). The action was tried in the district court before a jury, which returned a verdict of $500,000. This was trebled to $1,500,000, and from that there was deducted the $2,500 originally paid in compromise by one-time defendant TreeSweet. There were added attorneys' fees fixed at $195,000, and costs. Timely appeal was filed in this Court. After argument, but before decision, one of the judges hearing this appeal died. It was thereupon set down for hearing a second time, was heard, and held pending the determination by the Supreme Court of *Milk Producers Assn. v. U. S.*, 1960, 362 U. S. 458, having to do with the antitrust exemptions of agricultural marketing cooperatives.

I.

PARTIES

Sunkist Growers, Inc., a corporation, was sued in the district court originally under its former name, California Fruit Growers Exchange. It is and has been a nonprofit agricultural cooperative marketing association. The second defendant, The Exchange Orange Products Company, a corporation, was sued in the court below as The Exchange Orange Products Company. At all times it was a wholly owned subsidiary of Sunkist. Together with Sunkist and Exchange Orange, there was originally named as a defendant Exchange Lemon Products Company, a corporation, sued originally as Exchange Lemon Products Company, a nonprofit corporation (hereinafter sometimes referred to as ELP or Exchange Lemon).

On motion of plaintiff, Exchange Lemon was dismissed with prejudice as a defendant, and was subsequently named as a coconspirator in plaintiff's second amended complaint filed February 2, 1956, to conform to proof.

TreeSweet Products Company, a corporation (hereinafter referred to as TreeSweet) was an original defendant, but settled for $2,500, and was dismissed as a defendant. In the said second amended complaint, it was referred to as a coconspirator.

E. A. Silzle Corporation, a corporation (hereinafter referred to as Silzle) was never a defendant but was named a coconspirator in both plaintiffs' first and second amended complaints.

Appellee Ronald Walker is trustee of the estate of Winckler & Smith Products Co. in those proceedings pending in the district court below for its reorganization under Chapter X of the Bankruptcy Laws, being Number 538860-C of the records of said court. Mr. Walker was appointed March 26th, 1952 as such trustee, and by order made May 9, 1952 he was permitted to and did intervene in this case. Mr. Walker is sometimes referred to herein as appellee, Walker, Trustee, or as Intervenor.

Thus on this appeal there are two appellants, Sunkist and EOP, and two appellees, the Winckler corporation and the Trustee.

II.

THE THEORY OF THE CASE

Appellees allege in their first cause of action (Section 1 of the Sherman Act; 15 U.S.C. §1), and appellants deny, that appellants have conspired and entered into contracts which had the purpose and effect of unreasonably restraining interstate commerce in canned California citrus fruit juice, particularly single strength orange juice. This was proved, say appellees, by "six acts." These were:

(a) In the 1950-1951 canning season ELP processed 28,812 tons of oranges for EOP at cost, and without profit to ELP. Appellants *admit* this.

(b) During the same period, EOP processed 1,740 tons of lemons for ELP on the same basis. Appellants *admit* this.

(c) Sunkist and EOP agreed to establish and maintain the price of by-product oranges available to independent processors like appellees at a level making it impossible for processors like appellees to purchase oranges from EOP, or any other source, at a price or under any other arrangement enabling appellees and other processors to produce and sell canned natural orange juice and frozen concentrate juice at prices competitive with prices charged by appellants and their favored customers, TreeSweet and Silzle. Appellants *deny* these allegations.

(d) Under a contract effective July 23, 1951, between EOP and TreeSweet, TreeSweet received oranges from EOP, made single strength orange juice for EOP at cost and without profit to TreeSweet, and then bought the orange juice from EOP at Sunkist's then published price for single strength orange juice, less certain discounts not available to other customers, including appellees. The purpose and effect of this contract allegedly was to enable TreeSweet to obtain orange juice at a cost which prevented appellees from competing with Sunkist or TreeSweet in the natural orange juice market. Appellants *admit* the contract and supplying the oranges; *deny* the balance.

(e) Under a contract effective June 26, 1951, between EOP and Silzle, EOP furnished oranges to Silzle at $22.50 per ton, which was lower than the price to appellees or other processors. The purpose and effect allegedly was to give Silzle oranges at a price with which appellees could not compete. Appellants *admit* the contract and furnishing the oranges; *deny* the purpose or effect.

(f) EOP refused appellees a TreeSweet or Silzle type contract in 1951. Appellants *denied* the refusal, but *admitted* such a contract was not made.

Appellees allege that as a result of the above acts of appellants (listed in (a) to (f) above), and the monopoly control of Sunkist and Exchange Orange in 1951 over the amount and price of Valencia oranges available for processing, appellees were unable to process natural and frozen concentrate fruit juice in competition with Silzle, TreeSweet and Sunkist, which alleged facts eliminated appellees as a competitor, and forced the filing of proceedings under Chapter X of the Bankruptcy Act. These allegations were added in the second amended complaint filed after the close of evidence. They were materially different from those in the original complaint. Appellants *deny* all these allegations.

Under the second cause of action (brought under §2 of the Sherman Act; 15 U.S.C. § 2) it was charged that acts (a) to (f) above were done by appellants with monopoly control over citrus fruit markets in California and Arizona, and in so doing and in making such contracts, the parties named conspired to monopolize, and monopolized, single strength Valencia orange juice.

The second amended complaint additionally alleged contracts with independent processors Hyland-Stanford and Mission Dry, giving them first call on oranges and processing to the exclusion of Independent Fruit Growers' Association and Morgan Ward, its selling agent, and one of the appellees' principal suppliers of by-product oranges.

Appellants plead five separate defenses:

First: The second amended complaint, the amended complaint, and the original complaint each failed to state a claim upon which relief could be granted.

Second: The applicable statute of limitations, Section 338(1) of the Code of Civil Procedure of California, bars all causes of action asserted in the second amended complaint and in the amended complaint.

Third: All causes of action alleged in the second amended complaint and the amended complaint are barred by the laches of appellees, in that appellees are barred by laches and estopped from relying upon any acts involving Silzle, as the Silzle contract was disclosed to appellees on March 14, 1952, and appellees did not amend their complaint to include this contract until December 15, 1954, and such a long delay was prejudicial to appellants.

Fourth: Appellees are barred by laches and estopped from relying on the Hyland-Stanford and Mission Dry contracts first referred to in the second amended complaint, as these contracts were disclosed to appellees on November 9, 1955, and appellees did not amend their complaint to refer to the Hyland-Stanford contract until January 31, 1956 (during the last few days of the trial) or to the Mission Dry contract until February 4, 1956 (after all the evidence was in), and such long delay was prejudicial to appellants.

Fifth: Appellees are barred by laches and estopped from alleging the new matters in the last paragraph of III(f) of the first cause of action (referred to in (f) above), because appellees knew of such matters through discovery long before trial and did not seek to amend its complaint to refer thereto until January 31, 1956, to appellants' surprise and prejudice, and such long delay was prejucial to appellants.

This is a long record before us, and the matter is as complicated, both factually and legally, as is most antitrust litigation. We attempt to summarize the appellees' position by first stating what it was not. It was *not* appellees' position that appellants did not have certain exemptions from the antitrust laws under the

Clayton and Capper-Volstead Acts, nor that they could not, as agriculturists, join together to make marketing agreements. It was appellees' position that such exemptions so granted were not absolute. Appellants could monopolize by-product oranges or single strength orange juice, either in the national market or in the California-Arizona area market, provided they achieved their monopoly position lawfully. Appellants could set any price they desired for their juice. They could make any "true" processing contracts with TreeSweet and Silzle, or with anyone else. They could refuse to make oranges available to appellees, if activated by "proper" business motives, as distinguished from "improper" motives.

Appellees insist, however, that appellants having monopolized by-product oranges from which single strength juice was made, and by such monopolization having control over the amount of by-product oranges available to independent contractors; having further set a price of $40.00 per ton for such oranges (a price alleged to have been one at which no independent processor could buy, process and compete with Sunkist in the single strength juice market); having at the same time (*i.e.*, during the one year of 1951, here involved) made oranges available to TreeSweet and Silzle, competitors of appellees, under so-called "processing" contracts which were more than that because they permitted the competitors to secure oranges at a price substantially lower than $40.00 per ton; the appellants were thus guilty of a conspiracy or combination unauthorized by antitrust law, even as modified by the limited agricultural marketing exemptions.

Under this theory of the case, the court sought to leave with the jury several *questions of fact,* namely:

(1) Whether appellants had a legal monopoly of by-product oranges (and a resulting legal monopoly in single strength orange juice) in the California-Arizona market.

(2) Whether, if appellants did have such legal monopoly, it was used legally or illegally, in the particulars alleged.

(3) Whether such monopoly, if proved, gave appellants power and control over single strength orange fruit juice prices in the California-Arizona market.

(4) Whether such power and control, if proved, was used with the purpose or with the effect of eliminating a competitor in such market, *i.e.*, eliminating appellees.

(5) Whether such power and control, if proved, was sufficient to enable appellants to determine the price or the terms and conditions under which by-product oranges were available in 1951 to independent processors, including appellees.

(6) Whether appellants had conspired with non-defendant coconspirators to unlawfully use their market power and control to appellees' alleged consequent injury, or whether appellants had unlawfully used such monopoly power and control to appellees' injury.

(7) What damages were proximately caused by appellants' alleged actions.

With this explanation of our understanding of the theory of the case, we pass to:

III.

QUESTIONS RAISED ON THIS APPEAL

There are four principal questions raised on this appeal: Was *any* violation of antitrust laws made out? Was there error in instructing or refusing to instruct the jury? Was there error in rulings on admission and rejection of evidence? Was there error in affixing attorneys' fees of $195,000? We shall discuss each in turn.

A. *Was any violation of antitrust laws made out?*

1. *The Exemption of Agricultural Cooperatives Generally*

There can be no conclusion as to the first error alleged until we determine the nature and extent of the exemption granted by law to agricultural cooperatives. This was raised by the pleadings and particularly, appellants' first and separate defense.

Sunkist was a nonprofit agricultural cooperative marketing association. So was EOP, a subsidiary of Sunkist. So was ELP, an association of growers who were likewise members of Sunkist.

The exemption claimed by appellants rests within §6 of the Clayton Act and §1 of the Capper-Volstead Act. Section 6 of the Clayton Act (38 Stat. 731 (1914), 15 U.S.C. §17 (1958)) reads as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital

> stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects hereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 1 of the Capper-Volstead Act (42 Stat. 388 (1922), 7 U.S.C. §291 (1958)) reads in material part as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in association, corporate or otherwise . . . in collectively processing, preparing for market, handling and marketing in interstate . . . commerce such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . ."

The legislative history of the Clayton and Capper-Volstead Acts makes it clear that farmers (including orange growers) were granted the right to combine, contract and conspire together in restraint of trade in associations which, without the exemptions, would have violated the Sherman Act. Its purpose was to permit the farmers to compete with large corporations.[1]

---

[1] "In the early 1900's, when agricultural cooperatives were growing in effectiveness, there was widespread concern because the mere organization of farmers for mutual help was often considered to be a violation of the antitrust laws. Some state courts had sustained antitrust charges against agricultural cooperatives, and as a result eventually all the States passed Acts

But by its terms, the exemption was not absolute—the individuals were permitted to associate in groups and the associations were permitted specifically to do but two things: "arrange marketing agencies in common," and contract and agree with their members participating, if necessary, to effect such purposes. As the most recent Supreme Court decision states:

> "Thus, the full effect of §6 is that a group of farmers acting together as a single entity in an association cannot be restrained 'from lawfully carrying out the *legitimate objects* thereof' (emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will." *Milk Producers Assn. v. U.S., supra*, at 465-6.

There have been few cases dealing with the Capper-Volstead Act exemptions.[2] At the time this case was tried in the district court, *United States v. Borden Co.*, 1939, 308 U. S. 188, was the leading case. It held that Capper-Volstead does not wholly exempt cooperatives, and particularly those conspiring with non-exempt legal entities. This same principle has been

---

authorizing their existence. It was to bar such prosecutions by the Federal Government as to interstate transactions that Congress in 1914 inserted § 6 in the Clayton Act exempting agricultural organizations, along with labor unions, from the antitrust laws." Milk Producers Assn. v. U.S., *supra* at 464.

[2] Milk Producers Assn. v. U.S., *supra*; Tigner v. Texas, 1940, 310 U. S. 141; United States v. Borden Co., 1939, 308 U. S. 188; United States v. Maryland & Virginia Milk Pro. Assn., D. C. Cir. 1949, 179 F. 2d 426; Hinton v. Columbia River Packers Ass'n., 9 Cir. 1942, 131 F. 2d 88; United States v. Maryland Cooperative Milk Pro., D. C. 1956, 145 F. Supp. 151; Cape Cod Food Products v. National Cranberry Ass'n., D. Mass. 1954, 119 F. Supp. 900; Manaka v. Monterey Sardine Industries, N. D. Calif. 1941, 41 F. Supp. 531.

applied to labor unions, which have no absolute exemption from antitrust laws. *Allen Bradley Co. v. Union*, 1945, 325 U.S. 797, 805. The Clayton Act, §6, applied only to nonstock agricultural cooperatives. Section 1 of the Capper-Volstead Act extended the same exemption to capital stock agricultural cooperatives.

> "[T]he general philosophy of both [acts] was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." *Milk Producers Asn. v. U.S., supra*, at 466.

And in conclusion, Mr. Justice Black stated:

> "[T]he [Capper-Volstead] Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative." *Id.* at 467.

We conclude, therefore, that no blanket exemption is created by either Section 6 of the Clayton Act or Section 1 of the Capper-Volstead Act which permits an agricultural cooperative to either unlawfully monopolize, or attempt to monopolize, under Section 2 of the Sherman Act, nor to do any acts to restrain or suppress competition, or which result in the restraint or suppression of competition prohibited by Section 1 of the Sherman Act, if such acts, in either event, fall within the prohibitions of the respective Sherman Act sections. Thus the question as to whether there has been a violation of the antitrust laws is ordinarily one to properly go to the jury.

We next consider if there was proof of the violation of antitrust laws, despite the limited exemption the appellant Sunkist enjoys, sufficient to make out a question of fact for the jury. To pass upon this, we must consider certain of the facts of this case in detail in an attempt to establish and define the product and the pertinent market with which we are here concerned.

2. *The Product Involved*

As the case went to the jury, the defendants Sunkist and EOP were charged, as appellees' counsel put it on oral argument, with "a combination and conspiracy [under Sections 1 and 2 of the Sherman Act] to restrain trade in California citrus juices and to monopolize the production, processing and sale of those juices, primarily, insofar as appellee is concerned, single strength juices." The contracts charged to be in restraint of trade were allegedly made with the purpose of eliminating a competitor, the appellees.

In the first cause of action contained in appellees' amended complaint, the relevant market was designated as "canned citrus fruit juice, produced and processed in the State of California, and marketed throughout the United States." Thus originally all citrus fruit juice was involved; orange, lemon and grapefruit. By the amendment to the complaint to conform to evidence, the relevant market was restricted to "single strength Valencia [orange] juice."

In that respect it was alleged (again to conform to proof) that:

> "A total of approximately 5,400,000 gallons of single strength Valencia juice was processed in

> California in 1951. Of this amount, defendants EOP, TreeSweet and Silzle processed approximately 4,511,202 gallons, of which amount approximately 3,044,394 gallons were processed by TreeSweet and Silzle under the contracts and arrangement [complained of]. . . . Because of the monopoly control by Sunkist and EOP over the quantity and price at which Valencia product oranges were made available to independent processors of single strength juice other than TreeSweet and Silzle, and the aforesaid contracts, plaintiff was unable to and did not process any single strength Valencia juice in 1951."

3. *The Relevant Market*

The record discloses that entirely apart from the marketing of citrus fruit itself as the end product, an important consideration in the citrus industry is the utilization of by-products, such as oils from the peel, peel and pulp for cattle feed, and the juices themselves. Juices are divided in the trade into three categories: (1) The so-called "hot concentrate juice" (the syrup base for mixed citrus drinks); (2) the cold, or so-called "frozen concentrate," which is used to prepare the canned or frozen juice; and (3) the so-called "single strength," being the natural and untreated juice of the orange. Oranges for fruit juice purposes are valued and sold by the extent of their sugar content. Valencia oranges are apparently particularly valued for their high sugar content, and perhaps for their time of arrival on the market (although this advantage, of course, partially disappears when juices are kept from one season to the next).

Oranges are grown primarily in three states—California, Arizona and Florida. Oranges from both East and West Coasts compete in the national markets, both in fresh oranges and by-products. Due to the freight rates, California and Arizona oranges and juices are sold on a two-price structure—cheaper in the East, where Florida is closer and the freight costs on Florida juice lower, and more expensive in the West, where transportation from Florida costs more. We conclude the relevant market area here involved was the California-Arizona area.

4. *Competition and Prices in the Product Involved in the Relevant Market*

During the year 1951, Sunkist controlled approximately seventy per cent of the total by-product Valencia orange market in the California-Arizona area, or 318,000 tons of by-product oranges.

The remaining thirty per cent of by-product Valencia oranges grown in California-Arizona came from scattered growers such as: (a) Independent Citrus Growers & Shippers Association, a grower cooperative (Morgan Ward, selling agent); (b) Mutual Orange Distributors of Anaheim, California, a grower cooperative; (c) American Fruit Growers Company, an independent grower, packer and shipper; (d) Paramount Citrus Association, a corporation organized by various growers for profit; (e) an unorganized group of individual growers, members of (a) above, who did not desire to market through Morgan Ward.

In 1951 in the California-Arizona area, there were three principal independent processors of by-product oranges: Winckler & Smith, TreeSweet and Silzle.

These had no growers to supply them oranges, so they were required to buy their by-product oranges from the aforementioned five "independent" groups of growers, or from Sunkist or its subsidiary EOP, or (as to a very small amount of fruit) from even "more independent" growers than the five independents above mentioned. Mutual, American and Paramount, mentioned in (b), (c) and (d) above, had their own processing facilities, and by 1951 were processing all their own fruit, so had none to sell to independent processors.

"Independent Citrus Growers & Shippers Association" had no processing facilities of its own and no sales organization. It therefore sold to independent processors. Whether these independent processors would buy by-product oranges to process into single strength juice depended, obviously, on the price they might be forced to pay for the oranges, and the price they might get for the canned or bottled single strength juice. If the processors could see no chance to make a profit then the growers' representatives were forced to make processing contracts with hired processors in order to realize anything on their by-product oranges, and to prevent a loss.

There is no question but that Sunkist was the "leader" on pricing within the industry. In 1951 Sunkist admittedly set a price of $40.00 per ton on oranges containing 120 pounds of "soluble solids." (This is a term descriptive of what is left from an orange when water is extracted. It includes sugars, citric acid, and other solids. The average Valencia orange contains 120 pounds of soluble solids per ton of oranges.)

In 1951, "Independent Citrus Growers & Shippers Association" made a contract with Case-Swayne Co., Incorporated, an independent processor with no grower's supply, to process its by-product oranges into canned single strength juice, selling it under the Case-Swayne label, paying a net to Independent after deducting costs and a profit. Independent had twelve to fifteen per cent of the total supply of by-product oranges in the California-Arizona market, or at least 53,000 tons.

On August 6, 1951, Morgan Ward for Independent, signed a processing contract with Winckler by which Ward agreed to deliver sixty tons of by-product oranges per day up to three hundred and sixty tons per week during the two-months' canning season for the production of frozen concentrate, but this did not produce single strength juice for Winckler to sell. On August 17, 1951, he wrote to Morgan Ward (Exhibit AZ) in which he complained that he was not getting oranges for single strength juice. He charged monopoly against Morgan Ward, and requested the latter to put the matter up to the By-Products Committee of the Independent Citrus Growers & Shippers Association. This was done; the matter was left entirely to Morgan Ward's discretion. That company still refused to sell oranges to Winckler for single strength processing. Mr. Ward's explanation is of interest. He said:

> "Well, in 1951 I knew that we would be faced with a lot of fruit, there being no home for it outside of Winckler-Smith, Case-Swayne, Paramount and a few other small plants, a few small plants otherwise. I knew that we were going to have, in order to get money for the fruit for the growers, we were going to have to enter into participating contracts in processing this fruit, not with one, but several of these. So I wanted to

be fair to Mr. Winckler, I wanted to be fair to Mr. Swayne and Paramount, for that matter, so I knew that Case-Swayne had no facilities except straight canned juice, so the first contract we entered into was with Case-Swayne for single-strength juice, orange juice.

"Q. That was early in the season?

"A. Early in the year. That was the first reason I gave him that part of it.

"The second reason was that if I gave single strength to Winckler and single strength to Case-Swayne, we would have our oranges out in the market competing in canned juice form, competing against each other.

"Then in order to be fair again with Winckler, I gave him the concentrate deal. Even though he wanted some single strength, I did not give it to him for that reason."

Winckler & Smith had been organized in 1946. The amounts of by-product oranges it had purchased primarily from Sunkist and thereafter from others up to and including 1950 had been as follows:

1946—	$1,000,000 worth
1947—	Substantially less
1948—	$200,000 worth
1949—	3,500 tons from Sunkist
	10,500 tons from Morgan Ward
	4,300 tons from other sources
1950—	1,300 tons from Sunkist
	11,500 tons from Morgan Ward
	4,100 tons from other sources

During this same time, the tons of by-product oranges it had purchased from other sources, including Morgan Ward, had been increasing. Thus it is not entirely accurate to state, as appellees do, that "appellee [Winckler & Smith] had been a regular customer of Sunkist in the purchase of by-product oranges since its organization in 1946," up to 1951.

In 1951 Sunkist started out the year with plans for pooling and disposing of all its by-product oranges. The plan was to have EOP process the fruit, or to sell to other processors. A schedule of prices was established at which fruit was to be sold at a separate price per ton for each pound of soluble solids per ton, ranging from sixty to one hundred and fifty pounds.

The price set on by-product Valencia oranges for 1951 ranged from $17.00 per ton for fruit having sixty pounds of soluble solids to $51.50 per ton for fruit having one hundred and fifty pounds of soluble solids. Fruit having one hundred and twenty pounds of soluble solids was priced at $40.00 per ton, f.o.b. packing house. This price was set by Sam H. Kelly, general manager of Sunkist's Los Angeles District Office. The "Independent Association" followed the "lead" of Sunkist as to price.

Sunkist sold 46,000 tons of by-product oranges at this price to independent processors in 1951. Apparently these oranges went into hot or frozen concentrate, as there was testimony such a price could be paid for such oranges so used in 1951 and produce a profit.

All other tonnage of Sunkist growers in 1951 was turned over to EOP for disposal. This was the largest by-product Valencia orange crop ever handled by EOP. It received 318,000 tons, processed 164,000 tons, and turned over 31,200 tons to ELP for processing at cost.

Exchange Orange thus had 122,800 additional tons of by-product oranges on hand. It sold 19,747 tons to General Foods; 14,842 tons to Hyland-Stanford; 6,773 tons to Mission Dry; and 3,730 tons to Hart's for processing, or a total of 45,092 tons, under "custom packing" contracts,[3] into hot and frozen orange concentrate, but not for single strength juice. It contracted with TreeSweet to process 24,148 tons into single strength juice, and Silzle to process 6,675 tons into single strength juice. These were the contracts described as two of "six acts" which are the basis of appellees' complaint against Sunkist. Ten thousand six hundred and thirty tons were sold to Mission Dry and 817 tons to Hyland-Stanford under a "deferred payment plan."[4] This left 35,000 tons, approximately, which were unsuitable for processing into juice products.

---

[3] Under the true processing or "custom packing" contract, Exchange Orange furnished fruit to the independent processor for processing into specified products. The processed products were sold under the Sunkist label by the Products Department of Sunkist. The processor was paid its costs plus an assured profit on the processing operations. In 1951, Exchange Orange made such contracts for the processing of hot and frozen concentrate with Hyland-Stanford, Mission Dry, General Foods and Hart's.

[4] Under the so-called "fruit purchasing" contract, the independent processor agreed to buy all of its by-product fruit requirements from EOP at the going Sunkist price for such fruit at the time of delivery. The processed product was sold by the independent processor under its own label or under the labels of its buyers. The independent was not required to pay for the fruit until such time as it had sold the processed products. In the event the independent stopped buying fruit for its own account, either because of the price of fruit or because its capacity exceeded its own requirements for fruit, its production facilities were to be made available to EOP upon request. If EOP used such production facilities, the independent was paid its costs of operation plus a guaranteed profit. This provision of the fruit purchasing contract ties in to the true processing or "custom packing" contract which EOP sometimes had with the same independent processor.

The years immediately before 1951 had seen a change in the use of by-product oranges. In 1950 EOP processed eleven per cent of all frozen orange juice in the California-Arizona market. In 1951 it processed fifty-eight per cent. There was an increasing market for frozen orange juice. Nevertheless, it was advisable and necessary to maintain the market in canned single strength juice.

There were four principal independent processors of canned single strength orange juice in the California-Arizona area, namely, TreeSweet, Silzle, Case-Swayne and appellee. TreeSweet sold in the national market under its own label. Silzle sold in the national market to private label buyers. Case-Swayne sold largely in the California market under its own label "Case-Swayne." Appellee sold in the national market under its "Anagold" label. These four canners were in competition with each other, and each of them competed with Sunkist, in the sale of canned single strength orange juice in interstate commerce.

5. *Contracts in the 1951 Season*

Under the 1951 contract between Exchange Orange and TreeSweet, Exchange Orange made by-product

---

Finley characterized the so-called "fruit purchasing" contracts with Hyland-Stanford and Mission Dry as providing for a "deferred payment" or a "credit plan," since the independent processor was not required to pay for the fruit it purchased from EOP until the products processed therefrom were sold by the independent, even though the processed products were, at all times, the property of the independent. Finley said that the provision in such contracts which required the purchaser to buy its full requirements of by-product oranges from EOP assured the independent of a dependable source of supply of fruit. He stated further that the deferred payment privilege afforded the independent under such contracts was given in exchange for the privilege given EOP for "first call" on the independent's processing facilities.

oranges available to TreeSweet on a consignment basis in such quantities as Exchange Orange determined. Exchange Orange agreed to pay TreeSweet its processing costs at specified rates and to pay the trucking costs of the fruit to TreeSweet's plant. TreeSweet agreed to purchase the resultant juice at the Sunkist published selling price as of the date of purchase, less discounts and allowances of fifteen per cent plus an advertising allowance of seven cents per case. TreeSweet was not required to pay for the juice until it was sold. The oil and peel were to be the property of Exchange Orange.

Under this contract TreeSweet processed 24,148 tons of by-product oranges into canned single strength orange juice, and sold it in the same interstate markets under the TreeSweet label in competition with similar juice sold by Sunkist and Silzle.

Finley (general manager of Exchange Orange) admitted that the Exchange Orange-TreeSweet contract guaranteed TreeSweet against any inventory losses and protected it against any reductions in the market price for canned juice during both the selling and carry-over seasons. He admitted further that TreeSweet was guaranteed a profit under such contract. He stated that the TreeSweet contract provided, in effect, that Exchange Orange was to be paid for its by-product oranges on the basis of the difference between the amount credited to TreeSweet for processing such fruit and the price which TreeSweet paid Exchange Orange for the processed juice.

The amount credited to TreeSweet for processing the 24,148 tons was $859,004.00, and the amount payable by TreeSweet for the juice processed therefrom was

$1,204,031.41. The difference between these two figures, to wit: $345,027.41, was the amount TreeSweet actually paid Exchange Orange for the 24,148 tons without the peel and oil by-products, or at the rate of almost $14.29 per ton.

Under this contract, EOP was to get the oil and peel or the proceeds therefrom. The net return from the oil and peel was $10.81 per ton. Therefore, the total amount EOP received for the by-product oranges processed under the TreeSweet contract was $25.10 per ton, namely, $14.29 actually paid by TreeSweet plus $10.81 for the oil and peel, or a price which was $19.12 less than the price for which the same quality of oranges were available for sale by Sunkist to other independent processors, including appellees.

Substantially the entire production of single strength orange juice under this contract was marketed under the TreeSweet label, and none of it was sold under the Sunkist label. TreeSweet received an advertising allowance of seven cents per case. The usual purpose of an advertising allowance was to advertise the brand name of the concern granting such allowance, but in this case TreeSweet was permitted to make any use it saw fit of this advertising allowance.

The contract with TreeSweet was justified on the ground that TreeSweet had the facilities to process the juice and the sales organization to move the merchandise, and on the ground that it was important that some California single strength juice be on the market in 1951. Sunkist had never mentioned to any independent processor until 1951 that this kind of arrangement was being made available to TreeSweet during the years 1947 to 1950, inclusive.

Silzle was engaged primarily in the business of processing and selling canned single strength orange juice. It sold such juice primarily to private label buyers who sold to the same class of customers and in direct competition with canned single strength juice sold by Sunkist, TreeSweet and appellees. Silzle had secured through the Bauer Fruit Company, a partnership composed of certain stockholders of Silzle, its fruit requirements.

Early in 1951, Kelly of Sunkist called Finley of EOP to secure the latter's approval to sell seventy-two tons of by-product oranges to Silzle at $27.00 per ton, including the oil and peel, in order to permit Silzle to meet a competitive situation then existing with Case-Swayne. Finley approved the sale. These oranges ranged from one hundred twenty-three to one hundred thirty-six pounds of soluble solids per ton which, under the Sunkist published selling price, were priced from $41.15 to $46.13 per ton. A little later, under an oral arrangement, Finley let Silzle have five hundred and twenty-seven tons at $22.50 per ton, with Silzle keeping the oil and peel.

About the middle of June 1951, Finley contacted Thelma Silzle, president of Silzle, and offered her a contract similar to the TreeSweet contract, "and she was willing and wanted a contract." The parties operated on an oral basis for most of the season. The written contract was not signed until September 10, 1951, but by its terms it was to be effective from July 15, 1951 until the end of the season.

Under this contract Silzle processed 6,675 tons of by-product oranges into canned single strength orange juice, in addition to the seventy-two tons and five hundred and twenty-seven tons purchased earlier. Silzle purchased the canned juice from EOP at the published Sunkist selling price at the time of purchase, less a discount of twelve and one-half per cent, plus an advertising allowance of seven cents per case. Silzle was credited with $215,602.10 for processing, and it paid EOP the difference between $215,602.10 and $306,263.65, Sunkist's selling price for the resultant juice. Silzle thus paid $90,661.55 for the 6,675 tons of oranges exclusive of oil and peel, or at the rate of $13.58 per ton for by-product oranges. The average soluble solids content of the oranges processed by Silzle under the 1951 contract was one hundred and twenty pounds of soluble solids per ton. The Sunkist published selling price in 1951 for by-product oranges containing one hundred and twenty pounds of soluble solids per ton was $40.00 per ton. Silzle thus acquired oranges from EOP, exclusive of the peel and oil content, at a price which was $26.42 per ton less than Sunkist's published selling price for oranges of the same quality.

Under this contract EOP was to get the value of the oil and peel, which amounted to $4.08 per ton. Thus, the total amount EOP received for the by-product oranges processed under the Silzle contract was $17.66 per ton, namely, $13.58 per ton paid by Silzle, plus $4.08 per ton received for the oil and peel; or a price which was $22.34 per ton less than the price for which the same quality of oranges was available for sale by Sunkist to other independent processors, including appellees. Unlike TreeSweet, Silzle was to pack juice only for current sales, not for inventory.

The terms of the various contracts are definite. The contracts themselves are in evidence, and their execution is admitted by the pleadings.

The question permitted to go to the jury for determination was why Sunkist, in 1951, sold to one processor of "single strength Valencia orange juice" at one price, and failed to sell to another at any price. If there *was* a refusal, was it a valid exercise of business judgment? If so, it was lawful. If it was a contract made to restrain competition or to fix prices, or, from a position of legal monopoly, was used illegally to monopolize or to attempt to monopolize, then appellees were entitled to recover damages proximately resulting from appellants' illegal acts. Such questions obviously would ordinarily be questions of fact.

6. *The Alleged Refusal to Sell*

We have observed above, with respect to the "sixth act" of the "six acts" mentioned hereinbefore (II(f), *supra*), that Sunkist denied any refusal to sell to appellees, but admitted no contract had been made with them.

The right to offer to sell or buy with perfect freedom, and to refuse to sell or buy with the same freedom, is supposedly a fundamental right sought to be protected by our competitive free enterprise system, and by the antitrust laws.

Its legality has been primarily established by what has been described as one of the ten leading cases in antitrust enforcement during its seventy year history: *United States v. Colgate*, 1919, 250 U.S. 300. Speaking for a unanimous Court, Mr. Justice McReynolds there referred to the long recognized right of a manufacturer to exercise his independent discretion as to parties with whom he would deal.[5] But like so many generalizations, the "right" to exercise independent discretion cannot be taken as an absolute.[6]

Mr. Justice Burton so stated in *Lorain Journal v. United States,* 1951, 342 U.S. 143, 155.[7] As Mr. Justice Holmes said: "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion."[8]

We speak here only of decisions arrived at unilaterally, *i.e.,* the decisions of the single trader. Any notion that such a right to select customers by joint action exists has been laid to rest.[9] *Klor's* has reduced this prospect to a mirage.[10]

---

[5] "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U.S. 300, at 307.

[6] We discuss the problem without considering the immunities defendant allegedly acquired under both the Capper-Volstead and Clayton Acts. We also note that the general statement in Colgate has reference to a right as it exists under the Sherman Act. More than that was originally plead in this case, but the Robinson-Patman Act violations were dismissed and were not before the jury.

[7] Cf. Rifkind, Division of Territories, in Van Cise and Dunn, How to Comply With the Antitrust Laws, 127, 136 (1954).

[8] Amer. Bank & Trust Co. v. Federal Bank, 1921, 256 U.S. 350, 358.

[9] Klor's v. Broadway-Hale Stores, 1959, 359 U.S. 207.

[10] Oppenheim, Selected Antitrust Developments, 15 A.B.A. Section of Antitrust Law 37, 54 (1959).

Confining our attention, then, to the decision made by a single trader, irrespective of any statutory immunities, we ask whether the seller may select with whom he may deal. Whether we label it a right or a privilege, both common law[11] and statute[12] have consistently adhered to the general theory expressed in *Colgate*. Late Supreme Court cases confirm its existence,[13] but with certain definite limitations.

Text writers tell us this general "right" of choice of dealing may be violative of antitrust laws when it is "misused or abused," *i.e.*, "when there is proof of any one of a number of plus elements of liability that may taint the otherwise lawful individual refusal to sell."[14] "These plus elements," says Professor Oppenheim of Michigan,

> "include, among others, the following major species of illegality: (1) tortious conduct constituting unfair competition or unfair trade practice at common law; (2) violation of a civil rights statute or other type of constitutionally valid statute limiting refusals to deal; and (3) conduct otherwise

---

[11] 4 Restatement, Torts § 762.

[12] 15 U.S.C. § 13(a) (1958).

"Section 2(a) of the Robinson-Patman Act, 15 U.S.C. Section 13(a), contains a proviso 'That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.' In Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55 at 64 (1959), the Court stated that this proviso codifies the rule of United States v. Colgate & Co., 250 U.S. 300 (1919). . . ." Oppenheim, op. cit. supra note 10, at 43.

[13] Handler, Recent Antitrust Developments, 14 Record of the Bar Association of the Bar of the City of New York 318 (1959).

[14] Oppenheim, op. cit. supra note 10, at 43.

in violation of the Sherman Act, Clayton, Section 5 of the Federal Trade Commission Act or any applicable state antitrust statute."[15]

But the decisions in past years,[16] as well as recent dicta by the Supreme Court,[17] warrant the generalization made by a writer with which this Court agrees: "[*An*] *individual refusal to deal is preserved wherever*

---

[15] Oppenheim, op. cit. supra note 10, at 43-4.

[16] Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847 (1955); Saulnier, Achieving Price Stability as a Basis for Economic Growth in a Free Society, 15 Bus. Law 83 (1959).

United States v. Parke, Davis & Co., 1950, 362 U.S. 29, emphasized the narrowness of the path of legality a seller must follow in utilizing the doctrine of United States v. Colgate in suggesting resale prices to customers. Relying on U. S. v. Bausch & Lomb Co., 1944, 321 U.S. 707, Federal Trade Comm. v. Beech-Nut Co., 1922, 257 U.S. 441, and Dr. Miles Medical Co. v. Park & Sons Co., 1911, 220 U.S. 373, the Court ruled there were two types of action prohibited by Colgate: (1) agreements or contractual arrangements on a vertical plane, and (2) a concerted plan of action on a horizontal plane.

"In other words, an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." United States v. Parke, Davis & Co., supra at 43.

The unilateral right to set prices, without "other means" of implementation, leaving the person affected the right to accept or reject the fixed price, is maintained from Colgate, and approved. Cf. also George W. Warner & Co. v. Black & Decker Mfg. Co., 2 Cir. 1960, 277 F.2d 787.

[17] Justice Black in Klor's specifically said: "This is not the case of a single trader refusing to deal with another. . . ." (citing United States v. Colgate, supra; United States v. Schrader's Son, Inc., 1920, 252 U.S. 85; U. S. v. Bausch & Lomb Co., supra; Lorain Journal v. United States, supra). Klors v. Broadway-Hale Stores, supra at 312.

it is reasonably ancillary to the effectuation of lawful marketing objectives."[18] (Emphasis added.)

Entirely apart from a unilateral refusal to sell or deal, we have, charged herein as a conspiracy, the joint or concerted refusal. "Concerted refusals by traders to deal with other traders" are equated to "group boycotts" by the most recent Supreme Court decision on the subject.[19] They "have long been held to be in the forbidden category."[20] The Court goes on:

> "They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' *Fashion Originators' Guild v. Federal Trade Comm'n,* 312 U.S. 457, 466, 467-468. Cf. *United States v. Trenton Potteries Co.,* 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, 213, 'such agree-

---

[18] Oppenheim, op. cit. supra note 10 at 44. See Associated Press v. United States, 1945, 326 U.S. 1. Professor Oppenheim goes further: "Indeed, the cases support an even broader generalization. In the absence of one of the plus illegal elements previously summarized, a seller acting alone is not required by law to justify his refusal to deal. His motive is immaterial unless it is relevant to one of the plus elements mentioned." Cf. Times-Picayune v. United States, 1953, 345 U.S. 594, 625; Timberg, Selection of Customers, in Van Cise and Dunn, How to Comply With the Antitrust Laws, 117, 119 (1954), citing Fed. Trade Comm. v. Raymond Co., 1924, 263 U.S. 565.

Also cf. Oppenheim, Developments in Antitrust Law During the Past Year, pp. 29-33, American Bar Association Section of Antitrust Law (1960).

[19] Klor's v. Broadway-Hale Stores, supra at 212.

[20] Klor's v. Broadway-Hale Stores, supra at 212.

> ments, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' Cf. *United States v. Patten,* 226 U.S. 525, 542." *Klor's v. Broadway-Hale Stores,* 1959, 359 U.S. 207 at 212.

Thus, in this case, we conclude the question as to whether there had been a concerted refusal to sell, as alleged by appellees, or an illegal unilateral refusal to sell, were questions of fact for the jury's determination. The jury's verdict could have been based on either (1) the alleged illegal conspiracy and agreement to make contracts constituting a restraint of trade, or (2) the alleged illegal sole trader decision not to sell, made with an intent to illegally restrain trade or commerce, and implemented by other illegal means beyond the bare refusal, or (3) a similar unilateral decision not to sell, except at a fixed price, made from a monopoly position, with an intent or purpose to eliminate a competitor. We cannot know which one or more of the theories stated were adopted by the jury in determining liability. With this in mind, we must consider the evidence and the instructions given on this phase of the case. If there exists in the record sufficient evidence to justify the action going to the jury on all three of these theories, and there were no errors in the instructions nor in the introduction of evidence, then we are bound by the jury's verdict on questions of fact.

We conclude that this was the theory under which the trial court permitted the case to go to the jury, as disclosed by the instructions themselves and the trial court's and counsel's comments, and discussion of them, at the trial. We further conclude such submission to the jury was, in theory, correct.

B. *Was there error in instructing or refusing to instruct the jury?*

This was not an easy case in which to instruct the jury, and the instructions were necessarily many and involved.

In the instructions, the jury was first advised that a parent corporation and its wholly owned subsidiary (Sunkist and EOP, respectively) "can be guilty of combining or conspiring together to violate the antitrust laws," *i.e.*, on the theory of an intracorporate conspiracy (*e.g., Kiefer-Stewart Co. v. Seagram & Sons*, 1951, 340 U.S. 211); that acts lawful in themselves can become unlawful "when part of an illegal scheme or plan, or when used to accomplish an illegal purpose" (*e.g., Direct Sales Co. v. U.S.*, 1943, 319 U.S. 671); that the acts charged against appellants under the first or restraint of trade cause of action need not have been shown to have been done with specific intent of elimination of competition in the juice market, if those acts "actually and necessarily resulted in the elimination of such competition," since everyone is presumed to intend the natural and probable results or consequences of his conduct. *People v. Renozo,* 1952, 109 Cal. App. 2d 793, 241 P. 2d 628; *King v. Commonwealth,* 1941, 285 Ky. 654, 148 S.W. 2d 1044.

The court then referred to the "six acts" complained of which were claimed to be the proximate cause of appellees' damage (see II(a) to (f), *supra*), and added:

> "The other contracts entered into evidence between Exchange Orange and Hyland Stanford,

> Harts, Case-Swayne, Mission Dry and General Foods, also referred to as Bireley's, were offered and received for the general purpose of showing the operations of Exchange Orange and such bearing as they may have in general, but are not claimed or alleged by the plaintiffs, to be any cause of their claimed damage."

The court explained the defendants' defense.[21]

The court then instructed on monopoly power:

> "The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful.

---

[21] "It is defendants' position, first of all, that they did not have a monopoly of products oranges or a monopoly of the business of processing the oranges and selling the juice in interstate commerce. Defendants contend that such monopolies could have been lawful, if they had existed, because of the statutes relating to marketing associations, but they deny that there were such monopolies.

"With respect to lemons, it is defendants' position that whether Exchange Lemon had a monopoly of products lemons or of the business of processing and selling lemon juice, is immaterial in this case, since, defendants claim, the plaintiff was not in the lemon juice business except in a very minor way.

"In any event, defendants deny that they misused any power that they may have had with respect to products oranges or lemons.

"Defendants also deny that they violated the antitrust laws in any way. They deny they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to restrain trade and commerce in single-strength Valencia orange juice or and (sic) other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to suppress or eliminate the competition of the plaintiff.

"Defendants also deny that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to monopolize the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold

"The defendant Sunkist is permitted under the law to acquire a legal monopoly over product Valencia oranges that are available for processing into citrus juice products, including single-strength Valencia juice. Sunkist or Exchange Orange could in 1951 have legally processed all of such oranges in their own plants into citrus juice products and not made any of them available to independent processors, such as the plaintiff, TreeSweet or Silzle, if they had been able to, and cared to do so. Defendant Exchange Orange, as the processing company for the grower members of Sunkist, could also enter into lawful processing contracts with independent processors to have the oranges of the grower members of Sunkist processed into citrus juices to be thereafter sold by Sunkist as the citrus

---

in interstate commerce, or that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to exclude the competition of the plaintiff from such market.

"The defendants also deny that they and Exchange Lemon and TreeSweet and Silzle, or any of them, actually monopolized the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce.

"With respect to the six acts complained of as causing plaintiff's damage, defendants contend that such acts were lawful and that they were not performed pursuant to any combination or conspiracy or for the purpose of restraining or monopolizing trade and commerce or for the purpose of injuring the plaintiff.

"It is also defendants' contention that they were under no legal obligation to do business with the plaintiff, and that even if defendants had had some obligation to do business with independent processors generally, there was ample justification for not doing business with the plaintiff.

"Defendants contend, finally, that what happened to the plaintiff in 1951 was caused, not by any act of the defendants, but by the general economic conditions in the citrus fruit industry and by plaintiff's lack of capital and the mismanagement of its business."

juice products of its grower members to prospective buyers thereof, including independent processors. However, such contracts must be lawful processing contracts and not devices which are resorted to pursuant to the conspiracy charged to illegally restrain trade, or to illegally monopolize that part of the citrus juice market which is represented by such citrus juices as are processed in California and thereafter sold in interstate commerce. It is for you to decide whether the contracts which Exchange Orange entered into in 1951 with TreeSweet and Silzle, when coupled with any refusal of the defendant Sunkist or Exchange Orange, to make oranges available to the plaintiff under comparable arrangements pursuant to the combination or conspiracy charged, were lawful processing contracts, or whether they were contracts which were made pursuant to the combination or conspiracy charged and had the purpose and effect of restraining and/or monopolizing interstate trade and commerce in the citrus juices and particularly single-strength Valencia orange juice processed in California and sold in interstate commerce, by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts."

And the court reinstructed on the same subject.[22]

---

[22] "Now, so that you will not be confused, let's back up. Here are co-operatives which are permitted to combine together to produce and market their fruit. The antitrust laws say that they

The court next instructed on the power to determine prices, or to exclude a competitor, and the lawful as well as the unlawful exercise of that power, and re-

---

may lawfully do that, and the antitrust laws say that they shall not be in violation of any—are you sleepy down there?

"Juror Daiker: No.

"The Court (Continuing): —shall not be in violation of any antitrust law in so doing.

"The plaintiffs claim that the defendants did actually have a monopoly of product fruit through their co-operatives. The defendants say, 'We didn't have it. But, if we did, it was legal.' And the court has told you that it was legal. So there is no dispute about that.

"As the court has told you, the defendants Sunkist, Orange, and co-conspirator Lemon, could have had 100 per cent monopoly of all oranges and lemons grown in Southern California, so that isn't our problem. It is what you find happened or did not happen from there on out.

"If they had this monopoly control of products oranges, then they could not use it illegally. They could use it legally. Likewise, the plaintiff contends that the defendants conspired and combined to restrain trade and commerce, and conspired and combined to monopolize the citrus fruit market, which is something different from the product fruit.

"The question that is being left to you as jurors is not the question as to whether these co-operatives could have legally had a monopoly of all the oranges or lemons in California; there is no argument about that; the question on that phase of the case is whether or not, if plaintiff proves they did have such monopoly, did they use it legally or illegally. That is a question of fact. You are the sole judges of the facts.

"Sections 1 and 2 of the Sherman Act have both the geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of the things forming a part of interstate commerce. If you find that either or both of the defendants combined with TreeSweet or Silzle to eliminate the competition of the plaintiff in the market for citrus fruit juices, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that any of the acts charged to have been performed by such defendants were performed in furtherance of such combination or conspiracy, and that the performance of any such acts was the proximate cause of any damage to the plaintiff, you should find that there was a violation of the antiferred specifically to the processing contracts with TreeSweet and Silzle.[23]

After advising the jury that direct evidence of a refusal to deal with Winckler on terms comparable to those offered to TreeSweet and Silzle was not necessary, and that EOP had a legal right to refuse to

---

trust laws and proximate causation, and you should proceed to the question of damage.

"Any combination effectively excluding outsiders from the business altogether is a monopoly and is unconditionally unlawful.

"No claim or contention is made herein by the plaintiff that defendants, or either of them, attempted to monopolize.

"This may be a technical distinction. There is a charge that they conspired to monopolize. That is different from an attempt to monopolize, to go back to those instructions that I gave you on conspiracy. Attempt to monopolize is something different. For instance, one individual could attempt to monopolize, without any conspiracy. But there is no charge of attempt to monopolize.

"In considering the matter of monopoly power two ingredients are of outstanding significance: the power to fix prices and the power to exclude competition.

"The words 'to fix prices,' refer to price fixing activities which tamper with or affect price structures in interstate trade or commerce.

"Whether monopoly power existed in a defendant or defendants, and whether such power was illegally used or misused, is a question of fact for the jury."

[23] "I charge you that the defendant Exchange Orange may legally enter into a processing contract whereby Valencia oranges furnished by Sunkist or Exchange Orange may be processed into single-strength orange juice for Sunkist by an independent processor party to such contract. However, such processing contracts cannot be entered into by Exchange Orange as part of a combination or conspiracy which has the purpose or effect of fixing the prices at which single-strength Valencia juice processed by TreeSweet and Silzle for Exchange Orange may be sold or offered for sale by TreeSweet or Silzle in interstate commerce as such contracts would then be illegal contracts.

"In other words, you have got a question of fact there. Were these legal processing contracts or were they illegal? I am trying to present both sides of the problem to you."

contract with Winckler unless such refusal was some part of a violation of antitrust laws, the court gave two instructions which he characterized as summing up "what is charged and what the plaintiff must prove." It is these instructions, originally requested by defendants but modified by the court, which appellants vigorously attack as error. They read:

> "(a) Defendants' No. 7
>
> The first cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators, Exchange Lemon, Tree-Sweet and Silzle, combined and conspired with each other at a date unknown to the plaintiff, and entered into contracts and did certain other things in 1951 with the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juices, particularly single-strength Valencia orange juice produced in California and marketed throughout the United States, with the resultant injury and damage to the plaintiff, i.e., that Sunkist and Exchange Orange and the alleged co-conspirators combined and conspired to eliminate the competition of the plaintiff in the interstate market for canned citrus fruit juices and particularly single-strength Valencia orange juice in the year 1951, and performed certain acts pursuant to such combination and conspiracy which proximately caused damage to plaintiff.
>
> "Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either TreeSweet, or Silzle, or ELP, and in 1951 did one or more of the specific acts charged—

those are the six acts, one or more of the six acts—charged in the first cause of action, and that such act or acts had the purpose or necessary effect of damaging or eliminating the competition of plaintiffs in the interstate market for California canned citrus fruit juices or single-strength Valencia orange juice, your verdict must be for the defendants on the first cause of action.

* * * *

"(b) Defendants' No. 17A

The second cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators Exchange Lemon, Tree-Sweet and Silzle combined and conspired together, and performed the same six acts alleged in the first cause of action, which are incorporated by reference into the second cause, in order to monopolize the production and interstate sale of California citrus fruit juices, especially single-strength Valencia orange juice, and that pursuant to such conspiracy they actually monopolized such production and interstate sale of California citrus fruit juices, and particularly single-strength Valencia orange juice, with resultant injury and damage to plaintiff. Unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange, or either of them, and one or more of the alleged co-conspirators, combined and conspired, and pursuant to such combination or conspiracy did one or more of the acts charged, and complained of, in order to acquire effective control of the interstate market for California citrus fruit juices, with the purpose or necessary effect of eliminating

> competition, including that of the plaintiff, from such market, your verdict must be for the defendants on the second cause of action."

Under that charge appellants urge the jury could have found that the conspiracy consisted of only Sunkist or EOP and ELP. Such a conspiracy, say appellants, involved only exempt cooperatives; that these instructions removed any exemption created by Capper-Volstead from the case entirely.

This error, say appellants, was compounded by the trial court in its attempt to clarify the charge after it had been given. In this regard the court said:

> "I also am told that I spoke about how the defendants had conspired on one occasion. The charge is not that the defendants conspired. The charge is that the defendants and co-conspirators conspired.
>
> "However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number less than the total conspired. It is your task to decide the facts."

Appellants' argument first presupposes that agricultural cooperatives can combine to fix prices or eliminate competitors with immunity, otherwise Capper-Volstead means nothing. With this position we do not agree.

First: We do not now understand (since the *Milk Producers* decision) that different agricultural cooperatives, combining together are entitled to claim a total immunity for acts which they may lawfully do unilaterally, any more than individuals may claim for certain of their joint actions the same immunity under antitrust laws which would exist as to their several independent acts.

> "[A] group of farmers acting together *as a single entity* in an association cannot be restrained 'from lawfully carrying out *the legitimate objects* thereof,' but the section [Section 6 of the Clayton Act] cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will." (Emphasis added.) *Milk Producers Assn. v. U.S., supra,* at 465-6.
>
> "The Capper-Volstead Act . . . extended §6 of the Clayton Act exemption . . . [but] did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain or suppress competition with the cooperative." *Id.* at 466-7.

Second: We point out that the error as allegedly compounded by the loose language ("You may find that nobody conspired, or . . . *that some number less than the total conspired.*" (Emphasis added.)) was followed by a grudging approval of such instruction to the jury by both sides, just before the jury retired:

> "[The Court:] . . . . Now, do you want to come back up again, or are you content? Is that satisfactory?
>
> "Mr. Fisher: I think we are content.
>
> "The Court: Satisfactory, Mr. Dixon?
>
> "Mr. Dixon: Satisfactory."

Third: We think there exists support in the law for such instructions. *United States v. Timken Roller*

Bearing Co., N.D. Ohio, 1949, 83 F. Supp. 2d 84 *affirmed* 341 U.S. 593 (1951). "[C]ommon ownership and control does not liberate corporations from the impact of the anti-trust laws." *Kiefer-Stewart Co. v. Seagram & Sons, supra* at 215. *But cf:* Report of the Attorney General's National Committee to Study the Antitrust Laws, pp. 30-36 (1955).

The entire instructions given cover fifty pages of the transcript. The first ten pages and the last five were "stock instructions," applicable in any private conspiracy antitrust case where plaintiffs seek damages. Ten pages of instructions cover the pleadings, the statutes involved, the appellants' denials and defenses, and an explanation of certain evidence received, to which no objection is made by appellants.

Appellants do however, in thirty-nine specifications object to almost every one of the remaining instructions, given at the request of appellees or on the court's own motion; and to four instructions which were requested by appellants but modified by the court. Additionally, twenty-seven instructions proposed by appellants and rejected by the court, are alleged as error. Thus, there are sixty-six alleged errors in the giving or refusing of instructions. We find it unnecessary to go into each instruction individually. Some are based on the theory of exemption which *Milk Producers Assn. v. U. S., supra,* laid at rest,[24] or the "public injury" concept, buried by *Klor's v. Broadway-Hale Stores, supra.*[25] Some have to do with definition of the relevant market hereinbefore discussed.[26] Some have to do with intra-corporate conspiracy.[27] Others were allegedly vague, ambiguous, or confusing,[28] or tended to "over-emphasize,"[29] or be unnecessary or needless repetition,[30] or were immaterial,[31] or focused attention unnecessarily.[32] All the foregoing objections not hereinafter touched upon we hold invalid, or of such slight consequence that they do not constitute substantial error, and are not prejudicial. Fed. R. Civ. P. 61.

---

[24] For example, alleged errors 2(a), 2(f), 2(g), 2(i), 2(k), 2(s), 2(z) and 2(dd).

[25] For example, alleged errors 2(z) (2d para); 3(a).

Appellees, of course, urge that the instructions must be "viewed in their entirety, rather than in isolated segments"; that "even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a consideration of the entire charge," citing *Jesonis v. Oliver J. Olson and Co.*, 9 Cir. 1956, 238 F. 2d 307, 309. We agree with that general principle, yet if a substantial and prejudicial error is made in the giving of but one instruction, the verdict cannot stand. We therefore consider in more detail certain other alleged errors which we feel merit discussion. We refer to the following:

(1) Was it error to instruct the jury as follows (alleged error 2(c)):

---

[26] For example, alleged errors 2(d) and 2(s).

[27] For example, alleged errors 2(b), 2(n) and 2(o).

[28] For example, alleged errors 2(d), 2(e), 2(h) and 2(i).

[29] For example, alleged errors 2(l), 2(m) and 2(u).

[30] For example, alleged errors 2(g) and 2(h).

[31] For example, alleged errors 2(k), 2(l), 2(m) and 2(p).

[32] For example, alleged errors 2(j).

> "The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

The objection was because (a) it assumes monopoly power existed when its existence was a question of fact for the jury; (b) it is inapplicable to a conspiracy situation; (c) the only charge of misuse of monopoly power is by conspiracy; (d) it contains no reference to substantial restraint on interstate commerce; (e) it is silent on matter of intent.

This instruction is an exact quotation from *United States v. Griffith,* 1948, 334 U.S. 100, 107. It is difficult for this Court to see how a monopolist can make any business decision without its involving and using its monopoly power, nor how it can make any sale or purchase (for example) at an advantageous price, without gaining some competitive advantage. The statement is a broad one, but there were several other instructions given which modified and tempered its broadness, and which we must assume the jury understood and followed.

We find no merit to the objections urged, in view of the instructions taken as a whole and read together, as we are required to do on this appeal.

(2) Was it error to instruct the jury as follows (alleged error 2(r)):

> "Single strength orange juice . . . sold in interstate commerce may be the subject of restraint and monopoly under the Sherman Act."

The objection was because (a) this is a question of fact for the jury; (b) which was taken away from the jury.

The question of whether substantial interstate commerce exists is a question of fact for the jury. *Marks Food Corp. v. Barbara Ann Baking Co.*, No. 16095, decided December 28, 1959, as amended, 9 Cir., ... F. 2d .... *Cf. Beacon Theatre v. Westover*, 1959, 359 U.S. 500. But such question as to whether single strength orange juice was or was not a subject of restraint or monopoly was not, in our opinion taken away from the jury when the instructions are again read as a whole. Even considered singly, the instruction stated the jury *might*, not that it *must*, find that single strength orange juice was the subject of restraint and monopoly in interstate commerce. We hold there was no prejudicial error in this instruction.

(3) Was it error for the court to comment to the jury on the legal effect of Exhibits 84-A (plaintiff's re-organization plan, alleged error 2(aa)) and particularly the last paragraph of said comment:

> "The loss of $169,000 or $170,000 resulting from the sale of the real estate and plant referred to in the evidence should not have been taken into account during Winckler & Smith's fiscal year ending January 31, 1950, and Mr. Lynch, the expert witness for the defendants, should not have so considered it, and the court was in error in permitting him to do so in his computations."

The objection was because (a) when the loss was to be taken was not a matter of law; (b) the comment discredited appellants' expert witness, Lynch.

In view of our position hereinafter taken as to damages, error or lack of it in this instruction is immaterial.

(4) Was it error to refuse appellants' six instructions, nine to fourteen, inclusive, instructing the jury the "six acts" complained of were not unlawful (alleged error 3(b))?[33]

---

[33] "No. 9

"You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Orange and Exchange Lemon whereby Exchange Lemon processed oranges into single strength orange juice for Exchange Orange at cost and without profit to Exchange Lemon. Unless you find, therefore, from the preponderance of the evidence, that such agreement or arrangement was part of the conspiracy charged in the first causes of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Orange and Exchange Lemon as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 10

"You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Lemon and Exchange Orange whereby Exchange Orange processed lemons for Exchange Lemon at cost and without profit to Exchange Orange. Unless you find, therefore, from the preponderance of the evidence, that such agreement or arrangement was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Lemon and Exchange Orange as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 11

"You are instructed that there was nothing unlawful in Sunkist's setting its own price of by-product Valencia oranges available to independent processors at $40.00 per ton in 1951; and, unless you find, from the preponderance of the evidence, that the setting of such price was a part of the conspiracy charged in the first cause of action and was done for the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard Sunkist's setting of the $40.00 price as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 12

"You are instructed that there was nothing unlawful in the contract entered into between defendant Exchange Orange and

Each of these instructions referred to one of the six acts as being "nothing unlawful." They then went on to say that unless the acts were "part of a conspiracy" made with the purpose and effect "of eliminating competitors, you will disregard such agreement or arrangement as being of no consequence in the case." Thus, in effect, the act "X" was lawful, unless you find it was done in unlawful conspiracy. These instruc-

---

alleged co-conspirator TreeSweet Products Company, effective as of July 23, 1951; and, unless you find, from the preponderance of the evidence, that such contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged co-conspirator TreeSweet Products Company, as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 13

"You are instructed that there was nothing unlawful in the contract between defendant Exchange Orange and alleged co-conspirator E. A. Silzle Corporation, effective June 26, 1951; and, unless you find, from the preponderance of the evidence, that this contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged co-conspirator E. A. Silzle Corporation, as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 14

"You are instructed that there was nothing unlawful in the refusal of defendant Exchange Orange to enter into processing agreement with plaintiff for processing Valencia oranges during the 1951 season comparable to the contracts entered into between defendant Exchange Orange and alleged co-conspirators TreeSweet Products Company and E. A. Silzle Corporation; and, unless you find, from the preponderance of the evidence, that such refusal was a part of the conspiracy charged in the first cause of action and was done with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard the refusal as being of no consequence in this case, so far as the first cause of action is concerned."

tions were confusing. In view of all instructions given, and the nature of the case, we cannot hold the failure to give them, just as requested by defendants and appellants, constituted prejudicial error.

(5) Was it error to give the court's own instruction E (alleged error 2(y))[34] because of the court's ruling excluding so-called "after-acquired" information with respect to appellees' alleged watering of juice?

This again can better be decided under a discussion of errors charged with respect to the introduction of evidence.

(6) Was it error to fail to instruct the jury as to necessity of "*specific intent*" to eliminate a competitor in the first cause of action, and to exclude appellee as a competitor in the second cause of action (alleged errors 3(m), 3(n))? Appellants rely on *United States v. Griffith, supra,* and *Times-Picayune v. United States,* 1953, 345 U.S. 594, in support of both of their proposed instructions (nos. 8, 18).

> "It is, however, not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements.
>
> . . . Specific intent in the sense in which the common law used the term is necessary only where

---

[34] "The refusal of EOP, if such you find, to give a contract to plaintiff similar to the Silzle and TreeSweet Contracts must be judged on the basis of the evidence and instructions in this case and upon such knowledge and information as EOP and its officers, agents and employees had at the time of such refusal, if any, and not upon the basis of facts or information thereafter discovered or ascertained by EOP."

the acts fall short of the results condemned by the Act. The classical statement is that of Mr. Justice Holmes speaking for the Court in *Swift & Co. v. United States,* 196 U.S. 375, 396:

> 'Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee,* 177 Massachusetts 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.'
>
> * * * *
>
> "Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of [Sherman Act] §2, provided it is coupled with the purpose or intent to exercise that power." *United States v. Griffith, supra* at 105-7.

Thus we find it not necessary to find a specific intent to restrain trade or eliminate a competitor or to create a monopoly. It is necessary to find that the restraint of trade or monopoly results as a consequence of the critical act, and that such act was done with the specific intent of accomplishing that act, when the actor acts from such a position that the natural result or necessary effect accomplishes the proscribed act. The actual result need not be the object of the specific intent.

We therefore rule that there was no error in refusing the appellants' proposed instructions 8 and 18 (alleged errors 3(m) and 3(n)). *Cf. Times-Picayune v. United States, supra* at 614, where the Court said:

> "The . . . contracts must be tested under the Sherman Act's general prohibition on unreasonable restraints of trade. For purposes of §1 '[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint, or because it falls within the class of restraints that are illegal *per se*.' *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948).
>
> * * * *
>
> "[I]t '[is] unreasonable *per se* to foreclose competitors from any substantial market.'" *Id.* at 608.

Mr. Justice Clarke in *Times-Picayune* then goes on:

> "Since the requisite intent is inferred whenever unlawful effects are found, *United States v. Griffith*, 334 U.S. 100, 105, 108 (1948); *United States v. Patten*, 226 U.S. 525, 543 (1913), and the [tying cases] rule of *International Salt* is out of the way, the contracts may yet be banned by §1 if unreasonable restraint was either their object or effect." *Id.* at 614.

In conclusion, we find no reversible error in the instructions, other than error that need not be considered in view of our ruling as to damages, hereinafter to be discussed.

C. *Was there error in rulings on admission and rejection of evidence?*

1. *As to Liability*

Appellants urge that much evidence offered by them was wrongfully excluded by the trial court. They charge that this evidence went not only to the measure of damages, but to causation and liability. Motions for a directed verdict and for judgment *non obstante veredicto* were made, not only upon the grounds that plaintiffs had failed to prove (a) any conduct outside the agricultural cooperatives' exemptions; (b) any combination or conspiracy to restrain trade, or (c) any monopoly control or capacity or intent, but also upon the grounds (d) that plaintiffs had failed to prove injuries proximately resulting from any act of defendants, or (e) the amount of any damages claimed to have resulted to plaintiffs.

When Winckler asked in his second conversation with Finley for a contract similar to the TreeSweet and Silzle contracts, he was told he could not have the same type of contract. "I told him I . . . was having plenty of trouble . . . with those we did have contracts with wanting more fruit, rather than less fruit, so I just couldn't give him a contract and cut off our old customers."

Appellants sought to introduce evidence "heard from others in the industry" that Winckler & Smith's juice was regularly watered and adulterated, and was of poor and inferior quality, and that such facts were in defendants' corporate "mind" when it refused to deal with Winckler & Smith in 1951, and this excused its "refusal" to so deal. This, of course, was, if admissible, material not only on the issue of liability, but also on the nature and extent of damages that proximately resulted from any liability found.

The difficulty with appellants' position with respect to admissibility on the question of liability was that specific information as to such "watering" had not reached the appellants at the time of their "refusal" in 1951. They had suspected that such facts existed; there had been rumors thereof, but no substantiation amounting to proof. We take it if a person charged with making a decision (which may or may not be a violation of law, dependent upon the intent and purpose and effect which accompanies it) is willing to rest such decision on surmise, suspicion, conjecture, and intuition, he has that right, but so acts at his peril. He may be called upon to justify it. Subsequently discovered facts cannot be introduced to fortify the strength of the facts upon which such previous surmise, conjecture and suspicion was based, but subsequently discovered facts could be utilized as a defense to the amount of damages claimed to have proximately flowed as a result of defendants' actions, whether such facts were known or unknown at the time the decision was made.

Appellants offered to prove "a statement by a former sales manager of Winckler & Smith Company, who, when asked whether Winckler was watering his product, this fellow said, 'I don't know, because I was instructed never to go into the plant.'" If we assume that this alleged statement goes *beyond* the expressed lack of factual knowledge it discloses on its face, and if it does purport to express a fact, it was not offered to establish the truth of the facts it purportedly contained, but the condition or state of Finley's mind when he talked to Winckler.

Appellants' offer of proof went farther than to show a condition of mind. It was that Finley would testify that Charles Sisk, when asked if Winckler & Smith watered their products, said to Finley:

> "I couldn't prove it in court, but I am sure they do. Winckler, though, ordered me strictly never to go out in the plant, and I was never allowed in the plant while I was sales manager."

Again this expressed an unprovable opinion[25] in a third person that watering of the orange juice took place. But it was offered, not to prove watering, but that such a statement had been made to Finley—a statement that might affect his state of mind. In refusing the offer, the court ruled not that it was inadmissible to prove the state of mind, but was inadmissible as hearsay. The court stated:

> "Objection sustained as to conversation with Charles Sisk, the former sales manager. *If you want to bring Sisk in, we will cross that bridge at that time, as to what he can testify to.*" (Emphasis added.)

Part of the offer made was to show that at the price Winckler & Smith sold certain Arizona grapefruit juice, it could not make a profit. From this Finley concluded that water and sugar must have been added. As the trial court pointed out, another conclusion of equal validity would be that the sales were made by Winckler & Smith at a price which lost it money. Many factors, such as amount of stock on hand, finances of the company selling, or a dozen other factors might have brought about a sale at a losing price—and none of such reasons would be the basis for a conclusion that the juice was watered.

---

[25] Part of the offer of proof was not only that certain persons had the opinion the Winckler & Smith juice was watered, but that "there is no analytical method known by which it can be determined whether water, sugar, or acid have been added to natural juice in order to compare that with the finished product. It is only possible to determine whether adulterants of that sort have been used by comparing an analysis made before [adulteration] and an analysis made after." Appellees, apparently surprised at this offer of proof, did not dispute its accuracy, but its admissibility.

The trial judge concluded that the offer did "nothing but add and inject into the case other issues," and sustained the objection. Additionally, the offer was refused because the same witness, Finley, had testified the reason for his refusal to sell to Winckler was that he was having trouble with his existing contracts, because of a shortage of fruit. Or, as the trial court stated it, "because of the capacity that was involved." Of course, if Finley had more than one reason for refusing to deal with Winckler, he had the right to detail it, or them, to the jury. That he rested on but one explanation under cross-examination by plaintiff-appellee is no reason he could not have enlarged his reasons on direct examination. This presents a serious question as to whether error was not committed by the trial court. However, the court gave a further reason why he would not admit such evidence. The court ruled as follows:

> "I have already sustained the objection to similar matters on the further ground it is an issue that was never called to the attention of the court, was not listed as an issue that you intended to produce

at this trial, was raised for the first time during the trial, and my previous comments on objections will be incorporated here at this point."

An examination of the pre-trial proceedings contained in the transcript before us indicates the court's statement as to issues raised was correct. We are inclined to think the ruling made was within his general judicial discretion as to the method of trial of the case, at least on the issue of liability, particularly in view of what the court did permit counsel for appellants to introduce into evidence.

Counsel for appellants presented evidence mentioned in his offer of proof which had not been ruled out by the trial judge. Finley, to show his state of mind in 1951, testified (a) to his unsatisfactory experience with Winckler in 1947 (when Finley had helped Winckler with scarce cartons, only to have Winckler's promises unfulfilled, with a subsequent recovery to Sunkist of eleven cents on the dollar; (b) to his unsatisfactory experience with Winckler & Smith in 1947 on the purchase of hot concentrates—"high yeast and bacteria count—poor pasteurization"; (c) his dissatisfaction with the Citromats (orange squeezing machines) used by Winckler & Smith prior to 1951. The following question was then asked of Mr. Finley, still on direct examination, and he gave the following answer:

> "Q. Mr. Finley, at any time in 1951, assuming that you had had a surplus of fruit available for processing, would you have been willing to enter into any kind of a processing agreement with the Winckler-Smith Company?
>
> "A. I would never have entered into a processing agreement with the Winckler-Smith Company."

No additional offer of proof, nor any attempt to introduce evidence was made by appellants. We can find no ruling of the trial court on the issue of liability that constitutes error so prejudicial as to constitute reversible error.

2. *As to Damages*

This brings us to the matter of Exhibits I-1 to I-4, identified by witness Opal Smith (a laboratory technician employed by Winckler & Smith, as Opal Comstock, in 1949 until 1952, inclusive) as "Daily Laboratory Statistics" maintained by Winckler & Smith at their Anaheim plant, delivered to Mr. Winckler's desk.

As an example of her testimony, this witness testified that on one day the acid test in the raw juice was 1.54%; while in the canned product it was 1.37% acid. This change in acidity, said the witness, was accomplished by the addition of water.

Appellees took the position that the information disclosed by these records was not known to Sunkist when its Mr. Finley refused to contract with Winckler; that the fact of adulteration thus could not have entered into the refusal to contract, and was therefore immaterial. This position was taken by appellees, despite the testimony of the surmise or conjecture or conclusion of Sunkist's officer that the Winckler product was watered. If this evidence were offered solely for the purpose of explaining Sunkist's refusal, or adding a second reason for the refusal, it is conceivable that the records offered, at the then state of the record, would not be material, *i.e.*, were what counsel for appellees described as "after the fact evidence," a phrase adopted by the trial judge. For that reason, we are not prepared to rule that the exclusion was error, if the limited purpose of offering the evidence was to show Finley's state of mind.

But such evidence was offered additionally for two separate purposes—to impeach the plaintiff Winckler as to his knowledge as to whether or not his products were adulterated (as well as prove the fact of adulteration), and secondly, it was offered on the question of damages—to show the Winckler & Smith product was an inferior and not a "Grade A" product, as Winckler had testified.

And, of course, if admissible for any purpose, the documents should have been admitted, *Petroleum Carrier Corp. v. Snyder,* 5 Cir. 1947, 161 F. 2d 323; *Estate of Clark,* 1949, 93 Cal. App. 2d 110, 116, 208 P. 2d 737, with necessary precautionary instructions requested and given to the jury.

The trial judge originally saw the admissibility of such evidence on the issue of damages. But he saw difficulties in any effort which defendants-appellants might make to show (a) complaints by dissatisfied users that the product was watered; (b) loss of sales due to adulteration.

Counsel for appellants stoutly maintained he could produce such testimony, and stated: "getting back to the causation question . . . whether his product was good or bad has a bearing on why he went out of business."

Counsel for appellants urged that in view of Mr. Winckler's previous testimony that "Fancy" and "Fancy California" were the equivalent of Department of Agriculture "Grade A Fancy," this evidence was admissible, for Mr. Winckler had testified that under the government definitions of orange juice, a citrus product that is sold as orange juice contains no ingredient other than the juice extracted from fresh fruit; and that sweetened orange juice contains no ingredient other than the juice with dry sugar added.

Counsel for appellants further offered to prove that Winckler & Smith added tap water to the juice, rather than "merely" condensate. Winckler had denied he had done this, and agreed that "introducing tap water" was not permissible.

Counsel for appellants further offered to prove that the records offered "were regularly shown to Mr. Winckler, they bear his initials showing he has seen them. By one witness I will show they discussed this practice of adding water to these products."

The trial judge then discussed the admissibility of these records at some length. He commented on the lack of reference to the exhibits at the pre-trial; the "obvious purpose of this evidence is to bootleg into the record after-knowledge which the defendants did not have"; the possibility of using the records for impeachment, and if so, what his duty would be in that regard;[38] and further stated:

> "[T]his matter of taking an exhibit that might be admissible for one small purpose and tossing it in a case where it can have the effect of being

---

[38] "[B]ut if it does go into evidence as impeachment, the jury will certainly be told, and told in no uncertain terms what it will not be considered for, and when I get through telling them what it is not being considered for, I am afraid that the exhibit will not be as effective as the defendants think it might be."

used for a different purpose presents a problem. It presents a problem to the Court in its right to control the admissibility of evidence in a case.

* * * *

"An offer that you made injects issues in this case where this case could go on forever."

The court then sustained the appellees' objections. On its admissibility on the question of damages, very little was said.[37]

We think the evidence was clearly admissible on the issue of damages, particularly in view of the specific terms of the offer with respect to causation, and specifically, dissatisfied users with resultant loss of sales. Such evidence was material, and we must assume the appellants were able to produce it, had they been allowed to do so. We find the exclusion of such evidence was error. While it remains a close question as to whether this error is not prejudicial to the issue of liability, we believe that its exclusion might come within the trial court's discretion as to the control of evidence as to collateral issues. We therefore do not hold it was prejudicial error on the issue of liability. On the other hand, we find it clearly was prejudicial on the issue of damages.

The same conclusion applies to the proffer of proof by appellants of testimony by the witness William Rodgers, former plant superintendent of Winckler &

---

[37] "As to the question of damages, that they would go to the question of damages, or causation, alleged inferior product, we are not trying a Food and Drug case.

"As far as we know, maybe people liked orange juice with water in it as well or better than orange juice without water in it, assuming that you could prove that tap water was put in it."

Smith, that that witness had observed that single strength orange juice had been stretched by the addition of water and other additives to the extent of approximately twenty per cent—and that Mr. Winckler knew of this addition, and was satisfied to let it continue.

Appellants likewise claim error in restrictions placed upon them by the court's rulings preventing them from exploring Winckler & Smith's earlier business history —prior to 1951—or its alleged under-capitalization and inefficient operations; the court's position that losses reported for income tax purposes did not necessarily mean actual business losses; the court's refusal to admit Winckler's letters in 1951 explaining his inability to deliver juice due to other reasons, and the court's rulings respecting witness Hodge's mythical 12,000 tons theory of loss, and the appellants' attack thereon.

Appellants point out, as most important rulings against them, the following:

(1) Appellants sought to show that after the Chapter X reorganization, Mr. Winckler and other stockholders had withdrawn some $250,000 from the company in a two and one-half year period by way of salary, bonuses, debt forgiveness, and rentals. Appellees' objection was that this line of proof was "wholly irrelevant and immaterial . . . and not tending to prove or disprove any of the issues of this lawsuit." The objection was sustained, with the comment that appellants could prove the condition of the company in 1951. Later, the trial court relaxed this ruling somewhat to permit interrogation as to salary, allowances and bonuses paid Mr. Winckler in 1949, 1950 and 1951, but not in other years; and he still

excluded Exhibit BI which summarized the figures in the three years mentioned.

(2) While admitting evidence of the ultimate fact that Mr. Winckler had been forgiven a $38,000.00 indebtedness owing the corporation, the court excluded any breakdown of that figure. It was sought to show by this breakdown that substantial amounts of corporate funds were expended to enable Winckler to buy out one of the company's stockholders; and that the corporation, through its Chapter X receiver objected to the former's claim in this regard. The objection to this evidence was not clearly expressed, but seems to have been irrelevancy and "that the representation could not be supported by this witness [Mr. Lynch, appellants' accountant]." The objection, whatever it might have been, was sustained.

(3) Appellants were not permitted to show that in 1949 and 1950—the two years claimed by plaintiff to have been profitable ones—Winckler & Smith filed income tax returns showing a net loss, rather than a profit, in each of those years. The objection to this testimony stated no grounds—it was merely "I object to any inquiry along that line." That "objection" was sustained. Later appellees' counsel spoke of it being out of order, in the middle of the trial, to require plaintiff to produce further records, *i.e.*, the tax return for 1949; and the "objection" was again sustained on the ground the request came too late, and it would be going into extraneous issues. However, copies of state or federal returns for 1949, 1950 and 1951, with supporting schedules, had long since been identified by Mr. Winckler. And when those copies were offered in evidence they were excluded, the objection

then being irrelevancy. Furthermore, when the court's attention was called to the fact that the 1949 return had been requested in appellants' pre-trial discovery long before the trial, he declined to change his ruling.

(4) It was appellants' theory that in calculating the loss or gain from the mythical 12,000 tons, as well as to arrive at the true cost of fruit under a Tree-Sweet type arrangement, it was necessary to take into consideration the returns from oil and peel which, under such an arrangement, would have belonged to EOP. Accordingly, they prepared computations which took that factor into account and which showed that the cost of the fruit would be considerably more than Mr. Hodge's calculated figure and that the result, *vis-a-vis* processing of the 12,000 tons, would have been an additional loss. They also sought to have their accountant witness testify that this factor was omitted in Hodge's computations. The effort proved fruitless. The trial judge, largely on his own motion and for the reason that he thought appellants' theory to be illogical excluded the proffered evidence, both oral and documentary, on this subject. At first the trial judge indicated that he would exclude it only as direct rebuttal of or comparison with Plaintiffs' Exhibit 69-A in which the results of Hodge's theory were incorporated. Ultimately, however, he excluded the evidence entirely.

(5) A number of letters issued by Winckler & Smith were offered as containing statements, *i.e.*, admissions, showing that in 1951 its inability to furnish orange juice was due to the short California supply of fruit, heavy local bookings by Winckler & Smith, or excessive Florida inventory which had driven prices down.

No objection was made as to foundation or authenticity; but it was objected that the person signing the letters had testified earlier. The objection was sustained.

Without going into precise details as to which portions of this evidence to which objections were sustained should have been admitted, we can say that we believe appellants were denied a fair opportunity to present their defense on the issue of damages to the jury. For example, income tax returns are frequently admissible, even though capable of being explained away, *Roche v. Commissioner,* 5 Cir. 1933, 63 F. 2d 623; *United States v. Farrell,* D. Conn. 1929, 35 F. 2d 38, and the business experience and operations and profits of previous years are not always, or necessarily, inadmissible.

The obligation is on a plaintiff in a Sherman Act case to prove damages recoverable in an action at law. *Locker v. American Tobacco Co.,* 2 Cir. 1914, 218 Fed. 447.

It cannot be said that the erroneous exclusion of evidence directly bearing on damages would not have affected the verdict. The error is therefore presumed to be prejudicial. "[A]n erroneous ruling which relates to the substantial rights of the party is ground for reversal unless it *affirmatively* appears from the whole record it was not prejudicial." *McCandless v. United States,* 1936, 298 U. S. 342, 347-8.

While a great deal of leeway is granted a jury in assessing damage once the fact of injury has been established, the damages alleged must be established as a direct and proximate result of defendant's violation of the Sherman Act with reasonable certainty. *Story Parchment Co. v. Paterson, etc. Paper Co.*, 1931, 282 U. S. 555, 562; *Flinkote Company v. Lysfjord*, 9 Cir. 1957, 246 F. 2d 368; *Wolfe v. National Lead Co.*, 9 Cir. 1955, 225 F. 2d 427, 431.

Plaintiffs-appellees introduced by means of the expert testimony of Mr. Hodge evidence of alleged loss of profits. This loss was based upon several presumptions:

First: That 12,000 tons of Valencia oranges were available to appellees;

Second: That the amount of juice taken therefrom would have produced a certain amount of canned juice, which would have been sold at a certain price, *i.e.*, the same price Sunkist charged TreeSweet *before* discount and allowances;

Third: That processing and other costs to Winckler in 1951 would be the same in 1951 as they were in 1949.

The evidence was that Winckler & Smith usually had received less for its orange juice than the price Sunkist usually received. There was evidence the equipment used by Winckler & Smith was not as efficient and modern as that of other canners. The demand for its juices was surely not as heavy as the demand for Sunkist brands or TreeSweet juice. The number of its single strength juice customers was known to have declined substantially in 1950 over 1949.

But beyond all the foregoing, if such difficulties as to proof of damages were overlooked, a further assumption would be required, that the lack of dealing by Sunkist with Winckler & Smith was a proximate cause of the loss of Winckler & Smith's plant and business.

We need not go so far as to class this case with *Wolfe v. National Lead Co., supra,* where there was no proof of damage, and therefore dismiss the case. There this Court noted that the plaintiffs below

> "ask the court to disregard the apparent probative effect of their net profit figures [of their entire business] . . . and to consider only that portion of their business relating to titanium pigments, in this, they seek to have the court isolate the titanium pigment portion of their business and consider it separate and apart from their other operations. In this way, they attempt to establish the fact that they received a higher return on the titanium pigment . . . in 1949 than they were able to secure in 1947 and 1948." *Id.* at 430.

Here, if we substitute "Valencia oranges suitable for single strength juice" for "titanium pigments," the language is apt.

The record shows that in 1950, the year previous to the one here involved, the oranges sold to Winckler & Smith by Sunkist amounted to but 1.54% of the total used by Winckler & Smith. From 1948 on, Sunkist had never supplied more than 18%. The balance had been secured from other suppliers, principally Morgan Ward. In 1950, the number of oranges sold by Sunkist to Winckler & Smith was reduced to a mere trickle —1.54%. This was not claimed to be a proximate cause of the loss of the plant. Yet when Sunkist "refused" to sell 1.54% of the total to Winckler & Smith, and other producers refused to sell a larger percentage, appellees contend that *the sole* proximate cause of the damage suffered, including the loss of the plant, was the appellants' so-called "refusal."

At the time the plaintiffs below requested oranges from Sunkist the encumbrance on the Winckler & Smith property was in default and a sale on account thereof already set. Thus the loss of the plant, on the evidence in the record before us, becomes collateral, remote and conjectural. *Savings Bk. of So. Cal. v. Asbury*, 1897, 117 Cal. 36, 48 Pac. 1081; *Hartman v. Rogers*, 1886, 69 Cal. 643, 11 Pac. 581; *De Liere v. Goldberg Bowen & Co.*, 1916, 30 Cal. App. 612, 159 Pac. 197. Whether it will remain so on a new trial of the issue of damages, we do not here pass upon.

Appellees' proof as to loss of the plant rested on the testimony of Robert Hodge. He just testified that from 1946 to 1949, the company apparently lost $224,000 plus. The net worth of the company was $30,000 on July 31, 1949. From February 1, 1949 to June 31, 1950, the company increased its net worth to $137,000. Operating from February 1, 1950 to January 31, 1951, there was an operating profit of $40,000. From February 1, 1951 to July 31, 1951, there was a loss of $152,000.

On April 16, 1951, the Winckler & Smith Company exercised its option to repurchase the plant which it had previously lost. The company issued 26,535 shares of its preferred stock, paid $17,325 in cash, assumed $50,499.04 on the mortgage, and listed its fixed assets at $721,000 plus, making a capital surplus of $343,000 plus. Exhibit 65 showed that for the year ending January 31, 1952, $156,000 in sales were from Florida processed products, and $528,735.91 from California operations, with a loss of $184,523.20 due to "less sales in 1952" and "continuing overhead."

Mr. Hodge, the expert witness, was a Certified Public Accountant. He was not familiar with the accounting of any juice processor other than Winckler & Smith. But he was allowed to testify that if 12,000 tons of fruit had been made available to Winckler & Smith by anyone on the same terms as was made available to TreeSweet, then *based on the 1949 and 1950 operations of Winckler & Smith*, it would have had a profit of $10,000 in the year ending January 31, 1952. This hypothetical question excluded any reference to conditions in the industry generally in any year, or even to operations of Winckler & Smith in 1951. In explaining his answer, the witness stated he *excluded* Winckler & Smith's processing costs for 1950, but used only 1949 costs. He used general administrative costs of 1949. He then deducted, not selling costs *per ton*, but "Winckler & Smith's actual selling cost *in the year 1952*, as shown in my report, of $87,652.40." (Emphasis added.)

Computed on the same basis, if 15,000 tons had been sold by Sunkist to Winckler & Smith, the profit would have increased from $10,231.45 to $54,026.45.

Without going into the credibility of such testimony, or the restrictions placed upon his cross-examination by the court's rulings on evidence, or any particular matters he testified to (as for example, the matter of deferred charges which though actually paid in one year were placed for bookkeeping reasons in another), we fail to find in the hypothetical statement of facts upon which the opinion of this expert was based that fair statement of all the facts in the case which is required as a basis of any hypothetical question. *Fort Worth & Denver Railway Company v. Janski,* 5 Cir. 1955, 223 F. 2d 704; *Dairymen's Milk Co. v. McCormick Co.,* 3 Cir. 1940, 114 F. 2d 736.

We are completely satisfied that the question of appellees' damages, as presented to the jury, rested upon surmise, conjecture, and guess work, and that the amount found as damages was not logically or legally inferrible from the facts in evidence before the jury. The expert opinion was a guess based on conditions contrary to fact. It was, in reply to the hypothetical question, too speculative to be admissible. *Baush Mach. Tool Co. v. Aluminum Co. of America,* 2 Cir. 1935, 79 F. 2d 217, 227; *Carroll v. Magnolia Petroleum Company,* 5 Cir. 1955, 223 F. 2d 657.

We are satisfied that the jury's determination of liability must be affirmed, and its determination of the amount of damages reversed.

D. *Was there error in affixing attorneys' fee of $195,000?*

While it is the duty of this Court "to protect against vicarious generosity in the matter of attorneys' fees" (*Twentieth Century-Fox F. Cor. v. Brookside Th. Corp.,* 8 Cir. 1952, 194 F. 2d 846, 859), we cannot say as a matter of law that in a case like this, tried at great length below; argued twice on this appeal; and now to be reversed partially so that a new trial must be had below on the issue of damages, that before counsel for appellees obtain satisfaction of judgment for their client that $195,000 as attorneys' fees is too large a sum, or a figure that would shock the conscience. We do not know what amount will be recovered by appellees on a second partial trial below. When that is determined, finally, the sum heretofore awarded as attorneys' fees may be too large, or conceivably, too small. We cannot prognosticate, nor guess. We do not reach that issue. It can be raised below by either side, and if necessary, on subsequent appeal. We will not now disturb it, but assume that on remand the correct amount will be in issue below.

The judgment heretofore rendered on the jury's verdict is affirmed on the issue of liability, and reversed and remanded on the issue of the amount of damages.

(Endorsed) Opinion Filed Sept. 30, 1960.

Frank H. Schmid, Clerk.

Opinion Modifying Original Opinion.

On Petitions For Rehearing

Before: Stephens, Barnes and Merrill, Circuit Judges

Upon petitions for rehearing by both appellants and appellees, we modify the opinion heretofore filed as follows:

I. The balance of the first full sentence after the word "or", page 24, line 4, of slip opinion, is stricken, and inserted in its place is the following:

> ". . . (2) the alleged illegal sole trader decision not to sell, made *when such refusal would, as a natural consequence,* illegally restrain trade or commerce, and implemented by other illegal means beyond the bare refusal, or (3) a similar unilateral decision not to sell, except at a fixed price, made from a monopoly position, *and resulting, as a natural consequence, in the elimination of a competitor.*"

II. On page 50, line 18 from top of slip opinion, the language "and a sale on account thereof already set." is deleted.

The petitions for rehearing are severally denied. The suggestion for a rehearing *en banc* is rejected.

/s/ ALBERT LEE STEPHENS
STANLEY N. BARNES
CHARLES M. MERRILL
United States Circuit Judges.

(Endorsed) Order, filed May 5, 1961.
Frank H. Schmid, Clerk

APPENDIX B.

Statutes Involved.

SHERMAN AND CLAYTON ACTS [15 U. S. C. A., Secs. 1, 2, 15, 17]

§1. Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, §2, 26 Stat. 209.

§15. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 731.

§17. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, §6, 38 Stat. 731.

CAPPER-VOLSTEAD ACT [7 U.S.C.A. Secs. 291, 292]

§291. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First: That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second: That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third: That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members. Feb. 18, 1922, c. 57, §1, 42 Stat. 388.

§292. If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district Court, shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be *prima facie* evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof. Feb. 18, 1922, c. 57, §2, 42 Stat. 388.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 16 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 241

SUNKIST GROWERS, INC., a corporation, and THE EXCHANGE ORANGE PRODUCTS CORPORATION, a corporation,

Petitioners,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation, and RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,

Respondents.

MEMORANDUM FOR RESPONDENTS.

WILLIAM C. DIXON,
417 South Hill Street,
Los Angeles 13. California,

HOLMES BALDRIDGE,
77 West Washington Street,
Chicago, Illinois,
Attorneys for Respondents.

Of Counsel:
HARRY M. IRWIN,
215 West Fifth Street,
Los Angeles 13, California,
Attorney for Trustee and Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

IN THE

Supreme Court of the United States

October Term, 1961

No. 241

SUNKIST GROWERS, INC., a corporation, and THE EXCHANGE ORANGE PRODUCTS CORPORATION, a corporation,

Petitioners,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation, and RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,

Respondents.

MEMORANDUM FOR RESPONDENTS.

Respondents herein are petitioners in No. 275. Therein review was sought of a part of the same judgment below upon the grounds and for the reasons therein stated. While we think that all of the questions raised in the instant petition were correctly decided by the court below under controlling decisions of this Court, we do not oppose review herein provided review is also granted in No. 275. This Court would then have the entire controversy before it for such disposition as it sees fit to make.

Respectfully submitted,

William C. Dixon,
Holmes Baldridge,
Attorneys for Respondents.

Of Counsel:
Harry M. Irwin,
Attorney for Trustee and Respondent.

SUBJECT INDEX

PAGE

Opinion below 1

Jurisdiction 1

Statutes involved 2

Question presented 2

Statement of the case 3

1. Introductory description of the case and the parties 3
2. The Sunkist cooperative organization 5
3. Respondents' theory of liability and the evidence relating to it 10
4. How the question arose and was decided 17

Argument 21

I.

The Capper-Volstead exemption from the antitrust laws of the collective processing and marketing of farmers' products by their agricultural cooperatives is as applicable when the farmers are formally organized into several cooperative entities as it is when there is only one such entity 21

II.

The disposition of this case by the lower courts erroneously denied to petitioners the benefits to which agricultural cooperatives are entitled under the Capper-Volstead Act 33

Conclusion 37

Appendix. Statutes involved .... App. p. 1

TABLE OF AUTHORITIES CITED

CASES

PAGE

Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797 29

Apex Hosiery Co. v. Leader, 310 U. S. 469 30

Appalachian Coals v. United States, 288 U. S. 344 28

April v. National Cranberry Assn., 168 F. Supp. 919 22

Associated Press v. United States, 326 U. S. 1 21

Atlantic Coast Line R. Co. v. Tiller, 142 F. 2d 718 19

Baltimore & O. R. Co. v. Reeves, 10 F. 2d 329 19

Federal Trade Com. v. Beech-Nut Packing Co., 257 U. S. 441 31

Federal Trade Com. v. Raymond Bros. Clark Co., 263 U. S. 565 .... 31, 36

Gooch v. Oregon Short Line R. Co., 258 U. S. 22 26

Kiefer-Stewart v. Jos. E. Seagram & Sons, 340 U. S. 211 .... 31, 32, 33

Locker v. American Tobacco Co., 218 Fed. 447 29

Marine Cooks & Stewards v. Panama S.S. Co., 362 U. S. 365 29

Maryland v. Baldwin, 112 U. S. 490 19

Maryland & Virginia Prod. Asso. v. United States, 362 U. S. 466 .... 24, 27, 35, 37

Nelson Radio & Supply Co. v. Motorola, 200 F. 2d 911, cert. den. 345 U. S. 925 .... 28, 30

North Amer. G. Corp. v. Allan, 184 F. 2d 387 19

Olmstead v. United States, 277 U. S. 438 26

Samuel v. United States, 169 F. 2d 787 19

Schine Chain Theatres v. United States, 334 U. S. 110 .... 32, 33

Smith v. Onyx Oil & Chem. Co., 218 F. 2d 104 29

Stokes v. United States, 264 Fed. 18 19

PAGE

Tigner v. Texas, 310 U. S. 141.. 21

Times-Picayune Pub. Co. v. United States, 345 U. S. 625.... 36

Travelers Ins. Co. v. Wilkes, 76 F. 2d 701........................ 19

Union Pacific Coal Co. v. United States, 173 Fed. 737.......... 30

United States v. Borden Co., 308 U. S. 188..........24, 26, 27, 37

United States v. Colgate Co., 250 U. S. 300........................ 36

United States v. Columbia Steel Co., 334 U. S. 495.........31, 33

United States v. Crescent Amuse. Co., 323 U. S. 173........... 32

United States v. DuPont De Nemours & Co., 353 U. S. 586.. 28

United States v. Hutcheson, 312 U. S. 219........................ 29

United States v. Parke, Davis & Co., 362 U. S. 29............... 31

United States v. Timken Roller Bearing Co., 83 F. Supp. 284, aff'd 341 U. S. 593..............................19, 20, 32, 33

United States v. Yellow Cab Co., 332 U. S. 218.................. 33

Van Beeck v. Sabine Towing Co., 300 U. S. 343.................. 26

Weir v. Chicago Plastering Institute, 272 F. 2d 883.............. 30

Wilmington Mining Co. v. Fulton, 205 U. S. 60..................... 19

MISCELLANEOUS

61 Congressional Record, p. 1033.. 22

61 Congressional Record, pp. 1035, 1038, 1042...................... 22

61 Congressional Record, p. 1036... 25

61 Congressional Record, p. 4332... 23

62 Congressional Record, pp. 2049, 2257, 2163, 2261............. 22

62 Congressional Record, pp. 2058, 2059.............................. 22

62 Congressional Record, p. 2122 ....22, 23

62 Congressional Record, p. 2277.. 25

62 Congressional Record, pp. 2453-2455 23

	PAGE
House Report No. 24, 67th Cong., 1st Sess., pp. 1-2	25
House Report No. 24, 67th Cong. 1st Sess., pp. 2-3	22
36 Opinions of Attorney General, pp. 326, 339	26
Report of the Attorney General's National Committee to Study the Antitrust Laws (Govt. Print. Off. 1955), pp. 30-36	33
Senate Report No. 236, 67th Cong., 1st Sess.	23

STATUTES

Act of July 2, 1890 (26 Stat. 209)	2
Act of October 15, 1914 (38 Stat. 731)	2
Act of February 18, 1922 (42 Stat. 388)	2
Act of December 29, 1950 (64 Stat. c. 1184)	28
Capper-Volstead Act, Sec. 1	2
Clayton Act, Sec. 6	2
Clayton Act, Sec. 7	28
Sherman Act, Sec. 1	2, 18, 20, 28, 30
Sherman Act, Sec. 2	2, 18
United States Code Annotated, Title 7, Sec. 291	2, 25, 26, 36
United States Code Annotated, Title 15, Sec. 1	2
United States Code Annotated, Title 15, Sec. 2	2
United States Code Annotated, Title 15, Sec. 15	29
United States Code Annotated, Title 15, Sec. 17	2
United States Code Annotated, Title 15, Sec. 18	28
United States Code Annotated, Title 28, Sec. 1254(1)	1
United States Code Annotated, Title 29, Chap. 6	29

TEXTBOOK

13 Law and Contemporary Problems, p. 488, Hanna, Antitrust Immunities of Cooperative Associations	27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., a corporation, and THE EXCHANGE ORANGE PRODUCTS COMPANY, a corporation,
Petitioners,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation, and RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,
Respondents.

BRIEF FOR PETITIONERS.

Opinion Below.

The opinion of the Court of Appeals is reported in 284 F. 2d 1, and is printed at pages 3950-4005 of the Record. An order modifying that opinion in certain particulars is not reported, but is printed at pages 4006-4007 of the Record. There was no opinion in the District Court.

Jurisdiction.

1. Jurisdiction of this Court is invoked on the ground that review is sought of the judgment of a United States Court of Appeals reviewing a judgment of a United States District Court in an action arising under the antitrust laws of the United States. The statutory provision believed to confer that jursdiction is 28 U.S.C.A., sec. 1254(1).

2. The judgment of the Court of Appeals was entered on September 30, 1960. [R. 3950, 4005-4006.] A timely petition for rehearing was filed by these petitioners, which was denied on May 5, 1961. [R. 4008.] The petition for certiorari was filed on July 20, 1961.

Statutes Involved.

The statutory provisions involved are sections 1 and 2 of the Sherman Act [*Act of July 2, 1890,* 26 Stat. 209; 15 U.S.C.A., secs. 1, 2]; section 6 of the Clayton Act [*Act of Oct. 15, 1914,* 38 Stat. 731; 15 U.S.C.A., sec. 17]; and section 1 of the Capper-Volstead Act [*Act of Feb. 18, 1922,* 42 Stat. 388; 7 U.S.C.A., sec. 291]. They are set forth in the appendix to this brief.

Question Presented.

Where a group of citrus fruit growers form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act [7 U.S.C.A., sec. 291]—is an unlawful conspiracy under sections 1 and 2 of the Sherman Act, established upon proof only that these growers, through the agency of these three cooperatives, agreed among themselves with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the byproducts thereof processed and marketed by them?

Statement of the Case.

1. Introductory Description of the Case and the Parties.

The respondent Winckler & Smith Citrus Products Co. on February 1, 1952 commenced an action in the District Court for the Southern District of California to recover treble damages from the defendants for an alleged conspiracy to restrain and monopolize interstate trade in citrus fruit and canned fruit juices.[1] [R. 3, 13-14, 23.] Less than two months later Winckler commenced a reorganization proceeding under Chapter X of the Bankruptcy Act. The other respondent, Ronald Walker, was the trustee of Winckler's estate in that proceeding and was permitted to intervene in the action. [R. 24-25.]

Originally, the defendants in the action were Growers, EOP, ELP and TreeSweet. [R. 3.] The complaint, however, was twice amended—the last time shortly before the close of the trial to "conform to evidence." [R. 72-73, 250-251.] By that time ELP and TreeSweet had been dropped as defendants and the cause dismissed as to them—with prejudice as to ELP and without prejudice as to TreeSweet. [R. 67-72, 100-101, 144.] TreeSweet and ELP, however, were retained as alleged co-conspirators; and in the meantime Silzle had been added to that category. [R. 78, 255-256.]

---

[1] It will be convenient to refer to Winckler & Smith Citrus Products Co. as *"Winckler."* And also, to refer to the Sunkist agricultural cooperative organization of fruit growers collectively as *"Sunkist"*; to their marketing agency, Sunkist Growers, Inc., as *"Growers"*; to their orange-processing agency, The Exchange Orange Products Company, as *"EOP"*; and to their lemon-processing agency, Exchange Lemon Products Company, as *"ELP."*

TreeSweet Products Co., and E. A. Silzle Corporation, alleged to have been co-conspirators [see, p. 4, *infra*] will be referred to as *"TreeSweet"* and *"Silzle"* respectively.

These amendments narrowed the general nature of the action to one to recover treble damages for an alleged conspiracy, among Growers, EOP, ELP, TreeSweet and Silzle, (1) to restrain interstate trade in "canned citrus fruit juice produced and processed in the State of California and marketed throughout the United States . . ." [R. 265]; and (2) to monopolize that part of interstate trade "in natural and frozen concentrate fruit juices which is represented by the production of natural and frozen concentrate fruit juices processed in California . . . particulary single-strength Valencia orange juice . . ." [R. 271.]

After an extended trial, the cause was submitted to a jury under a charge which permitted a verdict against the defendants even if the conspiracy found to have been engaged in consisted only of concert of action within the Sunkist cooperative organization in processing and marketing the fruit of its grower-members. Conspiracy, combination or contract with someone outside of the Sunkist cooperative system was not made an essential element of a finding that the antitrust laws had been violated. [See pp. 17-19, *infra.*] The jury returned a general verdict against Growers and EOP in the sum of $500,000.00. [R. 295.] Judgment upon that verdict was entered in the sum of $1,692,500.[2] [R. 336-339.] On appeal from the judgment by Growers and EOP, the Court of Appeals affirmed on the issue of liability and reversed on the issue of the amount of damages. [R. 4005-4006.] A petition for certiorari by Growers and EOP was granted, limited to the one question already stated. [R. 4009.]

---

[2] That sum includes the trebled amount of $1,500,000, plus $195,000.00 attorney's fee and less $2500.00 paid by TreeSweet as consideration for its dismissal from the action. [R. 68-69, 338.]

2. The Sunkist Cooperative Organization.

About 12,000 individual growers of citrus fruits in the states of California and Arizona, whose average productive holding is about 16 acres each, have joined together for the purpose of "collectively processing, preparing for market, handling and marketing" their fruit and its by-products. [R. 538-540, 549-563, 2693-2710, 2723-2727, 3043-3045.] That organization over the years has evolved into and has taken the form of three nonprofit agricultural cooperative corporations (Growers, EOP and ELP) which are the agencies to whom have been delegated the processing and marketing functions necessary to get the grower-members' fruit and fruit products to market.[3] Each of these corporate entities handles only the fruit of Sunkist grower-members. [R. 538-540, 669, 695, 2725-2726, 2959.] Each of them complies in all respects with the organizational and other conditions prescribed by the Capper-Volstead Act for immunity from the sanctions of the antitrust laws in respect of such collective processing, handling and marketing of agricultural products. Indeed, that they do so comply was conceded below by all concerned. [R. 442, 444-445, 448-449, 3699-3701.]

---

[3] Originally, there was only one corporate entity, then called California Fruit Growers Exchange and now called Sunkist Growers, Inc. [R. 545.] The organization of the processing agencies, EOP and ELP, and their inclusion in the Sunkist organization came about as the result of need for the discovery and perfection of knowledge and techniques necessary to salvage and utilize, for the production of such by-products as could be developed, that fruit which was not sold as fresh fruit. The history of that development, the evolution of cooperative citrus marketing generally in California and the role in it played by Sunkist is interestingly told in the record; but it need not be set out at length in this brief. [See, R. 555-557, 2697-2708.]

This agricultural cooperative organization was referred to below as the "Sunkist system." That term was used to mean not merely the one corporate entity called "Sunkist Growers, Inc." but the entire organization—from the grower up through his intermediate associations [see pp. 6-8, *infra*] to the three corporate entities (Growers, EOP, and ELP) into which the growers are organized—that exists for the purpose of processing and marketing the products of its grower-members. It included also the functions of processing and marketing carried on by the various components of that organization. [R. 2693-2696.] Sunkist is an organization, everyone agreed below, substantially the same as other marketing organizations organized under the Capper-Volstead Act. [R. 2695.]

At the base of the Sunkist system are the individual growers. It is their fruit, and only their fruit, that is handled by Sunkist. It is they who control and manage all components of the Sunkist cooperative organization. The individual growers have organized into local associations. The local associations, in turn, organized into twenty-two district exchanges, each of which is governed by a board composed of grower-member representatives of the local associations included in it. Each district exchange selects one grower-member to be its representative on the governing board of Sunkist Growers, Inc. All representatives serve without compensation. [R. 538-540, 549-563, 2696-2701, 2723-2725, 3043-3045.]

Growers is a California nonprofit agricultural cooperative marketing corporation organized in 1905. It is a membership corporation and so has no capital stock. Its immediate members are the twenty-two district exchanges already mentioned. All of its revenues, less cost of operation and minor reserves for bad debts and other such contingencies, are distributed to the grower-members. [R. 538-540, 549-563, 2693, 2710, 2723-2725, 3043-3045.] Growers is the marketing agency for all of the Sunkist grower-members. [See, pp. 8-10, *infra.*]

EOP is a California nonprofit stock corporation, organized in 1916. Its stock is wholly owned by Growers. Its sole function in the Sunkist system is to process into juice and other by-products those oranges and grapefruit, grown by the Sunkist grower-members, which are not sold as fresh fruit.[4] [R. 539, 666-673, 690-691, 2956, 2959, 3043-3045.]

ELP is a nonprofit California corporation, of the stock type, organized in 1915. Its stock is wholly owned by Sunkist grower-members and their local associations. Its sole function in the Sunkist system is to process into juice and by-products those lemons grown by the Sunkist grower-members which are not sold as fresh fruit. [R. 538-540, 552-553, 555-563, 2725-2726. Pl. Ex. 30; R. 894, E453.[5]]

---

[4] Fruit not sold as fresh fruit is referred to as "by-product" fruit. It is, in other words, that fruit which is used or sold for processing into another product, *e.g.*, juice or a pharmaceutical, as distinguished from the fruit that is disposed of to be used directly as human food.

[5] The "Exhibit Volume" is not paged consecutively with the remainder of the record. A page reference in this brief preceded by an "E" refers to the Exhibit Volume.

The basic relationship among these components of the Sunkist system is defined by an agreement entered into in 1940, to which Growers and its various district exchanges and local associations were parties [Pl. Ex. 1 (par. 2); R. 557, E2-E3]; and which is terminable by any association or exchange, as to it, by notice prior to October 31 of any year. [Pl. Ex. 1 (par. 29); R. 557, E1, E21.] The gist of that agreement is that all citrus fruit produced by the grower-members is to be marketed by or through the local associations and district exchanges who, in turn, are to market it through Growers. For that purpose Growers is the agent of the local associations and district exchanges. Each local association reserves the right to designate the markets to which the fruit of its grower-members is to be shipped and the price it is willing to receive. [R. 558-559. Pl. Ex. 1 (pars. 6, 7, 9, 14, 17); R. 557, E1, E8-E9, E13, E14.]

Growers' primary concern is the marketing of Sunkist fruit as fresh fruit; and most of it is sold in that form.* [R. 540-541.] The fruit not so sold is processed, or sold to others for processing, into by-products such as juices, concentrates, oil, pharmaceuticals, pectin and cattle feed. [R. 551, 2957-2959.] The 1940 agreement [Pl. Ex. 1 (par. 1); R. 557, E1, E6] provides that in the case of fruit to be sold other than as fresh fruit, Growers may establish pools for its handling and marketing. To establish such a pool there must be a concurrence of a majority of the members of Growers' board of directors, including directors representing 75%

---

*When the phrase "Sunkist fruit" or "Sunkist by-product fruit" is used in this brief the reference is to fruit produced by the grower-members of Sunkist. The Sunkist cooperative organization does not handle any other fruit. [R. 669, 2726.]

by volume of the shipments involved. [Pl. Ex. 1 (par. 14); R. 557, E1, E12.]

Such a pool was in existence in 1950-51 for oranges not utilized as fresh fruit.[7] [R. 574-576. Pl. Ex. 3A; R. 575, E31.] Its purpose was to provide for the processing of the by-product fruit of Sunkist grower-members by EOP and ELP into juice and other forms of by-products; for the marketing of those by-products by Growers in behalf of the grower-members; and for the equitable allocation of the proceeds to the grower-members whose fruit was so utilized. [R. 568-573.] In essence, the pooling plan provided for classification of the fruit, in accordance with specified standards, into "juice" and "product" grades; and for the method of crediting to each grower-member whose fruit was included in the pool his proportionate share of the proceeds resulting from the sale of it and its by-products. [Pl. Ex. 3A; R. 575, E31.]

Under date of April 6, 1949 Growers, EOP and ELP provided by agreement for the handling of Sunkist by-product fruit. [R. 559-563; Pl. Ex. 2; R. 557, E28.] That agreement made specific, in respect of by-product fruit, Growers' underlying obligation to market all Sunkist fruit. [See, Pl. Ex. 1 (par. 6); R. 557, E8.] It recited that on September 10, 1940, Growers' board of directors had designated EOP and ELP as agencies for the utilization of Sunkist by-product oranges and lemons; and that, in recognition of its obligation to market all the fruit of Sunkist grower-members Growers had established a "Products Department" for distribution and sale of Sunkist fruit in processed or by-product form. The management of that department was delegated to a joint executive committee of sixteen members appointed, eight each, by EOP and ELP from their repective boards of directors.[8] [R. 562-565, 878-881.]

---

[7] A similar plan was in effect in earlier years, but the record does not show during what period. [R. 574-575.]

3. Respondents' Theory of Liability and the Evidence Relating to It.

It was generally respondents' theory below that in 1951 petitioners, in pursuance of the conspiracy alleged, performed certain acts—referred to throughout the trial as the "six acts"—that assertedly caused the respondents' injury. These acts, in short statement, were: (a) Processing by EOP of some lemons for ELP; (b) processing by ELP of some oranges for EOP; (c) execution of a processing and juice-purchase contract with TreeSweet; (d) execution of a similar contract with Silzle; (e) refusal by Sunkist to sell by-product oranges to Winckler at less than $40 per ton or to enter into a processing-juice purchase contract with it; (f) setting of a price for Sunkist by-product oranges which did not permit selling single strength orange juice at competitive prices. [R. 254-256, 265-270.] The evidence relating to these acts, in summary form, follows:

(a) *Intra-cooperative processing.* In 1951, under oral agreements between them, EOP processed about 164,000 tons of by-product oranges produced by Sunkist grower-members; and ELP processed an additional 31,200 tons for EOP. In the same year EOP processed some lemons for ELP. [R. 541, 543-544; Pl. Ex. 12;

---

[8] As we have seen [p. 6, *supra*] the governing boards of all components of the Sunkist system are composed of grower-members.

R. 679, E292. Pl. Ex. 13; R. 680, E292.] Such "reciprocal" processing is a temporary measure, done when one of the Sunkist processing agencies needs a particular product for which at the moment it does not, but the other does, have facilities. [R. 669, 681.] It is done at cost. [R. 681-683.]

(b) *TreeSweet contract.* As had been the case for several years before, TreeSweet and EOP entered into a processing-juice purchase contract in 1951. [R. 753-755, 757-758, 908-913, 944-945, 2979-2986, 2988-2990, 3051-3057. Pl. Ex. 20; R. 738, E332-E341.] By that contract EOP agreed to supply TreeSweet, for processing into single strength canned orange juice, with such quantities of oranges as the former might determine, for which processing TreeSweet would be paid its actual cost. [Pl. Ex. 20 (paras. 2, 3); R. 738, E335.] TreeSweet agreed to purchase the resulting juice at Growers' prices in effect at time of purchase, less discount and certain specified trade allowances. The price was to be paid when the juice was sold, but all of it was to be taken and paid for, in any event, by June 1, 1952. [Pl. Ex. 20 (pars. 9, 10); R. 738, E336, E337.] The juice remained EOP's property until purchased by TreeSweet. [Pl. Ex. 20 (par. 2); R. 738, E335.]

This type of contract was a means by which Sunkist fruit that might otherwise remain unsold was enabled to be disposed of. Packers of canned orange juice were reluctant to pack for inventory because, when they did so, they had to expend the cost of processing at the time of processing, and thus take the risk of a later decline in price for the canned product in a market dominated [R. 650-653, 1055, 1602-1603, 2186-2187, 2194-2198, 2203-2212, 2281, 2721-2723, 2961-2965] by

Florida production. Consequently, they tended to buy their requirements of by-product oranges on a day-to-day basis. The processing-juice purchase type of contract overcame the reluctance to pack for inventory. This it did by reimbursing the packer for his processing cost and assuring him that the price he would have to pay for the resulting juice would be the regular Sunkist price current at the time he elected or was required to buy it. The packer was obligated to buy all of the juice packed under the contract. In these ways, therefore, the processing-juice purchase type of contract enabled Growers better to perform its duty to market the maximum quantity possible of the fruit produced by Sunkist grower-members. [R. 756-760, 772-773, 2980-2985, 3051-3057.]

(c) *Silzle contract*. On September 10, 1951, EOP and Silzle entered into a written processing-juice purchase contract, which formalized an oral agreement made in the spring of that year and under which they had been operating. [R. 772-789, 801-807, 950-956, 965-976, 2987-2988. Pl. Ex. 25; R. 788-789, E356-E368.] Under it EOP agreed, as it was able, to supply and Silzle agreed to take and pay for a specified quantity of oranges for processing into single strength canned juice. The resulting juice was to be paid for upon shipment, at prices specified in the contract. These prices were based upon Sunkist's regular price less an amount based on Silzle's processing costs. [R. 2987-2988.] If the juice purchased by Silzle was not shipped immediately upon production it was to be stored in a Lawrence warehouse and released upon Silzle and EOP's joint signature. EOP's joinder in such release was conditioned on payment of the contract price by Silzle. All costs of the operation, including processing and storage, were to be borne by Silzle.

(d) *Dealings with Winckler.* Until 1948 Winckler customarily bought a substantial part of its by-product orange requirements from Sunkist. In that year, however, it transferred its patronage to other suppliers, mainly Morgan Ward.[9] From then on Winckler bought virtually no oranges from Sunkist.[10] [R. 646, 655-659, 661-662, 1005-1006, 1012-1016, 1431-1450, 1587-1589.]

In 1951 Ward had from 12% to 15% of the total supply of by-product oranges available in the California-Arizona area. According to him, he had "a lot of fruit" for which there was no "home" except with cer-

---

[9] Actually, the supplier was Independent Growers & Shippers Association, for whom Morgan Ward was the selling agent. The latter's name was frequently used during the trial as a convenient means of reference to the Association, and we continue to do so in this brief.

[10] The transfer of Winckler's patronage was brought about by Sunkist's dissatisfaction with Winckler's credit standing and the slowness of its payments. As a consequence, in 1948 sales to it were put on a cash basis. [R. 648-649, 656-662, 665.] Shortly after that was done, Winckler was informed by Ward that the latter had fruit and was happy to sell to Winckler on the usual terms. So, from that time on Winckler dealt mainly with Ward. [R. 1012, 1014.] Ensuing upon that transfer of patronage, Winckler got its Valencia oranges from the following suppliers in the proportions specified [Def. Ex. BP; R. 2407-2408, E541. Def. Ex. BQ; R. 2410-2411, E542. R. 1014-1016, 1436-1442.]

	From Ward	From Sunkist	From Others
1949	73.28%	17.47%	9.25%
1950	91.31%	1.54%	7.15%
1951	86.66%	0.43%	12.91%

In 1948 Winckler bought 2161 tons of oranges from Sunkist. The record does not show what percentage of its total purchases in that year this amount was; but in 1949 when it bought 17.47% of its oranges from Sunkist it got 2225 tons from that source. [R. 1966-1977.]

In 1947 Winckler and EOP had entered into two processing contracts. [R. 1611-1615.] The quality of the juice produced by Winckler was so bad that much of it was poured down the sewer, and other quantities had to be re-processed, by EOP [R. 3031-3034, 3062-3063, 1129-1130, 1610-1612.]

tain firms, two of whom were Winckler and another called Case-Swayne. [R. 1581, 1600.] In that year he entered into a processing contract with Case-Swayne under which he supplied it with oranges to be processed into single strength juice. He also entered into a processing contract with Winckler under which oranges were supplied for processing into frozen concentrate. Winckler asked, indeed demanded, that Ward supply it oranges for processing into single strength juice. [See, *e.g.,* Def. Ex. AX; R. 1573, E536.] Ward refused to do so. [R. 1598-1601.] His reason for the refusal was that he had given Case-Swayne a single-strength processing contract and he did not want his oranges "out in the market competing in canned juice form, competing against each other." [R. 1439-1440, 1601.] Sunkist had nothing at all to do with this refusal. It was not even shown to have had knowledge of it. [R. 1576-1578, 1596-1602.]

Ward's final refusal came some time after August 17, 1951.[11] In the meantime Winckler had inquired of Sunkist if there was any change in the latter's price for by-product fruit, and was told it was still $40 per ton. Winckler complained, in effect, that at this price single strength juice could not be profitably processed to sell at the then prevailing juice prices.[12] Winckler evidenced no desire to purchase; and Sunkist was not disposed to lower its price. [R. 608, 615-616, 647, 1058-1066.] Later, Winckler requested an "arrangement" for fruit similar to the one he assumed other processors, such as TreeSweet and Silzle, had. He was told, however, that by then EOP had or had arranged for sufficient facilities to handle the expected crop and that no more processors were needed. [R. 857-861, 1061-1067, 1069-1070, 2998-2999, 3002-3003, 3101-3102.]

---

[11] On that date Winckler wrote to Ward complaining of the "Monopolistic situation" he was creating and requesting that the matter be put before the Association's By-Products Fruit Committee. [Def. Ex. AX; R. 1573, E536.] Ward did so; the Committee left decision up to him; and he decided not to give Winckler a contract. [R. 1598.]

[12] In 1951 most by-product oranges—for example, 75.6% of the California-Arizona supply—were used for processing into frozen concentrate juice rather than for single strength. Only 2.4% was used fo. the latter type of juice. This was so because

(e) *Prices.* Growers as the marketing agency for all Sunkist fruit, of course, sets the price at which Sunkist by-product fruit and the products processed therefrom by Sunkist will be sold.[13] The price in each instance is determined by the manager of the division or department whose product is involved. Consultations with respect to prices take place among Sunkist's exec-

---

of the much larger demand for the frozen product and because a greater return could be realized for the grower. At a price of $40 per ton for by-product oranges processors of the frozen concentrate juice could and did operate profitably. [R. 654, 890-891, 1525-1530, 1594-1595, 2970-2972.] The plain fact is that the development of the frozen product only a few years before and its almost universal public acceptance had made canned single strength juice an obsolescent if not obsolete commodity.

[13] Price-fixing by agreement with *outsiders* was never an issue in this case. The only allegation on the subject of prices is that Growers and EOP agreed to establish and maintain a price for their by-product oranges that made it "impossible for independent processors such as plaintiff, to purchase or acquire by-product oranges from defendant E.O.P. or any other source, at a price . . . that would enable plaintiff . . . to produce and sell canned natural and frozen concentrate juice at a price that would be competitive to the prices charged by defendants and favored processors TreeSweet and Silzle." [R. 265-267.] Whatever may be the scope of this allegation, "price-fixing" in the ordinary antitrust sense [See R. 412-413], or as a cause of damage, was repeatedly disclaimed by respondents throughout the trial. [R. 412-413, 2817-2818, 2880, 2926, 2929, 2936-2937, 3168-3169, 3256, 3378.]

utives and operating personnel, and inquiries as to market conditions may be made on the outside; but final decision in all cases is for the appropriate Growers' department or division manager. [R. 566-568, 576-579, 591-594, 616-619, 625-631, 683-685, 877-878, 882.]

In 1951, Sunkist's opening price was $40 per ton for by-product oranges of 120 pounds of soluble solids. This price was set by the manager of the division of Growers having charge of sales of by-product fruit in the Los Angeles area. It did not change during the 1951 season. [R. 623, 625-631, 649-656. See note 12, p. 14, *supra.*]

Sunkist's juice prices in 1951 were determined in similar fashion by the manager of the Products Department of Growers. They varied from time to time during the season and were sometimes but not usually the same as competitors' prices. [R. 567-568, 592-594, 683-685, 815-819, 850-851, 877-878, 882, 889, 979, 984-986, 1454-1457, 1480-1482, 2274-2275, 2280-2281, 3057.] Analysis of Sunkist's and TreeSweet's price lists [Pl. Ex. 27; R. 816, E369-E442. Pl. Ex. 28; R. 816, E443-E452. Pl. Ex. 36; R. 916, E461-E466] shows that during all of that season, except for three or four weeks when they were the same, TreeSweet's juice prices were substantially lower than Sunkist's. Winckler's prices varied from locality to locality and from time to time. Usually, they were different from Sunkist's. [R. 850-851, 889, 1454-1457, 1480-1482.] Silzle's prices were in the same general range as Sunkist's, but were not identical. [R. 979, 984-986, 2951-2954.]

4. How the Question Arose and Was Decided.

The jury were instructed generally that no formal agreement is necessary to constitute a conspiracy or combination, but one may be inferred from a course of dealing [R. 3686]; that it is sufficient to show a conspiracy or combination if there is concert of action, all of the parties working together understandingly, with a single design and for the accomplishment of a common unlawful purpose [R. 3687]; and that it is unlawful to conspire or combine to restrain or monopolize interstate trade in single-strength orange juice or other citrus juices. [R. 3697-3699.] The jury were also told that if the petitioners (Growers and EOP) and the alleged co-conspirators (ELP, TreeSweet and Silzle) conspired to restrain or monopolize interstate trade in citrus fruit juices, especially single strength orange juice, and in pursuance of that conspiracy did any one of the six acts with resultant injury to Winckler, liability under the antitrust laws was made out against the petitioners. [R. 3690, 3692-3694, 3711-3713.]

The generality of the charge just summarized was made specific in a way that permitted the jury, notwithstanding Capper-Volstead, to find liability based upon conspiracy even if the only element of agreement upon a course of action was entirely and only between or among the component parts of the Sunkist cooperative organization. Accordingly, and to that effect the jury were given these instructions:

(a) Only one combination or conspiracy was charged in the case. [R. 3697.]

(b) Growers and EOP could combine or conspire together to violate sections 1 and 2 of the Sherman Act. [R. 3688-3689.]

(c) Notwithstanding that the charge was that the defendants (Growers and EOP) and the co-conspirators (ELP, TreeSweet and Silzle) had conspired, the jury could find that all of them, none of them, or "some number less than the total" conspired. [R. 3730.]

(d) There could be no verdict against Growers or EOP unless it was found that they, or either of them, combined or conspired with either ELP or TreeSweet or Silzle and did one or more of the six acts in pursuance of such combination or conspiracy. [R. 3711-3712.]

The trial court's theory of the case was climaxed by its refusal of petitioners' requests to instruct that the Sunkist cooperative organization, *i.e.,* Growers, EOP, and ELP, constituted a single cooperative organization and, therefore, could not conspire with itself. [R. 182-183, 3253-3255.]

As the jury's verdict was general [R. 295] it cannot be determined whether it found conspiracy or combination with TreeSweet or Silzle, or only between or among Growers, EOP and ELP. Nor can it be determined upon which of the "six acts" the verdict was based. In that state of the record the verdict cannot be upheld unless all theories submitted were free from material error.[14]

The Court of Appeals failed to find error in the theory of liability submitted to the jury. [R. 3975-3984.] It apparently agreed that under the charge "the jury could have found that the conspiracy consisted of only Sunkist [Growers] or EOP or ELP . . ." [R. 3982-3983.] In the Court's view, however, that theory of the case did not have the effect of denying to petitioners any exemption created by Capper-Volstead for the benefit of agricultural cooperatives; for to hold that it did, the Court declared, presupposes that "agricultural cooperatives can combine to fix prices or eliminate competitors with immunity . . ." [R. 3982.] Support for the theory of the submission was found by the Court of Appeals in *United States v. Timken Roller Bearing Co.*, N. D. Ohio, 83 F. Supp. 284, *af-*

---

[14] Under all the instructions given, the verdict might have been based on a finding of conspiracy or combination among only the three Sunkist cooperatives, or, upon one or more of the several other theories submitted. When two or more theories or issues are submitted to a jury and "upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given." [*Maryland v. Baldwin*, 112 U. S. 490, 493. Accord: *Wilmington Mining Co. v. Fulton*, 205 U. S. 60, 78-79; *Samuel v. United States*, 9 Cir. 169 F. 2d 787, 794-796; *Stokes v. United States*, 8 Cir., 264 Fed. 18, 23; *Baltimore & O.R. Co. v. Reeves*, 6 Cir., 10 F. 2d 329, 330-331; *North Amer. G. Corp. v. Allan*, D.C.Cir., 184 F. 2d 387, 389; *Atlantic Coast Line R. Co. v. Tiller*, 4 Cir., 142 F. 2d 718, 722; *Travelers Ins. Co. v. Wilkes*, 5 Cir., 76 F. 2d 701, 705.]

firmed 341 U. S. 593 [R. 3983]—a case in which it was held that it was no defense to the restraint complained of that it arose from, and was incident to, a joint venture or partnership between the parties. [See, 83 F. Supp. at 312.].

This disposition of the question does not go to the heart of the matter, for it ignores the essential fact that what Capper-Volstead immunized was collective action by farmers to process and market their products. It ignores as well the fact that restraint without unlawful concert of action is not a violation of section 1 of the Sherman Act. So the real question is not whether there was collective action; the very conception of agricultural cooperatives subsumes that there will be. The decisive question, rather, is whether the collective action involved in the doing of any one of the "six acts" was limited to the confines of the Sunkist cooperative organization set up by the growers as their processing and marketing instrumentality; for if it was so confined it was privileged and, therefore, not a prohibited form of collective activity. To hold that the members of an agricultural cooperative or their constituted processing and marketing instrumentalities may, with immunity from the antitrust laws, agree among themselves in respect of the processing and marketing of the members' products, is not to hold that they may, with similar immunity, conspire or combine with others to restrain trade. The dividing line that puts agreement within the cooperative and agreement with others in different areas is precisely the line that Congress by Capper-Volstead intended to draw.

ARGUMENT.

I.

The Capper-Volstead Exemption From the Antitrust Laws of the Collective Processing and Marketing of Farmers' Products by Their Agricultural Cooperatives Is as Applicable When the Farmers Are Formally Organized Into Several Cooperative Entities as It Is When There Is Only One Such Entity.

It is evident from the language and history of the Capper-Volstead Act that it was designed to take collective action by farmers in the processing and marketing of their products out of the shadow of antitrust penalties. The Act was not needed to permit farmers to do that which without it and notwithstanding the antitrust laws they could always have done. It is, therefore, an act which, in this Court's characterization, "sanctioned cooperative action by farmers [and] restricted their amenability to the anti-trust laws . . ." [*Tigner v. Texas,* 310 U. S. 141, 145]; one which bespeaks the congressional intent ". . . to permit cooperatives," to a certain and limited extent, "to interfere with the competitive system of business . . ." [*Associated Press v. United States,* 326 U. S. 1, 14.]

Throughout the two legislative sessions at which the Act was considered the Congress was repeatedly told that the individual farmer lacked the bargaining power to get a decent price from the many and economically powerful middlemen who stood between him and the ultimate market for his products.[15] The remedy, therefore, was cooperative action that would equalize bargaining and economic power. But, the Congress was also told that standing in the way of acceptance by farmers of that approach to their problem was the fear that collective action would result in imposition of the criminal and civil sanctions of the antitrust laws. Congress gave obvious heed to these expositions.[16] It was to allay that fear and to clear the road to cooperative action that Capper-Volstead became law.

---

[15] Typical of the statements made are these by the co-authors of the legislation:

> *Senator Capper:* [62 Cong. Rec. 2058, 2059]
>
> ". . . if farmers must continue to sell individually . . . then farmers must for all time remain at the mercy of the buyers. In so doing they are not in the most accurate sense marketing their products at all, but are forced by conditions to turn over such marketing to powerful associations of middlemen.
>
> * * *
>
> "At present there is no recourse. The farmer is in a large measure helpless. He knows that as an individual he is handicapped, and due to the ambiguity of Federal laws he fears he will lay himself open to prosecution by interests opposing him if he seeks to act collectively through cooperative organizations . . ."
>
> * * *
>
> *Congressman Volstead:* [61 Cong. Rec. 1033]
>
> "It [the bill] aims to authorize cooperative associations among farmers for the purpose of marketing their products. There are a great many of those associations today scattered all over this country . . . they have been constantly threatened with prosecution . . ."

Similar statements by others will be found at 61 Cong. Rec. 1035 and 1038 (Reavis), 1042 (Summers); and 62 Cong. Rec. 2049 (Kellogg), 2122 and 2163 (Walsh), 2257 (Norris), 2261 (Hitchcock).

See, also, *April v. National Cranberry Assn.*, D.C. Mass., 168 F. Supp. 919, 921.

[16] The report of the House Committee on the Judiciary, to which the bill had been referred, commented in this way: [*House Rep. No. 24*, 67th Cong., 1st Sess., pp. 2-3.]

> ". . . Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast ag-

No one would doubt the applicability of Capper-Volstead to a group of farmers organized into one cooperative corporation to which was given the whole function of processing and marketing their products. No doubt of that applicability would be created if the corporation, without concert of action with outsiders, processed the products in such plant or plants as it chose, set the price at which it would sell the products, and selected its customers as an ordinary business corporation would. In all this there would be nothing but normal processing and marketing; and the fact that it was the resultant of combination or cooperation on the part of a number, even a large number, of farmers would not, in view of Capper-Volstead, make applica-

---

> gregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for a fair price, he is threatened with prosecution. Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members do business as one person. The officers of the corporation act as agents of these members. This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.
>
> * * * *
>
> ". . . To maintain his self-respect and the dignity of his occupation the farmer must be given an opportunity to deal in selling his products on an equal footing with those who purchase it . . ."

The report of the Senate Committee on the Judiciary [*Sen. Rep. No. 236,* 67th Cong., 1st Sess.] did not deal at length with this phase of the subject. It was concerned almost entirely with the Senate Committee's proposed substitute for the House version of section 2 of the bill. That substitute would have expressly made cooperatives subject to the monopolization provisions of section 2 of the Sherman Act. [61 Cong. Rec. 4332.] In the previous session the Senate approved but the House rejected a similar substitute. [62 Cong. Rec. 2122.] This time, however, the Senate too rejected the proposed substitute and the House version was enacted into law. [62 Cong. Rec. 2453-2455.]

ble those provisions of the Sherman Act that are conditioned on collective action. [See, *Maryland & Virginia Prod. Asso. v. United States,* 362 U. S. 458, 466-467; *United States v. Borden Co.,* 308 U. S. 188, 204-205.]

In realistic appraisal the case at bar is not distinguishable from the one just supposed. The only difference is a formal one; *i.e.,* instead of forming into one corporate instrumentality which performs the whole function of processing and marketing, the cooperating farmers here are organized into three such instrumentalities among whom the processing and marketing functions are divided. The element of combination—the element made privileged by Capper-Volstead—is the same notwithstanding that difference of form. It is still the underlying farmers who are combining; it is only their products that are being processed and marketed; it is only their instrumentalities, controlled and managed by them, that are doing the processing and marketing.

In the case at bar, it was necessary to the imposition of liability grounded in combination or conspiracy that some element of unprivileged collective action on petitioners' part be found. The courts below permitted it to be found from the mere fact of intra-coooperative activity; *i.e.,* from agreement between the cooperative instrumentalities of the underlying grower-members; and the doing, in pursuance of that agreement, of one or more acts of ordinary processing and marketing of the products of those grower-members. [See, pp. 17-18, *supra.*] It was in this respect that the courts below erred. It is to the demonstration of that error that we now turn.

First: We start with the language of the Act. It permits persons—farmers and fruit growers among others—engaged in the production of agricultural products, "to act together in associations, corporate or otherwise . . ." [7 U.S.C.A., sec. 291.] The use of the plural number is significant, especially when it is remembered that the Act goes on immediately to provide that "Such associations may have marketing agencies in common . . ." [*Ibid.*] The statutory inference is thus plain that Congress had in contemplation the likelihood that the cooperative organization of a single group of farmers or growers might take the form of a plurality of entities which would act together through a common marketing agency.[17]

Congress did not leave the organizational form of cooperatives entirely unmentioned or unnoticed. It placed limitations upon the voting power of the cooperative's stock and upon the amount of dividends it could pay. The cooperative had to comply with one or the other of these limitations. The Act also limited all cooperatives in respect of the extent to which they could handle the products of non-members. [7 U.S.C.A., sec. 291.] It is, therefore, fair to assume that had it been the intention to limit the corporate form to a single entity "Congress doubtless would have said so." [*United States v. Borden Co., supra,* 308 U. S. at 201. See, note 17, p. 25, *supra,* in which there is a quotation from the committee report on the bill. That quotation was the conclusion of the committee's discussion of these organizational requirements.] In the words of the Attorney General, rendering an opinion that a cooperative association is within Capper-Volstead though composed of local associations to which the farmers belong, the "... statute imposes no restriction upon business forms of cooperation and association which may be employed to effectively organize cooperative associations of agricultural producers for handling and marketing their products ..." [36 Op. Atty. Gen. 326, 339.]

---

[17] Congress was aware, when the Act was adopted, that there were already in existence farmer's cooperatives operating in multi-corporate form. Indeed the Sunkist organization, under its then name of California Fruit Growers Exchange, was referred to on the floor as an example. [62 Cong. Rec. 2277 (Walsh). See, also, 61 Cong. Rec. 1036 (Black).] There was no expression on anyone's part of an intention or desire to exclude such cooperatives from the benefits of the Act. There was, in fact, strong evidence of an intention to include them, as appears from the following comment in the committee report on the bill: [*House Rep. No. 24*, 67th Cong., 1st Sess., pp. 1-2]

> ". . . The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of its members might avail themselves of the provisions of this bill. The bill does not, however, compel any association to change its present organization . . ."

Second: We need not, however, depend upon or even argue about the literal meaning of the statutory language. It is frequently true that a statute imports a policy going beyond its words. [See, *Gooch v. Oregon Short Line R. Co.,* 258 U. S. 22, 24; *Van Beeck v. Sabine Towing Co.,* 300 U. S. 342, 351. Also, Holmes, J., diss. in *Olmstead v. United States,* 277 U. S. 438, 469.] Capper-Volstead is such a statute.

So far as the words of the Act are concerned, farmers are permitted, notwithstanding the antitrust laws, to act together in associations for the purpose of processing and marketing their products. That, however, is only the means to an end. The end in view is not merely cooperation for cooperation's sake; it is to enable farmers, without deterrence from the antitrust laws, to take advantage, for their mutual benefit, of the strengthening of bargaining power that comes from collective action. That end could not be achieved so long as the threat of antitrust prosecution stood as an obstacle in the way of utilization and development of the cooperative principle.

Of course, this does not mean that the farmer was given complete freedom to combine or conspire as he saw fit. Combination was limited to those with whom he had a community of economic interest. [*Maryland & Virginia Prod. Asso. v. United States, supra,* 362 U. S. at 466-467, 472; *United States v. Borden Co., supra,* 308 U. S. at 204-205. See, Hanna, *Antitrust Immunities of Cooperative Associations,* 13 Law and Contemp. Problems, 488.] To make sure that the resulting cooperative association would be operated only for the mutual and even-handed benefit of its members, limitations were imposed upon the corporate voting power and the share of proceeds that could be vested in any one member. Subject to these limitations, it is clear that Congress was not concerned with the form of cooperation but with the achievement of it in fact.

The policy thus imported by the Act should not be constricted by formal considerations. The end result of cooperation by farmers is the same whether any particular group of them achieves it in the form of only one or of several corporate entities. The important element is that the cooperation, however it is outwardly evidenced, be and remain only the cooperation of the farmers themselves.

The antitrust laws are practical statutes. Their restrictions "are not mechanical or artificial . . . [C]lose and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment . . ." [*Appalachian Coals v. United States*, 288 U. S. 344, 360.] Accordingly, in the cited case, a combination in the form of collective designation of a common marketing agent for a number of concerns in the same line of trade, which, of course, tended to eliminate competition between those joining in the designation, was held not to be violative of the Sherman Act because, realistically viewed, the same adverse effect upon competition could have been lawfully produced by a different form of combination (merger) from the one actually employed.[10] [288 U. S. at 375-377.]

The case at bar is analogous in principle, as we have shown. [See, pp. 23-24, *supra*.] Even in the case of ordinary business corporations it is held that the concert of action required under section 1 of the Sherman Act is not supplied by the concerted action of the officers and agents of one corporation [*Nelson Radio & Supply Co. v. Motorola*, 5 Cir., 200 F. 2d 911, 914, *cert. den.* 345 U. S. 925]; or by cooperation between departments or divisions of one corporate entity. [See, *Locher v.*

---

[10] It may be that today, and since the 1950 amendment [Act of Dec. 29, 1950, 64 Stat. c. 1184] that broadened and made clear the scope of section 7 of the Clayton Act [15 U.S.C.A., sec. 18]—see, *United States v. DuPont De Nemours & Co.*, 353 U. S. 586, 590—the Court's premise of the legality of such a merger might be found unsound as against determined challenge under that section. But the Court's reasoning from that premise was and still is sound. It is *for* that reasoning that we cite the case. The equivalent premise in the case at bar is unquestionably sound. It is that farmers may combine into a single-entity agricultural cooperative and that, insofar as those provisions of the antitrust laws that are conditioned upon collective action are concerned, it is lawful for that cooperative to process and market its members' products and, to that end, select its processors, fix its own prices and exercise a single trader's usual discretion in determining to whom it will or will not sell.

American Tobacco Co., 2 Cir., 218 Fed. 447, 449; *Smith v. Onyx Oil & Chem. Co.*, 3 Cir., 218 F. 2d 104, 109.] Here, the three cooperative entities were doing exactly, and no more than, that which would have been done had there been only one Sunkist corporation divided administratively into orange-processing, lemon-processing and marketing departments. Had that been the form of corporate structure involved here, the applicability of Capper-Volstead would be undeniable. If "realities are to dominate the judgment" no substantive legal difference can be derived from a purely formal difference of corporate structure.

There is another suggestive analogy in the interpretative history of the antitrust laws. The legislative intention behind the labor exemption in the Clayton Act [15 U.S.C.A., sec. 15], many people thought, had been frustrated by unnecessarily narrow construction. [See, *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797, 801-805.] Congress, therefore, enacted the Norris-LaGuardia Act. [29 U.S.C.A., chap. 6.] That statute, in words, dealt primarily with the use of injunctions in labor disputes; but its policy was significantly broader, *i.e.*, to undo what had been done to the Clayton labor-exemption by judicial construction. As a consequence, the new legislation was held to effect not merely an immunity from injunctive process, but more broadly, an exemption from the antitrust laws for the collective activities of labor unions and their members, so long as those activities were carried on in the mutual self-interest of the members, without combination with others. [*United States v. Hutcheson*, 312 U. S. 219; *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U. S. 365, 369.]

The purpose behind freeing agricultural cooperatives from the full reach of the antitrust laws is very similar to the purpose behind the exemption of labor. In each instance it is to permit collective bargaining for economic advantage from the bargaining strength that comes from cooperation, and to enable that type of bargaining to be carried on through appropriate associations without the deterrence to organization that would otherwise be exercised by those laws. In the case of the labor exemption this Court said that "it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed . . ." [*Apex Hosiery Co. v. Leader*, 310 U. S. 469, 489.] It is equally appropriate that the agricultural exemption of Capper-Volstead be given the same treatment.

Third: The Court of Appeals was apparently of the view that the instant case was controlled by the so-called doctrine of intra-enterprise conspiracy. [See, pp. 19-20, *supra.*] Dependence upon that doctrine, we respectfully suggest, was error. Even if it be assumed that because of the doctrine any concert of action or agreement between affiliated corporations having a trade-restraining effect is unlawful, it does not follow that the doctrine is applicable to a case in which the intra-enterprise concert of action is privileged. It is not restraint alone but restraint produced by unlawful concert that section 1 of the Sherman Act proscribes. [*Union Pacific Coal Co. v. United States*, 8 Cir., 173 Fed. 737, 739; *Weir v. Chicago Plastering Institute*, 7 Cir., 272 F. 2d 883, 887; *Nelson Radio & Supply Co. v. Motorola, supra*, 200 F. 2d at 914. And *cf.*, *Federal Trade Com. v. Raymond Bros.-Clark Co.,* 263 U. S. 565, 573-574.] The whole significance of Capper-Volstead is that concert of action among, but confined to, farmers in the processing and marketing of their products is privileged so far as the antitrust laws are concerned.

In point of fact, this Court has never employed the doctrine as an affirmative means of imposing liability in a situation where, without the doctrine, there would be no liability. The doctrine has come into play only to reject, in a case involving an otherwise established liability, a defense based on affiliation between the corporate conspirators. [See, *United States v. Columbia Steel Co.,* 334 U. S. 495, 522.] That is well illustrated by *Kiefer-Stewart v. Jos. E. Seagram & Sons,* 340 U. S. 211—the case which the Court of Appeals cited. There the violation charged and proved was a conspiracy to fix and maintain the resale price of a commodity manufactured and distributed by the corporate defendants who were parent and subsidiary. To that conspiracy the parent and subsidiary corporations were not the only parties. Adherent to it also were the independent dealers who resold the commodity involved. That was clearly a violative conspiracy or combination, without regard to the corporate affiliation of the manufacturers. [See, *e.g., Federal Trade Com. v. Beech-Nut Packing Co.,* 257 U. S. 441; *United States v. Parke, Davis & Co.,* 362 U. S. 29.] So far as "intra-enterprise conspiracy" was concerned, all that this Court did was to say that it is no defense to a conspiracy of the kind there shown that the two manufacturing companies are parent and subsidiary, especially when the two companies "hold themselves out as competitors."[19] [340 U. S. at 215.]

When the affiliated companies are agricultural cooperatives, composed of, and controlled and operated by, the same group of grower-members, the case is measurably different. When that is the situation and the only element of concert of action is concert within the confines of the cooperative organization itself, there is no violation of section 1, for the concert of action is privileged. The defense in such a case is not merely the fact that there is affiliation, but that the affiliation and the intra-cooperative action produced by it have been taken out of the reach of the antitrust laws.[20]

---

[19] Another intra-enterprise conspiracy case is *Timken-Roller Bearing Co. v. United States,* 341 U. S. 593. This Court's discussion of the subject in that case was obviously in response to a government contention which, when compared with the quotation from *Kiefer-Stewart* in the footnoted text immediately above, takes on an enlightening significance. The government's contention, citing *Kiefer-Stewart* among others, was this: [*Brief for the United States,* (Oct. Term 1950, No. 352) pp. 92-93]

> "There is no magic in the relationship between a stockholder and a corporation which will support an agreement between them not to compete. Even where stock ownership is sufficient to constitute voting control agreements not to compete are not thereby legalized. It has repeatedly been held that common ownership, financial integration, parent-subsidiary relationship, is not a defense to agreements not to compete between affiliated corporations if they are in fact *separate companies;* and the decisive fact here is that *these co-conspirators were separate companies, separately operated.* . . ." (Italics added.)

[20] The other intra-enterprise conspiracy cases from this Court are distinguishable for pretty much the same reasons as is *Kiefer-Stewart.* In two of them—*United States v. Crescent Amuse. Co.,* 323 U. S. 173, and *Schine Chain Theatres v. United States,* 334 U. S. 110—the violation was monopolization, for which no plurality of actors is needed. Furthermore, the conspiracy, to the extent that it was involved, was not confined to the affiliated corporate organization, for, in *Crescent* some of the conspiring companies were owned and controlled by a different group from that which controlled the other corporate conspirators; and in

II.

The Disposition of This Case by the Lower Courts Erroneously Denied to Petitioners the Benefits to Which Agricultural Cooperatives Are Entitled Under the Capper-Volstead Act.

The jury in this case were instructed that conspiracy to restrain or monopolize interstate trade is an offense; and that the conspiracy necessary to make out that offense could be found in action or agreement to which only the Sunkist cooperatives were parties.[21] [See,

---

Schine, as in *Kiefer-Stewart*, the conspiracy included outsiders. That was also true of *United States v. Yellow Cab Co.*, 332 U. S. 218, in which at least one of the corporate conspirators (Checker) was not owned by the same person who owned the others. It was anyway a monopolization case; and, as this Court has explained, what was there said was that "the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act . ... ." [*United States v. Columbia Steel Co., supra,* 334 U. S. at 522.] Furthermore, there the affiliation was itself the violative combination because it was the product of a plan of "deliberate, calculated purchase for control" of the relevant market. [See, 332 U. S. at 227-228.] This last comment is also applicable to *Timken Roller Bearing Co. v. United States, supra,* 341 U. S. 593, in which the affiliation was similarly the product of a deliberate plan by which separate and competing companies were brought together under common control to divide markets and restrict competition.

Generally, see, *Report of the Attorney General's National Committee To Study The Antitrust Laws* (Govt. Print. Off. 1955), pp. 30-36.

[21] We need not be concerned with the question whether there might have been support for the jury's verdict in some theory of monopolization, or of conspiracy with outsiders not members of Sunkist. The verdict was general. The record does not show that the verdict was based on either of these other theories or that it was not based on the alternative theory of intra-cooperative action. For the purpose, therefore, of testing the soundness of the alternative theory we must assume that it was the one upon which the jury acted or by which it was influenced in reaching its verdict. [Cases cited, note 14, p. 19, *supra.*] Furthermore, it is only the soundness of that theory that is within the scope of the limited grant of certiorari.

The jury were told that there was no claim in the case of any attempt to monopolize. [R. 3703.]

pp. 17-18, *supra.*] That submission worked in two ways to deprive petitioners of the Capper-Volstead benefits to which they were entitled.

First: Agreement within the cooperative organization was made unlawful, notwithstanding it did not go beyond allocation within it of the functions of processing and marketing. We put on one side, as we must for the purpose of testing the intra-cooperative theory of liability, whatever evidence there may have been of combination or agreement with outsiders. What remains is only evidence of the arrangements by which processing functions were assigned to EOP and ELP and marketing to Growers. [See, pp. 8-10, *supra.*] As we have shown, these were no different in substance from a similar division of functions between departments of a one-entity cooperative. [See, pp. 23-24, 28-29, *supra.*] If the latter is entitled to the immunity conferred by Capper-Volstead, as no one denies, so is the former.

Second: Activities that were nothing but ordinary processing and marketing of the fruit of the Sunkist grower-members, were permitted to be made the basis of a finding of illegality. Any one of the "six acts" if done pursuant to agreement or "conspiracy" between Growers and EOP or ELP was enough, under the court's charge, for a verdict of antitrust violation against petitioners. Yet, none of these acts, had they been performed by a one-entity cooperative, would have been violative of the antitrust laws.[22]

---

[22] None of the six acts was of a trade-restraining character in itself. Their intrinsic quality does not change merely because done pursuant to privileged agreement. In any event, since we cannot tell from the record which of them influenced the verdict, it is enough to infect the charge to the jury with error that any one of them was of a character that would not support a finding of trade restraint. [Cases cited, note 14, p. 19, *supra.*]

For example, Capper-Volstead certainly permits an agricultural cooperative to process its members' products. The Act is explicit to that point. Nothing in the Act suggests that the permitted processing can not be effected lawfully by hiring some one else's facilities for that purpose. But, at bar the jury were told that if ELP processed oranges for EOP, or the latter processed lemons for the former, pursuant to agreement with each other or with Growers, liability was made out. In that way, the purely ordinary processing that Capper-Volstead expressly permits was denied the petitioners. The fruit in each instance was fruit of the Sunkist members. It was, therefore, fruit they were entitled to have processed as the result of their collective agreement to cooperate in the processing and marketing of their products. The quality of that agreement is not changed because it was not made immediately by the members but mediately by their selected processing representatives or instrumentalities.

So, too, the Sunkist grower-members were entitled under Capper-Volstead to market their fruit collectively or through a marketing agency common to all of them. The Act is also explicit in this regard. From this it necessarily follows that the members, acting directly by their own agreement or indirectly by the decision of their marketing agency, may fix the prices at which their products will be sold. This court has recognized as much. [See, *Maryland & Virginia Prod. Asso., supra,* 362 U. S. at 466.] In the case at bar, that simple and necessary step in the marketing process was made the badge of a violation of the antitrust laws. [See, pp. 10, 15-16, *supra.*]

It is also a necessary consequence of Capper-Volstead's exemption of collective marketing, as well as of its express language, that cooperative "associations and their members may make the necessary contracts and agreements" to effect the purposes of processing and marketing. [7 U.S.C.A., sec. 291.] Non-restrictive contracts for processing of the members' products and for the sale of those products are obviously within this express grant. The processing-juice purchase contracts with TreeSweet and Silzle were of this kind. [See, pp. 11-13, *supra.*] They provided for nothing more than the processing of Sunkist oranges into juice; and the purchase of the resulting juice by the processor. The contracts were not trade-restraining in themselves. There was a good business reason for them; one which was obviously in furtherance of the purposes of processing and marketing for which agricultural cooperatives are permitted to be formed. [See, pp. 11-12, *supra.*]

The refusal to enter into business relations with Winckler was entirely permissible. Freedom to sell necessarily includes freedom not to sell. A single trader's refusal to deal, even in the case of an ordinary business corporation, does not violate the Sherman Act when not made pursuant to a proscribed concert of action or from a purpose to achieve or maintain a monopoly.[22] [*United States v. Colgate Co.,* 250 U. S. 300, 307; *Times-Picayune Pub. Co. v. United States,* 345 U. S. 625; *Federal Trade Com. v. Raymond Bros-Clark Co., supra,* 263 U. S. at 573.] *A fortiori* must that be so when the concern refusing to deal is one that, in respect of marketing not carried on by agreement or conspiracy with outsiders, is not amenable to the antitrust laws.

---

[22] Any question arising from alleged monopolization is not here involved. [See, note 21, *supra.*]

There is a sharp contrast between the facts of the instant case and those that were held determinative of antitrust violation in *Borden, supra,* 308 U. S. 188, and *Maryland & Virginia, supra,* 362 U. S. 458. First, in the case at bar, whatever concert of action or combination there might have been was entirely intra-cooperative in nature; in the earlier cases the combination extended to and embraced persons and concerns not members or processing or marketing instrumentalities of the agricultural cooperative. Second, at bar, the "six acts" were nothing but ordinary steps in the course of processing and marketing the grower-members' products; in the other cases the acts taken in pursuance of the unprivileged combination there involved were plainly predatory and anti-competitive in kind.[24]

Conclusion.

The judgment of the Court of Appeals, insofar as it affirmed the judgment of the District Court on the issue of liability, should be reversed.

Respectfully submitted,

Ross C. Fisher,
Herman F. Selvin,
Attorneys for Petitioners.

---

[24] For example, in *Maryland & Virginia* there were such acts as the acquisition by the cooperative of its strongest competitor for the purpose of eliminating competition; the agreement with that competitor that the latter would endeavor to cause its members or producers either to join the cooperative or transfer their competitive activity to another market; and, group boycotts of those who would not buy from the cooperative. [362 U. S. at 468-470]; in *Borden* the burden of the indictment was group fixing of the price that the cooperative and all other distributors of milk would pay to producers of the milk and of the resale prices of milk sold by the distributors. [308 U. S. at 194, incorporating the District Court's construction of the indictment at 28 F. Supp. 179-181, by which the Supreme Court was bound.]

APPENDIX.

Statutes Involved.

Sherman and Clayton Acts [15 U. S. C. A., Secs. 1, 2, 17]

§1. Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . [July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.]

§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. . . . [July 2, 1890, c. 647, §2, 26 Stat. 209.]

§6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. [Oct. 15, 1914, c. 323, §6, 38 Stat. 731.]

CAPPER-VOLSTEAD ACT [7 U.S.C.A. Sec. 291, 292]

§1. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First: That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or

Second: That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third: That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members. [Feb. 18, 1922, c. 57, §1, 42 Stat. 388.]

LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
MAR 7 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961
No. 241

SUNKIST GROWERS, INC., a corporation, and the EXCHANGE ORANGE PRODUCTS COMPANY, a corporation,
Petitioners,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation, and RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,
Respondents.

BRIEF FOR RESPONDENTS.

WILLIAM C. DIXON,
417 South Hill Street,
Los Angeles 13, California.

HOLMES BALDRIDGE,
77 West Washington Street,
Chicago, Illinois,
Attorneys for Respondent.

Of Counsel:
HARRY M. IRWIN,
215 West Fifth Street,
Los Angeles 13, California,
Attorney for Trustee Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

8

SUBJECT INDEX

PAGE

Opinion below 1

Jurisdiction 1

Statutes involved 2

Question presented 2

Statement of facts 3

A. The second amended complaint 3

B. Description of the parties involved 6

1. Respondent Winckler 6

2. Petitioners Sunkist and Exchange Orange and co-conspirator Exchange Lemon 7

3. The co-conspirators TreeSweet and Silzle 9

C. Control of California-Arizona Citrus Industry 10

D. Respondent's theory of liability and the evidence in support thereof 11

1. Establishing and maintaining a price of $40.00 per ton for by-product oranges in 1951 14

2. The contracts between Exchange Orange, and TreeSweet and Silzle 15

a. The TreeSweet contract 17

b. The Silzle contract 20

3. Petitioner's refusal in 1951 to make by-product oranges available to respondent except at the $40.00 price 21

Summary of argument 28

PAGE

Argument 30

I.

The question presented by petitioners is not supported by the trial court's instructions to the jury or by the evidence 30

II.

Even assuming that the trial court's instructions permitted the jury to find a combination and conspiracy only among the related cooperatives the conduct charged as unlawful was not privileged under Capper-Volstead and violated Sections 1 and 2 of the Sherman Act 43

Conclusion 56

Appendix. Statutes involved ....App. p. 1

TABLE OF AUTHORITIES CITED

CASES

PAGE

American Tobacco Co. v. United States, 382 U. S. 781........................44, 48, 56

Appalachian Coals, Inc. v. United States, 288 U. S. 344............ 56

Associated Press v. United States, 326 U. S. 1.......................... 44

Eastern States Retail Lbr. Dealers Assn. v. United States, 234 U. S. 600.. 49

International Salt Co. v. United States, 332 U. S. 392.............. 48

Interstate Circuit, Inc. v. United States, 306 U. S. 208............ 50

Kiefer-Stewart v. Seagram, 340 U. S. 211.................................. 32

Lorain Journal v. United States, 342 U. S. 143.......................... 49

Magniac v. Thompson, 32 U. S. 348.. 30

Maryland and Virginia Milk Producers Assn., Inc. v. United States, 326 U. S. 458..29, 50, 51, 54

Railway Co. v. Whitton, 80 U. S. 270.. 30

Seaboard Airline Ry. Co. v. Padgett, 236 U. S. 668.................. 30

Spring Co. v. Edgar, 99 U. S. 645.. 30

Swift and Company v. United States, 196 U. S. 375.................. 44

United States v. Aluminum Company of America, 148 F. 2d 416 49

United States v. Borden, 308 U. S. 188..........................31, 50, 51

United States v. Griffith, 334 U. S. 100...................................... 48

United States v. Paramount Pictures, Inc., 334 U. S. 131...... 50

United States v. Patten, 226 U. S. 525.. 44

United States v. Socony-Vacuum Oil Co., 310 U. S. 150....50, 56

United States v. Trenton Potteries, 273 U. S. 392.................... 50

Western Mass. Ins. Co. v. Norwich & New York Transportation Co., 79 U. S. 201.. 30

MISCELLANEOUS

PAGE

House Report No. 24, 67th Cong., 1st Sess, p. 2 53

House Report No. 24, 67th Cong., 1st Sess., p. 3 54

RULES

Federal Rules of Criminal Procedure, Rule 51 33

STATUTES

Act of July 2, 1890 (26 Stat. 290) 2

Act of October 15, 1914 (38 Stat. 731) 2

Act of February 18, 1922 (42 Stat. 388) 2

California Business and Professions Code, Secs. 16700-16758 3

California Business and Professions Code, Secs. 17000-17101 3

Capper-Volstead Act, Sec. 1 .... 2, 28, 29, 31, 35, 51, 52, 53

Capper-Volstead Act, Sec. 2 52

Clayton Act, Sec. 4 .... 2, 3, 6

Clayton Act, Sec. 6 .... 2, 35, 40, 52

Clayton Act, Sec. 7 .... 52, 53

Federal Bankruptcy Act, Chap. X 6

Robinson-Patman Act, Sec. 3 3

Sherman Act, Sec. 1 .... 2, 3, 4, 32, 48, 50, 54, 55, 56

Sherman Act, Sec. 2 .... 2, 3, 32, 40, 48, 50, 52, 53, 54, 55, 56

Sherman Act, Sec. 3 52

United States Code, Title 15, Sec. 1 .... 2, 3

United States Code, Title 15, Sec. 2 .... 2, 3

United States Code, Title 15, Sec. 13a 3

United States Code, Title 15, Sec. 15 3

United States Code, Title 28, Sec. 1254(1) 1

United States Code Annotated, Title 7, Sec. 291 .... 2, 31

Uniter States Code Annotated, Title 15, Sec. 4 2

United States Code Annotated, Title 15, Sec. 6 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., a corporation, and the EXCHANGE ORANGE PRODUCTS COMPANY, a corporation,
Petitioners,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation, and RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,
Respondents.

BRIEF FOR RESPONDENTS.

Opinion Below.

The opinion of the Court of Appeals is reported in 284 F. 2d 1, and is printed at pages 3950-4005 of the Record. An order modifying that opinion in certain particulars is reported in 289 F. 2d 933, and is printed at pages 4006-4007 of the Record. There was no opinion in the District Court but that Court's judgment entered upon the jury's verdict is printed at pages 336-339 of the Record.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 30, 1960. [R. 3950, 4005-4006.] Timely petitions for rehearing were filed by both petitioners and respondents, which were denied on May 5, 1961. [R. 4008.] The petition for certiorari herein was filed on July 20, 1961. Jurisdiction of this Court was invoked under 28 U. S. C. Sec. 1254(1).

Statutes Involved.

The statutes involved are sections 1 and 2 of the Sherman Act (Act of July 2, 1890, 26 Stat. 290; 15 U. S. C. A. Secs. 1, 2); Sections 4 and 6 of the Clayton Act (Act of October 15, 1914, 38 Stat. 731; 15 U. S. C. A. Secs. 4, 6); and Section 1 of the Capper-Volstead Act (Act of February 18, 1922, 42 Stat. 388; 7 U. S. C. A. Sec. 291). These statutes in pertinent part are set out in the appendix to this brief.

Questions Presented.

Where a group of citrus fruit growers form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act (7 U. S. C. A. Sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act, upon proof only that these growers, through the agency of these three cooperatives, agreed among only themselves with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?[1]

---

[1] As will be shown hereinafter under the Argument neither the facts adduced at trial nor the trial Court's instructions to the jury provide any basis for such a question.

Statement of Facts.

On February 1, 1952, respondent, an independent processor of citrus fruit juice, brought an action for treble damages under Section 4 of the Clayton Act (15 U. S. C. Sec. 15) against the California Fruit Growers Exchange,[2] its two processing affiliates Exchange Orange Products Company, and Exchange Lemon Products Company, and TreeSweet Products Company, an independent processor of citrus fruit juices, for alleged violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. Secs. 1, 2).[3] The charge was conspiracy to restrain, conspiracy to monopolize, and actual monopolization of interstate commerce in the production and marketing of citrus fruit and canned fruit juices produced and processed in the State of California and marketed throughout the United States. [R. 3-23.] This complaint was twice amended. [R. 72-99; 250-274.]

A. The Second Amended Complaint.

In the Second Amended Complaint petitioners Sunkist Growers, Inc., and the Exchange Orange Products Company were named as defendants. Exchange Lemon Products Company, TreeSweet Products Company, and E. A. Silzle Corporation (another independent California citrus juice processor) were named as co-conspirators but not as defendants. [R. 254-256.][4] Prior to trial TreeSweet had made a settlement with plaintiffs by the payment of $2,500.00 as damages. The dismissal of TreeSweet as a defendant was without prejudice. [R. 67-72.]

---

[2] Subsequently the name of this concern was changed to Sunkist Growers, Inc. [R. 545.]

[3] The Complaint also charged violations of Section 3 of the Robinson-Patman Act (15 U. S. C., Sec. 13a), of Sections 16,-700-16,758 of the California Business and Professions Code (commonly known as the "Cartright Antitrust Law") and Sections 17,000-17,101 of the same code (commonly known as the "Unfair Trade Practices Act") [R. 252]. The Robinson-Patman Act charge was dismissed on motion of plaintiffs after the trial began. [R. 250.] The two charges under the California statutes were dismissed on motion of defendants without objection from plaintiffs. [R. 176.]

The Second Amended Complaint [R. 251-274] charged in Count I that the defendants and the co-conspirators had conspired to violate Section 1 of the Sherman Act by entering into contracts which had the purpose and effect of unreasonably restraining interstate commerce in canned citrus fruit juice produced and processed in the State of California and marketed throughout the United States, particularly canned single strength orange juice, and that such contracts had had the effect of eliminating plaintiff as a competitor from such market. [R. 265.]

Six specifications were set out relating to what the defendants and the co-conspirators were alleged to have done to restrain interstate commerce and to eliminate plaintiff as a competitor, to wit: the making of reciprocal processing contracts between Exchange Orange and Exchange Lemon; establishment by Sunkist and Exchange Orange of a price for product oranges in 1951 for sale to independent processors of single strength orange juice, including plaintiff, which was so high as to make it impossible for such independents, including plaintiff, to purchase such oranges, and process and sell the resultant juice at prices which would be competitive with the prices charged by Sunkist, TreeSweet and Silzle; the making of contracts by Exchange Orange with TreeSweet and Silzle under which these latter two processors could process defendants' oranges and sell the resultant single strength juice at prices which were competitive with the prices at which Sunkist sold such juice, and the refusal of defendants to make oranges available to plaintiff on any comparable basis. [R. 266-269.]

---

[4] For convenience hereinafter Sunkist Growers, Inc., will be referred to as "Sunkist"; The Exchange Orange Products Company will be referred to as "Exchange Orange"; The Exchange Lemon Products Company will be referred to as "Exchange Lemon"; TreeSweet Products Company will be referred to as "TreeSweet"; the E. A. Silzle Corporation will be referred to as "Silzle"; and respondents will be referred to as "Winckler."

Count II of the Second Amended Complaint charged that defendants Sunkist and Exchange Orange, and the co-conspirator Exchange Lemon, had monopoly control over the production and distribution of fresh citrus fruit available in California and Arizona for processing into canned natural and frozen concentrate citrus juices in California, and that by entering into oral and written agreements and by doing the six acts described in Count I, the defendants and the co-conspirators TreeSweet, Silzle, and Exchange Lemon had conspired to monopolize, and had in fact monopolized, that part of interstate commerce in natural and frozen concentrate fruit juices produced in California and sold in interstate commerce, particularly single strength orange juice, with resultant damage to plaintiff. [R. 271.]

It was alleged further in Count II that pursuant to the alleged conspiracy, and in abuse of their monopoly power and control over product oranges, the defendants had entered into contracts with independent processors other than TreeSweet and Silzle under which defendants secured "first call" on the processing facilities of such independents to the exclusion of other marketing cooperatives, including the Independent Fruit Growers Association. [R. 271-272.]

After a lengthy trial the case was submitted to the jury which returned a general verdict against Sunkist and Exchange Orange in the sum of $500,000. [R. 295.] Pursuant to Section 4 of the Clayton Act this judgment was trebled, and the Court allowed $195,000 as attorney's fee. With deduction of $2,500.00 previously paid by TreeSweet [R. 68-73], the total judgment entered was $1,692,500. [R. 336-339.] On appeal from the judgment the Court of Appeals affirmed on the issue of liability and reversed and remanded on the issue of the amount of damages. [R. 4005-4006.] A petition for certiorari by Sunkist and Exchange Orange was granted, limited to the single question previously stated. [R. 4009.][3]

B. Description of the Parties Involved.

1. Respondent Winckler.

Winckler was a California corporation organized on October 29, 1945. Until March 26, 1952, it owned and operated a citrus fruit processing plant at Anaheim, California. Subsequent to such date such products as were produced at its plant were produced by the Trustee acting under the supervision and control of the Federal District Court under Chapter X of the Federal Bankruptcy Act. [R. 538.] Its president and operating head was Nicholas J. Winckler. [R. 994.]

---

[3] There is presently pending in this Court a petition for certiorari by respondents herein (No. 275, October Term, 1961), seeking review of that part of the judgment of the Court of Appeals which reversed the judgment of the District Court with respect to the amount of damages.

Throughout its existence the principal business of Winckler was the processing and sale in interstate commerce of canned single strength orange juice. [R. 999, 1003-1004.] It sold such juice in direct competition with canned single strength orange juice produced and sold by petitioners, by TreeSweet and by Silzle. [R. 540, 773-774, 886, 999-1001, 1005-1007, 1479-1485, 2969-2970.] In 1949 and 1950, Winckler invested $97,000.00 in new machinery and equipment, most of which was designed for the production of frozen concentrate, and by late 1950 Winckler was also producing canned lemonade, hot and frozen orange concentrate, blends and beverages. [R. 995-998, 1002-1005.]

2. Petitioners Sunkist and Exchange Orange and Co-Conspirator Exchange Lemon.

With a few additions deemed essential to an adequate factual presentation, respondents accept petitioners' description of the organization and functions of the constituent elements of the so-called "Sunkist System" of cooperatives.

Petitioner Sunkist is the largest marketing agency in the United States for fresh and by-product* citrus fruits. In 1951, its total volume of sales was in excess of $150,000,000.00 f.o.b. shipping point, of which 18 percent, or approximately $27,000,000.00 represented by product sales as distinguished from fresh fruit sales. [R. 587.] Approximately 60 percent of the oranges produced by growers affiliated with Sunkist in 1951 was sold as fresh fruit. The remainder was either sold to independent processors as product fruit or was processed by or at the direction of Exchange Orange into various products, including juice products, and sold. [R. 540, 541.] Sunkist sells by-product oranges to independent processors through a sales office located in Los Angeles. [R. 618.] Through its "Products Department" it sells various products manufactured by Exchange Orange and Exchange Lemon, including juices, oil, pectin, pharmaceuticals and cattle feed. [R. 553, 2956-2958.][7]

---

*"By-product fruit" is citrus fruit which is not marketed as fresh fruit. It is processed by canners into single strength juice, hot pasteurized concentrate juice and frozen concentrate juice.

Exchange Orange is a wholly-owned subsidiary of Sunkist. It is a processing company engaged primarily in the business of manufacturing various products from oranges and grapefruit, principally juice products. It takes that part of such by-product fruit which is not sold by Sunkist to independent processors and either itself processes such fruit or makes contracts with other processors for such purpose. [R. 538-540; 552-553; 666-669.] Exchange Orange manufactures three types of juice products from by-product oranges, namely, single strength juice, which is the natural juice of the fruit; hot concentrate, a pasteurized concentrate used as a base for various ade drinks, and frozen concentrate which, upon the addition of water, becomes ordinary orange juice. [R. 702-712.]

Co-conspirator Exchange Lemon is owned by the local grower associations affiliated with Sunkist which produce lemons. Its chief function is to process into juice and other products those lemons produced by Sunkist grower members which are not sold as fresh fruit. [R. 538-540; 552-553; 555-563; 2725-2726.]

---

[7] The "Products Department" is managed by a joint executive committee made up of an equal number from the boards of directors of both Exchange Orange and Exchange Lemon. [R. 562-565; 878-881.]

3. The Co-Conspirators TreeSweet and Silzle.

TreeSweet is a California corporation for profit and is engaged primarily in the business of processing and selling canned single strength orange juice which it sells in interstate commerce, largely under its own label. [R. 540; 906-910.] Its principal supplier of product oranges during the period 1947-1951, inclusive, was Exchange Orange. [R. 908, 910; Exs. 20, 21, 22, E 332-355.][8] TreeSweet competes directly with Sunkist, Silzle and Winckler in the sale in interstate commerce of its canned single strength orange juice. [R. 540; 744; 773-774; 886; 999-1001; 1005-1007; 1479-1485; 2969-2970.] In 1951 TreeSweet processed no frozen citrus juices. [R. 906.]

Silzle is a California corporation for profit, engaged in the business of processing and selling by-product citrus fruit into citrus juices. Like TreeSweet, its principal product is canned single strength orange juice, which it sells in interstate commerce [R. 540; 947] to private label buyers [R. 2969] in direct competition with similar single strength orange juice sold by Sunkist, TreeSweet and Winckler. [R. 540; 744; 773-774; 886; 999-1001; 1005-1007; 1479-1485; 2969-2970.] Silzle processed no frozen citrus fruit juice products in 1951. [R. 947.]

---

[8] Since the "Exhibit Volume" is not paged consecutively with other parts of the record, a page reference herein which is preceded by the letter "E" refers to the Exhibit Volume.

C. Control of California-Arizona Citrus Industry.

During the period 1949-1951, inclusive, petitioners controlled approximately 71 percent of all oranges, and approximately 88 percent of all lemons, grown in the California-Arizona area. On the average petitioners sold approximately 60 percent of their oranges as fresh fruit, as was the case in 1951; of the remaining 40 percent a part was sold by Sunkist to independent processors and the rest was turned over to Exchange Orange for processing by such company or at its direction. [R. 277-278, 540-542, 553-555, 600; Ex. 3A—B(1)-16, E 38, 39.]

In an average year petitioners had more by-product oranges than could be processed with their own facilities. The evidence showed that continuously since 1920, petitioners have maintained the general policy of utilizing to the fullest extent possible the facilities of independent processors in disposing of their by-product fruit, including by-product oranges. The reasons advanced by the general managers of Sunkist and Exchange Orange for the maintenance of such a policy was the desire to take advantage of the skills of the independent processors in the development of new citrus products and in the broadening of the market for such products; the desire to avoid the necessity of making large capital expenditures for additional processing machinery and equipment which would be required if they processed all of their own by-product fruit, and the fact that returns from processing contracts were frequently greater than would have been the case had the fruit been sold outright. Even in years of short supply petitioners made processing contracts with independents, particularly with those who had been regular customers. [R. 2711, 2713, 2714, 2983-2985, 992-2995.]

In the critical year 1951, petitioners controlled approximately 70 percent of all by-product oranges available in the California-Arizona area. [R. 688, 1582; Exs. 72, 75, CF, E 531, 535, 543.] The remaining 30 percent was scattered among three processing concerns[9] which had processing facilities of their own and hence had no by-product oranges for sale, and a group of growers organized into an association[10] which had packing and shipping facilities but no processing equipment, and either sold its oranges outright to processors or entered into contracts with processors. [R. 686-689, 1436, 1577-1582, 1589-1596.]

D. Respondent's Theory of Liability and the Evidence in Support Thereof.

Respondent's theory of liability and damage, as disclosed by the evidence, was that in 1951 petitioners controlled the supply of by-product oranges in the California-Arizona area available to independent processors, including respondent, for processing into citrus fruit products, particularly single strength orange juice; that petitioners combined and conspired with their affiliate Exchange Lemon and with two independent processors, TreeSweet and Silzle, which two independent processors were competitors of both petitioners and respondent, to restrain and to monopolize interstate trade and commerce in 1951 in the processing and sale of California citrus fruit juices, particularly single strength orange juice, and that such monopolization was actually achieved, and that the purpose or effect of such combination and conspiracy was the elimination of respondent as a competitor in the interstate market for such juices, particularly California single strength orange juice, respondent's principal product.

---

[9] These three concerns were: Mutual Orange Distributors of Anaheim, California, a grower cooperative; American Fruit Growers Company of Fullerton, California, a corporation for profit, and Paramount Citrus Association of San Fernando, California, a corporation for profit with grower members.

[10] The Independent Citrus Growers and Shippers Association of Fullerton, California.

The means of achieving such result were the following: (1) the setting of a price, after consultation between petitioners and TreeSweet and Silzle, of $40.00 per ton for by-product oranges available to independent processors of single strength orange juice, including respondent, and maintaining such price throughout the 1951 season; (2) the execution of contracts between petitioners and TreeSweet and Silzle under the terms of which by-product oranges were made available to the latter two companies at prices which were in fact and effect far below the $40.00 price, and under an arrangement pursuant to which TreeSweet and Silzle sold the resultant single strength juice in the interstate markets at the Sunkist established prices and with a guaranteed profit to TreeSweet and Silzle, and (3) the refusal by petitioners to make oranges available to respondent, a regular customer of petitioners, on any basis other than at a price of $40.00 a ton, a price which petitioners conceded no independent could pay for product oranges and process and sell the resultant single strength juice at a profit, or at prices competitive with the prices charged for such juice by petitioners, TreeSweet and Silzle, respondent's competitors.

The record evidence in support of this theory of liability is summarized below.

Petitioners by-product orange crop in 1951 was the largest in their history [R. 3045, 3046; Exs. FD, E 546], totalling approximately 318,000 tons. [R. 541.] This tonnage was disposed of in the following manner. Sunkist sold approximately 46,000 tons to independent processors [R. 541] for processing into hot and frozen concentrate.[11] The remaining 272,000 tons were turned over to Exchange Orange for disposition. Of this amount Exchange Orange processed approximately 164,000 tons with its own facilities, and Exchange Lemon processed approximately 31,200 tons for the account of Exchange Orange [R. 541]; approximately 45,000 tons were disposed of through contracts between Exchange Orange and four independent processors[12] for conversion into hot and frozen concentrate [Exs. 15, 16, 17, 17A, 18, 19, E 297-332], and the remaining tonnage, approximately 31,800 tons, was disposed of by contracts between Exchange Orange, and TreeSweet and Silzle for conversion into canned single strength juice. [Exs. 20, 25; E 332-341, 356-368.] It is these latter two contracts, together with the business setting in which, and the circumstances under which they were made, that gave rise to this lawsuit. Such circumstances are described below.

---

[11] While the record does not show precisely the products into which this tonnage was converted, it was not shown that the product was single strength orange juice. The general manager of Exchange Orange testified that processors of hot and frozen concentrate could pay the 1951 Sunkist price for product oranges and sell the resultant juice products at a profit. [R. 2971.]

[12] These four processors were: General Foods, Hyland-Stanford, Mission Dry, and Harts.

1. Establishing and Maintaining a Price of $40.00 per Ton for By-Product Oranges in 1951.

In April 1951, petitioners set a selling price of $40.00 per ton on product oranges having a soluble solids content of 120 pounds per ton. [Exs. 5, E 43-44],[13] and circulated such price list to the trade [R. 623-624], including Winckler. [R. 1044; Ex. 42, E 478].[14] This price list remained unchanged throughout the year 1951, although in most years changes occurred during the year. [R. 625, 654-655.] The 1951 price list was the product of joint discussions between officials of Sunkist and Exchange Orange. [R. 616-619, 631.] An official of Sunkist also sought the views of certain independent processors as to what the 1951 prices on by-product oranges should be, including three processors of single strength juice, namely, TreeSweet, Silsle and Case-Swayne. [R. 627-628.][15]

Petitioners were unable to sell at the $40.00 price any of the approximately 31,800 tons of product oranges which they had available in 1951 for processing into single strength orange juice.[16] The manager of Exchange Orange made it clear why this was so. He stated that no single strength juice processor could pay the $40.00 price for oranges, and process and sell the resultant juice at prices which would be competitive with the prices charged in 1951 by Sunkist for single strength juice, and make a profit. [R. 862-863.][17] Since petitioners were desirous of keeping California single strength orange juice in the markets throughout the country during the 1951 season [R. 891-892, 2971-2972; Ex. 29, E 452-453], they disposed of the tonnage by making processing contracts with TreeSweet and Silzle. [Exs. 20, 25, E 332-341, 356-368.]

---

[13] The term "soluble solids" is descriptive of the constituent elements inside the orange other than water, such as citric acid, sugar and other dissolved solids. [R. 571-572.] The selling price of by-product oranges varies with the soluble solids content. In 1951, the price ranged from $17.00 per ton for fruit having 60 pounds of soluble solids, to $51.50 per ton for oranges containing 150 pounds of soluble solids.] Most of the fruit with which this case is concerned ranged from 120 to 136 pounds of soluble solids per ton, or from $40.00 to $46.13 per ton. [R. 928, 1969; Ex. 5, E 43-44.]

[14] Petitioners did not send TreeSweet a copy of their 1951 price list. The only oranges purchased by TreeSweet for processing purposes in 1951 were purchased from sources other than Sunkist. [R. 917-918, 929-930, 938.]

[15] No price discussions occurred between any official of petitioners and Winckler. [R. 627-628.]

2. The Contracts Between Exchange Orange, and TreeSweet and Silzle.

In 1951 there were four independent processors in the California-Arizona area which were engaged primarily in the business of processing and selling in interstate commerce canned single strength orange juice. Each of these concerns was dependent upon others, chiefly the petitioners, for its source of supply of product oranges with which to manufacture such juice. These independent processors of canned single strength orange juice were Winckler, Case-Swayne Company, and the co-conspirators TreeSweet and Silzle. [R. 540,

---

[16] The processors which purchased oranges for conversion into hot and frozen concentrate could pay the $40.00 price and still make a profit on the sale of such products. [R. 2971-2972.]

[17] The same admission included the statement that no independent processor could compete price-wise with TreeSweet and Silzle [R. 862-863] which were made the beneficiaries of special deals which will be described in the next subsection of this brief.

906, 947, 1004.] Each of the processors was in direct competition with each of the others, and all four competed directly with Sunkist, in the manufacture and sale in interstate commerce of canned single strength orange juice. [R. 744, 773-774, 885-886, 999-1001, 1005-1007, 1479-1485, 2273, 2969-2970.][18]

Winckler had been a regular customer of petitioners throughout its existence in the purchase of by-product oranges for processing into canned single strength orange juice. [R. 646-647, 1005-1006, 1011, 1044-1045, 1441.] Neither TreeSweet nor Silzle nor Case-Swayne had been a regular customer of petitioners in the purchase of oranges for conversion into single strength orange juice. [R. 640, 929, 948-950, 2289-2290.]

Petitioners disposed of the approximately 31,800 tons of oranges available for processing into single strength orange juice by entering into a contract with TreeSweet [Ex. 20, E 332-341], under which TreeSweet processed 24,148 tons [R. 755]; and by making a contract with Silzle [Ex. 25, E 356-368], under which that company processed 6,675 tons. [Ex. 66A, E 520.][19] They offered a similar contract to Case-Swayne which that company declined [R. 2276-2278],[20] but refused Winckler's repeated timely requests either for a similar contract or for oranges at a price which would permit Winckler to process and sell single strength orange juice at prices which would be competitive with the prices at which Sunkist, TreeSweet and Silzle were selling such juice. [R. 1058-1084.]

---

[18] TreeSweet sold in the national market under its own label [R. 908]; Silzle sold in the national market to private label buyers [R. 2989, 3064]; Case-Swayne sold largely on the West Coast under its own label [R. 2969], and Winckler sold in the national market under its own label. [R. 998.]

[19] Earlier in the year Silzle had purchased 72 tons of oranges from Sunkist for processing into single strength juice at a price of $27.00 per ton, including the oil and peel [R. 776-778], and 527 tons at $22.50 per ton, including the oil and peel. [R. 778-780; Exs. 6, 7, E. 119-141, 143-147, R. 636, 642.]

a. *The TreeSweet Contract.*

Under the contract between Exchange Orange and TreeSweet [Ex. 20, E 332-341][21] the former company made oranges available to TreeSweet on a consignment basis, paid TreeSweet its processing costs at specified rates, as well as the cost of trucking the fruit to TreeSweet's plant. TreeSweet agreed to and did purchase the resultant single strength orange juice at the Sunkist published selling price for such juice as of the date of purchase, less discounts and allowances of 15 percent not available to other purchasers, including Winckler.[22] In addition, TreeSweet was given an advertising allowance of 7¢ per case [R. 765-768], although the juice was sold under the TreeSweet rather than the Sunkist label. [R. 758.][23] TreeSweet was not required to pay for the juice until it was sold. Under the contract Exchange Orange was to get the oil and peel.

---

[20] At the time petitioners offered such a contract to Case-Swayne that company had already committed its processing facilities to the making of vegetable juices, and single strength orange juice on a contract basis for the Independent Citrus Growers and Shippers Association. [R. 2272-2274, 2278-2280, 2284, 2287, 2290-2293.]

[21] The TreeSweet contract was made after discussions among officials of Sunkist, Exchange Orange and TreeSweet and was not available to any other independent processor. [R. 611-612, 752-755, 911-912, 2980-2982, 2990, 3039, 3066.]

[22] Winckler purchased some juice from Sunkist in 1951 and paid approximately $2.46 a case therefor while TreeSweet was purchasing the same juice for $1.73 a case. [R. 1085, Exs. 49, 50, E 481, 491.] Sunkist also maintained a two price structure in the sale of its single strength orange juice, charging a higher price for such juice in California and Arizona and a lower price elsewhere [R. 819, 825-827; Ex. 27, E 395-452.] When TreeSweet sold the juice to customers located in California and Arizona it paid petitioners therefor at the higher Sunkist price less the 15 percent discount, and the 7¢ per case advertising allowance. When it sold elsewhere it paid petitioners for the juice at the lower Sunkist price. [R. 926-927, 3056-3057.]

In effect, the contract provided that petitioners were to be paid for their product oranges on the basis of the difference between the amount credited to TreeSweet for processing such fruit and the price which TreeSweet paid petitioners for the processed juice at the time such juice was sold by TreeSweet. [R. 756.] On this basis TreeSweet was credited with $859,004.00 for processing the 24,148 tons, and it paid petitioners $1,204,031.41 for the single strength juice processed therefrom. The difference, to wit $345,027.41, was the sum which TreeSweet actually paid for the oranges, or at the rate of $14.29 per ton before adjustment for the oil and peel. [Ex. 67, E 525-528.] The net return on the oil and peel was $10.81 per ton. [Ex. 67, E 527-528.] Thus, the total received by petitioners for the oranges processed and purchased by TreeSweet was $25.10 per ton, or at a price which was $19.12 per ton less than petitioners' published selling price for oranges having a comparable soluble solids content.[24]

---

[23] The manager of Exchange Orange conceded that the normal and usual purpose of an advertising allowance was to advertise the brand name of the concern granting the allowance, but that in this situation TreeSweet was permitted to make such use as it saw fit of the advertising allowance. [R. 767-769.]

[24] The average soluble solids content of the oranges processed by TreeSweet under the 1951 contract was 131.6 pounds per ton [R. 928.] Petitioners' 1951 published selling price for oranges having a soluble solids content of 131.6 pounds per ton was $44.22 per ton. [Ex. 5, E 44.]

Petitioners conceded that such contract not only protected TreeSweet against any inventory losses in the market price for canned single strength orange juice during both the selling and carryover seasons [R. 3054], but also guaranteed TreeSweet a profit; that TreeSweet could not lose under such a contract. [R. 846.]

Petitioners' selling price on the 12/46 oz. family size case[25] of canned single strength orange juice in 1951, ranged from $2.50 to $2.80 per case in the California-Arizona area, and from $2.20 to $2.50 per case in all other areas. [R. 819; Exs. 27, 28, E 395-452.] TreeSweet's selling prices for such juice in 1951 were the same as those of petitioners. [Exs. 27, 36, E 395-442, 461-466.][26] Petitioners admitted that under normal use of processing facilities it would cost approximately $3.08 to produce a case of 12/46 oz. single strength orange juice with fruit which cost $40.00 per ton, before any addition for selling expense and profit, that is $1.74 per case for the oranges, and $1.35 per case for the cost of manufacture. [R. 745-749.][27]

---

[25] The 12/46 oz. family size accounted for approximately 80 percent of the pack. [R. 746.]

[26] The president of TreeSweet admitted that his company's selling prices were patterned after those of Sunkist, and were usually the same as the Sunkist prices, that such was the custom in the industry. [R. 919-920.] The general manager of Exchange Orange stated that whenever Sunkist made a price change in single strength juice such a change was communicated immediately to TreeSweet. [R. 825.]

[27] The operating head of TreeSweet testified that his company could not have processed and the 24,148 tons it received from Exchange Orange in 1951 and sold the single strength orange juice at a profit, even if his company had had to pay as little as $33.00 per ton for such oranges. [R. 938.]

b. The Silzle Contract.

The contract between Exchange Orange and Silzle was substantially similar to the TreeSweet contract. [R. 774; Ex. 25, E 356-368.][28] Under this contract Silzle processed 6,675 tons of oranges at a cost to it of $215,602.10. The Silzle purchase price of the resultant single strength juice was $306,263.65. The difference of $90,661.55, after the allowance to Silzle of its processing costs of $215,602.10 was at the rate of $13.58 per ton for oranges with a soluble solids content of 120 pounds per ton before adjustment for the oil and peel. [Ex. 66A, E 522-524.][29] Under the contract petitioners were to get the oil and peel, which amounted to $4.08 per ton. [Exs. 11, 25, 66A; E 285-291, 356-368, 522-524.] Thus, the amount received by petitioners for oranges processed under this contract was $17.66 per ton, or at a rate of $22.34 per ton less than petitioners' published list price for oranges having a comparable soluble solids content.

Under the contract Silzle was given a discount of 12½ percent off the published Sunkist selling price at the time of its purchase of the juice. In addition, Silzle received an advertising allowance of 7c per case, although substantially all of its production was sold to private label buyers, and none of it was sold under the Sunkist label. [R. 800, 2969, 3065.] Silzle was to pack juice only for current sales, and not for inventory. [R. 874, 2989.]

---

[28] This contract was not signed formally until September 10, 1951, but by its terms it was to be effective from and after July 15, 1951. [R. 784-789, 801-807, 950-956, 965-976, 2987-2988; Ex. 25, E 356-368.]

[29] The average soluble solids content of the oranges processed by Silzle under the contract was 120 pounds per ton. [Ex. 7, E 143-147.] The published Sunkist selling price for such oranges was $40.00 per ton. [Ex. 5, E 43-44.]

Silzle's selling prices for the single strength juice were patterned after and were basically the same as the Sunkist selling prices. [R. 978, 986, 2952-2954.]

3. Petitioners' Refusal in 1951 to Make Oranges Available to Respondent Except at the $40.00 Price.

Throughout the 1951 processing and selling season petitioners were always willing to sell product oranges to respondent but only at the $40.00 price. [R. 1058-1070.] Respondents' cost of processing and selling a 12/46 oz. case of single strength orange juice with $40.00 fruit was $3.52 per case without the addition of anything for profit. [R. 1026-1044.] As previously pointed out, Sunkist, TreeSweet and Silzle in 1951 sold at a profit the 12/46 oz. size case at prices ranging from $2.50 to $2.80 per case in California and Arizona, and from $2.20 to $2.50 per case in all other cases [R. 815-819; Exs. 27, 28, 36; E 395-452, 461-466; R. 986-987, 2952-2954.] The manager of Exchange Orange readily admitted that no one could pay $40.00 a ton for fruit, and process and sell the resultant single strength juice at a profit. [R. 862-863.]

Over a period of several months respondent sought unsuccessfully to secure oranges from petitioners either at a price or under an arrangement which would permit it to compete price-wise with its competitors Sunkist, TreeSweet and Silzle. About the middle of June, 1951, Winckler inquired of Kelly, who was in charge of Sunkist's sales of product oranges to independent processors, whether there had been any change in the price of fruit. Kelly said the price was still $40.00 but that he knew that juice was selling for $2.20 per case for the 12/46 oz. size. [R. 1058-1059.] Ten days later Winckler inquired of Kelly whether there was any possibility that the price of fruit would be adjusted so as to put it in line with the prices at which the juice was being sold. Kelly advised Winckler to discuss the matter with Wilcox, assistant general manager of Sunkist. [R. 1059-1060.]

The conference with Wilcox occurred around July 1, 1951. Winckler informed Wilcox that certain processors were offering juice at $2.20 per 12/46 oz. case and that there must be some special arrangement in effect between such processors and petitioners since it was impossible to pay $40.00 for fruit and sell the juice at such price. Wilcox advised Winckler to see Finley, general manager of Exchange Orange, who was the only person who could make such special arrangements. [R. 1060-1062.]

Around July 7, 1951, Winckler called Finley and asked for fruit under the same terms as petitioners were making oranges available to Winckler's competitors. Finley suggested that Winckler call again in about a week. [R. 1063.] Winckler called again around July 15, 1951, and was advised by Finley that nothing could be done. [R. 1064.][20]

On July 16, 1951, Winckler wrote Finley advising that he (Winckler) had surplus capacity and was prepared to do custom packing on single strength juice in any can size, low temperature concentrate and hot pasteurized concentrate in any customary size, and requested a reply. [Ex. 45, E 479-480.] No reply was ever received. [R. 1065.]

---

[20] On or about July 15, 1951, Finley, Wilcox and McCracken (President of TreeSweet) discussed a processing contract between TreeSweet and Exchange Orange [R. 912] which contract was executed on July 23, 1951. [Ex. 20, E 332-341.] Delivery of oranges to TreeSweet under this contract did not begin until July 31, 1951. [R. 912.] Finley admitted Winckler's request for fruit and said he told Winckler to see Kelly. [R. 857-858.]

Thereafter, Winckler called Finley periodically, seeking fruit at a price or on a basis comparable to that afforded other processors, but was refused. [R. 1065-1066.] At the time of these conversations with Finley, Winckler had no knowledge of the actual terms of the arrangements between Exchange Orange, and TreeSweet and Silzle, but he was aware of the fact that money would be lost on juice selling for $2.20 per case if made with $40.00 fruit. [R. 1066-1067.][31]

The record discloses a possible reason for petitioners' refusal to treat Winckler on a comparable basis with Winckler's competitors TreeSweet and Silzle. Kelly admitted that he had called Finley concerning complaints received from other processors to the effect that Winckler was a price-cutter. [R. 648.] The general manager of Sunkist's Products Department admitted that Winckler's prices on the sale of single strength juice were uniformly lower than the Sunkist selling prices on such juice. [R. 889.]

Winckler had purchased product oranges from petitioners for conversion into canned single strength orange juice during each year of its existence. Such purchases ranged from approximately $1,000,000.00 in 1946, to approximately $200,000.00 in 1948. In 1949, Winckler purchased 17.4 per cent of its total requirements from Sunkist, and 1.54 percent of its total requirements in 1950. [R. 661-662, 1005-1006, 1011, 1441-1442; Exs. BP, BQ, E 541, 542.]

---

[31] Respondent learned the actual terms of the TreeSweet and Silzle contracts upon discovery proceedings after suit was filed. [R. 3054-3055, 3101.]

The reason for the declining percentage in Winckler's purchases from Sunkist was the latter's requirement that Winckler pay cash for the fruit by cashier's check, whereas Sunkist's usual terms to the trade provided for payment within five days after delivery, or its customers were carried on an open account. [R. 658. 662-663, 1012-1016, 1432-1433, 1441-1446.] In their brief (p. 13, fn. 10) petitioners state that Winckler's purchases from them were put on a cash basis in 1948 because of Sunkist's dissatisfaction with Winckler's credit standing and the slowness of payment.[12] However, Kelly, the official in charge of Sunkist sales of product oranges to independents, admitted that petitioners had never lost a dime on any fruit sold to Winckler. [R. 649.]

Winckler sought to secure a supply of oranges from the Independent Growers and Shippers Association, the only source other than Sunkist which had oranges for sale in 1951. This Association had furnished a part of Winckler's supply in the three years prior to 1951. [R. 1011-1014.] No oranges were available from this source for purchase except at the $40.00 price. The Association selling agent, Morgan Ward, explained the reason as follows: He testified that petitioners controlled 70 percent of the available fruit and hence set the industry price on product oranges; that the Association, being competitive, had to offer its oranges at the same price in order to stay in business [R. 1582]; that few, if any, oranges could be sold at the $40.00 price because there were no customers to buy them—since petitioners in 1951 had all of the independent processors tied up in various types of processing contracts except Winckler, Case-Swayne and Paramount. [R. 1596.][33] Ward testified that the only way he could dispose of his oranges in 1951 was to enter into processing contracts with these three independents, Paramount, Case-Swayne and Winckler; that he entered into contracts with these three concerns, which contracts accounted for better than 80 percent of the Association's fruit in 1951 [R. 1596-1597]; that he made a contract with Paramount for the production of concentrate which paid the Association quite a bit under the market price of $40.00 for the fruit [R. 1595]; that he made a processing contract with Case-Swayne for processing four or five thousand tons into single strength juice for which Case-Swayne was paid its processing costs plus a five percent profit, with the balance, after sale of the juice by Case-Swayne, being returned to the Association [R. 1592-1593]; that he made a processing contract with Winckler for processing approximately 5000 tons into frozen concentrate for which Winckler was paid its processing costs plus a profit of five per cent. [R. 1589-1590; Ex. 55, E 497-504.]

---

[12] In 1946, Winckler had packed a large volume of orange juice products for inventory, particularly a new blend called "Citrus Cocktail," at a high fruit cost. Substantially all oranges so processed were purchased from Sunkist. A falling citrus products market in 1947 resulted in large inventory losses to Winckler, which inventory loss was common among independent processors in California that year. [R. 1196-1197, 1427, Ex. 39, E 467.] Winckler was able to remain in business after Chapter XI reorganization proceedings, which proceedings terminated in 1949. [R. 1085-1086, 1152-1155.]

---

[33] As previously pointed out petitioners had contracts of various other types with Hyland-Stanford, Mission Dry, General Foods and Harts. [Exs. 15, 16, 17, 17A, 18, 19, E 297-331.] In a true processing contract [Exs. 18, 19, E 349, 325], the independent processor is paid a profit on the processing operation and the juice is sold by Sunkist under the Sunkist labels. Where Exchange Orange and not Sunkist, purports to sell the fruit under a fruit purchasing contract [Exs. 16, 17A, E 303, 314] the processor owns the fruit but does not have to pay for the fruit until it sells the juice processed therefrom. This type of contract continues in effect until cancelled and is part of a tie-in exclusive requirements deal wherein Exchange Orange gets first call on the processing facilities of the independent. [Exs. 15, 16; 17, 17A; R. 713-738; 790-795; 3050-3051.] The tie-in type of exclusive dealing contracts closed a potential market to competitors of Sunkist in the product orange market. [R. 1583-1587.]

Ward explained that he made the contract with Case-Swayne for single strength juice and with Winckler for frozen concentrate because Winckler had frozen facilities and Case-Swayne did not; that he wished to be fair to both companies, and that had the Association awarded single strength contracts to both companies it would have had oranges "out in the market competing in canned juice form, competing against each other." [R. 1600-1601.]

Winckler's inability in 1951 to secure product oranges from petitioners either at a price or on any basis which was comparable to the basis upon which petitioners made oranges available to Winckler's competitors, TreeSweet and Silzle, prevented Winckler from processing and selling any single strength orange juice, its principal product, in 1951. [R. 1005, 1052-1053.] As a result Winckler sustained a substantial operating loss in 1951. [Ex. 65, E 517.] This operating loss set in motion a chain of events which caused the loss of Winckler's plant and business. [R. 1089, 1915-1917.] It resulted in default on an installment and interest due under a Reconstruction Finance Corporation loan, which, because of an acceleration clause operative under such a situation, made the entire amount of the loan due. Although Winckler had had a line of bank credit, attempts to refinance the loan with the Reconstruction Finance Corporation and with commercial banks proved fruitless in view of Winckler's inability to secure oranges required to manufacture its principal product, namely, canned single strength orange juice. [R. 1089-1090; 1186-1190; 1259-1260.]

Summary of Argument.

The basic question in this case is whether the district court's instructions to the jury deprived three related agricultural cooperatives of whatever antitrust immunities are afforded them by Section 1 of the Capper-Volstead Act. The district court viewed the case as one which involved a combination and conspiracy between agricultural cooperatives and outsiders to impose unreasonable restraints upon competitors in the interstate market for California single strength orange juice. Petitioners claim that the district court's instructions, in which the Court of Appeals found no error, were so worded as to permit the jury to find combination and conspiracy not only among the cooperatives and outsiders, but also among only the three related cooperatives, and that since the jury's verdict was general it cannot be sustained unless both theories upon which the case was submitted are free from material error.

I.

The "Question Presented" herein by petitioners is not supported by the instructions of the trial court when such instructions are viewed in their entirety rather than piecemeal or in isolation. It is wholly contrived. It was "constructed" by fitting together five isolated bits of the trial court's charge, and by ignoring the charge as a whole which encompassed more than fifty pages of the printed record. It is only by insistence that the charge be viewed in such truncated fashion that petitioners were able to claim that the jury could have found combination only within the Sunkist cooperative system.

But when the trial court's instructions are read as a whole, rather than in isolated segments, it is clear that this case was submitted to the jury as one involving a combination and conspiracy among agricultural cooperatives and outsiders. On each phase of the case the instructions were consistently phrased in terms of a third-party conspiracy.

II.

Assuming that the trial court's instructions may be interpreted in such a way as to have permitted the jury to find liability if only the three related cooperatives conspired, there is nothing in Section 1 of the Capper-Volstead Act that makes such combination privileged if it imposes trade restraints upon competition of the kind and character which, if performed by private business corporations, would violate the Sherman Act. *Maryland and Virginia Milk Producers Assn., Inc. v. United States,* 326 U. S. 458, 467.

The evidence in this case showed that the three related cooperatives possessed monopoly power, and that they used that monopoly power to eliminate a competitor from a substantial market. They used monopoly power in one product to secure price and market control in another product. They fixed prices with competitors. They discriminated against competing buyers. Such conduct is violative of the Sherman Act whether done by private business concerns or by a group of related cooperatives.

The Court of Appeals quite properly invoked the doctrine of intra-enterprise conspiracy as one means of rejecting, in a case involving an otherwise established liability, the defense of petitioners based upon affiliation between corporate conspirators.

ARGUMENT.

I.

The Question Presented by Petitioners Is Not Supported by the Trial Court's Instructions to the Jury or by the Evidence.

The question presented by petitioners for review by this Court is wholly synthetic and completely artificial. It ignores most of the evidence[34] and ignores the instructions of the trial court to the jury when such instructions are viewed in their entirety. It was contrived by fitting together five isolated bits of the trial Court's charge to the jury, a charge which encompassed more than fifty pages of the printed record,[35] and by ignoring the remainder of the charge. Petitioners contend (Br. 17-20), contrary to established law,[36] that when these isolated segments of the trial

---

[34] While the "Question Presented" is couched in terms of whether there is liability based upon the evidence at trial (Br. 2), petitioners nevertheless have confined their argument to alleged error in the instructions. The "Question Presented" seeks to know whether three related cooperatives have violated the antitrust laws upon proof only that they have agreed among themselves upon the division of the functions of processing and marketing the products of their grower members. Respondents' statement of facts clearly demonstrated that the evidence adduced at the trial showed the existence of an illegal conspiracy between petitioners and third parties. (See pp. 11-27, *supra.*)

[35] R. 3677-3725, 3729-3731, 3732-3735. These instructions were prepared after painstaking study by the trial court in conference with counsel, with full argument from both sides in the absence of the jury. The discussion and argument with respect to the instructions eventually given cover more than 420 pages of the printed record. [R. 2830-2943, 3159-3469.]

[36] A trial court's instructions to a jury must be viewed in their entirety, rather than piecemeal or in isolation. *Seaboard Airline Ry. Co. v. Padgett,* 236 U. S. 668, 672; *Spring Co. v. Edgar,* 99 U. S. 645, 659; *Railway Co. v. Whitton,* 80 U. S. 270, 291; *Western Mass. Ins. Co. v. Norwich & New York Transportation Co.,* 79 U. S. 201, 203; *Magniac v. Thompson,* 32 U. S. 348, 389.

Court's charge are analyzed separate and apart from the charge as a whole it becomes apparent that petitioners were deprived of the antitrust exemptions provided agricultural associations by Section 1 of the Capper-Volstead Act (7 U. S. C. Sec. 291), since under such isolated instructions, the jury could have found that there was a combination and conspiracy only between or among related agricultural associations to collectively process and market the products of their members, and that this is especially true in view of the fact that the jury's verdict was general. Stated in another way it is petitioners' position that because it cannot be assumed that the jury did not return its verdict upon the basis of an intra-enterprise conspiracy, it is therefore necessary to view the case as one which involves only an intra-enterprise conspiracy.[37]

Petitioners constructed the "Question Presented" in the following manner. After alluding to three general instructions petitioners say the jury was told that if petitioners (Sunkist and Exchange Orange) and the alleged co-conspirators (Exchange Lemon, TreeSweet and Silzle) conspired to restrain or monopolize interstate trade in citrus fruit juices, particularly single strength orange juice, and in pursuance of that conspiracy did any one of the six acts with resultant injury to Winckler, liability under the antitrust laws was made out against petitioners. (Br. 17.)[38] Petitioners then cull from the remainder of the full jury charge four instructions, taken out of context, which, they contend, made the general charge just summarized specific in such a way as to permit the jury to find liability if only the constituent elements of the Sunkist cooperative system conspired. (Br. 17-18.) These isolated bits of the charge were: (a) that there was but one combination and conspiracy charged [R. 3697]; (b) that Sunkist and Exchange Orange could conspire together to violate Sections 1 and 2 of the Sherman Act [R. 3688-3689]; (c) that notwithstanding the charge that Sunkist and Exchange Orange conspired with TreeSweet, Silzle and Exchange Lemon, the jury could find that no one conspired or that some number less than the total conspired [R. 3730]; and (d) that there could be no verdict against Sunkist or Exchange Orange unless the jury found that they, or either of them, combined with either TreeSweet or Silzle, or Exchange Lemon and did one or more of the six acts in pursuance of such combination or conspiracy. [R. 3711-3712.][39]

---

[37] See Petition for Certiorari, No. 241, October Term, 1961, p. 12, fn. 6. This attempt to remove from the case the basic fact that the Amended Complaint charged, the evidence showed, and the instructions to the jury covered a conspiracy between agricultural cooperatives and third parties, is readily understandable in view of this Court's decision in *United States v. Borden*, 308 U. S. 188, 204-205, and in view of repeated acknowledgments by petitioners trial counsel that a combination between cooperatives and third parties is not immune from the proscriptions of the antitrust laws. [R. 2858-2859, 2861, 3242.]

---

[38] This "paraphrase" is purportedly extracted from seven pages of instructions, that is, R. 3690, 3692-3694, 3711-3713.

[39] Even as to these "bit" instructions petitioners omitted any reference to important qualifications placed upon them by the trial court and that they were based upon instructions requested and approved by petitioners without the objections now made. For example, in the instruction designated (b) by petitioners (Br. 18) the following important qualification was omitted: "* * * subject to other instructions concerning the Capper-Volstead Act, and Section 6 of the Clayton Act, and the exemptions contained therein." [R. 3689.] This instruction was based on respondents No. 2 [R. 146] and *Kiefer-Stewart v. Seagram*, 340 U. S. 211. Again, in the instruction designated by petitioners as (c) (Br. 18), they omit any reference to their request that the Court make it clear that "* * * the conspiracy alleged is a conspiracy of the five, that is to say, with TreeSweet, Slizle,

While it is respondents' position that petitioners were not deprived of the antitrust exemptions afforded them by the Capper-Volstead Act even if petitioners' artificial narrowing of the charge be deemed to be controlling,[40] a review of the charge in its entirety will demonstrate that the case was submitted to the jury under instructions which made the finding of a third-party conspiracy implicit in any verdict returned against the petitioners.

The first fourteen pages of the instructions were standard.[41] The Court then instructed with respect to the contentions of the respective parties. It charged that it was plaintiffs' contention that "the defendants [Sunkist and Exchange Orange] and alleged co-conspirators [TreeSweet, Silzle and Exchange Lemon] combined, conspired and contracted to restrain interstate trade and commerce in California citrus juices

---

ELP-" [R. 3727], and that they approved the instruction complained of. [R. 3730.] Again in petitioners (d) (Br. 18) petitioners fail to mention that the instructions therein referred to were based on their No. 7 [R. 184] as thereafter revised by them [R. 185] and ultimately given by the Court after extensive discussion in modified form [R. 3271-3290, 3292-3293, 3302-3307, 3711], and a companion instruction [17A, R. 196, 3351-3356, 3712.] Both instructions concluded with the language of the petitioners: "* * * your verdict must be for the defendants * * *." [R. 3711-3712.] Neither instruction was objected to by petitioners on the grounds now urged. [R. 3306-3307, 3355-3356.] Petitioners may not now assign error to such instructions. (See Rule 51, Federal Rules of Civil Procedure.)

[40] See Point II herein, *post*.

[41] These instructions [R. 3677-3690] dealt with the following subjects: the jury were the sole judges of the facts; the credibility of witnesses; the burden of proof; inconsistencies and discrepancies in testimony; preponderance of the evidence; admissions; the law of conspiracy; proximate cause and intervening cause. In addition the court instructed that the jury was "not to single out one instruction alone as stating the law but must consider the instructions as a whole." [R. 3679.]

and particularly single strength Valencia juice processed in California and sold in interstate commerce in 1951, in violation of Section 1 of the Sherman Act." [R. 3691-3692]; that "Plaintiffs further contend that the defendants and co-conspirators combined or conspired to monopolize the market for California citrus juices and particularly single-strength Valencia orange juice processed in California and sold in interstate commerce in 1951, in violation of Section 2 of the Sherman Act" [R. 3692.] These instructions are clearly couched in terms of a third-party conspiracy, that is, a conspiracy between one or both of petitioners and one or both of the independent processors, TreeSweet and Silzle.

In instructing with respect to acts innocent in themselves but which are performed pursuant to an unlawful conspiracy, the trial Court placed such acts in a setting of combination and conspiracy between one or both of petitioners and either TreeSweet or Silzle. The jury was told that if it found as a fact "that either or both of the defendants combined or conspired with TreeSweet or Silzle as charged in the first and second causes of action, and that any one or more of the acts alleged by the plaintiffs to have been committed pursuant to the combination or conspiracy were committed by either one of the defendants or co-conspirators, that you find were a party to such combination or conspiracy, that the act or acts so committed would then become the act of all members of the combination or conspiracy." [R. 3689.]

In instructing with respect to the geographical and distributive application of the Sherman Act the Court again described the alleged conspiracy in terms of a combination between either one or both of the petitioners and TreeSweet or Silzle. The instruction reads [R. 3703]:

> "* * * If you find that either or both of the defendants combined with TreeSweet or Silzle to eliminate the competition of the plaintiff in the market for citrus fruit juices, particularly single-strength Valencia juice processed in California and sold in interstate commerce and that any of the acts charged to have been performed by such defendants were performed in furtherance of such combination or conspiracy, and that the performance of any of such acts was the proximate cause of any damage to the plaintiff, you should find that there was a violation of the antitrust laws and proximate causation, and you should proceed to the question of damage."

The trial court gave ample instructions with respect to the antitrust exemptions of agricultural cooperatives under both Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act. It instructed that the defendants Sunkist and Exchange Orange and the co-conspirator Exchange Lemon were cooperatives which were entitled to such exemptions from the antitrust laws as are afforded cooperatives by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act; that Section 6 of the Clayton Act provides that nothing in the antitrust laws should be construed to forbid the existence and operation of agricultural organizations organized for the purpose of mutual help, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; that Section 1 of the Capper-Volstead Act permits fruit growers to act together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, the products of persons so engaged; that such associations and their members may have marketing agencies *in* common, and may make the necessary contracts and agreements to effect such purposes, provided such associations are operated for the mutual benefit of the members thereof, as such producers. [R. 3699-3700.]

The Court instructed further that as a cooperative Sunkist is permitted to acquire a legal monopoly over product oranges available for processing into citrus fruit juices, including single strength orange juice; that Sunkist or Exchange Orange in 1951 could legally have processed all of such oranges in their own plants and could have refused to make any of such oranges available to independent processors; that defendant Exchange Orange, as the processing company for the grower members of Sunkist, could enter into lawful processing contracts with independent processors for processing oranges of Sunkist's grower members into citrus juices to be thereafter sold by Sunkist as the products of its grower members. [R. 3700-3701.] The Court, however, instructed that such contracts must be lawful contracts and not devices which were resorted to pursuant to the conspiracy charged to illegally restrain trade, or to illegally monopolize that part of the citrus juice market represented by citrus juices processed in California and thereafter sold in interstate commerce. [R. 3701.]

In dealing specifically with the contracts between Exchange Orange, and TreeSweet and Silzle, the Court instructed in terms of conspiracy between petitioners and TreeSweet and Silzle. It charged that it was a question for the jury to decide whether the contracts between Exchange Orange, and TreeSweet and Silzle in 1951, when coupled with any refusal of Sunkist or Exchange Orange to make oranges available to plaintiff under comparable arrangements pursuant to the combination and conspiracy charged, were lawful processing contracts, or whether they were made pursuant to the combination and conspiracy charged and had the purpose or effect of restraining or monopolizing interstate trade in citrus juices, particularly single-strength orange juice processed in California and sold in interstate commerce, by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts. [R. 3701-3702.] By this instruction the jury was permitted to decide whether these contracts, made between the cooperative Exchange Orange and the independent processors, that is, the co-conspirators TreeSweet and Silzle were lawful or unlawful. The jury by its verdict found that such contracts were unlawful.

The instructions relating to monopoly were also couched in terms of a third-party conspiracy. The jury was told that two monopolies were charged; one, a monopoly over product oranges which plaintiff conceded would be a lawful monopoly in the absence of abuse; the other, a monopoly of the market for the juices made therefrom [R. 3692-3693]; that monopoly power consisted of the power to exclude a competitor from a market and the power to fix prices [R. 3704, 3706]; that if the jury found that the effect of the action of Exchange Orange in entering into

2

contracts with TreeSweet and Silzle in 1951, and in refusing to enter into a comparable arrangement with the plaintiff, was to exclude plaintiff as a competitor of Exchange Orange, TreeSweet and Silzle, from a substantial market for single strength orange juice processed in California and sold in interstate commerce, such exclusion would be unreasonable in and of itself, and illegal. [R. 3705.]

After instructing that it was illegal *per se* for two or more competitors to enter into any agreement which fixes or otherwise tampers with the price or price structure at which the products of such companies shall be sold in interstate comme[illegible] the Court again instructed the jury in the language of a third-party conspiracy. The jury was told that if it found that the 1951 contracts between Exchange Orange and TreeSweet and Silzle had the necessary or intended effect of fixing or tampering with the price or price structure at which Sunkist, TreeSweet or Silzle sold single strength orange juice in interstate commerce, the jury might consider such fact in determining whether such contracts were in fact entered into as part of a conspiracy to restrain interstate commerce, or a conspiracy to monopolize or control the production and sale of California citrus fruit juices in interstate commerce, as charged by plaintiff. [R. 3705-3706.]

An additional charge was given on the abuse of monopoly power which was related directly to the contracts between Exchange Orange and TreeSweet and

Silzle and which involved the element of combination between an agricultural cooperative and a third party. After advising the jury that petitioners could not use their control over product oranges to extend their control over the citrus juices processed therefrom [R. 3706], the jury was instructed that if it found that Sunkist and Exchange Orange, or either of them, by combination or conspiracy, was seeking to extend their control in the juice market by making contracts with the independents, TreeSweet and Silzle, and that as a part of such combination and conspiracy they refused to make oranges available to plaintiff under comparable arrangements, and that such refusal eliminated plaintiff as a competitor of Sunkist, TreeSweet and Silzle in such market, they might find that the defendants violated the antitrust laws. [R. 3707.] This instruction is couched in terms of combination or conspiracy between agricultural associations and third parties.

The following general instruction was also couched in the language of a third-party conspiracy. It reads [R. 3711-3712]:

> "Unless you find, therefore from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either TreeSweet, or Silzle, or ELP, and in 1951 did one or more of the specific acts charged —those are the six acts, one or more of the six acts—charged in the first cause of action, and that such act or acts had the purpose or necessary effect of damaging or eliminating the competition of plaintiffs in the interstate market for Cali-

> fornia canned citrus fruit juices or single-strength Valencia orange juice, your verdict must be for the defendants on the first cause of action."

A similar instruction was given with respect to the second count, that is, the Section 2 Sherman Act charge. [R. 3712.][12]

Before the jury had retired for deliberation counsel requested that additional clarifying instructions be given. [R. 3726-3729.] The jury was given further instructions, including the following instruction on the compositions of the parties to the alleged conspiracy in connection with the charge of monopolizing citrus fruit juices. [R. 3730]:

> "I also apparently erroneously talked about the charge was that the defendants had actually monopolized. The charge is that *the defendants and the co-conspirators* had monopolized, they succeeded in their conspiracy and had accomplished monopolization. *In other words, the co-conspirators are named in there. It does not involve solely the two defendants.*
>
> "I also am told that I spoke about how the defendants had conspired on one occasion. The charge is not that the defendants conspired. *The charge is that the defendants and co-conspirators conspired.*

---

[12] Instructions were given on the following additional subjects: An instruction that only one combination and conspiracy was charged [R. 3697]; a charge that Sunkist and Exchange Orange could conspire to violate the Sherman Act, but that such was subject to the exemptions provided in the Capper-Volstead Act and Section 6 of the Clayton Act [R. 3688-3689]; an instruction relating to the circumstances under which a private business concern may select its own customers [R. 3709-3710]; instructions relating to certain exhibits, the Chapter XI proceedings in 1948, and damages. [R. 3113-3125.]

> However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number less than the total conspired. It is your task to decide the facts." (Emphasis supplied).

These additional instructions again describe the conspiracy as one between petitioners and third parties.

The jury retired and returned to inquire further about the six acts. After again explaining the relationship of these acts to the violation charged [R. 3732-3734], the Court instructed the jury that they "must treat all instructions as a whole and not single out any one of them, and any one you are considering you must consider in connection with all the other instructions." [R. 3735.]

The jury's understanding of the charge can be determined only by a consideration of the charge in its entirety;[43] not in isolated segments, as petitioners have proposed. Throughout the charge the trial court returned repeatedly to the composition of the parties to the alleged conspiracy, namely, one or both of the petitioners *and* one or both of the independent processors, TreeSweet and Silzle. Repeated emphasis was placed upon the contracts between petitioner Exchange Orange, and TreeSweet and Silzle. The trial court left to the jury the determination as to whether these contracts were lawful or unlawful; whether they were parts of a plan to monopolize the citrus juice market, particularly single strength orange juice made by California processors and sold in interstate commerce; whether such contracts had either the purpose or effect of eliminating respondent as a competitor in the interstate market for California single strength orange juice. Such contracts were made between an agricultural cooperative and two non-cooperative companies. Had the jury found that such contracts were lawful it would not have returned a verdict against petitioners. To assert, as do petitioners, the likelihood that the jury could have based its verdict solely upon a conspiracy between petitioners and Exchange Lemon necessarily requires the assumption that the jury ignored the evidence and the issues, as well as the trial court's instructions.[44]

---

[43] Not only were the trial court's instructions to the jury repeatedly stated in terms of a combination and conspiracy between petitioners and the independent processors TreeSweet and Silzle, but such a theory of the case was argued by counsel for the plaintiffs, both in the opening statement [R. 499], and in his closing argument. [R. 3478, 3489, 3500, 3512, 3516-3538, 3556, 3560, 3672.]

---

[44] Certainly the trial court who was close to the case, had no such misgiving. In a discussion between court and counsel as to whether special interrogatories should be submitted to the jury on the composition of the parties to the conspiracy the trial court said [R. 3463]:

> "* * * If you get a verdict, you are generally able to sustain it, with the sole exception here if they [jury] only found Lemon [Exchange Lemon] was the other conspirator, and I don't know how they could find that. If there is a verdict for the plaintiff, you can rest assured TreeSweet and Silzle will be listed as the co-conspirators and not Lemon."

II.

Even Assuming That the Trial Court's Instructions Permitted the Jury to Find a Combination and Conspiracy Only Among the Related Cooperatives the Conduct Charged as Unlawful Was Not Privileged Under the Capper-Volstead Act and Violated Sections 1 and 2 of the Sherman Act.

While the Amended Complaint charged, the evidence proved, and the case was submitted to the jury under appropriate instructions as a five-party conspiracy among three related agricultural associations and two corporations for profit, the conduct charged as unlawful herein was not privileged under the Capper-Volstead Act even if the trial court's instructions be construed as permitting the jury to find a combination and conspiracy only among the three related cooperatives in the Sunkist system.

The petitioners take the flat position that absent a combination with outsiders the activities of an agricultural association are completely exempted from liability under the Sherman Act so long as such activities are concerned with the processing and marketing of the products of its grower members. They contend that each of the "six acts" alleged to have been done pursuant to the combination and conspiracy charged was concerned with some phase of processing and marketing of the products of their grower members; that they may make reciprocal processing contracts among themselves; they may set a price at which they will sell their products; they may make contracts with others for the processing of their fruit, and they have the right to select the customers to whom they will sell the products of their growers. (Br. 21-30.)

It may be conceded that each of the "six acts", when viewed in isolation and without regard to the relationship of one to another, and without any consideration of the industry or business setting in which such acts were performed, is a type or kind of activity which is concerned with the processing and marketing of the agricultural products of the grower members of the three related associations which comprise the Sunkist cooperative system. In explaining such acts for the purpose of determining the issue of liability, petitioners consistently refuse to discuss them except as isolated activities in time, place and circumstance. Thus viewed, petitioners are able to ignore the competitive effects of such acts as a whole.

But such acts cannot be so viewed in determining liability in this case. They must be judged with respect to their effect upon competition when considered as a whole rather than in isolation,[40] and in the business or industry setting in which they occurred. When so viewed it becomes apparent that the "six acts", resulted in the imposition of unreasonable restraints in the interstate market for California single strength orange juice in 1951. In sum the situation was as follows:[40]

---

[40] In a case charging violations of the Sherman Act the charges in the complaint, as well as the evidence introduced to support such charges, must be considered in their entirety, rather than piecemeal or in isolation. *Swift and Company v. United States*, 196 U. S. 375, 396; *United States v. Patten*, 226 U. S. 525, 544. Acts innocent in themselves when standing alone or when viewed in isolation may be steps in a plan or program to destroy competition and hence may become actionable as part of the overall plan. *Associated Press v. United States*, 326 U. S. 1, 14; *American Tobacco Co. v. United States*, *supra*, at p. 809.

In 1951, petitioners controlled the supply of by-product oranges in the California-Arizona area which were available to independent processors for the manufacture of California single strength orange juice. After consultation with independent processors, including the co-conspirators TreeSweet and Silzle, but not Winckler, petitioners set a price of $40.00 per ton on their product oranges and maintained such price throughout the year. They were unable to sell any oranges at such price for conversion into single strength orange juice. There were four independent processors of single strength orange juice in the California-Arizona area in 1951 who were dependent upon others for their supply of oranges. These four concerns were the co-conspirators TreeSweet and Silzle, Case-Swayne, and Winckler. These four concerns competed directly with each other, and all four competed with Sunkist in the sale of California single strength orange juice in the interstate market for such juice. Of the four independents only Winckler had been a regular customer of Sunkist in the purchase of product oranges.

Petitioners then entered into contracts with TreeSweet and Silzle under the terms of which oranges were made available to the latter at prices which in fact and in effect were far below their $40.00 published selling price, and pursuant to which TreeSweet and Silzle sold the resultant single strength orange juice processed there from in the interstate market at non competitive and fixed prices which guaranteed them a profit. Petitioners offered a similar contract to Case-Swayne which that company refused since it had already otherwise committed its processing facilities. Although respondent made repeated timely requests for oranges, either at a price or under an arrangement which would permit it to process and sell single strength juice at prices which would be competitive with the prices at which its competitors Sunkist, TreeSweet and Silzle were selling such juice, petitioners refused to make oranges available to respondent except at the $40.00 price, while at the same time conceding that no one could pay $40.00 per ton for oranges and process and sell the single strength juice at prices competitive to those charged by Sunkist, TreeSweet and Silzle. In addition, maintenance of the $40.00 price throughout the year by Sunkist, the industry leader, together with the fact that petitioners had tied up with contracts all of the available independent processors of hot and frozen concentrate, prevented respondent from securing oranges from the only possible alternative source of supply, the Independent Growers and Shippers Association, except at the $40.00 price. The result was that respondent was unable to process and sell any single strength orange juice, its principal product in 1951, and hence lost its 1951 anticipated profit, its plant and business.

---

[40] See Respondent's theory of liability and the evidence in support thereof, pages 11-27.

Thus, the six acts, when viewed together and in the industry setting in which they occurred, became more than mere normal activities of processing and marketing the products of the grower members of the Sunkist cooperative system. They became instruments which were used to eliminate a competitor from a substantial market.[47] They constituted an abuse by petitioners of their monopoly control over product oranges. Petitioners used their monopoly control over product oranges to secure a monopoly in the interstate market for California single strength orange juice. Petitioners fixed the price of their product oranges after consultation with their competitors, including TreeSweet and Silzle. Petitioners fixed the prices of California single strength orange juice in agreement with the co-conspirators TreeSweet and Silzle.[48] As the seller of product oranges available to independent processors for processing into single strength orange juice, petitioners discriminated in favor of two and against one of the competing buyers.

If these acts, in the industry setting in which they occurred, had been performed by private business corporations they would constitute violations of Sections

---

[47] The total amount of California single strength orange juice processed from all sources in the California-Arizona area in 1951, was 5,400,000 gallons. [Ex. 10, E 285.] Of this total 4,409,266 gallons, or approximately 82 percent, was processed by petitioners, TreeSweet and Silzle. TreeSweet processed 2,382,744 gallons and Silzle processed 661,650 gallons. [Exs. 9, 10, 11; E 282-283, 284-285, 285-291.] Respondent produced and sold no single strength orange juice in 1951. [R. 1020, 1052.]

[48] Respondents did not claim that the price-fixing between petitioner and TreeSweet and Silzle on the single strength juice was a cause of damage, but did claim that it was one of the elements relating to liability for violation of the antitrust laws. [R. 2926-2929.] Neither did respondents claim that the Exchange Orange-Exchange Lemon processing deals were the cause of any damage to respondents. [R. 2005, 2850.]

1 and 2 of the Sherman Act. Setting aside for the moment any consideration of antitrust exemptions afforded agricultural cooperatives by the Capper-Volstead Act, the conduct charged herein as unlawful will be examined in the light of the applicable case law:

The real indicia of monopoly power is power "to exclude competition when it is desired to do so"; and power to control or fix prices. *American Tobacco Co. v. United States,* 382 U. S. 781, 809, 811, 814. Petitioners possessed monopoly power. They controlled the supply[49] as well as the price of by-product oranges in the California-Arizona area. They also controlled the prices at which California single strength orange juice was sold in the interstate market. They had power to exclude competition, and they exercised such power by eliminating respondent as a competitor in the interstate citrus juice market, particularly the interstate market for California single strength orange juice. It is "unreasonable, *per se,* to foreclose competitors from any substantial market." *International Salt Co. v. United States,* 332 U. S. 392, 396. And "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *United States v. Griffith,* 334 U. S. 100, 107.

---

[49] Respondents made no attack on petitioners' monopoly control over California-Arizona by-product oranges, as such. It was assumed that Capper-Volstead permits an agricultural association to secure control over the supply of fruit provided such control results from the voluntary act of local growers in becoming members of the Association. The trial court instructed the jury that petitioners could acquire a legal monopoly of by-product oranges, even 100 percent control of such market. [R. 3700.] The Court instructed, however, that such a monopoly could not be abused in such a way as to restrain competition. [R. 3700.]

Abuse of monopoly power was demonstrated in the action by petitioners setting and maintaining the $40.00 price for product oranges, and in refusing to sell oranges to Winckler except at that price while at the same time admitting that no single strength juice processor could pay such price and process and sell the resultant juice at prices which would be competitive with the prices at which petitioners, and their favored customers Tree-Sweet and Silzle, sold such juice. The resultant price squeeze was strikingly similar to that which was imposed by Alcoa upon its aluminum sheet customers at a time when that company had a monopoly on the production of ingots essential to the manufacture of sheet. This price squeeze was condemned as an abuse of monopoly power in *United States v. Aluminum Company of America,* 148 F. 2d 416, 437, 438 (C. A. 2, 1945).

Petitioners' refusal to sell oranges to respondent except at the $40.00 price, while at the same time making oranges available to respondent's competitors, Tree-Sweet and Silzle in fact and effect at little more than half that price, was unlawful under the Sherman Act since it conferred a monopoly on petitioners, TreeSweet and Silzle in the interstate market for California single strength orange juice. *Lorain Journal v. United States,* 342 U. S. 143, 155. And where such refusal is a part of a combination and conspiracy to eliminate a competitor it is unconditionally unlawful. *Eastern States Retail Lbr. Dealers Assn. v. United States,* 234 U. S. 600, 614.

The wide difference in the price at which Winckler was offered oranges as compared to the price or arrangement under which oranges were made available to its competitors TreeSweet and Silzle, was a discrimination imposed by the seller upon competing buyers, and as such violated the Sherman Act. *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 159-161; *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 231.

Consultation between petitioners and competing independent processors with respect to the price at which petitioners should offer by-product oranges for sale, as well as similar consultation between petitioners and Tree-Sweet and Silzle with respect to the selling prices of California single strength orange juice to be sold in the interstate market, was a *per se* violation of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221; *United States v. Trenton Potteries*, 273 U. S. 392, 397-398.

In view of this case law, unless the Capper-Volstead Act made such conduct privileged, petitioners violated both Sections 1 and 2 of the Sherman Act. This Court has had occasion to treat directly with the scope of the exemption from antitrust proscriptions provided by the Capper-Volstead Act, in *United States v. Borden*, 308 U. S. 188, and in *Maryland and Virginia Milk Producers Assn., Inc. v. United States*, 362 U. S. 458. In *Borden* an indictment charged that a milk association organized as an agricultural cooperative, major distributors of milk and allied groups, labor union officials, municipal officials and others, had conspired to fix noncompetitive prices to be paid to all producers by all distributors for all fluid milk produced in four midwestern states and shipped into Chicago; to fix noncompetitive prices for the sale by distributors in Chicago of fluid milk shipped in from the states in question and to limit and control the supply of fluid milk coming into Chicago from such states. (308 U. S. at 191, 194.)

In applying Section 1 of the Capper-Volstead Act to the facts alleged in the indictment this Court held that the right given by such Act to agricultural producers to unite in marketing their products and to make contracts essential thereto "cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise". (308 U. S. at 204-205.) It held that such a combined attempt to control the market had no justification in Section 1 of the Capper-Volstead Act (*id.* 205), and that Section 1 of such Act "cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment." (*id.* 206.) This Court concluded that the conduct charged did not come within the scope of the activities made privileged by Capper-Volstead.

The basic issue in *Borden* was not the loss of a privilege given by Capper-Volstead merely because there was an argument between the cooperative association and outsiders, but rather that the conduct charged was neither consistent with nor essential to the purposes of the cooperative, and was of such a kind or character that if done by an ordinary business corporation would clearly be violative of the Sherman Act. The Court held that Capper-Volstead did not authorize the kind of activities and agreement with outsiders which was charged in the indictment.

Recently, this Court again examined the nature and extent of the Capper-Volstead exemptions. In *Maryland and Virginia Milk Products Assn. v. United States,* 362 U. S. 458, the United States brought an action against a milk producers association which supplied approximately 86 percent of the milk purchased by all milk dealers in the Washington, D. C. metropolitan area. The association membership consisted of some 2,000 dairy farmers located in Maryland and Virginia. The Association was charged with an attempt to monopolize and with actual monopolization of commerce in fluid milk in Maryland, Virginia and the District of Columbia in violation of Section 2 of the Sherman Act; with eliminating and foreclosing competition in the same area by the making of contracts and agreements with Embassy Dairy and others in violation of Section 3 of the Sherman Act, and with lessening competition and tending to create a monopoly through the purchase of all the assets of Embassy Dairy, the largest milk dealer in the area which competed with the Association, in violation of Section 7 of the Clayton Act. (362 U. S. at 460-461.) The Association claimed complete immunity from the antitrust laws by virtue of Section 6 of the Clayton Act and Sections 1 and 2 of the Capper-Volstead Act. (*Id.* at p. 461.)

The District Court held that an agricultural cooperative is completely exempt from the antitrust laws, both with respect to its existence as well as to all of its activities, so long as it does not combine or conspire with non-producers of agricultural products. (*Id.* at p. 461.) It, therefore, dismissed the Section 2 Sherman Act monopolization charge under which the Association was not alleged to have acted in combination with others, but upheld the Government's right to go to trial on the Section 3 Sherman Act and Section 7 Clayton Act charges since they involved activities with others who were not agricultural producers. (*Id.* 462.)

This Court affirmed the judgment of the District Court which found violations of Section 3 of the

Sherman Act and Section 7 of the Clayton Act,[50] and reversed the action below in which the charges under Section 2 of the Sherman Act had been dismissed. In so doing this Court interpreted the language of Section 1 of the Capper-Volstead Act as well as its legislative history. As to the former the Court said that it was reasonably clear that the general philosophy of such Act "was simply that individual farmers should be given, through agricultural cooperatives acting as entitled the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities"; that the legislative purpose[51] of the Act was "to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws"; that the legislative history "does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way." (362 U. S. at 466-467).

The Court then referred to the statements of the Secretary of Agriculture and the Solicitor of the Department of Agriculture, made at the Senate Committee hearings on the bill, to the effect that "the Act would not authorize cooperatives to engage in predatory practices in violation of the Sherman Act." *(Id.* 467.) Finally, the Court set out the following passage from the House Committee Report which reads:

---

[50] A trial had been had upon these two charges and a decree entered against the Association (167 Fed. Supp. 799; 168 Fed. Supp. 880).

[51] The Court was referring to the following quoted passage from the *House Report* on the Act (H. R. Rep. No. 24, 67th Cong., 1st Sess. 2):

> "Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it. * * *"

> "In the event that Associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law."[52]

and concluded that such passage "correctly interpreted the Capper-Volstead Act, and that the Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative." *(Id.* 467.)

The essential holding in *Milk Producers Assn.* was that the Capper-Volstead Act was intended to place an association of farmers in a position of competitive equality with private business corporations, but that such associations were to remain subject to the proscriptions of the antitrust laws in the same way as private business corporations. Since the activities of petitioners herein were of the kind and character which clearly would have been violations of the Sherman Act had they been performed by private business corporations, and since the activities of agricultural associations are subject to the proscriptions of the antitrust laws in the same way and to the same extent as are private business corporations, the petitioners herein violated Sections 1 and 2 of the Sherman Act even if the trial court's instructions be interpreted in such a way as to have permitted the jury to find a combination and conspiracy only among the three related cooperatives of the Sunkist cooperative system.

---

[52] *H. R. Rep.* No. 24, 67th Cong., 1st Sess. 3.

Petititoners contend (Br. 30-32) that the Court of Appeals erred in viewing the case as one which was controlled by the doctrine of intra-enterprise conspiracy because, they say, such combination was made privileged by Capper-Volstead. They claim that such doctrine has been used "only to reject, in a case involving an otherwise established liability, a defense based on affiliation between the corporate conspirators" (Br. 31.) But petitioners' contention is based upon the erroneous assumption that the so-called "six acts" relating to liability are privileged. As we have demonstrated such acts, when viewed against the industry setting in which they occurred, were not privileged, but on the contrary constituted violations of Sections 1 and 2 of the Sherman Act. Hence, the Court of Appeals quite properly invoked the doctrine of intra-enterprise conspiracy to reject a defense based upon affiliation between the corporate conspirators "in a case involving an otherwise established liability," and in so doing acted in accordance with petitioners' concept of what this Court was held should be done in such circumstances.

The contention (Br. 34) that none of the "six acts" would have been violative of the antitrust laws had they been performed by a one-entity cooperative and that they cannot therefore, become violative of the antitrust laws merely because they were performed by two related cooperatives, simply ignores reality. These acts, in the business setting in which they were performed, had the direct effect of eliminating a competitor from a substantial interstate market. Violations of the antitrust laws are determined by the nature, the character, and the substantive effects of the acts and practices which are attacked, rather than by the mere form in which the assailed transactions are clothed. *United States v. American Tobacco Co.,* 221 U. S. 106, 180-181; *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 221. Nor does the form of business organization control, since the basic test is the presence of trade restraints or monopoly. *Appalachian Coals, Inc. v. United States,* 288 U. S. 344, 377.

It is submitted that whether the trial court's instructions to the jury with respect to the composition of the parties to the conspiracy herein charged be interpreted as one involving a conspiracy between cooperatives and outsiders, or whether such instructions be interpreted as a conspiracy only among the related cooperatives in the Sunkist system, the judgment of the jury must be sustained. Under either theory petitioners were liable for violations of Sections 1 and 2 of the Sherman Act.

Conclusion.

The judgment of the Court of Appeals, insofar as it affirmed the judgment of the district court on the issue of liability, should be sustained.

Respectfully submitted,

William C. Dixon,
Holmes Baldridge,
Attorneys for Respondent.

Of Counsel:
Harry M. Irwin,
Attorney for Trustee Respondent.

APPENDIX

Statutes Involved

SHERMAN ACT (15 U. S. C. A., Secs. 1, 2)

§1. Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . [July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.]

§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. . . . [July 2, 1890, c. 647, §2, 26 Stat. 209].

CLAYTON ACT (15 U. S. C. A., Secs. 4, 6)

§4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [Oct. 15, 1914, c. 323, §4, 38 Stat. 731].

§6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; *nor* shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws. [Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.]

CAPPER-VOLSTEAD ACT [7 U. S. C. A. Sec. 291.]

§1. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First: That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or

Second: That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third: That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members. [Feb. 18, 1922, c. 57, §1, 42 Stat. 388.]

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 19 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., a corporation and
THE EXCHANGE PRODUCTS COMPANY, a corporation,
Petitioners,
v.
WINCKLER & SMITH CITRUS PRODUCTS CO.,
a corporation and
RONALD WALKER, as Trustee of Winckler & Smith
Citrus Products Co.,
Respondents.

PETITIONERS' BRIEF IN REPLY TO BRIEF FOR RESPONDENTS

ROSS C. FISHER,
458 South Spring Street
Los Angeles 13, Calif.

HERMAN F. SELVIN,
523 West Sixth Street
Los Angeles 14, Calif.

Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX

Page

Preliminary Statement 1

Argument 3

I. The instructions given the jury were erroneous and they raise the question here presented 3

II. Respondents' argument is irrelevant to the one question to which certiorari was limited 12

III. Petitioners had no monopoly power to abuse .. 14

Conclusion 19

TABLE OF CASES

Cummings v. Pennsylvania R. Co., 45 F. 2d 152 7
Maryland & Virginia Prod. Assoc. v. United States, 362 U.S. 458 14
Puget Sound Nav. Co. v. Nelson, 59 F. 2d 697 7
United States v. Aluminum Co. of America, 148 F. 2d 416 15
United States v. Borden Co., 308 U.S. 188 14
United States v. Columbia Steel Co., 334 U.S. 495 15
United States v. E. I. Du Pont de Nemours & Co., 353 U.S. 586 15
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 15

REPORT

Report, U. S. Attorney General's National Committee to Study the Antitrust Laws 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., a corporation and
THE EXCHANGE PRODUCTS COMPANY, a corporation,
Petitioners,

v.

WINCKLER & SMITH CITRUS PRODUCTS CO.,
a corporation and
RONALD WALKER, as Trustee of Winckler & Smith
Citrus Products Co.,
Respondents.

PETITIONERS' BRIEF IN REPLY TO BRIEF FOR RESPONDENTS

PRELIMINARY STATEMENT

Notwithstanding the limited grant of certiorari in this case respondents argue it as though it were here at large. The bulk of their argument relates to questions and issues that are irrelevant to, and are not within the scope of, the one question to which certiorari was limited. We do not intend to be led down a side alley by replying in detail to matters that in the instant context are irrelevant, thus, in effect, arguing a case that is not here instead of the one that is here. (See, Point II, *infra.*)

Respondents' statement of facts is as irrelevant as the argument postulated on it. If the questions they discuss were properly cognizable in the present posture of the case, considerable correction and supplementation of that statement would have to be made. It will be enough, however, to make only such corrections as are significant to the argument to be presented by us. They will be made in the course of that argument.

Respondents say that the question presented by us does not arise. (Resp. Br., 30-42.) Yet, curiously and inconsistently enough, when they re-state the question involved they do so by adopting virtually *verbatim* our statement of the question. (Compare, *Resp. Br.*, 2 with *Pet. Br.*, 2.*) Thus recognizing that the question is presented, they have barely a word to say about it. They do not meet it on its merits. They seek to avoid it by arguing other questions that are not here.

In essence, what respondents argue is that the judgment in their favor in the District Court should be affirmed because (1) petitioners had and abused monopoly or market control of by-product oranges in the California-Arizona area; and (2) petitioners conspired not merely with ELP, another of the Sunkist grower-members processing instrumentalities but with outsiders in the persons of TreeSweet and Silzle. Neither of these questions is within the bounds of, or relevant to, the one question to which the case here is limited as may be readily shown. (See, Point II, *infra.*)

---

* To the abbreviations listed at page 3, note 1, of the Brief for Petitioners, add "*Resp. Br.*" for Brief for Respondents, and "*Pet. Br.*" for Brief for Petitioners.

Respondents brush off the "six acts" (see, Pet. Br., 10-12) as being of practically no importance in relation to the conspiracy alleged. The main thrust of their argument now is that monopoly power was abused, upon which ground alone, they say, the judgment below ought to be affirmed. The six acts are important, seemingly only as the instruments by which that abuse was consummated. (Resp. Br., 4-5, 44-47, 55-56.)

In the trial court, however, the six acts were given a much higher rating. There, conspiracy, in pursuance of which the acts were done, was the principal ground upon which a judgment in favor of the respondents was sought. So much so was this true that the jury interrupted its deliberations to return to the courtroom to ask for additional instructions about the six acts. (R. 3732.) The trial judge gave those instructions and in doing so virtually restricted the jury's considerations to conspiracy and the six acts—all with respondents' agreement and over petitioners' objection. (R. 3732-3735.) The jury was told:

> "There is a charge of violation of the antitrust laws in this case, but the burden is on the plaintiff to go further than merely show a violation of the antitrust laws. Plaintiff *must show* that its damage came from *one or more* of six particular acts or things which were complained of.
>
> "Those were the six things which I spoke of as being the acts complained of . . ." (R. 3732-3733. Italics ours.)

The trial judge then enumerated and explained the six acts (R. 3733-3734); and it is significant that none of them was the "abuse of monopoly power" alleged (R. 271-272) or to which respondents now so single-mindedly devote themselves. A clear distinction between the two theories was made below by respondents in tendering the issues of their case. (Compare, R. 265-270 with R. 270-272.) So, too, when the Court of Appeals affirmed it did so in an opinion in which it discussed, as a ground of affirmance, intra-cooperative conspiracy and the six acts, but not abuse of monopoly power. (R. 3960-3965.)

The question to which this case on certiorari is limited relates to its conspiracy, not to its monopoly, aspects.

ARGUMENT

I

The Instructions Given the Jury Were Erroneous and They Raise the Question Here Presented

Respondents argue that the single question here involved does not arise because the instructions taken as a whole submitted to the jury only the theory of a conspiracy with outsiders. (Resp. Br. 30-42). They also say the instructions were not objected to. (Resp. Br., 32 (n. 39).) They are wrong. The theory of intra-cooperative conspiracy was submitted; and petitioners objected to it.

First: No doubt instructions on any given subject must be read as a whole. That does not mean, however, that any significant part of them is or can be eliminated by or in the process of so reading them. It is precisely because instructions are to be taken as a whole, and because the jury in this case were told to read them that way (R. 3679), that the instructions of which we complain were fatally prejudicial. They had the necessary effect of qualifying every other instruction given relating to the kind of a conspiracy that would be illegal, by injecting the theory of intra-cooperative conspiracy into the case.

It will be recalled that when the charging of the jury was apparently completed, the trial judge, after first incorporating by reference all objections that had been made in the course of settling the instructions, asked if there were "any further objections." (R. 3725) Counsel for petitioners replied that the "conspiracy alleged—is a conspiracy of the five, that is to say, with TreeSweet, Silzle, ELP—"; that the jury had not been told this; that there was the same omission to refer to such a conspiracy in the references to a conspiracy to monopolize; that this was an objection to the charge; and that the point of the objection was that the court's charge "related only to the two defendants, rather than mentioning the three others." (R. 3727.)

It was in an effort to overcome this objection, that the trial judge told the jury that the "charge is not that the defendants conspired. The charge is that the defendants and co-conspirators conspired." (R. 3730.) He did not, however, leave the matter there. He immediately followed up the quoted passage with this:

> "However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number *less than the total* conspired. It is your task to decide the facts." (R. 3730. Italics ours.)

This plainly enough, left the jury free to find that the only conspirators were Growers, EOP and ELP.

That was made certain by the other specific instructions given. (Pet. Br., 17-18.) Thus the jury were told, and they could not but have believed, that it was not necessary that TreeSweet or Bilale—the only two outsiders—have been conspirators in order to pin liability on the defendants. Furthermore, having due regard to the occasion on the context in which the quoted instruction was given, the jury must inevitably have believed that the "less-than-the-total" qualification applied to everything that the judge had previously said about a conspiracy among the defendants and co-conspirators. Especially must they have so construed the charge in view of the instructions that they "must consider the instructions as a whole." (R. 3879)

It is just because the jury were told this that, in order to determine whether they were erroneous as a whole, all of the instructions on a given subject had to be brought together. And, of course, it is no cure of whatever error or inconsistency appears upon such total consideration that the various instructions on the subject were given in different parts of the charge, separated from each other by instructions on a variety of other subjects. A charge to the jury upon a given subject is to be judged by its content as a whole, not by the hour or minute of its delivery or its place along with instructions on other subjects.

In our brief, we brought together all the instructions given on the subject of conspiracy. (Pet. Br., 17-18.) We did so because, as respondents emphatically insist, instructions must be considered as a whole. Obviously, the error of which we complain was not cured by instructions on the many other and wholly independent subjects to which respondents address themselves at such length. (Resp. Br., 33-39) A correct instruction does not cure the error of an incorrect one unless the latter one is clearly corrected or repudiated. *Cummings* v. *Pennsylvania R. Co.*, 2 Cir. 45 F. 2d 152, 153-154; *Puget Sound Nav. Co.* v. *Nelson*, 9 Cir., 59 F. 2d 697, 700. Certainly, error in respect of one subject is not cured by an instruction on a wholly different subject.

Second: While the theory of conspiracy with outsiders was submitted it was clearly not the trial court's intention to limit the jury's consideration to that theory. (See Resp. Br. 28, 33). Rather, it was demonstrably its intention to permit them to find, as the predicate of liability, a conspiracy to which only the component parts of the Sunkist organization were parties. This demonstration is made by putting together the following facts:

1. Although requested so to do, the trial court refused to instruct that the Sunkist cooperative organization constituted a single cooperative organization that could not conspire with itself. (R. 182-183, 3253-3255.) Had such an instruction been given it would have been clear that someone not a part of the Sunkist organization had to be a conspirator, before liability could be imposed on the defendants.

2. Petitioners requested instructions that would have told the jury that unless they found that Sunkist Growers or Exchange Orange conspired with one of the outsiders, *i.e.*, with either Tree Sweet or Silzle, their verdict would have to be for the defendants. (R. 178, 185-186, 196-197.) The requested instructions were modified by the trial

court so as to include ELP, disjunctively, as one of those a conspiracy with whom would impose liability. (R. 3711-3712).

3. At pre-trial and throughout the trial petitioners consistently asserted and maintained their position that to be unlawful the combination or conspiracy with which they were charged had to include as participants, not the Sunkist cooperatives alone, but one or more "outsiders." The trial judge just as consistently disagreed with them. (See, *e.g.*, R. 435-436, 443-444, 2848-2849, 2858-2861, 2877, 2878, 3242-3243, 3272, 3278-3280, 3290, 3353-3354, 3461.)

Third: Respondents assert that the instructions of which we complain "were based upon instructions, requested and approved by petitioners without the objections now made . . ." (Resp. Br., 32(n. 39).) That assertion is wrong. These are the facts shown by the record:

1. The instruction that Growers and EOP could combine or conspire together (R. 3688-3689) was requested by the respondents as their "No. 2." (R. 145, 146) It was objected to by petitioners on the ground "that under the evidence Exchange Orange and Sunkist Growers cannot conspire under the Capper-Volstead Act, because they are both cooperatives owned by the same growers." (R. 2849) On another occasion, when this instruction was under discussion, counsel for petitioners said ". . . Our view is that the members of the Sunkist system should be treated as a single unit, just as if they were one company. That means if they conspire with Tree-Sweet or with

Silzle, they are subject to the antitrust laws, but under the Capper-Volstead Act, it is our position that they cannot conspire among themselves for this reason. . . ." (R. 2857-2859. See, also, to the same effect, R. 2877.)

2. The instruction that there could be no verdict against Growers or EOP unless it was shown that they conspired with ELP *or* TreeSweet *or* Silzle (R. 3711-3712), was a modification by the court of instructions requested by the petitioners. Had they been given as requested, however, the jury would have been told correctly that the conspiracy for which liability could be imposed had to be with one of the outsiders, TreeSweet or Silzle. (R. 185-186, 196-197.) The modification added liability from conspiracy with ELP. Contrary to respondents' claim (see, Resp. Br., 32(n. 39)) petitioners' objection on the ground now urged was saved. At the conference with the trial judge over instructions, petitioners presented the one now being discussed, and pointed out that as presented it was not consistent with the court's "rulings up to date, with respect to the capability of the three co-operatives to combine and conspire among themselves . . ."; and that, "although we would like to submit this as it is, as an alternative we would be willing to submit one which . . . stated that Sunkist, Exchange Orange, Exchange Lemon, TreeSweet, or Silzle, rather than separate the five into two categories . . ." (R. 3271-3272.) The judge did not adopt the suggestion and the alternative instruction was never submitted to him or requested by petitioners. But, in response to the suggestion of that alternative, the judge said that

he had noticed that the instruction as offered "is not consistent with the other instructions that I have given. *You already have your point on that. . . .. You will not be waiving that point if we modify this particular paragraph.*" (R. 3272, Italics ours.) That paragraph was modified when the instruction was given and it is that modification of which we complain.

3. The instruction that there was only one conspiracy charged in the case (R. 3697) was part of a summary of the parties' contentions and of the pleadings. (R. 3690-3698.) It was given on the court's own motion. Certainly, it was not among the instructions requested by the petitioners. (See, R. 178-223). It was a correct statement of the respondents' allegation; but the instructions permitted a different conspiracy to be found.

4. The instruction that they could find that "some number less than the total conspired" was given, as we have seen, on the court's own motion, in an unsuccessful effort to cure an error in earlier instructions to which petitioners had objected. (R. 3725, 3727, 3729-3730).

The instruction just mentioned was interspersed among some corrective instructions on other subjects, all given in response to objections to the original charge made by petitioners as well as by respondents (R. 3725-3731); and no further objections were made. It is this incident to which respondents apparently refer when they say that petitioners "approved the instruction complained of . . ." (Resp. Br., 33(n. 39). That asserted "approval" must be judged in the setting in which it was made. When that is done it will be seen not to have been an approval of the instruction at all.

There were lengthy conferences with the trial judge over the instructions. (See, Resp. Br., 30 (n. 35).) In the course of those conferences, petitioners repeatedly asserted their position that a "conspiracy" between only the Sunkist cooperatives was not violative of the antitrust laws—a position that petitioners had maintained form the beginning of the cause. (R. 435-436, 443-444, 2848-2849, 2858-2861, 2877, 2878, 3234-3243, 3272, 3278-3280, 3290, 3353-3354, 3461.) The trial judge informed counsel that when the charge was given the objections made during the conference would be incorporated by reference, so that when counsel were called to the bench after it was given, for statement of objections, repetition would not be necessary; but, when so called to the bench, they could "make *additional* objections which might occur to you on the spur of the moment . . ." (R. 2830-2831). Italics ours.) After the charge had been delivered, counsel were asked if there were any "*additional* objections?" (R. 3725, 3726, Italics ours.) Some objections were made by both sides; the corrective instructions were given; and both sides indicated acquiescence in the corrections. (R. 3724-3730.) In this setting, the so-called acquiescence in the charge should not be interpreted as anything more than a disclaimer of "additional" objections.

The purpose of requiring an objection to an instruction is, of course, to give the trial court an opportunity to correct an error before the trial ends, instead of having to resort later to the cumbersome and costly method of ordering a new trial. In the instant case, it would be wholly unrealistic to assume that, after repeated efforts along that line had failed, another and formal repetition of petitioners' persistent objection would have caused the trial judge suddenly to change his mind and reverse his frequently expressed view that the Sunkist cooperatives could conspire with only each other. Form would be unduly promoted over substance to hold that petitioners had foreclosed themselves from asserting a position they had consistently advanced to the trial court throughout the entire trial simply because on only one occasion they did not mention it.

II

Respondents' Argument Is Irrelevant to the One Question to Which Certiorari Was Limited

First: The theories of liability based on conspiracy with outsiders and on so-called abuse of monopoly power are irrelevent to the question here presented. These theories were, of course, submitted to the jury. But *so was* the theory of liability based on a conspiracy to which only the Sunkist cooperatives were parties. Whether it was submitted as prominently or in as much detail as the others is not the point. Since it was submitted it is entirely possible, even probable, that it significantly and materially influenced the jury into arriving at the verdict they rendered. We do not know they were not so influenced; nor do we know that the verdict was the product solely or at all of the other theories.

This being so, it is immaterial that, as respondents argue, the evidence relating to these other theories is sufficient to support the verdict, and that there was no error in the charge relating to them. Before the judgment entered upon the verdict can be affirmed it must also appear that there was no error in the charge relating to the third of the three theories submitted, for that may have been the one that produced the verdict. The cases cited at page 19, note 14, of the Brief for Petitioners, plainly teach the doctrine just stated. (Pet. Br., 33 (n. 21).) Respondents make no effort to show the contrary. Indeed, they ignore the whole matter, tacitly assuming that these other and independent theories of liability are cognizable here notwithstanding that the verdict could have been, and for all we know was, grounded upon other evidence and another theory of law.

Second: The two other theories of liability are not within the scope of the one question to which certiorari was limited. That question, in brief, is whether combination or conspiracy, so-called, between the cooperative processing and marketing instrumentalities of one group of fruit-growers violates the anti-trust laws when pursuant to it there is done only that which a single trader could do to process and market his products. Obviously separate from and independent of that question are the questions whether the cooperatives had abused monopoly power, and whether they conspired with outsiders to whom the Capper-Volstead Act is not applicable. No doubt these latter questions were in the case below. We assume, however, that had it been intended to bring here every question inhering in the record the grant of certiorari would not have been limited and the case would not have been assigned to the summary docket.

A simple test exposes the out-of-bounds character of respondents' argument. Suppose, that as a ground of reversal *we* now sought to argue various errors occurring below in relation to these other two theories. We would clearly be beyond the bounds of the one certiorari question. Respondent's side of those two questions is just as much beyond the bounds. The negative of the argument is no more relevant than the affirmative would be.

Third: The three theories of liability mentioned above are independent of each other. Proof of one would not necessarily involve proof of either of the others.* Certiorari was limited to a question based on one alone of these theories. It follows, then, that the other two are not embraced within it.

III

Petitioners Had No Monopoly Power to Abuse

First: Respondents do not deny, or otherwise take issue with, our contention that for purposes of applying the Capper-Volstead Act the Sunkist cooperative organization is to be treated no differently from a single-entity cooperative. It is settled that a cooperative within the exempting reach of *Capper-Volstead* may lawfully do under the antitrust laws whatever a single trader may do. (See *Maryland & Virginia Prod. Assoc.* v, *United States,* 362 U.S. 458, 466-467; *United States* v. *Borden Co.,* 308 U.S. 188, 204-205.) Respondents do not deny that all this is so. Their argument is that petitioners had and abused monopoly power with resultant anti-competitive consequences. (*Resp. Br.,* 43-56). The argument is not cognizable here, as we have shown (see, Point II, *supra*) but we will answer it, because monopolization does not need a plurality of actors for its consummation and so is a violation of the antitrust laws that a single trader can commit.*

---

* Monopolization is a violation of the antitrust laws for which conspiracy or concert of action with others is not an essential element. So, too, a conspiracy with TreeSweet and Silzle would be a different conspiracy from one with ELP.

The major and essential premise of respondents' argument is that petitioners, by reason of their control of 70% of the by-product oranges available in the California-Arizona area had market control of or monopoly power over that commodity; and that by exercising their power, they eliminated Winckler from the national juice market. The premise is false; and with its collapse the whole structure rested upon it falls. Petitioners did not have market or monopoly control. They did not exercise any power to eliminate Winckler. The evidence in that regard is plain and unequivocal as we shall see in a moment.

To be sure, Sunkist grower-members produced and petitioners, therefore, controlled in 1951 about 70% of the by-product oranges available in the California-Arizona area. But the indicium of market control or monopoly power is not a mere matter of percentage, at least not until the figure is very much higher than the one here. (*See*, L. Hand, J., in *United States* v. *Aluminum Co. of America*, 2 Cir., 148 F. 2d 416, 424; *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528.) The true indicium, as respondents recognize (Resp. Br. 48), is the power to exclude competition whenever the monopolist desires. (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (n. 59); *United States* v. *E. I. DuPont de Nemours & Co.*, 353 U.S. 586, 592; *Report*, U. S. Attorney General's National Committee to Study the Antitrust Laws (1955), p. 43.)

---

* Respondents' argument is based on sweeping statements of asserted fact for which no references to the record are given and which the record does not support. We lay correction on one side for the moment, for the argument as made is demonstrably fallacious.

Petitioners did not have any such power. The evidence here clearly shows that to be so. It shows also that petitioners could not have eliminated Winkler, and did not eliminate that concern, from the juice market. That elimination was accomplished, without petitioners' knowledge or participation, by the refusal of Morgan Ward, Winkler's regular supplier who had an ample supply of oranges, to let Winkler have oranges in 1951 for processing into single strength juice. The detailed facts in this connection are stated, with appropriate references to the record at pages 13-15 of the Brief for Petitioners, and need not be repeated. (See, also the Petition for Certiorari in this case, pp. 9-11.) The essential fact is that a substantial part of the available supply was in hands other than Sunkist's; the bulk of this supply was in the hands of Morgan Ward, Winckler's regular supplier; and the existence of this other supply negated Sunkist's alleged power of elimination. It is, therefore, clear that except for Morgan Ward's refusal in 1951, Winckler could not and would not have been eliminated from the juice market. Winckler was not a regular customer of Sunkist in 1951, and had not been since 1947.[*] (Pet. Br., 13-15.)

---

[*] Morgan Ward had 12% to 15% of the total supply of by-product oranges in 1951, *i.e.*, not less than 54,000 tons for which, as he testified, there was "no home . . . outside of Winckler-Smith, Case-Swayne, Paramount and a few other small plants . . ." (R. 1581, 1600) In that year he let Winckler have 9000 tons, at a price that figured out to $30.04 per ton, but under a contract that required the oranges to be processed into frozen concentrate. (R. 1438-1440, 1530-1531, 1568-1575, 1586-1604, 2278-2280. Exhibit 56, R. 1589, 3497.) Winckler had never used more than 9000

Second: The factual bases of respondent's argument in this connection are badly overstated. Correction is not really necessary, for the argument is fallacious even if it be assumed that the given bases are correct. In the interests of completeness, however, we call attention to some of the more important misstatements in respondents' presentation.

Morgan Ward was not prevented in 1951 by anything for which petitioners were responsible from selling by-product oranges at less than $40.00 per ton. In fact, he sold more than 80% of his supply at a lower price. (R. 1596-1597.) As we have seen his price to Winckler came out at $30.04 per ton for 6000 tons. (R. 1530-1531. Def. Exhibit AO, R. 1532 (not printed, but the original exhibit has been transmitted to the Court).) Obviously, he could have sold that quantity or more to Winckler at the same price without restriction of its use to frozen concentrate. And just as obviously, although he wanted to get $40 if he could, he did not have to charge a higher price in order to be competitive with Sunkists's $40-price. (R. 1596, 1597)

The processing-juice purchase contract with Tree-Sweet was not something new in 1951. Similar contracts had been entered into for several years, including

---

tons in one season for single strength juice and it used that much only in one year, *i.e.*, in 1949 when it got 12,700 tons of which about 75% went into single strength. (R. 1004, 1015, 1027.) In the other years in which Morgan Ward was Winckler's main and regular supplier, it got from him 10,500 tons in 1949; and 11,500 tons in 1950, in addition to substantial quantities from other suppliers not including Sunkist; and of these quantities much less than all was used for single strength juice. (R. 1004, 1014-1016, 1027, 1436-1442, Def. Ex. BO; R. E403, E440.) It was Ward's failure in 1951 to continue that course of dealing that caused Winckler's single-strength troubles. (*Pet. Br.*, 13-15.)

the two years—1949 and 1950—in which Winckler made a profit. (R. 752-755, 757-758, 908-913, 2979-2986, [illegible], 3051-3057.) These contracts did not guarantee TreeSweet a profit. TreeSweet was obligated to buy all the juice processed under them. The price for the juice was Sunkist's list price at the time of purchase less various discounts and allowances. These provided enough of a margin, so that *if* TreeSweet succeeded in reselling all of the juice at or near the list price it would realize a small profit. (R. 846.)

Sunkist did not set the industry price for by-product oranges. Respondents cite no references to the record for their assertion that Sunkist was the "industry leader." (*Resp. Br.*, 46.) In the Court of Appeals, however, respondents at page [illegible] of their Supplemental Brief conceded that "... The establishing and maintaining of the $40 industry price by appellants [petitioners] throughout the 1951 processing season was not price fixing ..."

There was no evidence of any fixing by Sunkist of the resale price of juice processed by TreeSweet and Sibile; and respondents refer to no such evidence. (*Resp. Br.*, 48.) The fact is that the prices for juice charged by California processors were not uniform or alike. (See, *Pet. Br.*, 16.)

Respondents say at pages 14-15 of their brief that, "Petitioners were unable to sell at the $40.00 price any of the approximately 31,000 tons of product oranges they had available in 1951 for processing into single strength orange juice ... they disposed of that tonnage by making processing contracts with TreeSweet and Sibile ..." There was no such evidence; and the references to the record given by respondents do not support their assertion. Such evidence as there was on the subject shows that virtually all of Sunkist's 1951 supply was used by it or disposed of to other processors, including but not limited to TreeSweet and Silzle. (R. 594-595, 611-614, 634, 671-676, 685-686, 691-707, 749-751, 2964-2996. Pl. Ex. 72; R. 1959, E531. Def. Ex. FC; R. E545.) Indeed, by the time in 1951 that Winckler requested a processing contract of Sunkist, arrangements had already been made for disposition of the latter's entire supply; and because the crop was not as large as early estimates, deliveries to the processors dealing with Sunkist were being cut back:* (R. 2990-3003.)

CONCLUSION

The judgment of the Court of Appeals, insofar as it affirmed on the issue of liability, should be reversed.

Respectfully submitted,

Ross C. Fisher,
Herman F. Selvin,
Attorneys for Petitioners.

---

* Incidentally, Winckler's letter of July 16, 1951 which, respondents say, "requested a reply" (*Resp. Br.*, 23), did so only "if you [EOP] are interested . . ." (Pl. Ex. 45; R. 1064, E479.) EOP was not interested and no reply was sent.

Office-Supreme Court, U.S.
FILED
JUN 20 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961.
No. 241

Sunkist Growers, Inc., a corporation, and the Exchange Orange Products Company, a corporation,
Petitioners,

vs.

Winckler & Smith Citrus Products Co., a corporation, and Ronald Walker, as Trustee of Winckler & Smith Citrus Products Co.,
Respondents.

RESPONDENTS' PETITION FOR REHEARING.

William C. Dixon,
417 South Hill Street,
Los Angeles 13, California,

Holmes Baldridge,
77 West Washington Street,
Chicago, Illinois,
Attorneys for Respondent.

Of Counsel:
Harry M. Irwin,
215 West Fifth Street,
Los Angeles 13, California,
Attorney for Trustee Respondent.

SUBJECT INDEX

PAGE

I.

The conclusion that the two-issue rule of Maryland v. Baldwin, 112 U. S. 490, 493 (1884), is applicable merits reconsideration 1

II.

The question as to whether the use of separate corporations by petitioners had economic significance in itself, or whether outsiders considered and dealt with the three entities as independent organizations, was not fully argued or considered by the court........ 3

III.

The two-issue rule of Maryland v. Baldwin, 112 U. S. 490, 493 (1884), if applicable, merits reconsideration........ 5

IV.

The allegations of the second amended complaint, the undisputed evidence, and the charge to the jury were sufficient to justify an affirmance of the judgment and a ruling that petitioners, as a single entity, engaged in anticompetitive activities in violation of Sections 1 and 2 of the Sherman Act 7

Conclusion 9

TABLE OF AUTHORITIES CITED

Cases PAGE

Berger v. Southern Pacific Company, et al., 144 Cal. App. 2d 1 6
Kiefer-Stewart v. Seagram, 340 U. S. 211 .... 2, 6, 9
Maryland v. Baldwin, 112 U. S. 490 .... 5, 6, 10
Maryland & Virginia Milk Producers Assn. v. United States, 362 U. S. 458 .... 8, 10
Snyder v. United States, 112 U. S. 216 .... 5, 10
United States v. Borden Co., 308 U. S. 188 .... 2, 6
United States v. Yellow Cab Co., 332 U. S. 218 .... 2, 9

Statutes

Sherman Act, Sec. 1 .... 7, 8, 9
Sherman Act, Sec. 2 .... 7, 8, 9
United States Code, Title 15, Sec. 1 .... 7, 8
United States Code, Title 15, Sec. 2 .... 7, 8

IN THE

Supreme Court of the United States

October Term, 1961.

No. 241

Sunkist Growers, Inc., a corporation, and the Exchange Orange Products Company, a corporation,

Petitioners,

vs.

Winckler & Smith Citrus Products Co., a corporation, and Ronald Walker, as Trustee of Winckler & Smith Citrus Products Co.,

Respondents.

RESPONDENTS' PETITION FOR REHEARING.

Pursuant to the provisions of Rule 58 Respondents herein submit their Petition for Rehearing on the following grounds:

I.

The Conclusion That the Two-Issue Rule of Maryland v. Baldwin, 112 U. S. 490, 493 (1884) Is Applicable Merits Reconsideration.

The Court failed to consider that part of the charge which authorized a verdict for Respondents in reaching its conclusion that a verdict could have been based on the acts of Petitioners and/or their coconspirator Exchange Lemon.

The Court applied the two-issue rule on the ground that ". . . the instructions quite plainly left it open for the jury to base their verdict upon a finding of conspiracy among petitioners and Exchange Lemon." (Sl. Op. p. 7.) In reaching this conclusion the Court quotes from parts of the charge to the jury (Sl. Op. pp. 5, 6)[1] including excerpts from two paragraphs thereof (Sl. Op. p. 6), each of which was based on instructions requested by petitioners and which concluded with the language ". . . Your verdict must be for the defendants." [R. 3711-3712.] The opinion nowhere refers to the *only* instruction in the charge that dealt with the factual findings required to support a plaintiff's verdict. [R. 3703.] This instruction, to which the opinion makes no reference, and which was presumably not considered by the Court, required a finding of a third party or a *United States v. Borden Co.,* 308 U. S. 188 (1939), type of conspiracy as a basis of any jury verdict for the plaintiff. A consideration of *this* instruction would have made it unnecessary for the Court to apply the two-issue rule or to engage in speculation or "conjecture" as to the "probable" basis of the verdict (Sl. Op. p. 7) or to assume, contrary to the record, that ". . . the instructions (presumably as a whole) quite plainly left it open for the jury to base their verdict upon a finding of conspiracy among Petitioners and Exchange Lemon." (Sl. Op. p. 7.)[2]

---

[1] The instruction [Sl. Op. p. 5, R. 146, 3688] was based on the general corporate law of conspiracy as stated by this Court in *Kiefer-Stewart v. Seagram,* 340 U. S. 211, 215, and *United States v. Yellow Cab Co.,* 332 U. S. 218, 229. The opinion nowhere refers to these decisions.

II.

The Question as to Whether the Use of Separate Corporations by Petitioners Had Economic Significance in Itself, or Whether Outsiders Considered and Dealt With the Three Entities as Independent Organizations, Was Not Fully Argued or Considered by the Court.

The opinion of the Court is based on the single enterprise theory that two or more cooperative corporations are incapable, as a matter of law, of conspiring to violate the Sherman Act. The opinion justifies the application of the theory on the ground that "there is no indication that the use of separate corporations had economic significance in itself, or that outsiders considered and dealt with the three entities as independent organizations." (Sl. Op. pp. 10-11.) The record contains substantial and undisputed evidence to the contrary, of which the following is but a part.

---

[2] The record is replete with references to the fact that the only theory of liability argued by Respondent to the jury was that based on a third party, *Borden*-type conspiracy. The Court's view of the "probabilities" of the basis of the jury's verdict is also contrary to the view of the trial Court as to those "probabilities" when it stated: ". . . If there is a verdict for the plaintiff you can rest assured TreeSweet and Silzle will be listed as co-conspirators and not Lemon." [R. 3463.]

Exchange Lemon regarded its economic and legal interests sufficiently separate from those of Sunkist and Exchange Orange to have separate counsel represent those interests in the pending litigation. [R. 52, 55, 64.] Exchange Lemon dealt with independent processors as a separate entity [R. 459; Ex. 31, E. 377] as did Exchange Orange, and "outsiders" dealt with the three entities as independent and legally separate organizations. [Exs. 16, 17, 17a, 18, 31, E. 223, 229, 233, 238, 377.]

The undisputed evidence shows that the separate corporate entity of Exchange Orange was utilized by Petitioners to achieve their illegal monopolization of the market for California citrus juice products. For example, Sunkist was the only entity which to "outsiders" was authorized to sell oranges or citrus juices to independent processors. [R. 600, 614, 638, 685.] Yet Exchange Orange did, in fact, sell and make product oranges and juices available to the competitors of Sunkist in the citrus juice market at discriminatory prices, and under discriminatory contracts, to achieve such illegal monopolization. [Exs. 5; 6, 7; 16; 17A; 25; 49; E 43, 119-147, 303, 314, 358, 481.] The record contains numerous other examples which establish the fact that "outsiders" such as respondents were required to deal with the three entities as separate and independent organizations. Such evidence was not referred to in the briefs or discussed in oral argument, and from the language of the opinion such evidence was obviously not considered by the Court in reaching its conclusion that the corporate veil of Petitioners and Exchange Lemon should be torn aside and the single enterprise theory applied to the activities of their respective, separate corporate entities.

A rehearing should be granted so that such undisputed record evidence can be more fully presented, discussed and considered by the Court.

III.

The Two-Issue Rule of Maryland v. Baldwin, 112 U. S. 490, 493 (1884), if Applicable, Merits Reconsideration.

The ruling in *Maryland v. Baldwin*, 112 U. S. 490, 493 (1884) as applied by the Court in the instant case, is based on obiter dicta and is contrary to the principle announced by this Court in *Snyder v. United States*, 112 U. S. 216, 217 (1884). The Court applied the rule in *Baldwin* on the theory the instructions in the instant case permitted the jury to find liability where an exemption from liability might exist. The *Baldwin* case did not deal with any error in instructions. The *Snyder* case was one for a civil forfeiture in which this Court held that a general verdict upon several counts, seeking in different forms one object, must be upheld if one count of the complaint is good. The instant case is more like the *Snyder* case than *Baldwin*, and is certainly not the type of case to which the rule in *Baldwin* should be extended.

Liability was established in the instant case after extended litigation, which was based on statutes which express a public policy of encouraging private enforcement of the antitrust laws by treble damage actions. The application and extension of the rule in *Baldwin* to the instant case deprives a small business concern which was forced into bankruptcy by the commission of acts, which obviously constitute a violation of the antitrust laws if committed with third persons, of the benefits of a jury verdict.

The application of the two-issue rule of *Baldwin* to private treble damage enforcement actions which it is the policy of the law to encourage—not discourage—not only effects a grave injustice by depriving a damaged bankrupt of the benefits of a jury verdict acquired after extensive and bitterly fought litigation, but is also contrary to the persuasive reasoning and authority of *Berger v. Southern Pacific Company et al.*, 144 Cal. App. 2d 1 [1956]. The California Court in *Berger* upheld a general verdict for the plaintiff where the verdict could be sustained on one of several different counts or theories of liability.

While there is an admitted conflict on the question of the applicability of the two-issue rule to cases wherein a plaintiff has secured a verdict which can be sustained on only one of the two or more theories of liability on which the case was tried, it is submitted that where (1) the instructions and theory of liability are based on the decisions of this Court (such as *Kiefer-Stewart v. Seagram* and *United States v. Borden Co.*, *supra* (308 U. S. 188 [1939]), and (2) neither the language nor the history of the exemptive act relied on (Capper-Volstead) contains anything to justify the Court in extending a granted immunity beyond its expressed terms, a general verdict in a treble damage enforcement action should be upheld if (1) it can be justified on the theory on which the case was tried or (2) there is admitted liability on such theory. The verdict should not be set aside on pure conjecture, or speculation by the Court as to whether the jury *might* have based its verdict on a novel theory of the law which had not been established by this court at the time the verdict was rendered.

IV.

The Allegations of the Second Amended Complaint, the Undisputed Evidence, and the Charge to the Jury Were Sufficient to Justify an Affirmance of the Judgment and a Ruling That Petitioners, as a Single Entity, Engaged in Anticompetitive Activities in Violation of Sections 1 and 2 of the Sherman Act.

The decision raises and leaves unanswered the question as to whether absent a combination with third parties, the conduct of Petitioners and Exchange Lemon as a single entity constituted anticompetitive conduct in violation of sections 1 and 2 of the Sherman Act (15 U. S. C. Secs. 1, 2). While the case was not tried on this theory, Respondents should not be deprived of the benefit of their jury verdict even under the two-issue rule if the pleadings and the undisputed evidence established liability on this theory. A rehearing would establish such liability.

The acts which Petitioners committed, and which are alleged to constitute the violation in the instant case, consisted of (1) entering into discriminatory contracts with competitors, and (2) abusing an admitted legal monopoly power over product oranges by fixing and maintaining the selling price of such oranges at a monopolistic price while making such oranges available to competitors under discriminatory contracts and arrangements which were denied Respondents. [Second Amended Complaint R. 259 (d); acts (c), (d), (e), (f), 266-272.] The contracts and arrangements were alleged to have been entered into, and the exercise of the monopoly control over the selling price of product oranges was alleged to have been exercised in violation of both sections 1 and 2 of the Sherman Act (15 U. S. C. Secs. 1, 2) for the purpose of eliminating competition and to effect and achieve an illegal monopolization of the market for California citrus juices. [R. 265, R. 271, R. 3311-14, 3318, 3320, 3323, 3343, 3428-3429.] The jury was fully instructed on monopoly power, its abuse, and the legality of the discriminatory contracts which Exchange Orange awarded the competitors of Respondents and defendant Sunkist. [R. 3703, 3706-3710.]

It is submitted that the allegations of the amended complaint, and the undisputed evidence in support thereof, clearly constitute "anticompetitive activities" which are outside the "legitimate objects" of a cooperative and establish a violation of the Sherman Act even under a single entity theory under the ruling of this Court in *Maryland & Virginia Milk Producers Assn. v. United States,* 362 U. S. 458 (1960). The language of Mr. Justice Black in *Maryland Milk* is particularly applicable in support of the Petition for Rehearing. Mr. Justice Black therein stated:

> "We are satisfied that the allegations of the complaint and the statement of particulars, only a part of which we have set out, charged anticompetitive activities which are so far outside the 'legitimate objects' of a cooperative that, if provided, they would constitute clear violations of §2 of the Sherman Act by this Association, . . ." (p. 468.)

The ruling of the Court in its present posture has, in effect, legalized the conduct of the separate corporate entities, on the theory they are a single entity, even though the same conduct would be illegal if done in combination with "outsiders." It is accordingly submitted that the Court should grant a rehearing, and pass upon the unanswered question the opinion poses as to whether the same conduct constitutes a violation of sections 1 and 2 of the Sherman Act when resorted to by a single operating unit to achieve an illegal monopolization of the market for California citrus juices.

Conclusion.

It is submitted that a rehearing should be granted in the instant case for the following reasons:

The jury found that a small, independent competitor of Petitioners was put out of business by the "anticompetitive activities" and conduct of Petitioners. This finding stands, whether based on a theory that the activities and conduct complained of were committed in combination with "outsiders" or by a single entity. In either event, the acts were alleged to have been committed, and the jury found that they were committed for the purpose of eliminating competition and achieving an illegal monopolization of the market for California citrus juices. The decision of the Court, in effect, thus legalizes conduct of cooperatives, which would be illegal if committed in combination with "outsiders". To reach this conclusion, the Court necessarily disregarded the separate corporate entities of Petitioners and its prior rulings in the *Seagram* and *Yellow Cab* cases, and applied the obiter dicta two-issue rule of *Baldwin*. The rule in *Baldwin* is contrary to the rule of *Snyder*, to which the instant action is more comparable.

The single enterprise theory was applied without reference to or consideration of extensive undisputed record evidence that "outsiders," dealt with the three entities as separate and independent organizations, and that the separate entities did have economic significance in achieving an illegal monopolization of the market for California citrus juices by the use of their separate economic power. Such evidence was not referred to in petitioners' brief or oral argument, and can only be made available to the Court for its consideration by a rehearing.

Assuming arguendo that the single enterprise theory is applicable to cooperatives under *Capper-Volstead*, reasonable minds could not differ that undisputed evidence of their "anticompetitive activities" as a single entity, in the instant case, would and did violate the Sherman Act within the ruling of this Court in *Maryland & Virginia Milk Producers Assn. v. United States, supra* (362 U. S. 458 [1960]).

The effect of the instant decision is to frustrate and render nugatory the announced Congressional policy of encouraging private antitrust enforcement actions. Jury verdicts in such cases, which can be legally sustained on a theory of violation on which the case was tried, should not be lightly set aside on purely technical grounds in disregard of such announced Congressional policy.

A rehearing should accordingly be granted.

Respectfully submitted,

William C. Dixon,
Holmes Baldridge,
Attorneys for Respondent.

Of Counsel:

Harry M. Irwin,
Attorney for Trustee Respondent.

Certificate of Counsel.

I certify that the within Petition for Rehearing is presented in good faith and not for delay.

William C. Dixon